

FOREIGN LAWYERS: ENERGIZING THE U.S. PRACTICE OF LAW*

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I. INTRODUCTION

The issue of regulation of lawyers in the U.S., and in particular of foreign lawyers, is receiving more and more attention, and rightly so.¹

* This article is an authorized version, annotated by the Journal staff, of a presentation delivered by Judge Lippman at a program organized by the ABA Task Force on the International Trade of Legal Services (ITILS) at the ABA Annual Meeting on July 31, 2015 in Chicago. The program was entitled, "It's a Small World After All: A Global Tour of Transnational Regulatory Changes Affecting You!" The Journal is grateful for the assistance of Prof. Robert E. Lutz and Sohaib Latif (Southwestern '16).

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1. Laurel Terry, *Transnational Legal Practice*, 50 INT'L LAW. (forthcoming Summer 2016) (manuscript at 1-2) (on file with author). As Chief Judge of the State of New York and Chief Judge of the New York Court of Appeals Judge Lippman plays a major role in the Conference of State Chief Justices in promoting the points expressed here. Professor Terry states: "Transnational legal practice continued its growth trend in 2015. For example, during 2015, the U.S. government reported that 2014 legal services exports were more than 9 billion dollars, and increased almost \$75 million over the prior year. The United States imported more than 2 billion dollars in legal services in 2014, increasing its imports by approximately \$70 million." *Id.* (manuscript at 2).

The American Bar Association (ABA), the Conference of Chief Justices (CCJ),² academics, foreign legal regulators, and many state bars are in favor of permitting foreign lawyers in the U.S. to take part in more professional activity.³ Of course, there are other practitioners and legal institutions who warily view the practice by foreign lawyers in the U.S. as a form of competition.⁴

I will discuss where we are and where we should be on this issue—one that is so important to our regulatory framework.

II. NEW YORK: ILLUSTRATING THE GROWTH OF FOREIGN LAWYERS

New York is an international center for commerce and a destination for lawyers from around the world. In recent years, about 15,000 people have taken the New York bar exam, and nearly one third of them were educated outside the U.S.⁵ Further, the vast majority of foreign-educated people who take any U.S. bar exam choose to sit for the New York bar exam.⁶ New York is clearly the jurisdiction of choice for foreign-trained attorneys. In addition to the many thousands of foreign lawyers who seek to be fully admitted to the New York bar, others want to work in New York on a more limited basis in association with domestic lawyers and businesses.

III. ALLOWING CROSS-BORDER PRACTICE

Allowing for more cross-border practice makes sense. We live in an interconnected world, and the law is becoming an increasingly

2. See generally CONFERENCE OF CHIEF JUSTICES, <http://ccj.ncsc.org/> (last visited Feb. 20, 2016).

3. Laurel S. Terry, *Transnational Legal Practice (United States)*, 47 INT'L LAW. 499, 501-02 (2013). According to Terry, in response to globalization and technological developments, the ABA Commission on Ethics 20/20 presented six resolutions that dealt with domestic issues and had transnational practice applications. *Id.* at 501. Four additional resolutions were also adopted and dealt with: admitting foreign lawyers as in-house practitioners, establishing a policy for pro hac vice admission of lawyers, and other issues on which the ABA had no policy. *Id.* Terry concludes that these changes are modest but reflect the changing attitude of professional legal organizations, such as the ABA, towards globalizations. *Id.* at 503.

4. See Peter M. Gerhart, *Riding the Whirlwind*, 67 N.Y. ST. B. J. 13, 14 (1995) ("Globalization opens up many markets to American lawyers but also opens up the United States legal market to foreigners. Immigration brings more talented people to our profession. Globalization forces transcontinental cost comparisons [. . .] resulting in greater downward pressure on attorney's fees.").

5. See *Bar Exam Pass Result Lookup*, N.Y. ST. BOARD L. EXAMINERS, <https://www.nybarexam.org/Lookup.html> (last visited Mar. 11, 2016).

6. See Diane F. Bosse, *The New York Bar Exam By The Numbers*, 85 N.Y. ST. B. J. 24, 24-25 (2003).

global profession. The economy is changing, technology is developing, and travel has never been easier. Cross-border transactions are ever on the rise.⁷ Our economy benefits when lawyers can grasp the complicated legal and factual issues that arise in international practice. We need lawyers who can contribute their skills beyond the borders of their home countries. They help to maintain the smooth flow of commerce and society around the globe. As a result, we are seeing an increasing need for rules that give foreign lawyers some limited rights to ply their trade in this country.

Increased openness in the U.S. is, of course, something that the legal profession outside the U.S. would like to see. European lawyers, in particular, have reached out to U.S. regulators through the Council of Bars and Law Societies of Europe (CCBE).⁸ They asked for more liberal practice and association rights coinciding with negotiations underway on the Transatlantic Trade and Investment Partnership (TTIP) with professional licenses certainly an issue.⁹ And the CCBE, as the voice of the European legal profession, has been holding discussions with the ABA and the Conference of Chief Justices on what they would like to see.¹⁰

7. See Charles E. Meacham, *Foreign Law in Transactions Between the United States and Mexico*, 36 TEX. INT'L L.J. 507, 508 n.1. Meacham argues that cross-border transactions are on the rise, and uses Mexico as an example. *Id.* He cites the Mexican Ministry of Trade and Development which notes that from 1995 to 1999, foreign investment in Mexico was \$54.5 billion USD compared to \$27 billion USD from 1990 to 1994, signifying a 100% rise in cross-border transactions. *Id.*

8. Letter from William C. Hubbard, President, American Bar Association, to Aldo Burgarelli, President, Council of Bars and Law Societies of Europe (Nov. 19, 2014), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015jan15_ccbeletter.authcheckdam.pdf. The CCBE is an organization of bars and law societies of its thirty-two European member countries and thirteen associate and observer countries with some authority to speak for and represent the interests of its members.

9. *Id.* The letter outlines the elements of CCBE's outreach to the ABA. *Id.* It reflects the ABA's desire to work with the CCBE on how to best implement cross-border practice between the US and Europe, especially within the context of the Transatlantic Trade and Investment Partnership.

10. Laurel S. Terry, *Admitting Foreign-Trained Lawyers in States Other than New York: Why It Matters*, BAR EXAMINER, Dec. 2014, at 38, 44-45. At a January 2014 meeting between the Conference of Chief Justices, led by Chief Judge Jonathan Lippman, and the CCBE, led by Jonathan Goldsmith, the CCBE outlined the changes it would like to see. They include that any lawyer with credentials from an EU member state would be able to undertake several activities, such as representing a client in international arbitration, and providing services on international law, without the risk of practicing law illegally.

IV. PROCESS FOR CHANGE

But, in the U.S., putting rules in place to allow for some practice by foreign lawyers is not so easy. In our federalist system, some governance is reserved for the states.¹¹ And legal regulation in the United States is done at the state level.¹² Each state makes these decisions on its own. It is not possible to make a sweeping change in lawyer regulation that applies across the country. Change has to occur state by state.

In most states, the body responsible for regulating the legal profession, as in New York, is the high court.¹³ State Supreme Courts set rules for admission to the bar and for temporary or limited practice. In setting those rules, the regulators of the profession are acutely sensitive to the needs and interests of the lawyers in our states. At the same time, we have foremost in mind the protection of the public and the protection of clients.

New York has fairly comprehensive rules and practice around foreign lawyers.¹⁴ But many states are still quite closed off when it comes to practice by foreign lawyers. This is not due solely to parochialism or protectionism. International commerce is a major part of every state's economy. In 2013, forty-nine out of fifty states exported more than one billion dollars' worth of goods.¹⁵ These kinds of rules should be in the interest of all states. The real obstacle to change is that most states have not been aware until recently of the advantages of allowing more foreign practice or have not made change a priority. Regulators need to know why such rules are helpful and how to put them in place.

11. U.S. CONST. amend. X.

12. *See, e.g.*, CAL. BUS. & PROF. CODE § 6064 (West 2016); N.Y. JUD. LAW § 53 (McKinney 2016).

13. JUD. § 53 ("The court of appeals may from time to time adopt, amend, or rescind rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counselors at law, to practice in all the courts of record of the state.").

14. *See, e.g.*, JUD. § 53; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 520.6, 521 (2016).

15. Conference of Chief Justices Res. 2, In Support of Regulations Permitting Limited Practice by Foreign Lawyers in the United States to Address Issues Arising from Legal Market Globalization and Cross-Border Legal Practice (Jan. 28, 2015), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01282015-Legal-Market-Globalization.ashx> [hereinafter Resolution 2]. In 2014, the all fifty states exported more than one billion dollars' worth of goods. DEPARTMENT OF COMMERCE, UNITED STATES OF TRADE: 50 STORIES IN 50 STATES THAT SHOW THE IMPACT OF TRADE ACROSS THE NATION 4 (2015).

V. IMPLEMENTING TRANSFORMATIVE POLICIES

A. *Adoption of Model Rules*

The tools are there for this to change. The ABA has an array of model rules and policies in this area to support change.¹⁶ The Georgia courts have published a “how-to” tool kit for other states that documents how they passed foreign lawyer rules.¹⁷ In January of this year, the Conference of Chief Justices of the United States, at my urging, issued a resolution encouraging its members “to adopt explicit policies that permit [certain] qualified activities by foreign lawyers as a means to increase available legal services and to facilitate movement of goods and services between the United States and foreign nations.”¹⁸

The policies the Chief Justices would like to see—none of which in my view are revolutionary or disruptive to the practice of law in the U.S.—include:

- * temporary practice by foreign lawyers—often called “fly in-fly out” or “FIFO”—that is, foreign lawyers coming in to advise a client about a proceeding in a foreign country or to meet with co-counsel or the like;
- * Foreign Legal Consultant rules—unlike with temporary practice, Foreign Legal Consultants can have a sustained presence in the United States, can join partnerships with U.S. lawyers or be employed by U.S. lawyers, and are usually engaged in work for large multinational corporations;
- * rules for the registration of foreign in-house counsel, who are limited to working for their employer and may not practice law or give legal advice outside of that employment;
- * admission *pro hac vice* for foreign lawyers; and
- * allowing foreign lawyers to participate in international arbitration and mediation.¹⁹

Finally, the Chief Justices’ resolution encourages states to permit U.S. lawyers to enter into partnerships or affiliate with foreign lawyers and also to allow U.S. lawyers to employ foreign lawyers and vice versa.²⁰

16. *E.g.*, A.B.A. MODEL RULE FOR THE LICENSING & PRACTICE OF FOREIGN LEGAL CONSULTANTS (2006).

17. SUPREME COURT OF GA., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW 18-22 (2015).

18. Resolution 2, *supra* note 15.

19. *Id.*

20. *Id.*

The Conference of Chief Justices has made a clear statement that these rules do not present a threat to U.S. lawyers. Rather, they will allow for better service to clients and better opportunities for U.S. and foreign lawyers to collaborate. In our global world, we all benefit from the flexibility to provide services and work together across borders. With continued communication and promotion of these rules and their benefits—and support from members of the bar of each state—we will move toward nationwide consistency on rules applying to foreign lawyers.

At the same time, I believe it is critical for U.S. lawyers to have the ability to work overseas. What happens in foreign markets and foreign commerce affects us. We have an interest in practicing abroad and getting involved in the kind of major disputes and investigations that require the help of lawyers. Lawyers from countries like the U.S.—that are home to major financial institutions and have a regulatory influence on the globe—must be able to work on foreign matters when legal issues arise.

B. Mobility and Access to Justice

Another development relating to the mobility of lawyers in the United States, including those educated abroad, is the adoption of the Uniform Bar Exam (UBE). New York State adopted the UBE this year.²¹ We are the first large state, in terms of test takers, to do so—a huge step toward a national uniform bar exam.²² If, as I expect, the rest of the country in relatively short order embraces the UBE, prospective lawyers will have a portable score, greater mobility, and wider job opportunities.²³ For foreign lawyers seeking admission in the U.S., a national accreditation test that provides them with options for state admission would be a great asset. It would make a law license in the U.S. even more appealing.

Other emerging regulatory issues also impact on the ability of the courts and the legal profession to increase access to justice. In an effort to increase pro bono service, New York recently amended our in-

21. See Stephanie Clifford, *New York to Adopt a Uniform Bar Exam Used in 15 Other States*, N.Y. TIMES, May 6, 2015, at A21; see also *An Overview of the Future: New York Uniform Bar Exam (UBE)*, BARBRI, http://www.barbri-international.com/wp-content/uploads/2015/01/043-15_NY-UBE-Flyer-NOSG-Comments-16.6.2015.pdf (last visited Feb. 22, 2016).

22. See *id.* The second largest state to adopt the Uniform Bar Exam is Washington. See *id.*

23. See Erwin Chemerinsky, Op-ed., *A Better Way to License Lawyers*, L.A. TIMES, May 11, 2015, at A19. Dean Chemerinsky of UC Irvine argues that due to the sluggish job market, it is cruel under the traditional bar exam model to restrict lawyers to job searches only in the state in which they have passed the Bar. *Id.*

house counsel rules. Now, in-house counsel who are admitted to practice in a state outside of New York may represent pro bono clients in New York,²⁴ and we hope soon to extend this rule to foreign lawyers.²⁵

We have also looked at what non-lawyers might do to support unrepresented litigants. New York has piloted a program for non-lawyers, called “Navigators,” to evaluate whether trained non-lawyers can provide some assistance short of practicing law.²⁶ New York’s Navigators support unrepresented litigants in Housing Court and in consumer debt cases in Civil Court.²⁷ They actually go into court with the litigant.²⁸ Other countries have done something similar—for example, McKenzie Friends or the Citizens Advice Bureau in the U.K.²⁹—with real success. This idea of using non-lawyers to help people with legal problems is still new in this country. The only other formal non-lawyer program, so far, is Washington State’s limited license legal technicians.³⁰ This is still a new frontier for the profession in the U.S., but it certainly has serious implications regarding the regulation of the practice of law that we will be paying attention to as we embrace new ways to provide legal assistance to close the justice gap.

VI. CONCLUSION

From the state court perspective, we are trying to energize the practice of law in the United States and increase the flexibility and effectiveness of the legal profession. We can do that by welcoming the contributions of foreign lawyers to our states and by working with our friends abroad to expand foreign practice rights for our own attorneys. We can do it by moving toward a Uniform Bar Exam and by increasing the ranks of lawyers who can provide pro bono services to those in

24. See N.Y. R. CT. APP. § 522.8; see also Advisory Comm. on Pro Bono Serv. by In-House Counsel in N.Y. State, Report to the Chief Justice of the State of New York and the Presiding Justices of the Four Appellate Division Departments, 5 (Sept. 2013), <http://www.nycourts.gov/attorneys/in-house-counsel/IHC-ProBonoReport.pdf>.

25. Since July 31, 2015, when this article was presented, New York adopted an in-house counsel rule for foreign lawyers. See N.Y. R. CT. APP. § 522.

26. *Court Navigator Program*, N.Y. ST. UNIFIED CT. SYS., http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml (last updated Mar. 19, 2014).

27. *Id.*

28. *Id.*

29. See generally *Help with Legal Costs – Free or Affordable Help*, CITIZENS ADVICE, <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/help-with-legal-costs-free-or-affordable-help/> (last visited Feb. 22, 2016); MCKENZIE FRIENDS, <http://mckenzie-friend.org.uk/index.html> (last visited Feb. 22, 2016).

30. *Legal Technicians*, WASH. ST. B. ASS’N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> (last visited Feb. 22, 2016).

need. And we can do it by asking whether non-lawyers might be of help when there are no lawyers available to assist vulnerable litigants in need. All of these avenues ask the regulators of the legal profession to have an open mind and to be innovative in our thinking. With a federalist system, these kinds of changes take time to spread across the country. But with continuing efforts from the likes of the ABA and the Conference of Chief Justices, we will get there—and surely to the benefit of all.