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# A Federal Bar for Foreign Lawyers

Christopher J. Caywood\*

A number of commentators have noted that state control of the legal profession significantly restricts the practice of law by foreign attorneys in the United States.<sup>1</sup> Although arguing for liberalization, these commentators, almost without exception, advocate continued state regulation of lawyers.<sup>2</sup> The allegedly low quality of federal practice<sup>3</sup> and the increasing volume and significance of federal law<sup>4</sup> have led several commentators to suggest that a federal bar, with its own

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1. See, e.g., Boshkoff, *Access to State Bar Examinations for Foreign-Trained Law School Graduates*, 6 HOFTSRA L. REV. 807 (1978); Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1781 (1983) [hereinafter cited as Note, *Foreign Countries*]; Comment, *International Legal Practice: Restrictions on the Migrant Attorney*, 15 HARV. INT'L L.J. 198, 221 (1974) [hereinafter cited as Comment, *Migrant Attorney*]; Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284, 1289 (1967) [hereinafter cited as Note, *Foreign Branches*]; Note, *Foreign Attorneys: The Right to Practice*, 8 J. LEGAL PROF. 209, 211 (1983) [hereinafter cited as Note, *Foreign Attorneys*].

2. See Boshkoff, *supra* note 1, at 815; Comment, *Migrant Attorney*, *supra* note 1, at 329; Note, *Foreign Branches*, *supra* note 1, at 1288-89; Note, *Foreign Attorneys*, *supra* note 1, at 215; Note, *Problem of Foreign Law: Should Practitioners be Licensed?*, 9 SYRACUSE L. REV. 275, 280-81 (1958) [hereinafter cited as Note, *Problem of Foreign Law*]. But see Note, *Foreign Countries*, *supra* note 1, at 1821 (proposing a federal licensing scheme analogous to the patent licensing scheme for foreign attorneys).

3. See, e.g., *Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States*, 79 F.R.D. 187, 194-95 (1978) [hereinafter cited as *Tentative Report on Federal Admissions Standards*]; *Qualifications for Practice Before the United States Courts in the Second Circuit: Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159, 164 (1975) [hereinafter cited as *Second Circuit Final Report*]; Vetter, *Why We Need Federal Admissions*, LITIGATION, Spring 1983, at 45. Distinguished members of the judiciary have also criticized the quality of federal practice. See, e.g., Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 230-31 (1973); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175, 176 (1974).

4. See, e.g., Simonelli, *State Regulation of a Federal License to Practice Law*, N.Y. ST. B.J., May 1984, at 15; Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655, 756 (1981) [hereinafter cited as Special Project]; Note, *Certification of Out-of-State Attorneys Before the Federal District Courts: A Plea for National Standards*, 36 GEO. WASH. L. REV. 204 (1967) [hereinafter cited as Note, *Out-of-State Attorneys*].

admissions standards for domestic lawyers, would improve the quality of legal practice in the United States.<sup>5</sup> No one, however, has examined the possibility of a federal bar to regulate foreign attorneys.<sup>6</sup>

Part I of this note presents the case for a national bar to regulate foreign lawyers.<sup>7</sup> National regulation would likely enable the United States to conclude reciprocity agreements with foreign nations that would enhance the treatment of U.S. attorneys abroad. It would also benefit the American public by increasing

5. See, e.g., Comisky & Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L.Q. 945, 946 (1982).

6. Proponents of national legal regulation focus on:

- (1) the increase in the volume and significance of federal law, see Comisky & Patterson, *supra* note 5, at 946; Special Project, *supra* note 4, at 756; Note, *Out-of-State Attorneys*, *supra* note 4, at 204;
- (2) the substantial increase in the volume and scope of interstate transactions, see Comisky & Patterson, *supra* note 5, at 946; Special Project, *supra* note 4, at 756, 780; Note, *Out-of-State Attorneys*, *supra* note 4, at 204;
- (3) the trend toward uniformity in state laws, see Comisky & Patterson, *supra* note 5, at 946;
- (4) the increased mobility of attorneys and their clients, see Comisky & Patterson, *id.* at 946; Special Project, *supra* note 4, at 780;
- (5) the increased specialization in legal practice, see Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975); Comisky & Patterson, *supra* note 5, at 946; Note, *Out-of-State Attorneys*, *supra* note 4, 204; see generally Cheatham, *The Growing Need for Specialized Legal Services*, 16 VAND. L. REV. 497 (1963); Tweed, *The Changing Practice of Law: The Question of Specialization*, 48 A.B.A. J. 423 (1962);
- (6) the branching of law firms at both the national and international levels, see Comisky & Patterson, *supra* note 5, at 947; Graham, *Two Decades See Growth in Overseas Branching*, Legal Times, May 28, 1984, at 9;
- (7) the increased demand for out-of-state specialists, see Brakel & Loh, *supra*, at 699–700; Comisky & Patterson, *supra* note 5, at 947; Special Project, *supra* note 4, at 780; and
- (8) the allegedly low quality of federal practice. see *Second Circuit Final Report*, *supra* note 3, 67 F.R.D. at 164; Bazelon, *supra* note 3, at 2; Burger, *supra* note 3, at 230–31; Kaufman, *supra* note 3, at 176; Vetter, *supra* note 3, at 45; cf. *Symposium on Current Trends in Legal Education and the Legal Profession*, 50 ST. JOHN'S L. REV. 434 (1976) (discussing and debating the problems and inadequacies of legal education and practice).

Opponents of national regulation focus on:

- (1) the state's responsibility for the ethical conduct of its attorneys;
- (2) the state interest in maintaining a minimum level of legal competency; and
- (3) the state interest in creating favorable economic conditions for local practitioners.

Young, *A National Bar? No!*, 54 FLA. B.J. 109, 111 (Feb. 1980); see also Hall, *Opening Statement*, LITIGATION, Fall 1982, at 1, 58.

7. A detailed proposal for a federal bar for U.S. attorneys can be found in Comisky & Patterson, *supra* note 5. Comisky and Patterson suggest that admission to the proposed federal bar be contingent on successful completion of an examination that focuses on federal law. They also propose that the federal bar have its own code of ethics. According to their scheme, the holder of a federal license would be permitted to practice in all federal courts and engage in all types of office practice. In proposing a federal bar for foreign attorneys, this note suggests modifications in the guidelines proposed by Comisky and Patterson. These changes are intended to account for differences between the legal education, professional ethics, and cultural norms and values of foreign and U.S. attorneys.

the availability of legal expertise on foreign and international law, and encouraging international trade in services.

Part II addresses potential objections to a federal bar regulating foreign lawyers. Part A examines state and local bar associations' concerns regarding the maintenance of adequate levels of legal and ethical competence. It argues that a rigorous admissions standard and a federal code of professional responsibility, together with a limited scope of practice, will sufficiently address state interests in maintaining minimum levels of legal competence and ethical integrity among foreign attorneys.

Part B discusses the fear of some domestic practitioners that federal foreign-attorney regulation will enable foreign attorneys to broaden their practice and thus usurp the business of local practitioners. This section argues that given the limited scope of foreign attorney practice proposed in this note, local practitioners are unlikely to lose much business to foreign lawyers. Furthermore, it suggests that U.S. lawyers are, in fact, under an ethical obligation to encourage federal regulation of foreign attorneys since such regulation will serve the public interest.

## I. THE CASE FOR A NATIONAL BAR TO REGULATE FOREIGN PRACTITIONERS

Institution of a national bar for foreign attorneys and the likely consequential grant of reciprocity to U.S. lawyers abroad will benefit the American legal community and the American public.

### A. *Benefit to the American Legal Profession: Reciprocal Treatment*

The demand for U.S. lawyers abroad<sup>8</sup> suggests that the American legal community could gain significant business from the liberalization of restrictions on practice by foreign lawyers in other nations.<sup>9</sup> Without assurance of reciprocal

8. The initial demand for U.S. lawyers in Europe was in large part due to the rise in international trade caused by reconstruction efforts following World War II, and the relative strength of the U.S. economy compared with the economies of other nations during that era. See Brothwood, *International Law Offices*, 1979 J. Bus. L. 8, 9; Levy, *The American Lawyer in Paris*, 52 N.Y. St. B.J. 647, 648 (1980). More recently, large U.S. multinational corporations have become the source of much of the demand for U.S. lawyers abroad. See Note, *Foreign Countries*, *supra* note 1, at 1768-69; Comment, *Migrant Attorney*, *supra* note 1, at 298-99; Note, *Foreign Branches*, *supra* note 1, at 1285-86. The United States' role in the world commodities and investment markets has also caused foreign businesses to seek U.S. legal expertise. See generally Warren, Monahan & Duhot, *Role of the Lawyer in International Business Transactions*, 58 A.B.A. J. 181, 183-84 (1972).

9. The number of foreign branches maintained by U.S. law firms evidences the interest of U.S. attorneys in taking advantage of foreign demand for their services. A survey of the 200 largest U.S. law firms reveals that 50 have at least one office abroad. *National Law Firm Survey* (pts. 1 & 2), Nat'l L.J., Sept. 13, 1982, at 14; Nat'l L.J., Sept. 20, 1982, at 13. For useful discussions of the activities of U.S. law firms in various nations, see Note, *Foreign Countries*, *supra* note 1, at 1767 n.2; Comment, *Migrant Attorney*, *supra* note 1, at 298 n.2 and Note, *Foreign Branches*, *supra* note 1, at 1284 n.5.

practice privileges, however, governments are reluctant to allow U.S. attorneys to practice within their borders.<sup>10</sup> A national plan facilitating the admission and practice of foreign attorneys in the United States may persuade these nations to similarly relax their restrictions on U.S. lawyers.

The current system of state control of legal practitioners<sup>11</sup> complicates the negotiation of reciprocal treatment provisions and thus indirectly limits foreign practice by U.S. attorneys. Foreign nations are reluctant to negotiate reciprocal treatment agreements on a state by state basis.<sup>12</sup> Furthermore, since the federal

10. Perhaps the most illuminating example of the reluctance of another country to reduce restrictions on foreign attorney practice is the famed Milbank, Tweed incident. In 1977, Isaac Shapiro obtained a visa from the Japanese government to set up a law office in Tokyo for the New York law firm of Milbank, Tweed, Hadley and McCloy. Protest from the Japanese Federation of Bar Associations (JFBA) resulted in a freeze on the establishment of foreign law offices in Japan. One of the justifications for the freeze was the restrictive nature of U.S. practice requirements. See Stewart, *Japanese Fight Off Milbank Tweed*, AM. LAW., May 1979, at 1, 20. See generally, Abrahams, *Japan's Bar to U.S. Lawyers*, Nat'l L.J., July 4, 1983, at 1. This justification has been repeated by the Japanese on several other occasions. See Shapiro, *Claiming a Place for Foreign Lawyers in Japan*, Japan Times, Oct. 17, 1982, at 12; *JFBA Asks ABA to Rethink Decision*, Japan Times, July 14, 1982, at 7.

11. The structure of legal regulation varies widely from state to state. Most state's have "integrated" or "unified" bar associations. In such states, bar membership is required of all lawyers who wish to practice. Local (city or county) and state bar associations police their own ranks. As Glenn Winters notes: "This has proved efficient and effective, and it contributes greatly to the high morale of the bar, for self-government is the American way." G. WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES 6 (1954).

In contrast, lawyers wishing to practice in states which do not have a unified bar need not become a member of any bar association. The lawyers who do choose to become bar members are known as the "organized bar," and those who choose not to are referred to as the "unorganized bar." In these unintegrated or ununified states, the admission of new lawyers and the establishment of standards of professional conduct are overseen by independent organizations set up by the legislature or the supreme court. See *id.* at 3.

The integrated bar has recently come under attack. See, e.g., Schneyer, *The Unified Bar: A Historical Perspective*, BAR LEADER, Nov.-Dec. 1982, at 20; Winter, *Lobbying: An Arrow in the Unified Bar's Heart?*, BAR LEADER, Nov.-Dec. 1982, at 18. An examination of the merits of a integrated versus an unintegrated bar is beyond the scope of this note. The question of whether a federal bar should be a self-policing, unified association of attorneys, or a branch or agency of the judiciary or legislature, is left open. References in this note to "state," "state bar," or "local bar" are to the agency or association in each state that enforces the admission standards and procedures for lawyers practicing in that state.

12. Japan refuses to recognize reciprocity on a state-by-state basis. See Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678, 700 (1979). The French Republic (France) also refuses to grant reciprocity on a state-by-state basis. See District of Columbia Bar, Memorandum for the District of Columbia Court of Appeals 50-51 (Oct. 18, 1977) (Comments on Proposed Amendment to Rule 46 to Provide for Licensing of Legal Consultants) [hereinafter cited as 1977 D.C. Report] This is significant since both Japan and France are countries in which many U.S. lawyers wish to practice. See, e.g., Tell, *Firms Face Icy Welcome Overseas*, Nat'l L.J., Mar. 9, 1981, at 1 (Japan); Levy, *supra* note 8, at 648 (France).

government can arguably regulate both federal and foreign practice,<sup>13</sup> the failure to remove control from state hands probably diminishes the credibility of U.S. negotiators and leaves the United States open to the charge that it is not acting in good faith.

The state bar system also makes it difficult, if not impossible, for U.S. attorneys to negotiate agreements that are binding on the entire nation. Negotiations between Japan and the United States typify the problem. The Japanese Federation of Bar Associations (JFBA) is willing to negotiate with the American Bar Association (ABA), an umbrella organization for U.S. state bar associations. The JFBA is a powerful, autonomous national organization.<sup>14</sup> The ABA is a relatively weak confederation<sup>15</sup> representing powerful state and local bar associations which have little interest in international activity.<sup>16</sup> Negotiators for the JFBA consequently have greater bargaining strength than their ABA counterparts.

One commentator has suggested that demands by foreign nations for reciprocity are primarily designed to justify limiting opportunities for U.S. lawyers, rather than to ensure fair treatment of their own lawyers abroad.<sup>17</sup> Thus, it might be argued that even if a national regulatory scheme permitting foreign attorney practice were implemented, relaxation of restrictions on U.S. lawyers wishing to practice abroad would not be forthcoming. The implication of such an argument

13. The doctrine that the federal government may exercise only enumerated powers is inapplicable when the foreign affairs power is involved may support the constitutionality of a federal bar permitting foreign attorney practice. See *Zschernig v. Miller*, 389 U.S. 429 (1968); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 305, 315-16 (1936). Moreover, under the doctrine of preemption, admission standards created under federal authority may override state regulatory powers. See *Sperry v. Florida ex. rel. Florida State Bar*, 373 U.S. 379 (1963). In light of the broad holding of *Garcia v. San Antonio Metropolitan Transportation Authority*, 105 S. Ct. 1005 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976), a constitutional challenge to federal regulation in this area is most unlikely to succeed. For further discussion of the federal government's power to create a national bar, see Comisky & Patterson, *supra* note 5, at 964-75; Special Project, *supra* note 4 and Comment, *Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys*, 72 Nw. U.L. REV. 737 (1977). For a brief examination of the preemption doctrine in the context of federal admissions standards, see Simonelli, *supra* note 4, at 15-20 and Note, *Foreign Countries*, *supra* note 1, at 1817-18, 1821. *But see* Hall, *supra* note 6, at 58.

14. See S. CONE, *THE REGULATION OF FOREIGN LAWYERS* 86 (3d ed. 1984). The JFBA is the national bar association to which anyone "who wants to become a lawyer" (*bengoshi*) must belong. Lawyer Law, Law No. 205 of 1949, art. 8, *translated in* 2 EHS LAW BULLETIN SERIES, CA (1962).

15. The ABA is an unincorporated voluntary membership association; its policy-making body, the House of Delegates, includes representatives from every state bar association and the larger local bar associations. AM. BAR ASS'N, *POLICY AND PROCEDURES HANDBOOK* 1982-83, at 1, 2 (1982). State bar associations in some states have the power to regulate the legal profession through disciplinary proceedings. ABA/BNA *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* § 201:103 (1985).

16. One indication of a relative lack of interest in international affairs is that no state includes questions on international or comparative law on its bar examination. See *BAR/BRI DIGEST* (D. Skibbe ed. 1985).

17. See Note, *Foreign Countries*, *supra* note 1, at 1811.

is that liberalization of U.S. restrictions on foreign attorney practice would move the U.S. from a position of "having nothing to offer," to an even more undesirable negotiating position of having created and surrendered rights to foreign practitioners before gaining anything in return.

This argument lacks force. The laws regulating foreign attorney practice in Belgium, Brazil, France, the Republic of Korea (South Korea), and Spain have official reciprocity provisions which would permit American lawyers to practice within their borders if the U.S. Government were to enact national regulations permitting foreign attorneys to practice in the United States.<sup>18</sup> There is no reason to believe that these provisions will not be honored. As a further safeguard, a national regulatory scheme for foreign lawyers in the United States could include a similar reciprocal treatment provision.<sup>19</sup> Thus, foreign attorneys would be prohibited from practicing in the United States until their home nations granted U.S. lawyers the right to practice.

### *B. Benefit to the American Public*

The international activities of U.S. citizens and corporations, coupled with the increase in foreign business investment in the United States,<sup>20</sup> have heightened American demands for competent legal advice on issues of foreign and international law. By broadening the scope of practice available to foreign attorneys, a national bar would increase the availability of legal advice on foreign and international law.

Since some states either permit foreign attorneys to engage in a limited scope of practice without passing the state bar examination or allow them to take the bar examination without meeting the criteria required of American bar applicants,<sup>21</sup>

18. See S. CONE, *supra* note 14, at 48 (Belgium); *id.* at 49 (Brazil); *id.* at 69 (France); Lawyers Act, No. 63, art. 6(2), promulgated Nov. 7, 1949, translated in Laws of the Republic of Korea, at I-180 (4th ed. 1983); Echegoyen, *Spain*, in TRANSNATIONAL LEGAL PRACTICE 332 (D. Campbell ed. 1982).

19. A proposal to allow foreign lawyers to serve as special legal consultants in the District of Columbia, see *infra* note 49, while not requiring formal reciprocity, recommends that the opportunities for practice by D.C. lawyers in a particular foreign country be taken into account when an application by an attorney from that country is considered. District of Columbia Bar, Draft Memorandum for the District of Columbia Court of Appeals 2, 3 (Dec. 3, 1984) (Proposed Amendment to Rule 46 to Provide for Licensing of Legal Consultants) [hereinafter cited as D.C. Bar Memorandum]. A national program to allow foreign attorney practice could contain a similar provision or a more formal reciprocity requirement.

20. See Ekblom, *European Direct Investments in the United States*, HARV. BUS. REV., July-Aug. 1973, at 16.

21. New York permits foreign lawyers to practice as "legal consultants." See N.Y. R. Cr. § 521 (McKinney 1984); see also *infra* note 49. The District of Columbia and California are currently considering a similar rule. See *infra* note 49. Massachusetts admits to the bar some foreigners who have practiced or taught law for five years or more. The Supreme Court of Ohio may authorize a foreigner to take the bar examination of that state if it favorably evaluates the foreigner's educational

it might be argued that state regulation of lawyers does not, per se, limit the availability of advice by foreign attorneys. The fact is, however, that foreign attorneys lacking a degree from a law school accredited by the ABA are not permitted to sit for most state bar examinations.<sup>22</sup> Those states, such as New York, which afford foreign attorneys a limited right to practice without sitting for the bar examination, may receive more foreign applicants than necessary to meet the needs of the public.<sup>23</sup> Meanwhile, citizens of states in which foreign attorneys must meet all of the practice requirements of domestic attorneys enjoy only limited access to lawyers trained in foreign and international law. Administration of a nationwide licensing scheme through a federal bar would circumvent the restrictive effect that state regulation has on the movement of legal services across state boundaries and thus make the availability of such services more responsive to market forces.<sup>24</sup>

The benefits of increased availability of foreign legal expertise are not limited to individuals seeking foreign or international legal advice. All Americans will gain from the reduction of international barriers to trade in legal services that is likely to follow liberalization of state regulation of foreign practitioners in the United States. Legal services are essential to the functioning of other major services such as banking and investment.<sup>25</sup> Thus, the freer flow of legal services may facilitate greater U.S. trade surpluses from other service sales,<sup>26</sup> better

qualifications. The District of Columbia and Pennsylvania allow foreign lawyers to take the bar examination after they attend an American law school for one year. Texas and New Jersey also have procedures that allow foreign lawyers to take the bar examination. See S. CONE, *supra* note 14, at 3.

22. See Boshkoff, *supra* note 1, at 807; Turack, *Access to the State Bar Examination for Foreign Trained Graduates: The Ohio Experience*, 8 OHIO N.U.L. REV. 265, 266 (1981); Comment, *Migrant Attorney*, *supra* note 1, at 325. Among the states that require a candidate for admission to the bar to have graduated from an ABA accredited law school are Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin. See *Digests of Laws of the States, the District of Columbia, Puerto Rico, and the Virgin Islands*, in 7 MARTINDALE-HUBBELL LAW DIRECTORY 3-11 (1985) [hereinafter cited as *State Law Digests*].

23. Cf. Joint Conference on Bar Admissions of Foreign Law School Graduates 5 (Dec. 11, 1976) (address by Douglass G. Boshkoff) ("jurisdictions with liberal admission rules . . . are receiving more than their fair share of applications [from foreigners].") (available in University of Michigan Law School Library) [hereinafter cited as Conference on Foreign Graduates].

24. Cf. Comisky & Patterson, *supra* note 5, at 957-58 (arguing that national regulation of domestic lawyers would remove the restraints on competition created by the imposition of various state requirements on out-of-state attorneys).

25. See Campbell & Coc, *Introduction*, in TRANSNATIONAL LEGAL PRACTICE 2 (D. Campbell ed. 1982); Note, *Foreign Countries*, *supra* note 1, at 1812 n.250.

26. Since U.S. business executives prefer working with U.S. lawyers, see Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALB. L. REV. 199, 205 (1974), increasing the availability of American legal services abroad may increase sales of other American services abroad. See also Note, *Foreign Countries*, *supra* note 1, at 1768-69.



enabling the U.S. to balance its merchandise trade deficit.<sup>27</sup> National regulation of the legal profession should be supported on the ground that it will encourage liberalization of the rules governing practice by U.S. attorneys abroad and, consequently, increase international sales of other American services.

## II. STATE CONCERNS WITH A FEDERAL BAR

State and local bar associations may resist a federal bar for foreign attorneys out of fear that it will have an adverse impact on domestic practice. Opponents of national regulation of domestic lawyers believe that a federal bar will expose the public to incompetent legal practitioners.<sup>28</sup> Similar objections would likely be raised against a federal bar for foreign attorneys. State and local bar associations also fear that, under a domestic federal bar, out-of-state attorneys will infringe on their economic interests.<sup>29</sup> Again, it is likely that state and local bars would raise similar objections to a national bar for foreign attorneys.

### A. Maintenance of Legal and Ethical Standards

Potential state concerns regarding the competence of foreign lawyers in the law of their home jurisdictions, as well as the law of the United States, are legitimate. First, there is no simple, effective means to evaluate the quality of an attorney's legal education. Most state bar associations do not even attempt to evaluate the legal education of bar applicants trained in the United States. They simply require attendance at, or graduation from, an ABA approved law school.<sup>30</sup> Extensive on-site inspections spanning several years are required for ABA accreditation.<sup>31</sup> Even if the ABA were willing to undertake this task at foreign law schools, it is likely that many nations would view such activity as an infringement on their sovereignty.<sup>32</sup> As an alternative, the administrators of a federal bar could compile a list of distinguished foreign law schools. Requiring foreign

27. See Kristof, *New Era in Service Exports?*, N.Y. Times, Oct. 24, 1984, at D1; *Service Transactions Keep Balance of Trade in Surplus Despite the Large Deficit on Goods*, Wall St. J., Feb. 10, 1982, at 48. In 1974, for example, the banking industry had an estimated \$7.6 billion trade surplus. See R. Shelp, *BEYOND INDUSTRIALIZATION* 18 table 2.2, 19 table 2.3 (1981).

28. See Young, *supra* note 6, at 112. Young argues: "The public certainly has the right to expect that members of the legal profession . . . in this state measure up to definite norms of competence and moral fitness. Passage of authority over bar regulation to a national entity . . . is guaranteed to diminish public accountability." *Id.* Young, a member of the Florida Bar and the North Dade Bar Association, discusses accountability in the context of legal competency and moral fitness. *Id.*

29. See *id.* at 110.

30. See *supra* note 22.

31. See Note, *ABA Approval of Law Schools: Standards, Procedures, and the Future of Legal Education*, 72 MICH. L. REV. 1134, 1138-41 (1974); Conference on Foreign Graduates, *supra* note 23, at 11-12 (address by James P. White).

32. See Conference on Foreign Graduates, *supra* note 23, at 24 (address by Daniel A. Soberman).

applicants to the federal bar to be graduates of listed law schools would provide some assurance to the states that foreign lawyers practicing within their jurisdiction possess a minimum level of competence in their home law.

Although important, a quality legal education does not ensure that a foreign lawyer has a working knowledge of his or her home law. The requirements for practice in other countries vary from sitting for an examination to completing a short apprenticeship<sup>33</sup> and are of little help in formulating a uniform standard for evaluating a foreign lawyer's current legal knowledge. To get around this problem, a federal bar could require foreign applicants to have a minimum number of years' experience immediately prior to practice in the United States.<sup>34</sup>

Once the examiners for the proposed federal bar determine that a foreign lawyer's knowledge of the law of his or her home country is adequate, they will still face the problem of determining whether the foreign lawyer's knowledge of U.S. law is adequate. Assuming that foreign attorneys would be prohibited from practicing state law, the proposed federal bar could require that they take and pass a national bar examination covering general legal principles and methods of the federal system.<sup>35</sup> Such an examination, however, would not alleviate state concerns entirely. Even if a foreign attorney is competent in federal law matters,

33. See generally *TRANSNATIONAL LEGAL PRACTICE* (D. Campbell ed. 1982).

34. The minimum experience requirement has been criticized as too restrictive since it would prohibit mobile foreign lawyers from obtaining federal licenses. In addition, law professors and lawyers in executive capacities may be excluded because they are not practicing within the meaning of such a proposed rule. See Note, *Foreign Countries*, *supra* note 1, at 1797. Nevertheless, New York follows the minimum experience rule by requiring foreign applicants who wish to become legal consultants to practice law in their home jurisdictions for five of the seven years preceding application. N.Y. R. Ct. § 521.1(a) (McKinney 1984).

35. This examination would cover areas such as federal constitutional law, federal statutes and administrative regulations, and federal rules of civil procedure. Cf. Comisky & Patterson, *supra* note 5, at 958; *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States*, 83 F.R.D. 215, 224 (1979) [hereinafter cited as *Final Report on Federal Admissions Standards*]. The idea that a bar examination can measure or ensure competence is by no means universally accepted. See *id.* at 225. Care should be taken that such an examination is "keyed to the level of skill necessary to perform within the lawyer's permitted scope of activity." Note, *Foreign Countries*, *supra* note 1, at 1800 n.180. This may require writing a special examination for the foreign attorney that is somewhat easier than the examination contemplated under the proposed federal bar for domestic attorneys. A number of states already have special examinations for experienced domestic attorneys licensed to practice in another state. These special "attorneys' examinations" are presently offered by Alaska, California, Idaho, Maine, Maryland, New Mexico, and Oregon. See *BAR/BRI DIGEST*, *supra* note 16, at 8, 11, 18, 22, 23, 30, 34; Granelli, *How States Admit Lawyers*, Nat'l L.J., Feb. 17, 1983, at 24.

One commentator has argued that requiring foreign attorneys to take a bar examination in the United States will diminish the efficacy of reciprocity agreements because U.S. attorneys wishing to practice abroad may also be subjected to a bar examination. See Note, *Foreign Countries*, *supra* note 1, at 1800. This could prove to be "an insurmountable obstacle to an American lawyer wishing to practice in a foreign jurisdiction." *Id.* The interest in ensuring a minimum level of competence for foreign attorneys wishing to practice in the United States, however, may outweigh this cost.

there is no guarantee that he or she will understand or even recognize state law problems. Furthermore, there are inherent difficulties in classifying matters as based on either state or federal law.<sup>36</sup>

This problem would be mitigated significantly if the scope of foreign attorney practice were limited to matters of foreign and international law. Still, issues of foreign and international law will undoubtedly have domestic legal consequences. In order to ensure that domestic legal issues are not overlooked by foreign attorneys, the federal bar should require that foreign lawyers associate with or consult domestic attorneys licensed by a state bar association.<sup>37</sup> The public will then be assured that it is receiving competent advice on the domestic consequences of the issues for which it might consult a foreign attorney.

This solution is supported by another consideration. Differences between the U.S. legal system and other nations' legal systems may render otherwise accurate indicators of foreign attorneys' competence in the law of their home jurisdictions irrelevant as regards their ability to practice in the United States.<sup>38</sup> Even between culturally similar countries, differences in common law and civil law systems may result in different legal practices. For example, the U.S. approach to contract law emphasizes planning for every contingency. In contrast, Western European lawyers tend to assume a less precise, more general drafting approach.<sup>39</sup> Similarly, different levels of economic development often result in different, and sometimes incompatible, methods of legal practice.<sup>40</sup> By limiting the scope of foreign attorney practice to issues of foreign and international law, the proposed federal bar would turn the foreign lawyer's cultural bias toward the law and legal practice into an asset. Knowledge of the culture and legal system of foreign countries is the very commodity sought by U.S. clients who retain foreign lawyers.<sup>41</sup>

In addition to maintaining minimum levels of legal competence, state bar associations monitor the ethical conduct of attorneys practicing within their jurisdictions. Although national regulation of foreign lawyers may ensure the legal competence of foreign lawyers, state bar associations may fear that it will fail to ensure ethical behavior. This fear may be justified. Different cultural values and norms of conduct often lead to different ethical standards for lawyers.<sup>42</sup> States fear that a situation will arise in which a foreign lawyer's home standards of

36. Comisky & Patterson, *supra* note 5, at 962.

37. Cf. Comisky & Patterson, *supra* note 5, at 961 (proposed national bar for domestic attorneys would limit out-of-state attorneys' federal licenses to practice before state courts to situations in which they are associated with local attorneys).

38. See Note, *Foreign Countries*, *supra* note 1, at 1796.

39. See Warren, Monahan & Duhot, *supra* note 8, at 182.

40. See generally J. GARDNER, *LEGAL IMPERIALISM* (1980).

41. Note, *Foreign Countries*, *supra* note 1, at 1796-97.

42. See *id.* at 1802.

behavior will conflict with accepted U.S. definitions of ethical conduct.<sup>43</sup> Even if a foreign attorney's home country has ethical standards which resemble those of U.S. bar associations, states have no way to ensure that a lawyer's home bar association will take action when violations of the home standards occur.<sup>44</sup>

Each state presently has its own code of professional responsibility. Although these codes do not vary significantly from state to state,<sup>45</sup> each state administers its own examination,<sup>46</sup> and many states will not accept the result of a test administered in another state.<sup>47</sup> This lack of intra-state reciprocity restricts the mobility of domestic and foreign attorneys. A federal bar could provide alternatives to individual state testing which would ensure ethical standards yet avoid the restrictions on mobility that arise as a result of state regulation. On application, federal bar administrators could require that a foreign attorney present a letter of certification and good standing from his or her home nation.<sup>48</sup> New York, a state that permits a limited practice by foreign lawyers, follows this approach.<sup>49</sup> Appli-

43. See Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154, 1155 (1973).

44. See Note, *Foreign Countries*, *supra* note 1, at 1802.

45. The ABA adopted the Model Code of Professional Responsibility in 1969. Within three years, it had been adopted in 40 states. AM. BAR FOUND., ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, at ix n.2.

46. Twenty states include questions on legal ethics in the essay portion of their bar examinations. See BAR/BRI DIGEST, *supra* note 16, at 10-43. Twenty-five states and the District of Columbia require applicants to pass the Multi-State Professional Responsibility Examination. See *id.* at 8-43. Hawaii writes its own multiple choice examination which it administers as part of the general bar examination, see *id.* at 18, and Delaware gives a separate legal ethics examination. See *id.* at 14. Questions on legal ethics for the federal bar for foreign attorneys would be administered either as part of a federal examination or on a separate federal legal ethics examination. States would not be permitted to require foreign attorneys to take local ethics examinations. Domestic attorneys, however, might still be required to take an examination on ethical rules peculiar to the state. See Comisky & Patterson, *supra* note 5, at 959 nn.66-67.

47. The states that refuse to accept test scores from other jurisdictions are Alabama, Arizona, Florida, Georgia, Hawaii, Louisiana, Nevada, New Hampshire, New Jersey, South Carolina, and Washington. See BAR/BRI DIGEST, *supra* note 16, at 8-42.

48. This approach has been criticized as adding an extra administrative step to the certification procedure. See Note, *Foreign Countries*, *supra* note 1, at 1799.

49. Foreign lawyers in New York may be licensed as "legal consultants." See N.Y. R. CT. § 521.1(a) (McKinney 1984). Under the N.Y. rule, "legal consultants" can provide legal services, but they cannot (1) appear in any court except to represent themselves; (2) prepare any instrument affecting title to U.S. real estate or relating to the administration of a decedent's estate in the U.S.; (3) prepare any instrument relating to marital rights or duties or child custody for U.S. residents; (4) render professional legal advice on the law of New York or the United States unless it is based on the opinion of a person licensed to practice law in New York; (4) hold themselves out as a member of the New York Bar; or (5) use any title other than "legal consultant" or the authorized title of their foreign country. *Id.* at § 521.3. An informative evaluation of the New York program is found in Slomanson, *supra* note 26, at 210.

In 1977 and again in 1984, the Board of Governors of the District of Columbia Bar proposed an amendment to Rule 46 of the Rules of the District of Columbia Court of Appeals that would allow the licensing of persons admitted to practice in foreign countries to practice as special legal consultants.

cants are required to file a letter of recommendation from a member of the executive body of the foreign institution having final disciplinary authority over legal practitioners, or from a judge of the highest law court or court of original jurisdiction of such foreign country.<sup>50</sup>

In addition to requiring applicants to submit letters of good standing, federal bar administrators could enforce a federal code of professional responsibility.<sup>51</sup> In the event of a conflict with the home country's code, the foreign lawyer could be required to follow the federal code, and federal bar administrators could be empowered to take disciplinary action when a violation is found to have taken place. This system would be consistent with guidelines proposed by an International Bar Association study group. These guidelines state:

A foreign lawyer who has established an office abroad should be required to abide by the code of professional ethics of the local bar association or law society and the provisions of this code should prevail in instances in which they may be in conflict with the code of ethics of . . . [the foreign attorney's] national bar association or law society. . . .<sup>52</sup>

### B. Economic Protectionism

Although a federal bar created according to the guidelines suggested in this note might adequately address state interests in ensuring minimum levels of legal competence and ethical conduct among practicing attorneys, some state bar members may argue that foreign attorneys will infringe on the economic interests of local practitioners. A similar fear has been expressed with regard to the competition by out-of-state attorneys likely to arise as a result of a federal bar for domestic attorneys.<sup>53</sup> This section argues that the economic well-being of local practitioners would not be significantly threatened and, indeed, may even be enhanced by a federal bar for foreign attorneys. Moreover, it suggests that local

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D.C. Bar Memorandum, *supra* note 19, at 1. The proposed amendment is based on New York's foreign legal consultant provision. *Id.* at 4. The 1984 proposal is still pending before the Court of Appeals, and the Assistant Executive Director of the D.C. Bar believes that it will be approved. Telephone conversation with David Dorsey, Ass't Executive Director, D.C. Bar (July 8, 1985) (notes on file, Michigan Yearbook of International Legal Studies).

A proposal recently endorsed by the Board of Governors of the California State Bar would allow foreign lawyers to give advice on their home countries' laws. They would be restricted to business-related work such as giving advice on joint ventures and drafting contracts. To take effect, the proposal must be approved by the California Supreme Court. Pelline, *State's Push—Lawyers to Japan*, San Francisco Chronicle, Sept. 3, 1985, at 21, 21, 33.

50. N.Y. R. Ct. § 521.2(a)(2) (McKinney 1984).

51. This proposed code of ethics might resemble the ABA's Model Code of Professional Responsibility.

52. Lund, *supra* note 43, at 1155 (discussing recommendations made by the Estoril conference of the IBA, spring 1972).

53. See Young, *supra* note 6, at 110.

bar associations have an ethical obligation to increase public access to legal skills that are in demand.

Local bar associations may want to monopolize the opportunities presented by foreign and international legal practice in the United States.<sup>54</sup> They may argue that a national bar regulating the quality of foreign lawyers admitted to practice in the United States would not protect the economic interests of local practitioners. They may fear that a federal bar would result in increased competition for small, local law firms.<sup>55</sup> By limiting the practice of foreign attorneys to issues of foreign and international law, however, a federal bar would keep foreign attorneys from competing for any significant portion of the local practitioner's business.

Under the federal bar proposed in this note, questions of state and federal law unrelated to foreign and international law would be reserved for domestic attorneys. Foreign lawyers would be able to advise clients only on issues involving questions of foreign or international law. Furthermore, they would be required to consult with or refer clients to local practitioners for advice on the state and federal law ramifications of foreign or international law questions. Thus, local practitioners would not lose any business involving issues of state or federal law, even if a potential client consults a foreign attorney. Although there is no empirical data on the extent to which domestic lawyers engage in foreign or international practice, only those who are members of large law firms are generally able to afford the high cost of setting up a competitive international practice.<sup>56</sup> Only three percent of U.S. law firms have 20 or more persons, and they account for only 13 percent of the practitioners in the U.S. Moreover, only 11 percent of the U.S. law firms engaging in private practice employ more than 25 lawyers.<sup>57</sup> Thus, the U.S. lawyers with whom foreign lawyers would be competing are limited in number. Foreign lawyers do not pose a serious threat to the American lawyers' monopoly over legal practice in the United States.

Undoubtedly, the market will also protect the economic interests of local legal practitioners. Few foreign law firms will be able to afford the high cost of establishing a practice in the United States. Foreign attorneys will probably find that their clients are limited to corporations engaging in international trade. Hiring decisions made by local attorneys in local law firms may also limit foreign

54. See Note, *Foreign Countries*, *supra* note 1, at 1288–89.

55. Cf. Young, *supra* note 6, at 111–12 (arguing that the abolition of state admission requirements will increase the power of the large national firms likely to successfully compete for clients with smaller local firms). *But cf.* Silas, *Law Firms Branch Out*, A.B.A. J., June 1985, at 44, 48 (arguing that competition generally pits big firm branch offices against big local firms).

56. Cf. Note, *Foreign Countries*, *supra* note 1, at 1809.

57. See THE LAWYER'S ALMANAC: 1982–1983, at 68–69 (S. Glasser & L. Glasser pubs. 1982) (presenting statistics from a speech by Barbara A. Curran to American Bar Association Annual Convention, Aug. 8, 1981).

attorney practice.<sup>58</sup> Most law firms do not practice foreign or international law;<sup>59</sup> therefore, they are not likely to hire foreign attorneys.

Far from infringing on local practitioners' work, a federal bar that admits foreign lawyers may generate new international business for local lawyers. Such a phenomenon has been observed in other countries:

[E]xperience has shown in England that when foreign lawyers are organized to give an efficient business service to their clients, they present not a threat to the profession but the best form of competition, and, in fact, they introduce new international business. . . .<sup>60</sup>

In addition, the requirement that foreign attorneys associate with or consult local attorneys on issues with domestic law ramifications may generate additional business for local lawyers.

Finally, even if the economic interests of local lawyers do suffer somewhat from the increased availability of foreign attorneys, the public interest in obtaining competent, affordable legal advice must be given considerable weight. The demand for legal advice on issues of foreign and international law is increasing.<sup>61</sup> Restrictions on practice by foreign lawyers could lead to a shortage of competent legal advice, and an increase in the price of those services that are available.<sup>62</sup> Ethical considerations suggest that local bar associations and attorneys should not oppose the proposed federal bar to the extent that it encourages the availability of legal services. The ABA's Model Code of Professional Responsibility provides in part:

In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.<sup>63</sup>

Another ABA ethical consideration states:

Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity and admission procedures consistent with the needs of modern commerce.<sup>64</sup>

58. Cf. Note, *Foreign Countries*, *supra* note 1, at 1809 (arguing that these factors prevent U.S. lawyers practicing abroad from posing a threat to the local legal professions).

59. See *supra* text accompanying notes 55–57.

60. Lund, *supra* note 43, at 1157.

61. See Comment, *Migrant Attorney*, *supra* note 1, at 322; Note, *Foreign Attorneys*, *supra* note 1, at 209.

62. Cf. Note, *Foreign Countries*, *supra* note 1, at 1807 (“In a restricted market, legal services are harder to obtain, the cost of services goes up, and business opportunities may be lost.”).

63. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9 (1980).

64. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-3 (1980).

The public interest in obtaining competent, affordable legal advice should outweigh local concerns of economic protectionism.

### III. CONCLUSION

Some commentators advocate a compromise approach between state and federal regulatory powers. This approach envisions uniform national standards administered by the states.<sup>65</sup> States would presumably maintain their traditional role of oversight while the nation moves toward uniform regulation of foreign attorney practice.<sup>66</sup> State oversight would continue in the sense that local bar associations would enforce standards. Such oversight would not continue in the sense that local bar associations would no longer establish standards.

Although this compromise plan might quiet state objections to a federal bar for foreign attorneys,<sup>67</sup> it is unlikely to achieve the desired uniformity. There would probably be as many distinct interpretations of the federal standard as there are jurisdictions applying it.<sup>68</sup> The use by state bar associations of a uniform national test known as the Multi-State Bar Examination supports this prediction that a national standard applied by the states would not necessarily enhance the mobility of foreign attorneys. Each of forty-six states now administer the Multi-State Bar Examination as part of their bar examination.<sup>69</sup> But 11 jurisdictions refuse to accept a Multi-State test score transferred from an examination administered in another state.<sup>70</sup> Six other jurisdictions have no guidelines concerning the transfer of test scores.<sup>71</sup> Twenty-four of the 25 jurisdictions that accept transfer test scores do so subject to various time limitations.<sup>72</sup> Attorneys desiring to practice in other states are often required, therefore, to retake the examination. Thus, this national

65. Cf. Simonelli, *supra* note 4, at 20; Note, *Foreign Countries*, *supra* note 1, at 1819.

66. See Simonelli, *supra* note 4, at 20.

67. See Note, *Foreign Countries*, *supra* note 1, at 1820.

68. Cf. *id.* (noting that uniform national requirements may fail to yield a true uniform national policy because “[s]tates could still drag their feet in following the federal guidelines.”).

69. Comisky & Patterson, *supra* note 5, at 951.

70. Eleven states require experienced, licensed, out-of-state attorneys to take the same comprehensive bar examinations as non-licensed attorneys before being granted permanent licenses to practice law. These states are Alabama, Arizona, Florida, Georgia, Hawaii, Louisiana, Nevada, New Hampshire, New Jersey, South Carolina, and Washington. See *BAR/BRI DIGEST*, *supra* note 16, at 8–42.

71. Delaware, Georgia, Kansas, Kentucky, Minnesota, and New Mexico have no provisions for the transfer of test scores. See *State Law Digests*, *supra* note 22, at 4–7.

72. The following states accept Multistate scores from other jurisdictions: Alabama, Arizona, Arkansas, Connecticut, Idaho, Illinois, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. All except Maine and South Dakota have time restrictions, and South Dakota requires that an applicant be admitted in a prior jurisdiction. See *BAR/BRI DIGEST*, *supra* note 16, at 44.



standard has arguably failed to increase attorney mobility. It seems likely that other guidelines administered by the states will be similarly limited.

A national regulatory scheme for foreign attorneys is the best means of serving the needs of U.S. practitioners seeking to practice abroad and the American public desiring advice on foreign and international law. By limiting the scope of foreign attorney practice, a federal bar would ensure minimum levels of legal competence and ethical conduct. In addition, the requirement that foreign attorneys consult with local attorneys on issues of domestic law would ensure that U.S. law and procedure is not ignored. Requiring foreign attorneys to follow federal ethical guidelines should also alleviate state fears that a system of national regulation could not adequately ensure the ethical conduct of attorneys practicing within the state.

Local practitioners' fears that they will lose significant business to foreign lawyers are unfounded. If foreign attorney practice is limited to issues of foreign and international law, it will not pose a threat to any significant portion of local practitioners' business. It is even possible that foreign attorneys will generate new business for local practitioners either through consultation with local attorneys on issues of domestic law, or by facilitating international or foreign transactions that require the parties to consult local practitioners. In sum, a federal bar facilitating the admission and practice of foreign attorneys in the United States would meet the increasing demand for foreign and international legal services in the United States without unduly compromising legitimate local concerns.