

Globalization and Eligibility To Deliver Legal Advice: Inbound Legal Services Provided by Corporate Counsel Licensed Only in a Country Outside the United States

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I. INTRODUCTION

The time is ripe for an evaluation of the regulations governing the ability of lawyers licensed outside the United States to provide legal services within the United States. I say this with a certain amount of trepidation because we are in the midst of a rapidly changing environment. The late Fred Zacharias would undoubtedly urge restraint at this juncture in the debate. Many times the eminent scholar refrained from prematurely weighing in on hotly debated issues. Fred much preferred to “wait until the dust has settled” and judiciously assess the merits from a more philosophical perspective. However, there may be much to be gained from an interim review of the relevant licensing issues at this point in the debate, so we shall forge ahead.

Ongoing developments in a number of arenas will have an impact on the ease with which lawyers licensed elsewhere will be able to practice in the United States. For example, the ABA Commission on Ethics 20/20, in some of its earliest work, proposed discussion of three questions involving inbound corporate counsel: (1) should the ABA include foreign lawyers within the scope of the ABA Model Rule for Pro Hac Vice Admission; (2) should the ABA adopt a policy regarding registration of foreign lawyers practicing in-house in the United States; and (3) should the temporary practice provisions applicable to U.S. lawyers in Rule 5.5 of the *ABA Model Rules of Professional Conduct* be expanded to include non-U.S. lawyers?¹ The 20/20 Commission’s Working Group on Inbound Foreign Lawyer Issues, in its June 1, 2010 *Memoranda and Template for Comment—Inbound Foreign Lawyer*,² proposed an affirmative response to each of these three questions.³ The Commission is currently considering the comments and testimony presented to it on the issue.⁴ In addition, the Conference of Chief Justices—an organization including the highest judicial officers of the fifty United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands—in January 2007 adopted resolutions 7 and 8, which urge action regarding

1. AM. BAR ASS’N, COMM’N ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE 3 (2009), available at <http://www.abanet.org/ethics2020/outline.pdf>.

2. *Memoranda and Templates for Comment—Inbound Foreign Lawyer Issues*, AM. BAR ASS’N (June 1, 2010), <http://www.abanet.org/ethics2020/templates.pdf>.

3. *Id.*

4. Comments regarding inbound-foreign-lawyer questions, along with other issues within the mandate of the Commission, are posted on the ABA website. See *Comments: Inbound Foreign Lawyers*, AM. BAR ASS’N (July 2010), <http://www.abanet.org/ethics2020/comments.html>.

admission of non-U.S. attorneys.⁵ Resolution 7, directed at state supreme courts, urges consideration of

permitting individuals who have graduated from an Australian University and have been admitted to practice in Australia, and who meet the state requirements regarding experience, character, and fitness, to sit for the bar examination and if they pass that examination, to be admitted to the practice of law in the state.⁶

As of early 2011, fourteen states⁷ have taken the steps needed to allow lawyers licensed in Australia to take the bar examination and become licensed, even without any additional education at a law school approved by the ABA.⁸ Resolution 8, directed at the accreditation process, urges the ABA Section on Legal Education and Admission to the Bar to “consider developing and implementing a program to certify the quality of the legal education offered by universities in other common-law countries.”⁹ In a fairly recent development, an educational program in China, Peking University’s School of Transnational Law, has become the first program outside the United States to officially seek ABA accreditation.¹⁰ Further discussion of the School of Transnational Law can be found later in this Article.¹¹

5. See *Resolution 7 Regarding Authorization for Australian Lawyers To Sit for State Bar Examinations*, CONFERENCE OF CHIEF JUSTICES (Feb. 7, 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html>; *Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar*, CONFERENCE OF CHIEF JUSTICES (Feb. 7, 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol8AccredLegalEducCommonLawCountries.html>.

6. *Resolution 7 Regarding Authorization for Australian Lawyers To Sit for State Bar Examination*, *supra* note 5.

7. Those fourteen states include the following: Colorado, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maine, Nevada, New Hampshire, New Mexico, Oregon, Vermont, Washington, and Wisconsin. NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2011, chart 4, at 14–15 (Erica Moeser & Claire Huisman eds., 2011) [hereinafter NAT’L CONFERENCE OF BAR EXAM’RS].

8. *Id.*

9. *Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar*, *supra* note 5.

10. Andy Guess, *An American Law School in China*, INSIDE HIGHER ED (May 22, 2008), <http://www.insidehighered.com/news/2008/05/22/china>; Martha Neil, *Chinese Law School Plans To Seek Accreditation from ABA*, AM. BAR ASS’N JOURNAL (June 5, 2008, 7:19 PM), http://www.abajournal.com/news/article/chinese_law_school_to_seek_accreditation_from_ABA.

11. The accreditation process and the program at the School of Transnational Law are discussed *infra* Part IV(c).

Another factor to be considered is the work of the Asia-Pacific Economic Cooperation (APEC), an intergovernmental group of twenty-one nations comprising over fifty percent of world GDP, including Australia, New Zealand, China, and the United States.¹² APEC was founded to provide a forum for discussion of voluntary commitments related to trade liberalization by member nations. As part of its Legal Services Initiative, APEC is creating a rules and regulations database relating to licensing options and the scope of permissible practice for foreign lawyers in each nation that is an APEC member. The database project should effectively increase the accessibility of information and transparency, making it much easier for lawyers and regulators in one country to reliably determine the requirements of another APEC member nation. In July 2009, regulators from seventeen of the APEC members met in Singapore to discuss their various approaches to the regulation of foreign lawyers.¹³ In what was probably a well-intentioned effort to move the discussion forward, the *Best Practice Principles* draft¹⁴ was circulated on January 27, 2010, as a follow-up to the Singapore workshop. The extremely short two-week comment period seemed out of step with the consensus-building modality of the organization. Some of the controversial issues in the draft included recognition of entitlements,¹⁵ imposition of a single resolution of rights of association and lawyer partnership, scope of practice issues, and separate regulation of sophisticated clients.¹⁶ Much further discussion of these and additional points will be necessary before a consensus between member nations can be reached. However, although the *Best Practice Principles* draft represented only the tentative initial views of its drafters, the APEC goal of reducing impediments between APEC member economies to the provision of legal services in foreign jurisdiction law and international law remains very much alive. Significant substantive impact could

12. APEC's founding members are Australia, Brunei Darussalam, Canada, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and the United States. Later countries to join include China, Hong Kong, Chinese Taipei, Mexico, Papua New Guinea, Chile, Peru, Russia, and Vietnam. *Member Economies*, APEC, <http://www.apec.org/en/About-Us/About-APEC/Member-Economies.aspx> (last visited Feb. 2, 2011).

13. The APEC Legal Services Initiative Capacity Building Workshop was held in Singapore on July 30–31, 2009. For additional information about the Workshop, see *Group on Services*, APEC, <http://www.apec.org/en/Groups/Committee-on-Trade-and-Investment/Group-on-Services.aspx> (last visited Feb. 2, 2011).

14. Asia-Pac. Econ. Cooperation, Draft: Asia-Pacific Economic Cooperation, Best Practice Principles for the Regulation of Foreign Lawyers and Transnational Law Practice (Jan. 12, 2010) (on file with author).

15. Paragraph 3 of the draft Best Practice Principles document urged “[f]ormal recognition of an entitlement by foreign lawyers to [practice] foreign law on the basis of their right to [practice] law in their home jurisdiction.” *Id.*

16. *Id.*

result from projects such as APEC's attempts to prompt discussion among member nations regarding the regulation of transnational legal practice. Some mention must be made of the inclusion of recognition of professional qualifications in international agreements, some of which the U.S. federal government has signed: the Lisbon Convention (not yet ratified);¹⁷ General Agreement of Trade in Services (GATS); FTAs including the United States-Australia Free Trade Agreement,¹⁸ and the Bologna Process,¹⁹ which promotes higher education mobility, recognition of credentials, and quality assurance across tertiary—post-graduate degree level—education programs among signatory nations. The Bologna Process originated in Europe, and although the United States is not a signatory nation, the Bologna Process is likely to become increasingly important in setting standards for legal education. The forty-six countries that have joined the initiative thus far demonstrate the increasing sphere of influence and momentum of the Bologna Process. On the domestic front, the U.S. Federal Trade Commission (FTC) has begun evaluating potentially anticompetitive effects of states' regulations that may advantage "bricks and mortar" businesses that maintain traditional physical locations to the detriment of competing businesses conducted entirely via the Internet. In addition, the FTC has explored whether improperly anticompetitive tactics are being used by existing businesses to fend off challengers engaged in e-commerce.²⁰ The continuing struggle to distinguish permissible information about

17. See Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=8&DF=10/17/2007&CL=ENG> (last visited Feb. 2, 2011).

18. The United States-Australia Free Trade Agreement includes language stating, "The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional services suppliers and to provide recommendations on mutual recognition to the Joint Committee." Free Trade Agreement, U.S.-Austl., Jan. 1, 2005, Temp. State Dep't No. 05-074, at 10-A-1, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf.

19. See generally Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107 (2008).

20. See *Public Workshop: Possible Anticompetitive Efforts To Restrict Competition on the Internet*, FED. TRADE COMM'N, <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm> (last modified June 25, 2007).

legal issues from the improper unauthorized practice of law continues, notwithstanding decades of efforts²¹ to clarify the dividing line.

* * *

To focus discussion here, consider the situation facing Genevieve, who has been working as an in-house lawyer for a multinational corporation with operations in Europe, South America, and the United States. She is licensed as an attorney in France and has been practicing law in Paris for fifteen years, working for the company's European division. Executives are restructuring the company's operations and want to realign the legal department as well. To most effectively use her legal services, the executives want Genevieve to move to the United States and continue to advise the company regarding the laws of France, Germany, Spain, and other countries in the European Union. The executives are still considering several options regarding the location of their U.S. headquarters once the restructuring is completed. They are considering a number of options, including Saint Louis, Missouri; Honolulu, Hawaii; Phoenix, Arizona; and Wilmington, Delaware. The company's operations in Delaware are not really extensive enough to justify having a lawyer there full time, but some questions about German law do occasionally arise.

Genevieve has the expertise. In fact, few lawyers in any country could match her skill set. Furthermore, a sophisticated purchaser of legal services selected her to provide legal advice after an extensive search. And, with so many years of experience in working together, the executives at the client fervently want Genevieve to continue to give legal advice to the company. In some of the locations under consideration for the company's U.S. headquarters, however, Genevieve will not be allowed to continue to provide legal services for the company. Under the regulations in effect in those states, Genevieve would be engaging in UPL—the unauthorized practice of law—if she continued to give legal advice to the company after her office is located in that state.

It turns out that each of the states that are possible locations for the company's U.S. headquarters would give Genevieve a different degree of freedom.

21. See, e.g., AM. BAR ASS'N, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT 5-11 (2003), http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf; TEXAS UPL COMMITTEE, <http://www.txuplc.org/> (last visited Feb. 2, 2011); see also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3-5 (1981).

II. OBTAINING A LIMITED LICENSE AS AN IN-HOUSE ATTORNEY

Obtaining a limited license as an in-house counsel would allow the recipient to establish an office in the host state to give legal advice to the company that employs the lawyer and its affiliated corporate entities. In thirty-eight states,²² only lawyers licensed in another state in the United States who graduated from a J.D. program accredited by the ABA can obtain a limited in-house counsel license. Because she is not licensed anywhere in the United States and did not graduate from an ABA-accredited program, Genevieve is not eligible for an in-house counsel license in any of these thirty-eight states, including Missouri. A second group of states—Hawaii, Maine, Mississippi, Montana, and South Dakota—do not have any special regulation available for in-house counsel.²³ A lawyer who wants to move to one of these five states to work as an in-house lawyer would have to pass that state's bar exam and be found trustworthy in the character and fitness evaluation before the lawyer would be eligible to practice in any of these five states. This is the case even if the in-house lawyer is licensed by another jurisdiction within the United States, and the lawyer's legal practice is limited to working for a single company's legal department. As a result, even an in-house lawyer licensed in the United States would have to take the host state's bar exam to be able to move to an office in one of these states. Because Genevieve is licensed only in France, she cannot practice in these five states unless she qualifies to sit for that host state's bar exam. In both of these two groups of states, Genevieve—an honors graduate from the University of Paris and a distinguished lawyer with an impeccable record—cannot qualify to register as an in-house counsel under a limited license provision.

In a developing trend, however, a handful of states—currently seven—allow lawyers licensed in countries outside the United States to qualify for the in-house counsel license on the same basis as lawyers licensed in other states within the United States. Arizona, Connecticut,

22. The thirty-eight states in this group are Alabama, Alaska, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. See *In House Corporate Counsel Rules*, AM. BAR ASS'N (Apr. 12, 2010), http://www.abanet.org/cpr/mjp/in-house_rules.pdf.

23. See *id.*

Delaware, Georgia, Virginia, Washington, and Wisconsin are the states that have already taken this step to broaden the availability of their limited license for in-house counsel.²⁴ As noted in the comments to the Delaware rule, which track those of the ABA model rule on this point, organizational clients are “well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work.”²⁵ Once registered under these provisions, lawyers undertake a series of obligations. They have an obligation to inform their client that they do not hold the state’s regular law license; this should not present any problems for in-house counsel whose employers can easily insist on tracking the licenses of the attorneys in the legal department. However, it is clear that not all executives will insist on effective mechanisms for confirming that the lawyers employed by the company are validly licensed. The fact that one of the in-house lawyers advising Gucci America did not hold an active law license only came to light after the company became embroiled in litigation with Guess?, Inc.²⁶ Another requirement—that the lawyer explicitly submit to disciplinary authorities of the host state—similarly should not present any problem for legal department lawyers. This requirement clarifies a jurisdictional issue, regarding the power to discipline, but does not change the day-to-day operation of the legal department lawyers. In addition, the in-house counsel must pay registration fees comparable to those paid by regularly licensed lawyers in the states, pay the state’s client security fund fees, and comply with the continuing legal education (CLE) requirements on the same basis as United States-licensed lawyers in the state. Note that there has been little discussion of the cumulative burden of these apparently ministerial requirements. If a company wants the lawyers in its legal department to maintain limited licenses in three or four states in which the company intends to have them maintain offices, the annual cost can run to the thousands of dollars for each lawyer. These regulations are drafted

24. *See id.*

25. DEL. LAWYERS’ RULES OF PROF’L CONDUCT R. 5.5 cmt. 16 (2010), available at <http://www.courts.delaware.gov/Rules/DLRPCwithCommentsFeb2010.pdf>.

26. After holding an active California license for several years, Jonathan Moss changed to inactive status during the thirteen years he worked in-house for Gucci America. His employer stated that Moss was terminated for cause after he admitted that he had not told management that his California license was inactive while he was advising the company. Memorandum of Law in Support of Plaintiff Gucci America, Inc.’s Motion for a Protective Order Against the Disclosure of the Privileged Communications of Plaintiff’s In-House Legal Counsel Jonathan Moss at 4, *Gucci Am., Inc. v. Guess?, Inc.*, No. 09cv4373 (S.D.N.Y. filed Apr. 2, 2010), available at <http://www.nylj.com/nylawyer/adgifs/decisions/040810memorandum.pdf>; see also Sue Reisinger, *He’s Been Sacked! Gucci Fires In-House Counsel over Bar License*, CORPORATE COUNSEL (Apr. 7, 2010), <http://www.law.com/jsp/article.jsp?id=1202447607039>. This episode indicates that not all executives closely track the licensure status of personnel in the company’s legal department.

separately by each state, and the underlying assumption is that a lawyer is moving to the host state and maintaining an office only in the host state. Some states recognize CLE performed in other states, but a troubling minority of jurisdictions do not. The only CLE programs accepted in these states are programs that the particular host state has approved. This can result in an unnecessary burden on lawyers, requiring them to travel back to another state in which they are licensed rather than simply participating in CLE offerings in the state in which they are currently located.

III. FOREIGN LEGAL CONSULTANT REGISTRATION

Another option that Genevieve might consider is registering as a foreign legal consultant (FLC). In many ways, Genevieve's expertise would seem perfectly suited to this category. And, if management wanted Genevieve to advise the company regarding only the law of France, Genevieve could work as an FLC in any of the thirty-one jurisdictions in the United States that have adopted this registration category.

A. *Narrow Scope of Permitted Practice in Many States*

However, in the situation at hand, the FLC category as enacted in many jurisdictions is not a well-tailored solution. Recall that the company's management wants Genevieve to give legal advice on European Union law and the laws of Germany, Switzerland, and other countries in the European Union, in addition to advice regarding French law. This scope of practice is not allowed in twenty of the states that have adopted the FLC registration category.²⁷ FLC regulations in these jurisdictions severely circumscribe the scope of advice that FLCs are allowed to provide. In these states, a lawyer with Genevieve's experience licensed outside the United States is allowed only to give legal advice regarding the law of the country in which she is licensed. Because Genevieve is admitted only in France, she would be able to give

27. *Foreign Legal Consultant Rules*, AM. BAR ASS'N (Aug. 24, 2010), http://www.abanet.org/cpr/mjp/for_legal_consultants.pdf. States that prohibit Foreign Legal Consultants from advising on the law of countries in which they are not admitted to practice include Alaska, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Utah, and Virginia. *Id.*

advice only regarding French law, not the law of the European Union, third-country law, or international law. One reason this tightly restricted scope of practice is problematic for in-house counsel is the organization of corporate legal departments. Companies often organize their legal departments so that a lawyer has responsibility for issues that various business units and affiliated entities encounter relating to a broad legal category, without regard for the country in which the issue arises. In some circumstances, the company may want to have a single lawyer responsible for conveying legal advice regarding trademark and licensing issues affecting the company arising in any country in South America and the European Union. A lawyer who is restricted to providing advice regarding only the country in which the lawyer is licensed will not be able to fulfill that role for the lawyer's employer. The problems of the restricted scope approach are obvious. The client would have to bring many different lawyers into the legal department. If the company operates in twenty-seven countries and the executives want in-house expertise on even six different legal areas, such as environmental regulations, tax and pension requirements, government contracting, real estate, antitrust and securities regulation, and trademark and intellectual property, for example over 150 FLCs would be needed, just to handle the non-U.S. legal advising. Each of these many lawyers would have to become familiar with the intricacies of the company's business operations and the salient issues in the negotiation of the particular transactions that the company is engaged in and needs advice regarding. And, even if these lawyers could be utilized cost effectively by the company, it is likely that the executives who have worked with Genevieve for more than a decade would still want to hear her counsel and advice.

Why circumscribe the scope of advice so narrowly? After all, the executives at the company who have been employing Genevieve are quite sophisticated. And they realize that she is only licensed in France. It is unlikely that a sophisticated purchaser of legal services, such as the multinational corporation that employs Genevieve, would be unable to ascertain the information deemed necessary to assess the competence of its own in-house lawyer. The executives running the multinational client also know that she has developed her expertise in relevant areas of third-country law while Genevieve has been working for the company from her European office. Why should the company have to seek out separate lawyers licensed in each country in which it has operations? The alternative, having Genevieve become fully licensed in each and every country whose law her employer wants her advice on seems an onerous, and expensive, route to take. And, Genevieve would still be required to give competent legal advice, including recognizing the limits of her

expertise and bringing in other lawyers when the situation warrants. Furthermore, is it likely that numerous lawyers licensed in the host state are actually competent to advise on the laws of countries in the European Union? How many of the lawyers whose credentials are recognized in the host state are competent to deliver legal advice regarding the laws of Poland, Brazil, or South Africa? Limiting the foreign lawyers who have registered as FLCs to advising only on the law of the country or countries in which they have been licensed is an unnecessary constraint on the client's selection of counsel.

B. Jurisdictions with Broader Scope Allowed for FLC Practice

Currently, eleven jurisdictions allow a broader scope of practice for foreign legal consultants. Ten states and the District of Columbia allow FLCs to provide legal advice regarding third-country law and international law, in addition to the law of the country in which they are licensed.²⁸ If Genevieve's employer located its U.S. offices in one of these jurisdictions, and Genevieve registered there as an FLC, she would be able to continue giving legal advice as she has been for the past decade while her office is outside the United States in Paris. In many circumstances, a regulation permitting FLCs to engage in a broad scope of practice provides a sufficient framework so that the client can retain qualified counsel of its choice. However, a broad scope FLC provision is not, alone, a sufficient resolution for all situations in which clients seek to engage lawyers licensed in countries outside the United States.

C. Utilization of FLC Registration

Very few lawyers seek FLC status in the states in which it is available. Only a handful of lawyers utilize FLC registration in most states where the status is available, with fewer than a dozen lawyers admitted under that status. Between 1999 and 2006, for example, Arizona admitted a total of nine FLCs, Georgia admitted nine, Illinois admitted twelve, Massachusetts admitted four, Michigan admitted six, Minnesota admitted two, New Jersey admitted ten, Ohio admitted six, Utah admitted two,

28. The states that allow a broader scope of advice include Arizona, District of Columbia, Georgia, Iowa, Louisiana, Massachusetts, Michigan, New York, North Dakota, Virginia, and Washington.

and Washington admitted one.²⁹ Missouri and Wisconsin did not admit any FLCs during those seven years.³⁰ In the five jurisdictions in which the FLC status is more often utilized, the numbers are still relatively small in light of the volume of legal work being performed there. California has forty-six FLCs currently listed.³¹ Florida currently has forty-five FLCs.³² Texas has seventeen FLCs currently listed as admitted.³³ It is harder to obtain information about the current number of FLCs in Washington, D.C., and New York. What we can say with certainty is that between 1999 and 2005 the District of Columbia admitted a total of sixty-five and New York admitted 106.³⁴ The degree to which foreign lawyers register as FLCs does not appear to be correlated with the scope of practice authorized for FLCs in the various host jurisdictions. However, the relatively larger numbers registering in California, the District of Columbia, Florida, Texas, and New York do indicate that FLCs seem to be more inclined to establish a presence in jurisdictions with larger populations of potential clients whose legal matters are likely to have some extraterritorial aspects. Further empirical research is needed to develop a more complete picture of the legal services provided by FLCs and the reasons FLCs decide to register in the states in which they choose to do so.

IV. BECOMING FULLY LICENSED

A. Eligibility to Take the Bar Exam

Genevieve can take the bar exam in the state in which her office will be located in the United States if that state is among the twenty-eight jurisdictions that allow graduates of schools outside the United States to take their bar exam. This is an increase from the twenty-two jurisdictions that allowed such applicants fifteen years ago. Detailed

29. See Carol A. Needham, *Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-Border Legal Practice*, 15 MICH. ST. J. INT'L L. 605, 618 (2007); *2002 Statistics*, B. EXAMINER, May 2003, at 16; *2006 Statistics*, B. EXAMINER, May 2007, at 21.

30. See *2002 Statistics*, *supra* note 29; *2006 Statistics*, *supra* note 29.

31. This represents a decrease from the fifty-two FLCs in California in 2007. *Foreign Legal Consultants List*, STATE BAR CAL., <http://admissions.calbar.ca.gov/Requirements/ForeignLegalConsultantsFLC/ForeignLegalConsultantsList.aspx> (last visited Feb. 2, 2011).

32. In Florida, there has been a significant increase from the thirty-eight FLCs who had been listed in 2007.

33. See *List of Fully Qualified Foreign Legal Consultants in the State of Texas*, STATE BAR TEX., <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/MembershipInfoandServices/ForeignLegalConsultants/WebRosterNovember2010.pdf> (last visited Feb. 2, 2010).

34. See articles cited *supra* note 29.

discussions of requirements imposed on attorneys in other countries who are not licensed in the United States are available elsewhere.³⁵ What is relevant here is that movement towards liberalization originating with commitments made on a national level by the U.S. Trade Representative and pressures from groups such as APEC will tend in the direction of urging an increase in the number of states in which lawyers licensed outside the United States will be eligible to take the host state's bar exam. In addition, restrictions on those lawyers are likely to be minimized, such as the current requirement in some states that applicants receive additional legal education in the United States in an ABA-approved J.D.-granting program, be initially educated in a country with a common law-based legal system, or have practiced for a lengthy period of time in the applicant's home country, or a combination of these elements.³⁶ Half of the states currently require additional education beyond the foreign applicant's first law degree at an ABA-approved law school. Some states require that applicants have practiced in their home country. Determination of educational equivalency is required in some states. Fewer than half require the applicant to already be admitted in another jurisdiction in the United States. Many require that applicants must have received their first law degree in a country whose legal system is based on English common law.³⁷ Each state designs its own mix of these factors, and little uniformity has emerged.³⁸ Successfully passing a state's bar exam can be interpreted as an indication of an applicant's basic competence to practice. To take the experience of one state as an example, in Illinois thirty-eight of the sixty-nine non-U.S.-trained applicants since eligibility was expanded in 2003 passed the bar exam. This compares with an eighty-five percent blended pass rate for domestically educated applicants in Illinois during the years 2003–2009. Looking at statistics from all of the states that allow applicants educated in law schools outside the United States to take their bar exam, an

35. See, e.g., Jack Sahl, *Barring Foreign Educated Lawyers from Sitting for the Bar Exam* (Jul. 17, 2010) (unpublished manuscript) (on file with author); *2009 Statistics*, B. EXAMINER, Feb. 2010, at 6; AM. BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES 42 (2009), [http://www.abanet.org/legaled/committees/International%20Issues%20Report%20\(final\).DOC](http://www.abanet.org/legaled/committees/International%20Issues%20Report%20(final).DOC) [hereinafter REPORT OF THE SPECIAL COMMITTEE].

36. For additional information about the current requirements in the United States, see NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 7, at 8–19.

37. See REPORT OF THE SPECIAL COMMITTEE, *supra* note 35, at 14–15; NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 7, at 14–19.

38. See NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 7, at 14–19.

increasing number of such applicants are taking the exam. An average of 1171 applicants each year for 1992–1995 grew to 4315 applicants for each year from 2005–2007.³⁹ In other words, there was an increase of over 250% in the number of such applicants. And, the interest of applicants educated outside the United States is rising even in states other than California and New York, which historically have experienced the largest numbers of such applicants. The total number of persons educated outside the United States who applied to take a bar exam in all U.S. jurisdictions other than California and New York increased from about 100 per year—an average of 111 applicants—from 1992 through 1995, to 255 applicants per year from 2005 through 2007.⁴⁰ Assuming that the trend toward globalization of the labor market continues, the number of applicants who receive their legal training outside the United States is likely to continue to increase. Although not all applicants who take a bar exam in the United States are interested in establishing a practice in the United States, developments in U.S. immigration policy—particularly the ability to legally work in the United States—will also influence the likelihood that the numbers of applicants will continue to increase.

B. Admission on Motion

In six jurisdictions, graduates of law schools outside the United States are eligible for admission without taking the bar exam.⁴¹ The ABA Commission on Ethics 20/20 Working Group on Inbound Foreign Lawyer Issues proposed that lawyers licensed outside the United States should be included within the scope of the ABA Model Rule on Pro Hac Vice Admission, that the ABA should adopt a policy regarding registration of such lawyers practicing in-house in the United States, and that the temporary practice provisions of Model Rule 5.5(c) should be

39. REPORT OF THE SPECIAL COMMITTEE, *supra* note 35, at 11.

40. *Id.*

41. District of Columbia, Massachusetts, New Hampshire, Ohio, Vermont, and Wisconsin are listed in the 2011 Comprehensive Guide, but note that each jurisdiction imposes differing requirements. See NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 7, at 14–15, 19. Compare *Mitchell v. Bd. of Bar Exam'rs*, 897 N.E.2d 7, 9, 11–12 (Mass. 2008), and *Osakwe v. Bd. of Bar Exam'rs*, 858 N.E.2d 1077, 1078, 1080–81, 1083 (Mass. 2006), with MASS. SUP. JUD. CT. R. 3:01 §§ 6.1.4, 4.2.1, 4.2.3 (showing admission on motion for attorneys educated and admitted in a country outside the United States who have practiced for at least five of the previous seven years and whose legal education is deemed to be “equivalent to that provided in law schools approved by the American Bar Association”). Each of these states requires that the applicant already be admitted to practice in another jurisdiction in the United States. One of the most problematic hurdles for admissions authorities is timely and accurate analysis of the educational and practice record submitted by all applicants from outside the United States.

expanded to include such lawyers.⁴² If a host state adopts regulations carrying forward these proposals, lawyers in Genevieve's position would be able to confirm their eligibility to practice in the United States much more easily. In addition, the Working Group on Uniformity, Choice of Law, and Conflicts of Interest of the ABA Commission on Ethics 20/20 has developed an issues paper and solicited comments regarding the ABA Model Rule on Admission on Motion.⁴³ Among the questions posed by the Working Group is one that invites discussion of expanding a host state's licensing options for lawyers: "Would it be advisable to adopt . . . special registration categories that would permit a lawyer to perform certain types of work in a state, such as legal services related to international law . . . ?"⁴⁴ A number of commentators have proposed an expansion of eligibility for admission on motion that, if recommended by the Commission and adopted by the ABA House of Delegates, could influence additional states to further expand eligibility for this group of applicants.

*C. Impact of Possible ABA Accrediting of Programs
Outside the United States*

In a fairly recent development, a law school in China, Peking University's School of Transnational Law, has become the first program based outside the United States to officially seek ABA accreditation.⁴⁵ The school functions independently of Peking University's Chinese-based law school and is located in a satellite campus in Shenzhen. The founding dean for the school, Jeffrey Lehman, is former dean of the law school at the University of Michigan and former president of Cornell University, among his other accomplishments. Stephen Yandle, former associate dean at Yale and Northwestern University's law schools, is the associate dean at the School of Transnational Law.⁴⁶ The first class of

42. *Supra* note 2.

43. *For Comment: Issues Paper Concerning the ABA Model Rule on Admission for Motion*, AM. BAR ASS'N (Dec. 2, 2010), <http://www.abanet.org/ethics2020/aomissuepaper.pdf>.

44. *Id.* at 5.

45. *See* Guess, *supra* note 10.

46. Every news story in the U.S. press about the opening of the school included this information, which is also found on the school's English-language website. PEKING UNIV. SCH. TRANSNATIONAL LAW, http://www.pku-stl.org/the_peeking_university_schoo.html (last visited Feb. 2, 2011).

fifty-three students⁴⁷ enrolled at the School of Transnational Law in the fall of 2008. An additional sixty students started at the school in 2009.⁴⁸ The three-year program is being taught in English and focuses on training students to work for international law firms.⁴⁹ Dean Lehman has been quoted as saying, “Our goal is for them to walk out and work for Paul Hastings, Akin Gump and other similar firms.”⁵⁰ Under the original schedule, it was anticipated that the report of the site evaluation team would be sent to the Accreditation Committee during 2011.⁵¹ A number of milestones still would have to be successfully navigated before the School of Transnational Law could receive accreditation from the ABA. The Section Council of the ABA Section of Legal Education and Admissions to the Bar unanimously adopted a resolution regarding the *Report of Special Committee on Foreign Law Schools Seeking Approval Under ABA Standards*. The *Resolution on the Accreditation of Foreign Law Schools* adopted in December 2010 reads,

Consistent with the first recommendation of the Kane Committee report and in view of the comments received by the Council with respect to that report, the Council shall continue with its consideration of the approval of foreign law schools and engage in its consideration appropriate public and private stakeholders, for example, the Conference of Chief Justices, state bar examiners, legal educators, representatives of the legal profession, and public officials. Until the Council has fully vetted the issue as to whether to expand the accreditation role of the Section to encompass law schools located outside of the U.S. and its territories, the Section will not proceed with consideration of any application for provisional approval from a foreign law school.⁵²

Ordinarily, after the site evaluation team issued its report, the Accreditation Committee would hold a hearing and make its recommendation to the council regarding provisional accreditation. Among the difficult issues that the School of Transnational Law would have to navigate is the requirement that law school J.D.-granting programs accredited by the ABA are currently permitted to admit only those applicants who have received bachelor’s degrees from schools

47. Although contemporaneous news stories in mid-2008 uniformly state that the first class enrolled fifty-five students, the school’s website now states that the class only numbered fifty-three students. *Id.*; see, e.g., Neil, *supra* note 10.

48. PEKING UNIV. SCH. TRANSNATIONAL LAW, *supra* note 46.

49. *Id.*

50. Leigh Jones, *They Do It Our Way: Foreign Law Schools Follow the U.S. Playbook*, NAT’L L.J., Sept. 8, 2008, at 1, 3 (internal quotation marks omitted).

51. Updated information regarding the site visit should be available on the ABA website. *Law School Site Visits*, AM. BAR ASS’N, <http://www.abanet.org/legaled/accreditation/sitevisit/acvisits.html> (last visited Feb. 2, 2011).

52. *Resolution on the Accreditation of Foreign Law Schools*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20101201_resolution_on_accreditation_of_foreign_law_schools.authcheckdam.pdf (Dec. 2010).

whose accrediting entities are recognized by the U.S. Department of Education.⁵³ It is unclear how many of the potential applicants to the School of Transnational Law already hold qualifying undergraduate degrees. If those issues are resolved, however, and the School of Transnational Law were to receive ABA accreditation, it would be the first program conducted entirely outside the United States and not affiliated with a law school located within the United States to be able to offer a J.D. program accredited by the ABA.

V. FLY IN, FLY OUT TEMPORARY PRACTICE

If Genevieve remains in Paris, she could continue to provide legal advice remotely. But situations do crop up in which face-to-face meetings are valuable. If the host state allows “fly in, fly out” temporary practice (FIFO) by lawyers licensed in other countries, Genevieve will also be able to visit U.S. operations in the host state to give legal advice even though she does not establish an office or other permanent presence there. Recall the Delaware division of the company, which needed some advice on German law. Delaware is one of the eight jurisdictions in the United States that allows non-U.S. lawyers to provide legal advice while temporarily present in the state.⁵⁴ These jurisdictions are carrying forward the spirit of Recommendation 9 of the ABA’s MJP Commission. Lawyers who engage in temporary practice in these jurisdictions must be “subject to effective regulation and discipline” as a member in good standing of a recognized legal profession.⁵⁵ The attorney also cannot establish an office or other “systematic and continuous presence” in the host state or “hold out” to the public or otherwise represent that the lawyer is admitted to practice in the host state.⁵⁶ Many of these jurisdictions also require that the non-U.S. lawyer undertake the representation in the host jurisdiction in association with a locally licensed lawyer who actively participates in the legal matter. Section (d)

53. Hulett Askew, the ABA’s consultant on legal education, has raised this point and has been quoted as saying that “meeting the stringent ABA requirements that are designed for U.S. law schools may be difficult for foreign schools.” Jones, *supra* note 50.

54. These eight jurisdictions are Delaware, District of Columbia, Florida, Georgia, Pennsylvania, New Hampshire, North Carolina, and Virginia.

55. AM. BAR ASS’N, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 59 (2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf.

56. *Id.*

in Florida's rule 4-5.5 governing multijurisdictional practice substantially tracks the language of MJP Recommendation 9 but adds a requirement that either the client must reside or have an office in a jurisdiction where the lawyer is admitted or the legal services must "arise out of or [be] reasonably related to" the lawyer's practice in the lawyer's home jurisdiction.⁵⁷ Query whether this means that in the event that Genevieve's company moves its operations out of France she would no longer be able to engage in temporary practice in Florida because the client would no longer have an office in a jurisdiction in which she is admitted, and she is no longer practicing in her home jurisdiction, so services cannot be related to her practice there. Georgia added subsection (e) to its rule allowing domestic lawyers to engage in MJP; its language follows that of MJP Recommendation 9. Georgia's subsection (e) uses "foreign lawyer" as a defined term meaning a person who is authorized to practice law by a country outside the United States who is not also authorized by the state's Supreme Court to practice law in Georgia other than through the operation of subsection (e).⁵⁸ Pennsylvania has taken a different approach, by adopting language in its version of rule 5.5 that explicitly includes lawyers licensed outside the United States in the same category as lawyers licensed in other states within the United States. Lawyers from both backgrounds are authorized to provide legal services on a temporary basis in the state because the words "or in a foreign jurisdiction" were added to Pennsylvania's rule 5.5(c).⁵⁹ In the District of Columbia, the Court of Appeals Committee on Unauthorized Practice of Law (D.C. UPL Committee) issued Opinion 14-04 on December 10, 2004, in which the D.C. UPL Committee states that lawyers licensed to practice law in other countries who are actively practicing in those countries are allowed to give legal advice in the District of Columbia "when their presence in the District of Columbia is only of incidental or occasional duration."⁶⁰ Under the formulation of this opinion, lawyers recognized as attorneys by countries outside the United States are treated similarly to the non-D.C. lawyers who are admitted in other jurisdictions within the United States.⁶¹ The D.C. UPL Committee noted that under-the-radar practice is not uncommon in the District and cited the lack of reported problems in connection with that practice by non-U.S. lawyers as one of the reasons supporting its decision:

57. See FLA. RULES OF PROF'L CONDUCT R. 4-5.5(d)(3)(A)–(B) (2010). For further discussion and additional details regarding the provisions in Florida, Georgia, Pennsylvania, the District of Columbia, and North Carolina, see Needham, *supra* note 29 at 623–26.

58. See GA. RULES OF PROF'L CONDUCT R. 5.5(e) (2010).

59. See PA. RULES OF PROF'L CONDUCT R. 5.5(c) (2010).

60. D.C. Comm. on Unauthorized Practice of Law, Op. 14-04, at 1 (2004).

61. *Id.* at 2–3.

Moreover, it is the Committee's understanding that a significant number of foreign lawyers who maintain their office in foreign countries do practice law in the District of Columbia on an incidental basis consistent with this interpretation of Rule 49(b)(3), and the Committee is not aware of particular problems caused by such incidental practice.⁶²

Note, however, that the opinion of the D.C. UPL Committee is not as authoritative as a revision to the District's professional responsibility regulation explicitly granting permission to practice would be. The courts in the District of Columbia have not yet acted on the recommendation that a rules change be implemented. They remain free to disregard D.C. UPL Committee Opinion 14-04 and even to impose sanctions on a lawyer licensed outside the United States who relied on that opinion. New Hampshire's Supreme Court adopted Administrative Rule 42c governing temporary practice by foreign attorneys in 2007.⁶³ Although rule 42c appears separately from the state's version of rule 5.5, the language substantially follows that used in other states, including the requirement of association with an actively participating locally licensed attorney. North Carolina deleted the words "U.S. jurisdiction" from its version of rule 5.5(c).⁶⁴ With that deletion, the permission to engage in MJP in that state seems to be implicitly extended to lawyers licensed outside the United States.

As a result of the state's regulatory wording, Genevieve would be able to work in Delaware on a temporary basis as long as she associated with a lawyer licensed in Delaware who actively participated in the matter. This applies whether her office is in France or in another jurisdiction within the United States. Note that not all of the provisions allowing FIFO by non-U.S. lawyers would allow her to temporarily practice in the host state once her office has been relocated away from France.

VI. ADDITIONAL OPTIONS

A few other avenues exist through which the corporation could have a lawyer such as Genevieve transfer her office to a location within the United States while continuing to utilize advice from that lawyer licensed outside the United States. Some such lawyers may be willing to

62. *Id.* at 2.

63. N.H. SUP. CT. R. 42c, available at <http://www.courts.state.nh.us/rules/scr/scr-42c.htm>.

64. Compare MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2010), with N.C. RULES OF PROF'L CONDUCT R. 5.5(c) (2010).

work in a nonattorney-managerial role within a business unit of the company; others may be persuaded to work as a paralegal or in another nonattorney capacity within the legal department. Licensing and disciplinary counsel in many jurisdictions would accept an arrangement in which a lawyer who was licensed and recognized as eligible to practice in the host jurisdiction was supervising Genevieve's work. The key is that the supervising locally licensed lawyer would have to be capable of evaluating the legal advice that the client is receiving from the non-U.S. licensed attorney. Such evaluation could be more appearance than reality, however, if Genevieve's legal acumen regarding the legal issues under consideration surpasses the competence of the supervising attorney. True supervision would not occur if the ostensibly supervising attorney relied on Genevieve to fill in crucial nuances of the legal advice that were delivered to the client.

VII. COUNTERARGUMENTS MUST BE ADDRESSED

At least two major types of objections to liberalized regulations must be considered: differentiating on the basis of client sophistication and concerns about assessing the competence of all attorneys advising clients in the United States. Although some would argue that it is difficult to fairly determine whether a client should be categorized as "sophisticated" and therefore deserving of a lesser degree of protection, in other contexts, such as eligibility for Regulation D offerings in securities law, such delineation has long been routinely accomplished. A stronger set of objections centers on a reluctance to adopt differing standards for different categories of clients.

Lawyer competence is the second important consideration in this debate. A concern can exist regarding the possibility that lawyers trained outside the United States have not sufficiently demonstrated their competence. Completely capable attorneys like Genevieve, trained and licensed outside the United States, certainly are plentiful. But policymakers must also consider the ramifications of their decisions when the lawyers are at the other end of the competence spectrum and exhibit questionable legal analysis skills, problematic character and fitness issues, or both, which would have impeded their admission under current standards applied by the host state. Fly in, fly out practice is a particular concern on this score because there is absolutely no evaluation by any admission authority in the United States regarding even basic competence or trustworthiness of the lawyers engaging in FIFO practice.

VIII. CONCLUSION

The regulation of cross-border delivery of legal services remains in flux. Clients in the United States, particularly sophisticated corporate clients, should be allowed to utilize the special expertise possessed by lawyers licensed outside the United States. Key reforms that at this point are gaining traction include the following: allowing lawyers licensed outside the United States to qualify for limited licenses as in-house counsel; broadening the scope of practice so that all foreign legal consultants are allowed to give legal advice related to third-country and international law; and allowing fly in, fly out practice while temporarily present in the host state. Taking Fred Zacharias's counsel, we will certainly revisit the discussion of this continually developing area of the law in the years ahead.

