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Mexican Lawyers Going North and U.S. Lawyers Going South: Interstate Legal Practice, NAFTA and U.S. State Bar Regulations

Authors

Michael W. Gordon, George Bermann, Miguel Jauregui Rojas, Carlos Loperena Ruiz, William MacPherson, and Stephen C. Nelson

MEXICAN LAWYERS GOING NORTH AND U.S. LAWYERS GOING SOUTH: INTERSTATE LEGAL PRACTICE, NAFTA AND U.S. STATE BAR REGULATIONS

MODERATOR: PROF. MICHAEL W. GORDON*

Panelists: Prof. George Bermann, Lic. Miguel Jáuregui Rojas, Lic. Carlos Loperena Ruíz, Prof. William MacPherson, Stephen C. Nelson, Esq.

I. INTRODUCTION

GORDON: This is a discussion about how to promote the reduction of barriers to trade. Lawyers carefully maintain barriers to protect their own interest. If Mexican lawyers are concerned with an invasion of New York lawyers, so are lawyers in other states, such as Florida. Mexican lawyers may even look to our rules to see how to keep them out. No nation has the same state barriers that exist in the United States. The Mexico-U.S. barriers are no more severe than some of those that have existed for some time in the United States that keep people from moving from state to state.

There is an irony in the rules governing legal practice across the U.S.-Mexico border. Consider how much practice occurs outside of truly effective regulation. Accountants practice law in large accounting firms. In-house counsels practice law in many corporations. Lawyers for the government practice law. Lawyers for large multi-service consulting firms practice law. In Florida, retirees from the north continue to help clients and friends, many of whom have moved to Florida. Also, lawyers for international organizations practice law across borders.

Some people here at this conference have undoubtedly spent time in New York working with a law firm as Mexican law graduates and most would say they practiced law while in New York, not as foreign legal consultants. In Florida, there are, perhaps, two-dozen foreign legal consultants now and probably ten times that number of immigrant lawyers who are practicing law for others from their own countries, particularly within the Cuban community. The University of Florida College of Law educated approximately 600 Cuban lawyers in the early 1970s to take the Florida bar. About 20% of them passed, and it is thought the rest of them did not go quietly into the night. Some of them are undoubtedly writing wills, setting up corporations and doing other things.

The rules that attempt to regulate the giving of legal advice are a mess. They are ineffective, archaic, and in the coming years, they are going to be largely nullified by the Internet and what lies beyond. It is not quite 30 years ago that the Griffiths case¹ in Connecticut did away with the idea that you must be a U.S. citizen to practice law. In 30 years if someone reads the proceedings of this conference today, they will look at it as being a very archaic discussion of legal rules. Thirty years from now, much of the practice of law in the United States will be federalized and will not be under state control. Also, the governance of lawyers will shift away

* A biographical summary of each of the participants in this panel follows on the last page of this discussion.

1. See *Application of Griffiths*, 162 Conn. 249, 294 A.2d 281 (1972), rev'd 413 U.S. 717 (1973).

from the courts and move into something like the Department of Justice, retaining power within the courts for those appearing before the courts.

U.S. law graduates are required to choose, a year before they graduate usually, where they want to spend the rest of their life. They need to decide where they will take that first bar exam unless they wish to take several. It is difficult to take a bar exam 10 or 15 years after graduation if you have decided that Fargo, North Dakota is not the greatest place to spend the next 50 years.

The set of legal rules has simply failed to keep up with the movement of lawyers as individuals across international borders. Some attorneys are really lawyers wherever they, their computer, and their e-mail address happen to be. The organized bar would say that these individuals are out of control.

The irony of this is shown by another area. I frequently give advice on Florida corporation law in court as an expert, but I am not admitted to practice in Florida. This came about through an interesting point in a case some years ago. I was rendering advice on a corporate issue in the Federal District Court in Florida and the other side had not asked to depose me so they knew nothing of what I would say in the matter. I think this was a tactical error. As we walked into the courtroom, counsel for the adversary asked me if I was admitted to the bar in Florida. I said, "No". When I was put on the stand and qualified, he said, "Professor Gordon, where do you live?" I said, "In Gainesville." "Where did you study law?" he asked. I answered, "Connecticut." He continued, "Where are you admitted?" "In Connecticut," I stated. "You are not admitted in Florida?" "No." Finally, he asked, "How can you possibly sit there and render legal advice on Florida corporation law?" And I said, "Because I have been here for 10 or 15 years teaching corporation law, lecturing to the Bar on the Bar prep course on corporations, and wrote a five volume treatise on Florida corporation law five years ago, which is the predominantly used treatise." He said, "Oh." It got worse for him from there on, but that is another story.

II. DISCUSSION OF THE HYPOTHETICAL

Today, we are going to examine what the North American Free Trade Agreement (NAFTA) has accomplished to open the door to legal services or even, perhaps, to further restrict and protect legal turf. We will discuss the first part of the problem, the lawyers from Mexico coming to New Mexico, and then look at the lawyers from United States going to Mexico. The provisions of NAFTA that we think are the most important are the chapters that deal with cross-border trade in services in Article 1201 and some of the other provisions found in Chapter 12. Next, there is Annex 1201.5 on professional services. Annex One consists of the reservations for existing measures and liberalization commitments, and the schedules of the countries that have taken reservations. Following that there is Annex Two, which has the reservations for future measures. Lastly, Annex Six has miscellaneous commitments, and the schedule of Mexico and the United States.

The hypothetical problem is about a lawyer in Mexico named José Orozco who has spent three years practicing Mexican and international law in London at a large firm. He previously practiced tax and estate planning law for many years in Mexico City. Orozco forms a new law firm in Mexico City with another lawyer Ophelia

Siqueiros. Orozco y Siqueiros go on to represent a Mexican corporation that has opened a resort near Santa Fe, New Mexico.

Orozco received his law degree some years ago from the Escuela Libre de Derecho in Mexico City, and followed up with an LL.M. in comparative law from the University of Texas. Orozco would not be entitled to sit for the New Mexico Bar exam by just having the LL.M. Orozco has a home near Taos where he plans to phase into retirement over a period of about ten years. He has been spending two months in Taos each winter to work on the Santa Fe hotel's legal business. He flies back and forth every month the rest of the year to do the hotel's work as needed. He would like to be able to practice law while in New Mexico.

First, he would like to be able to advise the Mexican company's Santa Fe hotel on Mexican tax law. The hotel is willing to make him a part-time employee and appoint him in-house counsel if that would help. The first question I ask is whether or not he is safe doing this in Mexico City and in Taos?

MACPHERSON: I think we need to ask whether José is a lawyer or a non-lawyer. I think that one of the errors of NAFTA is that it does not ask this question. The answer to this is definitely going to shift the analysis. If he is a non-lawyer, we are going to look at the statutes of New Mexico and the penalties for unauthorized practice. If he is a lawyer, we are going to look at the Code of Professional Responsibilities. The Code of Professional Responsibility would identify José as a lawyer if he is licensed somewhere and coming into our jurisdiction. The main thing is that a lawyer shall not practice law in a jurisdiction where doing so violates the regulations of the legal profession. Therefore, you must first examine the status of that person. How do you define who is a lawyer under NAFTA? Does the Court of New Mexico have to judge whether José is a lawyer or a layperson? Does NAFTA, in Chapter 12 or the Annex, make that determination? If NAFTA does not define it for us, then where does New Mexico look to define who is a lawyer?

NELSON: I do not think that advising a Santa Fe hotel owned by a Mexican company on Mexican tax law would be regarded as the practice of law. Accountants and others do it all the time. I think that is one area where you would not succeed in getting anyone prosecuted for unauthorized practice of law simply because they are advising on Mexican tax law, whether it was here or in Mexico City.

JÁUREGUI: There is another issue to consider. What is the practice of law? Here we see that this individual was giving advice on Mexican tax law. Is that the practice of law or can an accountant do it? In Mexico, advice on tax law is very open, given by accountants. No one thinks it is the practice of law. It is thought of as part of their profession, not part of the lawyers' jobs. There is definitely a gray zone between one profession and the other regarding taxes. A lot of non-lawyers advise people regarding taxes in Mexico.

MACPHERSON: You could also look at the *Roel* case,² a 1957 New York case where a Mexican lawyer came up to New York and gave legal advice on Mexican law and the court held that that was the practice of law. However, it was not tax law.

2. See *In re Roel*, 144 N.E. 2d 24 (N.Y. 1957), appeal dismissed, 355 U.S. 604 (1958).

NELSON: You bring up an important point. That is, that case is distinguished by the fact that a lot of people in this country give tax advice even though they are not lawyers. Not only do they give advice on U.S. tax law, but also on foreign tax law. No one would argue that that is the unauthorized practice of law.

BERMANN: I would agree with Steve, but I think I would draw a distinction between whether you would be prosecuted for advising on Mexican tax law in the United States and whether you are violating U.S. law on that issue. My sense is that if you are giving advice on Mexican tax law in the United States, you are engaging in the practice of law. However, I do not think that anyone would prosecute you for that. Therefore, I draw a distinction between practicing law in an unauthorized fashion and practicing law in an unauthorized fashion that is likely to be prosecuted. If you are giving advice on tax law, you should either be giving it in your capacity as an accountant or in your capacity as a lawyer. Thus, if you are not giving advice on tax law in your capacity as an accountant, then you better be a lawyer. However, I think in either event, you are unlikely to be prosecuted.

NELSON: I was a member of the American Bar Association (ABA) Commission on Multidisciplinary Practice and one of the issues that we addressed was the question of what is the unauthorized practice of law and how do you determine when someone in a multidisciplinary practice who is not a lawyer is engaged in the unauthorized practice of law. The conclusion that most of my colleagues and I shared is that there are many things that lawyers do that is the practice of law, but when someone else does the same thing, it is not the unauthorized practice of law. The question then becomes the capacity in which he is giving this advice. If he is not holding himself out as a lawyer, from New Mexico or otherwise, but he is simply advising on tax law, he is in the same position as an accountant or anyone else not licensed to practice law. However, if he does hold himself out as a lawyer, it may be a different case.

GORDON: So, if Orozco had come to Taos with his accountant and had been asked to render some advice, should he refer it to his accountant since the accountant is a non-lawyer? Would it be better that the accountant do the tax work, which is considered non-law work, rather than Orozco acting in the capacity of a lawyer and doing the tax work? If the language in the Code of Professional Responsibility is for the lawyers that practice law in New Mexico, then all of the people here at this conference, not just those from Mexico but also those from Minneapolis, Connecticut, and New York, who have called home and spent a half an hour on the telephone going over some matters with a client, have been rendering legal advice under the rules which you have mentioned.

MACPHERSON: There is a dramatic change between the present Code of Professional Responsibility and the American Bar Association (ABA) Proposed Code of Professional Responsibility for the year 2000. The ABA is moving in the direction of allowing Orozco to do some of the things he wants to if we treat him as a lawyer from a foreign jurisdiction. In order to come to this conclusion, I compare the present law³ to the new proposal. As a result, some of the things that he can do as a lawyer are allowed.

3. New Mexico Code of Professional Conduct § 16-505 (2000).

This is the direction the regulations are moving in. However, this is also what I lament about NAFTA. NAFTA had an opportunity to carve out a new definition of what a lawyer and the practice of law actually are. Unfortunately, what they did was look at the foreign legal consultant law. This law, drafted in the 1960's, came in after the *Roel*⁴ case in New York, and was used as a model to create the foreign legal consultant law. Unfortunately, the foreign legal consultant law has never been very workable. When NAFTA was written, they should have accomplished the first step and defined who is a lawyer under NAFTA, and then determined what is the practice of law.

Many lawyers in this area argue that the local jurisdiction where the act took place does not have enough interest or there is not enough contact. Generally, it is assumed we are not interested in protecting Mexican citizens from bad legal advice in New Mexico. However, there is another classic case that says we are. In the *Howes*⁵ case, there was a lawyer licensed in New Mexico, but who never practiced here. He went to work for the federal government at the United States Attorney's office in Delaware. While he was there, he committed an offense by contacting a defendant directly in a criminal matter. When they attempted to sanction him under the Delaware Code of Professional Responsibility, Delaware looked at it, and determined that they did not have any interest in this case. They referred the case to New Mexico for sanctions. Initially, New Mexico said the same thing as Delaware since it was not one of New Mexico's citizens that had been affected. However, Judge Juan Burciaga wrote a very thoughtful opinion in which he said that New Mexico did have an interest in sanctioning this lawyer who practices in Delaware for violating their code because New Mexico is protecting the integrity of our code and our lawyers. As a result, the lawyer was sanctioned and the decision was up-held.

It is very critical to see that the inherent powers doctrine directs how to analyze the problem by looking at local law. My view is that an international treaty can never trump, replace or modify the inherent powers of the State courts over the admission and regulation of legal practice in the United States. It is a shame, though, that one must look at this because NAFTA failed to accomplish the basic steps. The first step should be determining who is a lawyer and what the attributes are of a lawyer; and second, determining what the practice of law is and what we are trying to regulate.

GORDON: Would you agree that New Mexico has no interest in this case if Orozco is advising this Mexican company in Mexico on Mexican law? That is a good question to start with. When we carry that to the next stage where Orozco is advising the Mexican company, in Mexico, on New Mexico corporate law, we get into the area where we are concerned with the quality of the legal advice rendered. If the real concern of the Code is to prevent harm to individuals from the practice of law by people who are unqualified to give advice on that particular area, then why does New Mexico not attempt to exert extra-territorial jurisdiction?

MACPHERSON: In order to answer that question, you must determine what the function of the courts is, and why lawyers are regulated. One thought on this, which

4. See *supra*, n. 2.

5. See *Matter of Howes*, 123 NM 311, 940 P.2d 159 (1997).

was originally considered 30 years ago, is to create a monopoly. The present thrust seems to be that we want to maintain and protect the client, as well as the quality of the law. Therefore, in cases like this, you must determine the level of interest to a particular jurisdiction. This is one thing that is being lost in the new proposed rules. For example, we are not interested in protecting the clients in Orozco's first contact. If it is determined that he is a lawyer, and he actually comes into New Mexico to talk to his client about New Mexico law, he is perfectly legal. We will let his jurisdiction, where he is licensed, regulate that conduct. However, what is the nexus with New Mexico in the second example where he goes to Mexico to advise on New Mexican law? He is not licensed in the state and we do not care if he causes harm to Mexican clients. The question is who does care if he gives bad advice on New Mexico law to a Mexican client?

GORDON: Well, Mexicans do, obviously.

MACPHERSON: Mexico would be the first jurisdiction. Now suppose Mexican law was just like the case in Delaware.⁶ Where are they going to refer a claim of malpractice? There is an issue here since no one will deal with the problem. Mexico says that they do not care, and the United States says that the client has no connection with us because he does not have a license here, so we cannot act on it. If you are concerned about international cross-border transactions, there is a gap right there that needs to be filled by NAFTA.

NELSON: I respectfully disagree. You are expecting too much of NAFTA. It is not NAFTA's job to decide what is the practice of law or what is the unauthorized practice of law. I think the job of NAFTA is to determine whether Canada, the United States or Mexico, as consistent with NAFTA, can regard something as the unauthorized practice of law. The unauthorized practice of law is not a matter of NAFTA law. NAFTA does nothing more than tell us whether there are any limits and, if so, what those limits are on a NAFTA country's determination that someone licensed elsewhere is engaged in the unauthorized practice of law. I think you are asking NAFTA to carry much too much weight.

MACPHERSON: Yes, however, would you want me to come in, as a litigant, defending somebody on the unauthorized practice of law and confuse you? My question is why NAFTA could not see that there is a problem in the United States about the definition of who is a lawyer and what is the practice of law. They had a golden opportunity not only to clean up the cross-border delivery of legal services, but also to give some guidelines to the states on this question.

GORDON: You raised the question on something, which was obviously built into Mexican tax law, as raising a question of defining tax law. Is this law or is this accountancy? If New Mexico will not go after him while he is in New Mexico rendering advice on Mexican tax law, what if he is now rendering advice on international law issues and NAFTA law? Is not NAFTA law actually international law plus Mexican law plus New Mexican law? I think the same thing may have been raised in the European Union. Is European Union law international law or domestic law in each one of those nations?

BERMANN: It is important here to strike the contrast with the European Union (E.U.). Whether or not we like it, NAFTA is not the E.U. and NAFTA does

6. *Id.*

not have the normative powers until an agreement is reached unanimously. There is no legislative authority to harmonize the rules on what is the unauthorized practice of law and what is not. A factor in this is that the E.U. has had a much different landscape to work on. It is perfectly understandable that one would expect the E.U. institutions to address that question directly, but I do not think that NAFTA is poised in quite the same way the E.U. is to discuss or to determine harmonization of law.

JÁUREGUI: NAFTA was not prepared to even look at what was going on in Mexico for licensing of lawyers in Mexico. It did not even consider it. I would like to pursue that avenue because I think it is important. What is the extent of NAFTA's interest in really defining the legal profession and defining what a lawyer is in the regulations of state bars, New Mexico or federal law, and court precedents in Mexico, the U.S. and Canada?

LOPERENA: We need to look at how the United States regards the practice of foreign law. United States lawyers often give opinions regarding foreign law. For example, you may go to a New York lawyer and ask him how to incorporate a Cayman Islands corporation. He will tell you how to incorporate, explain what a charter is, explain the requirements, explain how tax law in the Cayman Islands is different, and how you will not pay taxes here. All he will ask is for you to sign on the dotted line, and then he will send everything to his correspondent lawyer in the Cayman Islands who has a post office box as an address for the new corporation.

Also, Mexican lawyers give opinions regarding American law quite often. The client may ask how to deal with a problem. The lawyer may point out that, if it is possible to sue in New York, doing so would be a good course of action, since they have punitive damages, exemplary damages, and many other things that you would not have in Mexico. Therefore, the Mexican lawyer is giving opinions regarding New York law, even though it is not a formal, outright legal opinion, but a foreign law opinion given by a Mexican lawyer. So, you may have Mexican and New York lawyers giving opinions regarding New York or Cayman Islands law. This is a perfect example of how the world has been reduced to the global village.

MACPHERSON: This issue is a two-edged sword. There are American lawyers in Mexico who are of the opinion that they are not practicing law in Mexico and therefore do not need to comply with the registration in Mexico or get a foreign legal consultant certificate. It is very important to look at the status of the person giving the advice. We are not talking about regulating accountants who give tax advice. We are asking the question of whether the person is a lawyer and whether he talks about the law. If the person has the status of a lawyer somewhere, and is recognized in the jurisdiction where he is giving advice, whether it is Florida, New Mexico, or New York, he is practicing law. There is no difference between international law, Mexican law, or domestic law.

We are moving away from a formula that attempts to say that these acts are the practice of law. We are looking at it from the perspective of what we want to protect our citizens from. If it is determined to be the practice of law and you are a lawyer, two things then come into play: legal malpractice and the Code of Professional Responsibility. Under the concept of reciprocity, we argue that even if a jurisdiction does not have the right to take your license, they can send this

information to wherever the license is from and sanction him. We have a case⁷ that says you must do that. Therefore, if you say that you are not talking about Mexican or U.S. law, but are talking about Belgium law, which is not actually the practice of law, you may not be able to win that argument if you are a lawyer. If you are not a lawyer, you might have a glimmer of hope there. However, if you say you are a lawyer, you are on pretty thin ice.

GORDON: I think what George Bermann is saying is that we are not yet at the point where NAFTA is regulating activity. The hypothetical was essentially set to start off with people who I thought were lawyers, but questions have been raised as to whether they are lawyers at all. Lawyers run through the sequence to come to a conclusion, and I think we are saying that at some point in time, NAFTA may step in and play a role. George Bermann is correct in saying that we have not reached the point where NAFTA has stepped in to play a role. NAFTA is really not attempting to regulate the hypothetical issues. NAFTA does come in as we look at the foreign legal consultant rule that NAFTA is promoting. There are necessary definitions that include foreign legal consultant rules about the home rule, foreign law, and international law.

We are going to have to come back to those definitions since we are now going to talk about the issue, which deals with whether or not Orozco can take advantage of what NAFTA is promoting and become a foreign legal consultant in New Mexico in an effort to be legal. Bill has kindly provided us all the New Mexico rules on foreign legal consultants and I think can answer whether Orozco qualifies.

MACPHERSON: If Orozco were my client, I would ask him whether he wanted to be a foreign legal consultant in New Mexico. Before we even look at whether he is eligible, we need to look at the benefits and the detriments. The foreign legal consultant regulations are based upon the model proposed by the ABA. Nonetheless, the benefit of becoming a foreign legal consultant is the very liberal New Mexico Supreme Court view of what constitutes the practice of law. However, Steve Nelson made the point that New Mexico really is not interested. They probably are not going to enforce the rules even if the rules are violated.

Another advantage of becoming a foreign legal consultant is that it is easier to become a foreign consultant than it is to become a licensed lawyer here. Still, this is not the point. One of the main reasons Orozco would want to become a foreign legal consultant is that he does not pay State Bar dues. He pays a one-time fee that is good forever. He may be able to do most or all of what he wants to do. However, according to the new Code in New Mexico, the State Bar would only permit this if he does not stay in the state more than two months at a time. If it looks like he wants to make his domicile in New Mexico, he should get a license. However, if he is only occasionally coming up to take care of his client's business, and he opens up an office just to represent, he could look at the new code and argue that he is within the rules.

There are a few negatives in the new code with becoming a foreign legal consultant. First and foremost, it says that you are not a lawyer, but you are bound by the Code of Professional Responsibility in New Mexico. Second, it says that you

7. *Id.*

must comply with all other laws of New Mexico. Therefore, you do not get the benefits of a full license but you do get all of the burdens.

One of the most dangerous burdens here is maintaining moral fitness to practice law. Under New Mexico's rules, you must have moral fitness to get the license to practice, but it can be taken away at any time by lack of moral fitness. In another section of the Code of Professional Responsibility it implies that to be morally fit you must make your child support and alimony payments. That may be a problem for some lawyers. That is just an example of how, as you start to trace through it, it may not benefit you to be a foreign legal consultant.

GORDON: You have certainly discouraged people from thinking about becoming a foreign legal consultant. Steve Nelson has put enormous amounts of time into this over the last few years and now you are essentially telling him that it was wasted time. Steve?

NELSON: First of all, I do not agree that it is a question of domicile. I think there is a lot of jurisprudence, particularly in the New York area, where you have people domiciled in New Jersey and Connecticut, practicing law in New York. There is a lot of case law that says if a lawyer is there regularly and engaging in the practice of law from an establishment of any kind in that jurisdiction, it does not matter what your domicile is.

My second point is that all of the ABA's recommended rules on foreign legal consultants do include the provision and requirement that the foreign lawyer agree to be bound by local rules. It is an article of faith for all of us practicing in this area that if you are going to practice law in another jurisdiction in an established way, as opposed to an occasional way, that you are going to have to agree to be bound by the local rules. We formally agreed to do that in the Brussels Bar Agreement. We have also agreed to do that in the NAFTA arrangements, as well. That is a requirement, and I do not think you can possibly have lawyers practicing in another jurisdiction on an established basis without that condition.

That being stated, the biggest problem and risk with some of what Bill MacPherson wants to do is that they are not even permitted by the foreign legal consultants rule because it is so narrowly drafted. The scope of practice provision in that rule is much narrower than the ABA's model rule in that it limits the amount a lawyer can advise on Mexican law. The view we have taken is that it is all right to prohibit foreign lawyers from advising on international or third-country law, as opposed to their own country law, as long as you prohibit your own lawyers from doing the same thing. There is no jurisdiction in the United States that would prohibit a New York lawyer from advising on Cayman Islands law. Similarly, we have taken the view that a Mexican lawyer or foreign legal consultant in New York should not be prohibited from advising on Cayman Islands law in the same way and to the same extent as the United States' lawyer, subject always to the requirement of competence. The overriding rule is always that you shall not advise on any matter on which you are not competent. We get tangled up when we try to regulate, in terms of professional regulation, what advice that people can give as opposed to simply stating that you shall not advise on anything on which you are not competent.

GORDON: However, before we even get to the subject of advice, I do not think that Orozco can get to that point. Bill, what do you think?

MACPHERSON: He cannot make it there.

GORDON: Why not?

MACPHERSON: For the three years preceding his arrival in New Mexico, Orozco practiced in London. There is no jurisdiction where they will let you tack on what appear to be the unauthorized practice of law in five of the last seven years. For the last three years, he has been practicing in London. The facts do not indicate that he was licensed to practice in London. He will not be able to come to New Mexico and say he has good moral character while practicing unauthorized law. That will not bode well.

GORDON: Unauthorized in London?

MACPHERSON: Right.

NELSON: That is impossible because there is no rule on the unauthorized practice of law in England. A taxi driver could give advice on law in England, get paid for it, and not be in violation of any laws. The only thing he cannot do is hold himself out as a solicitor.

GORDON: New Mexico did not adopt this ABA rule. If you compare the ABA rule to the New Mexico rule, the New Mexico rule simply says that you must be actively engaged in the actual practice of law in that country for at least five of the last seven years. The ABA rule calls for practice for at least five of the seven years immediately preceding his or her application, that the lawyer have been a member in good standing in such legal profession, and that he actually has been engaged in the practice of law in the said foreign country or elsewhere. If New Mexico had adopted the ABA rules, then we could get to the question of what is permitted. That is, ask what the law is in New Mexico.

NELSON: The rule specifies that it be in that country, so it is much more restrictive.

BERMANN: I agree with Steve Nelson's point and I know that it is treacherous to compare the European Union with the NAFTA regime, but I need to do it. It is very clear that, despite the profound differences in the law among the member states of the European Union, none of the directives that you have read draws any distinction between international law, European community law, the law of one member state or the law of any and all other member states. My question is why have no distinctions been drawn? Perhaps, in part, it is because of the fundamental belief that the real criteria are based on competence, as Steve Nelson explained. Categorizing bodies of law for these purposes is unrealistic and impractical when what we are really concerned with is the level of competence.

We may not be ready to do this at this time, but in the European context it was clear. There was a strong consensus for the view that the practice of law shall not be segmented geographically. It shall not be segmented geographically and, if we admit someone to practice law, either occasionally or in a permanent basis, there is no geographic jurisdictional limitation to what they may do. However, there is an understanding that if they are incompetent they will be amenable to claims. The Brussels and Lugano Convention insure that any judgment against them will be enforced in the courts of every other state. There is an interesting linkage there that the full faith and credit aspects of malpractice actions allows the European Union to dispense with segmenting the practice of law geographically.

In the latest directive, we learned that one is not going to be able to become a member of the Bar of Belgium by virtue of the fact that one has practiced law in Belgium for three years without ever having been a member of the Bar. It is

required that they practice Belgium law during those three years. It is really quite an astonishing scenario that you can bootstrap yourself.

GORDON: It just could not happen.

BERMANN: Exactly. It is an interesting question whether you would want to go down that road. Most foreign legal consultant laws in the United States do have scope of practice restrictions but that is not the way the Europeans have gone and they don't regret it, I might add.

GORDON: The restrictions are fairly strict. None of the U.S. state foreign legal consultant laws allow the practice of local host state law. Most of them permit only the practice of foreign law and I think you can read the language of most of them to disallow the practice of international law. Are those lines really very clear? As I mentioned, we can interpret NAFTA law as U.S. law, as Mexican law and as a form of international law.

NELSON: What you said is true with just one quibble. The New York rule actually permits the foreign lawyer to advise on the law of New York, provided that his advice is based on the advice of someone licensed. In fact, I think that provision is included in the New Mexico rules, surprisingly.

GORDON: Why was that not included in the ABA rules? I think you were involved.

NELSON: Yes, it is included in the ABA rules.

GORDON: We will come back to foreign legal consultants in Mexico, but we will not address that now because NAFTA in Annex 1210.5, Section B, urges, if not requires, "the countries shall adopt some kind of foreign legal consultant's rules." We will be very interested in hearing about the rules that Mexico has adopted on foreign legal consultants. We will discuss this a little later. One of the next issues is the possibility that Orozco be admitted to the New Mexican Bar. After all, he is admitted in Mexico.

MACPHERSON: Just let me raise one point here. If Steve Nelson says that foreign attorneys are unregulated in London, then we will not, in New Mexico, give credit for those years of practice.

NELSON: I did not say that. What I said was that there was no rule against unauthorized practice of law. A foreign lawyer practicing with a firm in London would in fact agree to subscribe to the rules of the Law Society and be regulated as such.

MACPHERSON: And I did not see that in the fact pattern.

GORDON: But they very clearly are regulated by the Bar or by the Law Society.

MACPHERSON: So they do have to come under some jurisdiction.

NELSON: Right.

GORDON: One of the next issues is the possibility that Orozco be admitted to the New Mexico Bar. After all, he is admitted in Mexico. We will assume he is a Mexican lawyer in good standing and he did get a Masters Degree in Law from the U. of Texas. Is he qualified to become admitted to the Bar in New Mexico?

MACPHERSON: We have had some foreign lawyers, particularly from England and Canada, with excellent academic records, who were licensed abroad and who came to our law school, studied a year with us, received the J.D. Degree, and then were allowed to take the New Mexico bar exam. If they passed it, they

could be licensed. However, the rules for admission to the bar and the rules for the J.D. degree from an ABA accredited law school have since been changed.

DESIDERIO: I'm Bob Desiderio, Dean of the University of New Mexico School of Law. In the past, we would allow people with foreign licenses in common law countries to take one year at the law school and then give them our degree. The American Bar Association a few years ago adopted a standard which limits the amount of advanced standing credit awarded for foreign study by ABA approved law schools to one-third of the total required for the J.D. degree (one year)⁸. Now we must require that they take two years before we can give them our J.D. degree. The typical Master of Laws is a one year degree.

GORDON: Consider how diverse the rules are from New Mexico to New York.

BERMANN: In New York it is very clear. Until about ten years ago, it was sufficient to be admissible in New York, to be admitted to study for the LL.M. degree without actually receiving the LL.M. degree to take the bar exam. We had many applicants with foreign law degrees applying to Columbia and other schools asking whether they were admissible to the New York bar. We would write back and say you are admissible; here is the application for study at Columbia which they had no intention of filling out. They had a piece of paper that said they are admissible and they would seek to take the New York bar exam and they could. However, the New York law has been changed so that now the LL.M. degree is in fact required in order to take the New York bar exam.

GORDON: I think that if we reviewed the admission requirements for persons with foreign law degrees we would find a diversity in the range between these points. I think that addresses the NAFTA Article 1210 provisions on licensing and certification. NAFTA essentially says that you ought to have transparency, licensing and certification that is not burdensome and does not constitute a disguised restriction on legal practice. The question we could argue at some point is whether or not the various state rules in the United States are in compliance with the requirements of Article 1210. Is it really reasonable for Americans to be admitted to practice in Mexico as foreign legal consultants upon approval of the Secretaría de Relaciones Exteriores in Mexico City but a Mexican citizen will need to become a foreign legal consultant in each state subject to its idiosyncratic rules?

DESIDERIO: There is no New Mexico rule that says that the foreign lawyer must do so many hours of study. To be admitted to the bar of New Mexico, you have to be a graduate of an ABA accredited law school. This is the standard rule around the country.

NELSON: Isn't that the requirement for a full J.D. degree as opposed to an LL.M. degree?

DESIDERIO: The New Mexico rule for admission to the Bar simply says that you must be a graduate of an ABA accredited law school.

NELSON: That's where it varies state by state. New York, for example, does have a specific rule saying that if you have an LL.M. degree that is sufficient if you already are a licensed attorney in a foreign country. What the ABA rule does is to say that two years of legal studies is the minimum standard for awarding a J.D. degree. Most states don't admit people to their bars on the basis of an LL.M. degree.

8. Standard 507, American Bar Association Standards for Approval of Law Schools (2000).

So for most states, you need a J.D. degree. The ABA standard is addressed to the standard for accredited law schools to grant a J.D. degree to someone who is coming from another jurisdiction.

DESIDERIO: For many states, the only rule for admission to the bar of a state is a degree from an ABA accredited law school. That is all it says. If that's the case then, what is going to be required? To the extent that other states are that way, the LL.M. by itself won't be enough to qualify to take the bar examination.

GORDON: Florida has never accepted the LL.M. alone. So we get students coming through our LL.M. program and then going to New York, which is much better than it used to be. We used to get students applying to our program and then taking their admission for study in Florida to New York to take the New York bar exam. People at the University of Miami law school told me that it just created havoc in their planning. The foreign attorneys paid the fee, got admitted to study in Florida but never again contacted Miami. So on the day for commencement of classes, they were expecting 37 foreign students, but 35 of them were up in New York City studying for the New York Bar and only two of them are registered. So the change in the New York rules has certainly helped.

NELSON: Yes. We put an end to the old practice.

GORDON: We do have a diversity of rules and they do constitute barriers. Should Orozco just go ahead and give any legal advice he wishes and ignore the consequences as the cost of doing business? I think the cost of doing business is pretty high and I think that if we can reach consensus on any of these, it will be on that.

REYNA: My name is Jimmie Reyna, Washington, D.C. Orozco is planning to give advice to fellow Mexicans who have property in Mexico and Taos, New Mexico. It seems to me that the minute he begins to give advice on property rights in New Mexico that he is practicing law. That would be unauthorized.

GORDON: Now, are we assuming that he has become a foreign legal consultant?

REYNA: As soon as he begins to give advice on property rights in the State of New Mexico then that's unauthorized practice of law whether or not he is a foreign legal consultant. Is there any dispute on that?

NELSON: I think that's right, whether it's property rights in New Mexico or property rights in Mexico. I don't think it matters.

REYNA: It doesn't.

NELSON: That's the point of the New York case, *In re Roel*.⁹ That was a Mexican lawyer who was in New York giving advice entirely on Mexican law, at least it was stipulated that that was the case and he was still held to be engaged in the unauthorized practice of law. So it is not the subject matter. It's an oddity of the way the regulations work and it is very ill defined and fuzzy. It is a function of where you are when you are giving the advice and not what the advice is or what law is covered.

REYNA: I was reflecting on the District of Columbia rules. There are a lot of attorneys that are there that are members of other Bars and they are practicing law before federal agencies. The D.C. Bar has a rule that says that if you are rendering

9. *Supra*, note 2.

advice and you're before federal agencies, you don't have to be a member of the D.C. Bar but the minute that you begin to give advice on D.C. law, Virginia law or Maryland law, then you are outside of that exception.

NELSON: But that's a result of the rules of the agencies. The agencies themselves, like the Federal Trade Commission for example, have adopted a rule that says foreign lawyers can appear before it. So it's out of the hands of the D.C. Bar unless you buy the argument that it's in the inherent power of the local court to say "no deal" to the FTC.

REYNA: I understand how that works but it seems to me that, let's say you are a legal consultant and you are in New Mexico or New York and it just seems that if you start rendering advice on property rights in New York that you are engaged in unauthorized law practice.

NELSON: If you are a foreign legal consultant and you are advising on property, you are clearly going to be outside the scope of practice that you find in any foreign legal consultant rule because, one thing that is sacrosanct is local real estate law. But this is about scope of practice; it's not about what is the practice of law. The practice of law would include advice on real estate anywhere in the world. But, a foreign legal consultant would be outside the scope of practice if he advised on local property rights.

REYNA: I want to take this back to what we were talking about, tax law or international law or NAFTA law.

MACPHERSON: If you are a foreign lawyer talking about law, and you give advice incidentally on the Cayman Island law or something like that, we are not going to say that is the unauthorized practice of law whether or not you are a foreign legal consultant. Now this lawyer has a pretty good argument to say, is estate planning the practice of law? There is not a case in New Mexico but there is one in Florida that says estate planning is the practice of law. Assume the foreign lawyer says, I am advising my client primarily on estate planning under the law of Mexico. Because the client has some property in New Mexico, to do the proper job competently, I need to also factor the New Mexico property into the discussion. Well, the new ABA proposed rules seem to allow for that. If he says I am giving you advice on New Mexican law and incidentally, on Mexican law, then he has got a different analysis. He has to argue the facts analysis. And the point that Mr. Reyna raises is this. Would it not be incompetent if he said, "I will do your estate planning but I am going to leave out all of your property in New Mexico in the estate planning"? So the courts are starting to look at that. Now, NAFTA says you can only talk about New Mexico law if you are a foreign legal consultant, do you agree? And that seems to be their bible.

NELSON: I think it is important to remember that NAFTA does not regulate what lawyers can do or what anybody else can do. What NAFTA does is to prohibit certain things on the part of Contracting Parties (Canada, Mexico and the United States). And what it prohibits is violation of most favored nation treatment, violation of national treatment, violation of rules on transparency. What it says is we don't care what measures you have in place as long as they are not discriminatory, as long as you honor national treatment. It doesn't say New Mexico has to regulate in any particular way. What it does say is that you have got to regulate everybody the same way.

MACPHERSON: I was referring to the new proposed ABA rules, called the Ethics 2000.¹⁰

GORDON: They certainly have a very profound impact on the foreign legal consultant because I think prior to these rules being present to talk about, we really seem to have a situation where you either become a foreign legal consultant and get some turf or you just stay out all together. What this is doing, I think, looking a little more at the reality and attempting to develop some rules around reality and I think that is going to be good.

We are going to now turn to U.S. lawyers interested in going to Mexico. The hypothetical has two people Fitzgerald & Sam, a Tampa, Florida firm interested in international business and trade law which represents Transco, Inc., a Tampa based shipping company. It has recently formed Transco de Mexico, a joint venture affiliate in Veracruz, Mexico. Both Fitzgerald & Sam have J.D.s from U.S. law schools. Fitzgerald has a Maestria en Derecho from the Universidad Iberoamericana in Mexico City, which he obtained while a Fulbright Scholar a decade ago. Sam has an LL.M. from London School of Economics in shipping law. What does the Mexican law view as unauthorized practice of law? First, let us review the area of the Mexican foreign legal consultants. Could these people become Mexican foreign legal consultants in Mexico?

JÁUREGUI: I think what we have to be mindful of here is that in Mexico, as far as I am concerned, we did ourselves a big disfavor because we didn't understand the rules of the profession really, inasmuch as we don't have an integrated Bar and therefore not having that and having just associations, friendly associations of lawyers, puts us at a disadvantage because there is no real regulatory framework. You are coming out of basically the raw law of professions. I call it raw because it is very raw in this regard. There is no protocol and the regulatory environment deals with all professions so you never really had to worry about defining what is a lawyer and what is lawyering. You were a lawyer if you had a *cedula profesional* issued. This is the certificate issued by the state through the Bureau of Professions stating that you were a lawyer. And that is what constitutes being a lawyer. There was no court precedent defining what a lawyer is, at least at the time that NAFTA was being discussed. So the reason that I say we did ourselves a disfavor and a disfavor to everybody is because we have a confused role. Fitzgerald & Sam, will come to Mexico, and will apply to SECOFI (Secretaría de Comercio y Fomento Industrial)¹¹ to open a branch of their business. Then if SECOFI issues a branch permit, what is it that you are going to be doing? Where do you register yourself as a foreign law consultant? You really can open a branch and pay taxes. I forgot to say you must get your immigration visas that will cover the activity to give consultancy on foreign law in Mexico. And I am assuming that Mexican firms in Florida may act as consultants on Mexican law in Florida, either as a branch or in a subsidiary form. So what these two fellows do is go to SECOFI, get their branch permit, and give the tax notices. Assume that they already have their immigration

10. The ABA Center for Professional Responsibility has established the Ethics 2000 Commission to examine proposed amendments to the existing Model Rules, as well as newly proposed rules. A list of the rules to be considered and a description of the issues involved is available at the ABA web site. ABA, (visited May 22, 2001) <<http://www.abanet.org/cpr/ethics2k.html>>.

11. Now Secretaría de Economía.

permits so they are allowed to be in the country legally doing what the permit says. Once they have done all of these wonderful things, who knows what they are? They could be business consultants; they could be customs brokers; they could be lawyers; or they could be security brokers.

LOPERENA:...or maritime brokers. I think we are not going to have disputes like the Americans. We are unanimous, Miguel Jáuregui and I, because we understand the practice of law the same way. Of course we don't have the regulatory issues that you have in the United States. If you go to the Bureau of Professions (Dirección General de Profesiones) and ask them how many times they have applications to practice by foreign lawyers, the answer is very simple. Never. There are lawyers who go to jail because of malpractice, in a very few cases, or who are prosecuted for criminal offenses but the Bureau of Professions never takes notice of that. They only issue professional certificates, what we call the *cedula profesional* registration. That is a document that proves that you are licensed to practice. The Secretary of Commerce and Industry Ministry (now the Secretary of the Economy) authorizes the establishment of the businesses of the law form. But who authorizes the practice of law? The Secretary of Education through the Bureau of Professions. Another thing that not even many lawyers in Mexico are aware of is that the law of professions is a local law and every state is entitled to have its own professions law. But the license to practice is not given to legal entities. It is given to individuals. Some times the Americans send us a power of attorney. If Miguel's firm needs to represent somebody in Mexico and they send a power of attorney in favor of Jáuregui, Navarette, Nader y Rojas, S.C. Miguel will send it back. He will tell them to use the power in favor of Miguel Jáuregui or Gabriel Navarette or any other partner or associate. The practice of law in Mexico is performed by individuals, not by firms. Sometimes, a foreign law firm has obtained a permit from SECOFI to establish a branch or subsidiary or whatever and they stated that they were authorized to practice law in Mexico. They asked me whether this created a problem. But if you are in Mexico to practice without the permit from the Bureau of Professions, without being licensed to practice law, you will commit a criminal offense. Mexican jails are not five star hotels so they began to worry about it. Another thing that is different in Mexico is that a license to practice law in one of the Mexican states is good to practice all around the country. It comes from a clause that is in our Constitution: full faith and credit will be given to everything in every state including university diplomas. We do not have Bar exams to practice law in Mexico. Once a University with a law faculty is authorized to teach law and grant a diploma for a professional degree, a university degree as *Licenciado en Derecho*, that means licensed in law, an application is made before any of the local professional bureaus or the professions bureau in Mexico City and once this diploma is recorded and all the requirements are fulfilled (just objective requirements, no exams) the *cedula* is granted and this gentleman may practice law in any place in the country. Today some questions have arisen about the quality of the universities and there is a new body that is qualifying the people after obtaining a university degree. Not only legal degrees but for different professions. They are qualifying the people because it is a symptom that the university diploma is not a guarantee of professional competence. They call it the Center for Evaluation of Professions. It exists in the legal profession today. The Mexican Bar Association has a seat there; the Universidad Iberoamericana, Escuela Libre de Derecho and the

Universidad Nacional Autonoma de Mexico have a seat there as well. There have been a lot of political issues arising about this, even during the closing of UNAM last year. Some people say that the University has such high quality that there should not be a procedure for the qualification of competency after obtaining the university diploma. The external body was against the University. However, I think that it is in favor of the University and in favor of society as a whole to have somebody that qualifies the competency of all the people coming out of our universities.

JÁUREGUI: The Mexican Secretary of Commerce and Industry was negotiating NAFTA under the pressure of the Office of U.S. Trade Relations and the Department of Commerce saying Mexico needs to have foreign legal consultants in Mexico. Mexico needs to open up the legal profession. SECOFI tries to solve the issue without regard to anybody else but themselves. They negotiated the ability of U.S. persons to own Mexican law firms up to 49%.

GORDON: I think what we are saying is that if Sam & Fitzgerald go together to Mexico and they want to open an office to handle shipping issues and haven't said whether they were legal professionals or what, it is really the same as making a foreign investment under Chapter 11 of NAFTA. They can go and have 100% ownership of a firm. If they are asked what this firm is for and they say shipping consultation, they are probably not going to have very much trouble. They are going to get a permit to establish a business and then they are going to start practicing shipping consultations.

JÁUREGUI: In a branch, or a subsidiary of some sort.

GORDON: Sure. They then start actually to practice what we would agree to be maritime law and that may raise some problems. Let's say they go first and say we want to have a business and you say what is the business you want to have a branch for. It is to be a law firm. Does that send a red light to the granting of permission to open a firm?

JÁUREGUI: To begin with you have to define, and this obviously is not in the Anglo Saxon law, that the activity of rendering of professional services is a civil law activity rather than a commercial activity. This is an additional wrinkle to this whole issue. Therefore, if you are going to open up a branch, what kind of a branch is it? Is it a commercial company organized pursuant to the laws of Delaware or is it a limited liability partnership according to the rules of whatever state? What is Fitzgerald & Sam in Florida? Is it a personal society or is it a commercial company? Now let's assume just to make it easy on ourselves, that it happens to be something that we would call a civil society (*sociedad civil*) in Mexico. And that allows for people to get together in a collegiate body to practice the law and then you call it the *sociedad civil*, a civil society which is what we all are basically in Mexico. Let's say their legal form in Florida was a *sociedad civil*. So they present the charter and bylaws of their *sociedad civil* and comply with all the legal requirements. They open up the branch. So the branch, therefore, would be allowed as a commercial operation, which is now a *sociedad civil* from a civil law point of view prepared to render legal services regarding Florida law. As a commercial matter, it may legally bill for and collect money for those services in Mexico and pay taxes in Mexico. From an immigration regulatory administrative law point of view, Fitzgerald and Sam are authorized to do that by having had visas issued to them. Then everything seems to be perfect on the surface.

GORDON: This idea of labeling whether we are a law firm or whether we are a shipping brokerage reminds me of what actually happened with a very large international law firm about 15 or 18 years ago when I was teaching in Frankfurt. While I don't want to reveal the name of the firm, I will just call them Baker & Smith, they were not permitted at the time to practice in Germany. What they had done is to associate themselves with an accounting firm and on the door it said, Baker & Smith, Accountants. You went in through that door and there was a secretary sitting there and then you went through another door, which was Baker & Smith, Attorneys at Law. That's where all the attorneys were. So, we could put that into the context here, we are going to do marine brokerages, that's what is said on the outer door. The inner door says marine legal services. If we look at just Sam or just Fitzgerald and they go to Mexico and want to practice American law in Mexico as solo lawyers or a firm, where do they go to obtain the equivalent of the foreign legal consultant license? What can they do? In what areas can they practice? Do they have to have been a lawyer practicing in the United States for so long?

JÁUREGUI: The problem that I see is that you go nowhere because no one will tell you. I mean the General Bureau of Professions. You go there with your nice application and you say look, in NAFTA, we have jointly signed something that says we are going to file here for an application as we call it in our papers that says application for permit. Then we say, you know, a completed permit application and a form approved by the regulatory body. The problem is that the General Bureau of Professions has not approved, to my knowledge, any form. So, therefore, what you are doing and this is why it is so complex to explain. Those two gentlemen have the ability to go to Mexico and get their visas. They are sitting in Veracruz and they say now we want to practice as a law firm. Our firm is going to take the form of a *sociedad civil* so we go to a notary public. We get the form; we sign the book of the notary and we have a Mexican entity. Now the Mexican entity because it is civil law, *sociedad civil* rather than a commercial law oriented or born out of civil law not commercial law, we are going to render professional services. Can we do that? Yes. Then, what kind of services? Then you describe it in your purpose and you do it and the problem is then you are not a foreign legal consultant in Mexico because what you are, you're a Mexican *sociedad civil* with a specific purpose but you are not regulated by the Bureau of Professions, and you are sort of floating. And the issue is going to get very intricate when you have misguided a client as to what you were doing and whether you in fact have complied with a law that is *pari passu* with federal law, which includes a treaty. If you have defrauded the person that you are advising you are eligible to go to a five star Mexican jail.

VARGAS: Vargas, Juarez, Mexico. I respectfully disagree with Mr. Miguel Jáuregui. I believe that as of 1998 when Chapter 12 of NAFTA became an applicable norm in Mexico. You are allowed as a foreign attorney to file a constitutional lawsuit with the district courts in Mexico. The main argument for your allegation in the constitutional lawsuit would be that the Mexican government has failed to regulate the concept of the foreign legal consultant and therefore, I believe, you will be entitled to register yourself as a foreign legal consultant in Mexico and that way avoid being sanctioned criminally.

JÁUREGUI: I agree with what you are saying. I wasn't addressing what you were talking about at all. I was addressing establishment and the authority of the

General Bureau of Professions. But, in the case you are giving, which is perfectly understandable, it would be equivalent to what some of my colleagues who are foreigners who got their law degrees in Mexico had to go through which was, at the moment they finished their legal education, they would then have to go to the General Bureau of Professions to issue the certificate to practice law, the *cedula*. They would say, no, because you're not Mexican. Then you would seek an *amparo*¹² from a federal court, which would then order that the General Bureau of Professions grant you the *cedula* and register it for you. So, I fully agree with you and I think that the venue that you are bringing it into is more of a litigator's venue. I will let my friend correct me but you have organized as a sociedad civil and you are going to be practicing a law other than the Mexican law. In the example I gave, it was assumed that the person obtaining an *amparo* had a Mexican legal education. In the case of our friends, Fitzgerald & Sam, they do not have a legal education obtained in Mexico. They are Florida lawyers who are going to come and establish a business in Mexico. So what you are saying is, regardless of whether or not there is a rule in the Bureau of Professions, you would want to go and register your foreign legal advisors status and upon being either disregarded or disallowed, you would seek an *amparo*. Basically, that is what you said if I understood you correctly and I fully agree with that.

LOPERENA: What is the practice of law in Mexico? A maritime agency will be giving advice on maritime law for the public. If the agency does custom brokerage, you should be an expert in customs law. If you are an insurance broker, you should know a lot about insurance law sometimes more than many lawyers. So, what is the real practice of law? I have my *cedula* in my pocket with me all the time. Today it is in my hotel room. But ask Miguel Jáuregui; he never carries his *cedula profesional*. Why? For one single reason. Miguel is not a litigator. He doesn't go to court. If somebody goes to court and says he is a lawyer and tries to advise and to help somebody appearing before the court the judge will say, "Show me your authorization." If you do not have the certificate, you will be denied the right to practice in that court. Besides that, just appearing and announcing that one is a lawyer, if not true, is a criminal offense. So I have in my pocket all the time, a certified copy of my *cedula*. I have five or six of them because sometimes I forget one here or there and the original one is in a safe box, all the time. But if you ask other professionals in Mexico whether he carries his *cedula*, nobody does. And among lawyers, only the litigators. If Miguel wants to hire somebody in his firm to do research for contracts or opinions and he or she is a brilliant law student and remains in his or her office working and studying precedents, new laws whatever and never gets a degree, he or she could be a kind of apprentice or law clerk, a *pasante*, an employee of Miguel's firm. But that person is never considered to practice law because he or she never goes out and shows up in a courtroom or never signs a legal opinion. All the legal opinions are signed by the partners or the

12. In Mexican law, the legal concept of *amparo* involves legal protection of rights specified in the Law of Amparo by procedural remedies. It has been described as having "five diverse functions: (1) protection of individual guarantees; (2) testing allegedly unconstitutional laws; (3) contesting judicial decisions; (4) petitioning against official administrative acts and resolutions; and protection of farmers subject to the agrarian reform laws." H. Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 Calif. W. Int'l L.J. 306, 316 (1979).

associates who have the license to practice law. It happens in many cases in Mexico that people are well prepared, well trained, but without a license to practice law.

JÁUREGUI: To the extent that you have *pasantes*, many law firms have had *pasantes*, and those people are just as able as any other lawyer with a diploma to practice law except that they never appear before a court. So I think that the threshold of what I would call legitimate, is the court system. In other words, the practice of the law strictly defined is the practice of the law in a court or other judicial proceeding, whether it is from a labor law point of view, from an administrative law point of view, or from a civil or mercantile point of view. That is a daring kind of affirmative notion but, if you really look at it closely, the only place that you would get regulated would be in a court of law.

GORDON: In our hypothetical problem, Fitzgerald would like to be admitted to the Mexican Bar. That is very American language. It probably should be that Fitzgerald would like to fulfill the requirements, the same requirements that Carlos and Miguel have fulfilled to be able to apply and get the *cedula*. Fitzgerald has a Masters Degree from a Mexican law school. There are two questions here. What would be required before he appears to ask for the *cedula* profesional and what about the demand that he seek an *amparo*? I would like to have you address both of those. First, do you negotiate with a law school? Can you go from law school to law school and see how much credit they will give you? Could I challenge a rejection of my request for a *cedula* by the Bureau of Professions under NAFTA Chapter 20? That is, instead of seeking the *amparo* on the basis that the Bureau's rejection was an unreasonable restriction, could the United States bring an action under Chapter 20 of NAFTA?

JÁUREGUI: I think it could. I don't think you negotiate what credits you should have to become a Mexican lawyer. Basically you should compare the programs of both sides and see what you have complied with and then have the *cedula* issued. There is an important feature here, which has developed in the last few years and it happened to one lawyer in my office. That lawyer was Mexican by nationality. He had a law degree from a French University. All he had to do in Mexico to get registered as a Mexican lawyer was to prove to the Bureau of Professions that he was a French lawyer and they issued a certificate for Mexican law. He didn't have to negotiate anything with any university. Because you are Mexican and you are a lawyer, you proved your competency in the legal profession.

GORDON: If I negotiated with a Mexican law school and they gave me their degree, would that be challenged by the Bureau of Professions, if I went to obtain the *cedula profesional* today?

JÁUREGUI: I don't think they challenge it any more. It would have been challenged in the cases before because Mexican nationality was required. Now there is no discrimination for nationality because of NAFTA. Now you would get it registered without going to a tribunal.

GORDON: I raised the Chapter 20 question because about a year and a half ago, I had a call from the U.S. Trade Representative's office and they asked me to make up two hypotheticals. One to challenge one of the most sensitive areas of Canada and the other one of the most sensitive areas of Mexico. I said I guessed I could. I could probably make up a hypothetical dealing with a funeral home. They said, "No, no, no, don't do that." In fact, it is the funeral home case, the Loewen Group case, that is irritating other countries. We are irritated about the challenge

to the American legal system and the Mississippi legal system, in the Loewen Group case¹³. So I said, I think for Mexico we challenge the *amparo* proceeding. That is a little bit like Mexico challenging the United States Bill of Rights on the American side. And I am interested in your comment that maybe you could take that to a proceeding under NAFTA Chapter 20, which would seem to me to raise a terribly adverse reaction in Mexico. Would it not?

LOPERENA: This leads me to talk about *amparo*. The *amparo* was granted to the foreigners who studied in Mexico, mainly for the legal profession. The first time it happened, was 50 years ago because the profession of law is 55 years old. The person who challenged the refusal of a *cedula profesional* was a Spaniard. He obtained the *amparo* and he obtained a license to practice law. Then a second applicant followed, then the third, the fourth, and many many *amparos*. I don't know why the Congress was so lazy about amending a law that had been declared unconstitutional. If in your *amparo* complaint, you don't attack properly an unconstitutional law, the tribunal will apply *ex officio* its own arguments to determine its constitutionality in the new case. Well, maybe it is good for lawyers because it gives them a lot of work. Regarding again the practice of law, what is the practice of law? Drafting a contract? Contracts are drafted by accountants very often. By architects, by engineers, by many people and it is not considered practice of law. Of course, it gives a lot of work to the lawyers.

GORDON: Our two people Sam and Fitzgerald would like to merge with a Mexican law firm of two Mexicans to become Hernandez, Fitzgerald, Sanchez & Sam. All four would share equally in earnings from work undertaken in Mexico. The firm in Tampa would remain a separate U.S. firm. Can they do it?

JÁUREGUI: First of all, it depends on what they mean when they say they will share equally. I guess what they are doing is divorcing patrimonial ownership from sharing in the revenues of the firm. I don't think sharing equally is a problem provided, however, they are going to be practicing in their own fields and making money for the law firm. I would separate ownership, patrimonial ownership of the assets of the firm, from the income of the firm. I would think that Fitzgerald and Sam are limited by the SECOFI negotiations to owning up to 49%. Now the problem I see in the ownership of 49% is what can you do within the owned company or the owned *sociedad civil*? Can you practice? Can you continue to practice the same law that you were practicing in your branch and is that safe? Are you putting yourself out on a limb by having patrimonial ownership with the professional ability to practice law from Florida and Mexico? What is happening to your colleagues in Mexico and is there a contamination of such a kind that you can be bad in both places? You can be bad in Florida and you can be bad in Mexico. We go to the scenario that we were trying to discuss here in the case of a legal consultant position in the United States. Because then you are putting yourself

13. Loewen Group Inc., a Canadian operator of a large number of funeral homes in Canada and the United States, filed a claim under Chapter 11 of NAFTA seeking \$725 million in damages, interest and legal expenses against the United States for failure to provide protection from discrimination for its investment in a funeral home in Mississippi. Loewen Group lost a lawsuit in a Mississippi state court over its purchase for \$6 million of a funeral home in that state. The International Centre for Settlement of Investment Disputes has authorized the formation of an international arbitration panel to review the claim. See International Centre for Settlement of Investment Disputes, The Loewen Group, Inc. and Raymond L. Loewen v. United States. (Case No. Arb. (AF)/98/3 registered Nov. 19, 1998); also see Toronto Globe and Mail March 1, 2001 at B3.

on slippery ground. I think the commingling of patrimony in the same law firm might be a problem. First of all, I don't know what the answer is and, secondly, I don't know that anybody has legal experience in Mexico to say how it would be resolved. What I am trying to say is, to the extent that you seek to divorce patrimonial rights, ownership rights, from the distribution of the benefits of the practice of law, difficult questions arise. The two Mexicans probably will be practicing Mexican law and Fitzgerald and Sam will continue to practice Florida law. How do you differentiate and how much fine-tuning do you need to do in the firm? Pretty much, I guess, as a Chinese wall. Assume that Fitzgerald and Sam never touch Mexican law, and by the same token, the Mexican members of the firm, do not touch the Florida law. The problem is when you sit in a boardroom or in a conference room and you have issues that come up that involve Mexican law and Florida law, who discusses what? It becomes very, very complicated.

MACPHERSON: I have a question on this. Suppose that Fitzgerald and Sam had been giving advice to an American client, if they were practicing in Mexico and the client says, "If they were practicing law, I am going to file a grievance in Florida against them under some provision of the Florida Code of Professional Responsibilities." Suppose Florida said, yes, it was the practice of law. Therefore, the client can attack your Florida license. Now you could make an argument that Florida wouldn't be interested in that but there is law that would suggest that some innovative American lawyer could sue Fitzgerald and Sam for malpractice using the standards of the United States because they are governed by the Florida license. When I looked at the question, I couldn't resolve it. When I look at what little I know about Mexican law, I am very concerned, because the Mexicans don't really tell me who is a lawyer, other than you have got to have a *cedula profesional* and I agree. The only people that I ever see that are worried about it are those that go to court. What bothers me is that I hear lawyers say we are advising American clients but we are not practicing law. We are business advisors. Is that going to work? If the Florida court somehow said we have jurisdiction over this thing and Fitzgerald and Sam are going to say talking about shipping law is not, the practice of law, how do you define the practice of law? I see the problem as being that Mexico hasn't said what is the practice of law and what is a lawyer.

JÁUREGUI: The other issue that has come up and will continue to come up in the context of commingled ownership of a law firm is, can that law firm really issue an opinion letter that is valid under Mexican law; for instance for a foreign financing or a legal opinion that will be complementary to the issuance of securities in the Mexican market. It gets very complicated because the issue is what kind of practice of law does a commingled firm have. Can you really separate the lawyering part from the patrimonial part and not affect one or the other? What is the meaning of practicing law in Mexico in a venue that is not recognized anywhere but under commercial law created by a trading agreement? I don't know how to answer that one.

NELSON: It seems to me that this problem is a little bit artificial. We face this issue all the time in multistate practice in the United States. I had this come up the other day when I was in Asia and we needed an opinion on New York law relating to a bank guarantee. I couldn't issue an opinion on New York law. I am not admitted in New York but my firm can issue an opinion on New York law by having one of our partners who is so admitted sign the opinion on behalf of the firm.

That doesn't seem to me to be all that big of a problem. I do think that the combining of advice on different law, on the law of different jurisdictions, is absolutely critical to the ability of an independent legal profession to be relevant in the society and the economy that we have today. So, if you can't combine advice under the law of different jurisdictions, if you can't have lawyers qualified in different jurisdictions working together on a single problem, without running into regulatory or ethical issues, it seems to me we are in really bad shape. I don't see the problem, for example, with having the Mexican lawyers in Mexico advising on matters of Florida law, if they are competent or advising on the basis of the advice of their Florida partners on matters of Florida law. There is a problem if they are advising on Florida law in Florida, obviously. But I am not aware of any jurisdiction that, as a regulatory matter, prohibits lawyers admitted in that jurisdiction to advise on laws of another jurisdiction. I don't think, generally speaking, that this is a subject of regulatory measures as opposed to the general rule against incompetence.

MACPHERSON: I would address it this way. I would tell Mexican lawyers: come up here, you can advise on any law about which you feel competent. I don't care if it is Mexican law or Florida law but you are bound by the rules that define what is a lawyer and what is the practice of law in that jurisdiction. If you run afoul, you are going to be regulated like we all are. Sued for malpractice, or if it is bad enough, we will take you to the appropriate ethics committee. And I think that Mexico could easily say come down, if you think you're smart enough. You can give advice on that subject under our system of sanctions. The problem in Mexico is that the only sanction is basically a criminal action and that is the problem.

GORDON: Final question.

GILLEN: Steve Gillen with Foster Wheeler Corp. When I get on the plane going to Mexico, I fill in the immigration form. There is one box if you are a professional and there is another if your trip is business related. You mentioned that you have to be legally permitted entry immigration wise. What should I check off?

JÁUREGUI: I think you have to differentiate in immigration law two issues. Whether you are using what we call now, thanks to NAFTA, the NAFTA visa. That is for a specific purpose. You are going to be doing something other than what is in the scope of the NAFTA visa, which is basically to look after your business or trading issues in Mexico. Now that is very loosely worded so it encompasses a lot but I have a specific issue. We have now a case where a chairman of a public U.S. company and their legal counsel, the general counsel of that company and their body guards, have been accused criminally for violations of the Mexican immigration law. They came to Mexico under a NAFTA visa but they attended a board of directors meeting where the Board fired the Mexican CEO, then went into a shareholders meeting that diluted the Mexican minority. So the Mexican minorities' lawyers and CEO got together and commenced a criminal action, which is in the court now. Mexican immigration law has forever been sort of complicated for us. In many occasions it has been misused. That is not the proper use obviously of Mexican immigration law but it lends itself because of lack of clarity in many aspects. I suppose it happens in the United States as well that you can fall into areas that are gray or in violation of the law that can get you into a lot of trouble. Under the NAFTA visa, if you are only going to be checking on company matters and you

are really not going to be exposing yourself to anything that is as public as a shareholder's meeting or something like that, I think that the NAFTA visa is more than sufficient.

ROGERS: John Rogers, Carlsmith Ball. As I recall, a couple of years ago we considered the issue of whether foreign legal consultants who were working in Mexico for firms that had a license from SECOFI should register with the Bureau of Professions. This issue was raised with the Bureau of Professions and they said they could not permit the registration because they were awaiting the model rule for foreign legal consultants to be adopted. I want to ask if Mr. Nelson could give us a recapitulation of where we are on that question so that I can have a better idea of when I should file my application.

NELSON: I was afraid somebody was going to ask this question. There was an agreement reached in the course of discussions among the Bars of the three NAFTA countries that in effect attempted to create a model rule governing the issuance of licenses for foreign legal consultants from the NAFTA countries in the territories of the other and the nature of the practice in which they could engage and so on. The rule encountered considerable resistance in the United States in large measure because of some issues that were perceived as not being entirely clear in the agreement. However, the negotiators thought that was not the case, at least this negotiator thought that was not the case. We have not, thus far, succeeded in resolving those issues of interpretation. I would hope and expect that we could do that soon. Certainly, the United States government hopes and expects the same thing. This is in the June 1998 Joint Recommendations. Now, these recommendations were called for by NAFTA itself. The agreement provides that the government will request their respective professional bodies to consult and if possible come up with joint recommendations. That's the framework in which this was adopted.

OWEN: Michael Owen, Paul Hastings in Los Angeles. There were two questions that have been posed earlier but I must confess I am not certain that I understand the answers. One was just recently asked and that is on the visa going to Mexico. If we are filling out the NAFTA visa and we are a lawyer going down to represent our clients in business negotiations, should we check off as professional or as, I forget the other category because one of my Mexican lawyer friends once told me that there was a danger if you checked off as professional and so I was wondering, which box we should really check, or does it matter.

JÁUREGUI: I am not an expert in immigration law. Carlos Orland in my firm does all of that. What I understand in the case of the professional is that the problems that you arrive at is not a legal issue. I think it is an administrative issue as you arrive in Mexico. The immigration official looks at the paper because they ask you more questions than not and then maybe you can be sort of impeded from arriving at where you want to arrive unless you have some proof that what you are going to be doing is a professional activity that covers the foreigners interest, not the Mexican, that you are not practicing law in Mexico or anything else. So, as a practical matter, I understand that you just check the box that says you are coming to do business and forget about the professional part. That's just a practicality.

GORDON: I thought that form you get at the border was to check who you are, not what you are going to do while you are in Mexico. If what you are going to do in Mexico is carry out business, a tourist visa would not be applicable?

JÁUREGUI: No. You have to say what you will be doing in Mexico in the NAFTA visa.

OWEN: There is a form now that you fill out part of no matter what you are going to do but, if you are going in for business, you fill out another little part.

JÁUREGUI: Exactly.

OWEN: And it's in that other little part that you have got to check out whether you are coming in as professional or as a businessman.

JÁUREGUI: As a formal issue, you should be saying that I am coming in as a professional to give professional advice to a foreign client in foreign law in Mexico. As a practical matter, people say, just check business because it doesn't make any difference and no one is going to go after you. However, if you put down professional, you are going to be asked more questions. If you get an officious agent, you will be in real trouble because they will want proof of what you are doing and why you are doing it. This is a very incomplete answer and I apologize.

OWEN: The question that was raised in the materials about this gentleman who has a masters degree from the Universidad Iberoamericana was, can he get a *cedula profesional*? And I wasn't quite sure I understood the answer.

LOPERENA: The answer was not given. That is why you did not understand it. I have seen the *cedula profesional*, the license to practice, that says he is authorized to practice the profession of "doctor-in-law," "*doctor en derecho*." And I saw that once in the Mexican Bar Association because within one application they attached a photocopy of that document and we saved it but he needs a licenciado degree. That is a lower degree but the basic degree to practice. Even the law of professions law says that a degree of licenciado en derecho is required to practice the professions of law.¹⁴ A Masters Degree in law is not enough to practice law in Mexico. You need to be licensed the first degree because it means you had five years of study, at least, but if you want a Masters Degree in law you may get it in one year or two years. Sometimes a Masters-in-law knows less than a licenciado en derecho.

MACPHERSON: I had a friend who got his law degree from the University of Texas and I worked with him a long time. He's a Mexican national and he had a Doctor of International Law from I think UNAM. He wanted to get the *cedula profesional*. Basically, the Bureau of Professions told him that you need the basic degree. You don't know enough Mexican law and I don't care if you've got six Doctors in International Law, it's not going to apply. Well he'd say I'm going to sue for an *amparo* but I don't think he thought he would win on an *amparo*.

LOPERENA: I don't think he would because the basic law degree is licenciado en derecho.

MACPHERSON: There is another issue there that sort of compounds it. If you look at NAFTA, it seems to say, we will recognize as a lawyer, someone who has a five years Licenciado but there are schools in Mexico, for instance when I taught at Guadalajara that are now starting to offer abbreviated programs. You can get it from Guadalajara in four and a half years and they were talking about reducing it to four years.

14. Art. 2, Ley de Profesiones as amended by Decree of December 1973, Published in D.O., 2 January 1974.

GORDON: I hope that our dialogue has improved our understanding of the barriers that impede the cross-border practice of law by attorneys in Mexico and the United States. As noted before, legal rules in both countries have failed to keep up with the movement of individuals across international borders. If we have shed some light on these problems, we have succeeded in our mission.

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