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THE REGULATION OF FOREIGN-EDUCATED LAWYERS IN NEW YORK THE PAST, PRESENT, AND FUTURE OF NEW YORK'S ROLE IN THE REGULATION OF THE INTERNATIONAL PRACTICE OF LAW

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THE REGULATION OF FOREIGN-EDUCATED LAWYERS IN NEW YORK: THE PAST, PRESENT, AND FUTURE OF NEW YORK'S ROLE IN THE REGULATION OF THE INTERNATIONAL PRACTICE OF LAW

JUDGE HOWARD A. LEVINE*

OPENING REMARKS

As an Associate Judge of the New York State Court of Appeals, I served as the court's administrative judge overseeing attorney regulation and as its liaison judge with the State Board of Law Examiners. Before that, in my position as an Associate Justice of the appellate division, I had the opportunity to be involved in the attorney admission and disciplinary processes. The topic today — The Regulation of Foreign-Educated Lawyers in New York: The Past, Present and Future of the International Practice of Law — has been and becomes even more important every day.

I would like to trace with you the history of New York's regulation of foreign-educated lawyers. I believe that there are some controlling themes which prevail throughout this development. In regulating lawyers generally — and in the regulation of foreign-educated lawyers specifically — New York has always been concerned with educational qualifications, experience, and integrity. New York's admission system demonstrates a strong commitment to protection of the public in general, of consumers of legal services, and of the integrity of the courts.

In *People ex. rel. Karlin v. Culkin*,[1] Chief Judge Cardozo said of a lawyer's duty: "The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."[2]

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* I wish to acknowledge, with great appreciation, the invaluable assistance in the preparation of this lecture of my former law clerk, James McClymonds, J.D., New York Law School 1993, and of Court of Appeals Deputy Chief Court Attorney, Hope B. Engel. These remarks were part of the C.V. Starr Lecture presented at the New York Law School Wellington Conference Center on Tuesday, April 22, 2003.

1. 248 N.Y. 465 (1928).
2. *Id.* at 470-71.

New York's rules have a strong emphasis on the rigorous academic study of law. The New York admission process requires applicants to demonstrate that they possess the requisite character and fitness to ethically and competently serve the legal needs of their clients. New York has a system of registration and regulation which is in place to aid the courts in identifying qualified applicants and, if necessary, sanctioning the unfit and the unscrupulous. New York, too, is sensitive to the special role the state plays in the global economy. It recognizes that New York clients need access to qualified legal experts trained and able to handle complex matters for which traditional geographical barriers are not critical. Additionally, a strength of this great state — and of this nation — is that we are a pluralistic society. New Yorkers need the services of lawyers trained in the laws of other jurisdictions, for example, to counsel them and provide legal services relating, not only to issues of international trade and finance, but in a diverse field of practice areas including family law issues that cross national borders. In regulating attorneys in New York, the courts also need to be flexible and willing to adapt to change, to insure that our lawyers have access to foreign markets for legal services, while not compromising our values.

I. INTRODUCTION: NEW YORK'S ROLE IN THE REGULATION OF THE INTERNATIONAL PRACTICE OF LAW

New York State plays a pivotal role in the international practice of law through its regulation of the attorneys and counselors of law practicing in or licensed pursuant to its jurisdiction. This reality is due to several trends that have emerged in the past several decades.

First, New York law firms have been leaders in the "exportation" of legal services abroad, and have stood at the forefront of the internationalization of legal practice during the post-World War II era.[3] Second, New York is a leading "importer" of legal services. Increasingly, foreign-educated attorneys come to New York to study in our law schools, seek admission to our bar, and work in our law

3. *See, e.g.*, David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994); Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994).

firms.[4] They seek the prestige and knowledge earned by studying law in an American law school, satisfying our rigorous licensing requirements and practicing law here.

In my discussion with you today, I will examine the nature and scope of New York's regulation of the international practice of law. First, I will describe the key participants in the process and their differing roles. Second, I will explore the history and development of the rules governing the admission and practice of foreign-educated attorneys in New York. Third, I will describe the present regulations and their requirements. Finally, I will offer some thoughts about how New York's regulatory scheme will fit within the framework of international trade agreements.

II. KEY PARTICIPANTS AND THEIR ROLES

Like Gaul in Caesar's day, the New York regulation of lawyers is divided into three parts. The New York State Court of Appeals, the Appellate Division of the State Supreme Court, and the State Board of Law Examiners are each involved in regulating the practice of law.

A. The New York State Court of Appeals

As the highest appellate court in the State of New York, the Court of Appeals' primary function within the state judicial system, like that of the United States Supreme Court in the federal system, is as the principal law-making court — to "declar[e] and develop[ ] an authoritative body of decisional law for the guidance of the lower courts, the bar and the public."[5] The court of appeals was established by Constitutional Convention in 1846.[6] In 1871, the

4. *See, e.g.*, Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039 (2002).

5. *See* HENRY COHEN & ARTHUR KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 1, at 4 (3d ed. 1997).

6. *See* N.Y. CONST., art. VI, § 2 (1846), *reprinted in* 1847 N.Y. Laws vol. II, at 397. The 1846 Constitution also contained a clause that provided: Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state. *Id.* § 8. This provision was not carried forward into the next Constitution. However, the requirement that an applicant for admission to practice be a male was carried over into the Code of Civil Procedure. The limitation on gender was ultimately removed in 1886, due to the efforts of Kate Stoneman (*see* 1886 N.Y. Laws ch.

State Legislature statutorily vested the court with the additional power to establish rules regulating the admission of attorneys and counselors at law to practice in all courts of the state.[7] In 1895, the governing statute was amended to expressly provide the Court with the power to "make such provisions as it shall deem proper for admission of persons who have been admitted to practice in other states or countries."[8]

Today, the court of appeals' Rules[9] establish the general and legal educational and practice qualifications for admission to practice law in the state — either by examination or by motion.[10] The court similarly has rules governing the licensing of foreign legal consultants.[11]

In addition to its rule-making power concerning attorney admission, the court also functions in its more traditional role as an appellate tribunal, reviewing appeals in attorney admissions and disciplinary proceedings.[12] Like the majority of the court's civil appeals docket, appeals in attorney disciplinary proceedings are generally by leave of the court.[13]

B. The Appellate Division of the New York Supreme Court

The Appellate Division of the New York Supreme Court provides the first level of appellate review from orders of courts of original jurisdiction, like the circuit courts of appeals in the federal system. The four departments of the Appellate Division oversee the

425; *see also* Judith S. Kaye, *How to Accomplish Success: The Example of Kate Stoneman*, 57 ALB. L. REV. 961, 965 (1994).

7. *See* 1871 N.Y. Laws ch. 486, § 1. Before 1871, the power to regulate and admit attorneys and counselors to practice at the bar was exercised by the Supreme Court of the Judicature, which existed from 1691-1847. *See* NEW YORK STATE COURT OF APPEALS AND THE NEW YORK STATE ARCHIVES AND RECORDS ADMINISTRATION. DUELY AND CONSTANTLY KEPT: A HISTORY OF THE NEW YORK SUPREME COURT, 1691-1847, 20-21. Thereafter, the New York Supreme Court held this power. For a history of the early regulation of lawyers in New York, *see* 2 ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA, 7, 10-11, 36-37, 245-52 (1965).

8. 1895 N.Y. Laws ch. 946, § 1 (amending Code of Civ. Proc. § 56).

9. N.Y. COMP. CODES R. & REGS. tit. 22, § 520 (2003).

10. *See In re* Shaikh, 39 N.Y.2d 676, 679 (1976).

11. N.Y. COMP. CODES R. & REGS. tit. 22, § 521 (2003).

12. *See* N.Y. JUD. LAW § 90(8) (McKinney 2003).

13. *See* N.Y. C.P.L.R. 5602 (McKinney 2003); *Cf.* N.Y. C.P.L.R. 5601 (McKinney 2003).

actual admission of attorneys — including character and fitness review of applicants — and their discipline.

Each department is responsible for supervising the admission and discipline of attorneys residing or working within its geographical boundaries.[14] This function is accomplished through committees of attorneys, with supporting staff, established within each department.

The role of the appellate division in the admission of attorneys — determining a particular applicant's moral character and fitness — has traditionally been separate from the role of the court of appeals — determining generalized qualifications.[15] Vesting the latter role in the court of appeals assures a uniform statewide qualification standard.[16] In contrast, it has been said that the "individualized aspects of any inquiry into moral character and personal fitness — factors which often involve local perceptions and criteria — permit, even suggest, that both investigation and ultimate determination with respect thereto appropriately be the responsibility of the appellate divisions at the departmental levels."[17]

The appellate division's second core function in the regulation of attorneys is in the discipline of admitted attorneys. Each department is authorized under the express provisions of the Judiciary Law to "censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."[18] The appellate division is also authorized to revoke an attorney's admission for any misrepresentation or suppression of information made in connection with the application process.[19] Each department has established disciplinary committees to investigate allegations of attorney misconduct and prosecute disciplinary proceedings before the Appellate Division. Pursuant to this authority,

14. N.Y. JUD. LAW § 90(1)(a) (McKinney 2003). *See also* N.Y. C.P.L.R. 9404 (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10 (2003).

15. *See In re* Shaikh, 39 N.Y.2d at 680.

16. *See id.* at 682.

17. *Id.*

18. N.Y. JUD. LAW § 90(2) (McKinney 2003).

19. *See id.*

the departments have jointly promulgated disciplinary rules[20] — the Attorney's Code of Conduct — and have established separate procedural rules governing disciplinary proceedings.

C. *The State Board of Law Examiners*

The third key participant in the regulatory process is the State Board of Law Examiners (SBLE). The SBLE, the members of which are appointed by the court of appeals,[21] is responsible for overseeing and administering the New York State bar examination and certifying whether applicants have successfully completed the examination.[22] Although a person may be admitted to the Bar only by order of the appropriate appellate division department, no application may be entertained by that court unless the SBLE has issued the required certification.[23] The only exception to that requirement is when an applicant who relies on the rules governing admissions without examination, applies directly to the appellate division.[24]

III. Statutory and Regulatory History: Where We've Been

Historically, licensed attorneys have had a virtual monopoly on the practice of law in New York State. Even today, the Judiciary Law expressly provides that, subject to certain exceptions, it is unlawful for any person to practice or appear as an attorney, except on his or her own behalf, in a court of record, or to hold oneself out as an attorney, without first being "duly and regularly licensed and admitted to practice law."[25] The unlicensed practice of law is punishable as a criminal misdemeanor.[26] The practice of law includes not only appearing in court and holding oneself out as an attorney, but also

20. *See* N.Y. Jud. Law Appendix.

21. *Id.* at § 56.

22. *Id.* at § 464; N.Y. Comp. Codes R. & Regs. tit. 22, §§ 520.7, 520.8. *See also* N.Y. Comp. Codes R. & Regs. tit. 22, § 6000 (2003).

23. *See In re* Anonymous, 78 N.Y.2d 227, 230 (1991).

24. *See id.* at 230 n.*. *See also* N.Y. Comp. Codes R. & Regs. tit. 22, § 520.10 (2003)

25. N.Y. Jud. Law § 478 (McKinney 2003). One exception is for those attorneys admitted *pro hac vice*, a temporary status not explored in this paper.

26. *See id.* at § 485 (McKinney 2003).

providing legal advice and counsel,[27] including giving advice on foreign law.

Thus, in the 1957 case, *In re New York County Lawyers Assoc. (Roel)*,[28] a Mexican citizen and lawyer admitted to practice in Mexico, but never a citizen of the United States nor a member of the New York Bar, maintained offices in New York City where he advised and assisted New York clients in obtaining Mexican divorces. In *Roel*, the court of appeals, with two Judges dissenting, held that the activities engaged in by the Mexican lawyer constituted the practice of law in New York[29].

The majority's primary concern in so holding was the protection of members of the public when they seek legal advice. There would be no guarantee that a client of a lawyer only admitted in Mexico would be advised of the domestic consequences of a Mexican divorce decree nor would the client be protected by the character and fitness screening process and the disciplinary supervision to which New York lawyers are subjected.[30]

The alternative to the *Roel* case complete bar was to subject the foreign-educated lawyer, whose exclusive service to clients would be advising on foreign law, to supervision by the New York courts. Thus, laws and regulations creating the status of foreign consultant were eventually developed.

A. Foreign Legal Consultants

1. The Original Rules

Prior to 1974, nothing in the New York statutes or regulations allowed for the licensing of a foreign legal consultant. In 1924 and 1925, the Association of the Bar of the City of New York, perceiving a need to change the existing law to allow foreign-educated lawyers to be licensed to practice in the limited area of their specialty, unsuccessfully urged the New York State Legislature to pass such legis-

27. *See* Spivak v. Sachs, 16 N.Y.2d 163, 166-67 (1965).

28. 3 N.Y.2d 224 (1957).

29. *See id.*

30. *Id.* at 231-32.

lation.[31] Later attempts to change the law, in 1947 and 1955, also failed.[32]

In the early 1970s, the proponents of licensing for foreign legal consultants in New York finally achieved success. A committee of the Association of the Bar of the City of New York began drafting proposed legislation and rules that would provide for the licensing of foreign-educated attorneys without examination.[33] The committee emphasized the role of New York City as a center in the flow of international investment and development. It argued that: (1) a system of licensing of foreign legal consultants would facilitate international transactions and encourage foreign investment within the state;[34] (2) it would benefit New Yorkers engaged in international transactions if experts in foreign laws were readily accessible to them;[35] (3) granting foreign lawyers the privilege of practicing their specialty here would encourage reciprocal privileges to New York firms abroad;[36] and (4) consumer protection objectives could be met by a system of licensing.[37]

In April 1974, the New York State Legislature responded by adopting Judiciary Law § 53(6), which expressly authorized the court of appeals to adopt rules for "the licensing, as a legal consultant, without examination and without regard to citizenship, of a person admitted to practice in a foreign country as an attorney or counselor," with the proviso that a person so licensed not practice in the courts of the state.[38] Subdivision 6 also expressly subjected licensed foreign legal consultants to the appellate division's admission and disciplinary authority and the other regulatory provisions of the Judiciary Law governing attorneys and counselors-at-law. By

31. *See Roel*, 3 N.Y.2d 224, 231.

32. *See id.* at 231-32.

33. *See* SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE, 3:2-3:3, 3:30-3:33 (1996).

34. *See* MEM. OF NEW YORK AD HOC COMMITTEE ON FOREIGN LAW REGULATION CONCERNING PROPOSAL FOR LICENSING ON LIMITED BASIS OF QUALIFIED LEGAL CONSULTANTS FROM OTHER COUNTRIES (JAN. 18, 1974), BILL JACKET, 1974 N.Y. Laws ch 231, at 52-54.

35. *See Roel*, 3 N.Y.2d at 235 (Van Voorhis, J., dissenting).

36. *See id.*

37. *See* CONE, *supra* note 33.

38. *See* 1974 N.Y. Laws ch 231.

adopting subdivision 6, New York became the first state in the nation to formally recognize foreign legal consultants.[39]

In June 1974, the court of appeals issued its rules for the licensing of legal consultants, designated Part 521 of the Rules of the Court of Appeals.[40] Under the 1974 rules, the appellate division had the discretion to license, without examination, a foreign-educated attorney who was admitted, actually practiced and was in good standing as an attorney or counselor at law or the equivalent in a foreign country for at least five of the seven years immediately preceding the lawyer's application. The applicant was also required to possess the good moral character and general fitness requisite for a member of the New York Bar and to be an actual resident of the state. A duly licensed legal consultant was subject to the disciplinary authority of the appellate division, including the Disciplinary Rules. Licensed legal consultants were not authorized to litigate before the courts, prepare any instrument conveying real property, or engage in any decedents' estates or matrimonial practice. A legal consultant was also prohibited from rendering professional legal advice on the law of New York or the United States, except on the basis of advice from a member of the New York Bar.

2. Subsequent Amendments

In the mid-1980s, the legal consultancy rules were subject to two significant modifications. The first modification was in response to the problems faced by attorneys who were refugees from East of the Iron Curtain, whose victimization by communist regimes prevented them from meeting the years of recent practice requirements of the rules.

In October 1983, the court of appeals recognized this problem.[41] Part 521 was amended to permit the court of appeals to waive practice qualifications. Accordingly, a new section was added to the Rules that provided:

39. *See* Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126, 1141-42 (1998); Hope B. Engel, *New York's Rules on Licensing of Foreign Legal Consultants*, 66 N.Y. ST. B.J. 36, 36 (March/April 1994).

40. *See In re the Rules of the Court of Appeals for the Licensing of Legal Consultants*, Ct. App., (June 6, 1974); N.Y. COMP. CODES R. & REGS. TIT. 22, § 521 (2003).

41. *See* Court of Appeals, For Release on Receipt (Nov. 16, 1983).

> The [c]ourt of [a]ppeals, upon application, may in its discretion vary the application of or waive any provision of these rules where strict compliance will cause undue hardship to the applicant.[42]

The court of appeals' determination to retain the authority to waive professional qualification requirements was consistent with the traditional distinction between the roles of the court of appeals and the appellate division discussed above.

3. Five Years Prior Practice Rule

The second modification to Part 521 concerned the requirement that a foreign-educated attorney be admitted and practice the law of the applicant's home country for at least five of the seven years immediately preceding an application for a foreign legal consultant license.[43] The concern was raised to the court of appeals that a strict reading of the requirement as originally adopted would result in the denial of an application of a foreign-educated lawyer who had continuously practiced the law of that lawyer's own country, but who practiced that law for two or more years in a law office located in yet a third country.[44] In response, the court of appeals modified the rules to clarify that the five-year prior practice requirement could be satisfied by practice within or outside the applicant's home country.[45]

4. Reciprocity

The next major modification of the foreign legal consultancy rules occurred in response to multinational negotiations under the General Agreement on Tariffs and Trade (GATT) during what was known as the Uruguay Round. During the Uruguay Round, the negotiating parties drafted a General Agreement on Trade in Services

42. N.Y. COMP. CODES R. & REGS. tit. 22 (2003), former § 521.6; *See In the Matter of the Amendment of the Rules of Court of Appeals for the Licensing of Legal Consultants* (Oct. 28, 1983).

43. *See* N.Y. COMP. CODES R. & REGS. tit. 22, former § 521.1(a)(1) (2003).

44. *See* Letter from Sydney M. Cone, III, to Hon. Richard D. Simons (Jan. 18, 1985).

45. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Feb. 15, 1985).

(GATS), which was one of the agreements ultimately adopted by the parties at the conclusion of the negotiating round.

In communications between the court of appeals and the United States Trade Representative (USTR) during the GATS negotiations, the USTR indicated that, to the extent the New York rules allowed for consideration of reciprocity in the licensing of foreign legal consultants, a most-favored-nation derogation for any such reciprocity measure might have to be taken.[46] At the time, Part 521 contained no reciprocity requirement for foreign legal consultants. However, the New York Legislature had recently imposed a reciprocity requirement in bar admissions in response to actions of other states, which were failing to admit New York attorneys without examination even though lawyers from those states were being admitted in New York without examination.[47] Concerned that the GATS once in effect might freeze New York's rules on reciprocity, the court of appeals amended Part 521 to allow the appellate division, in its discretion, to take into account whether a member of the New York Bar would have a "reasonable and practical opportunity" to establish a foreign legal consultancy in the applicant's country of admission before granting a foreign applicant a license to practice as a legal consultant in New York.[48]

5. The November 1993 Amendments

In August 1993, the ABA House of Delegates approved a model rule for the licensing of foreign legal consultants, which in turn, prompted the New York Court of Appeals to review its own rules.[49] In November 1993, after public comment, the court adopted amendments to part 521.[50] The amendments, in effect, brought the court's rules into conformity with the ABA model rule.

46. *See* CONE, *supra* note 33 at 3:34. For a general background on New York's role during the GATS negotiations, see *id.* at 3:3-3:4, 3:18-3:20, 3:34-3:35.

47. *See* 1988 N.Y. Laws ch. 307, § 1, amending N.Y. JUD. LAW § 90(b); *see also* SENATE MEM. IN SUPPORT, BILL JACKET, 1988 N.Y Laws ch. 307.

48. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Jan. 14, 1993), amending N.Y. COMP. CODES R. & REGS. tit. 22, § 521.1.

49. *See* Court of Appeals, Notice to the Bar (Sep. 13, 1993).

50. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Nov. 11, 1993).

One significant modification to Part 521 settled a long simmering debate concerning the extent to which foreign legal consultants could form partnerships with members of the New York Bar, or employ or be employed by Bar members.

Responding to changes in the position of ethics committees of major bar associations, a new Section 521.4 was adopted expressly providing that a licensed foreign legal consultant could employ or be employed by a member of the New York Bar, and could form partnerships with members of the Bar.[51] The new rule also expressly authorized licensed legal consultants to carry on their practices using certain names, titles and designations identifying them as such.[52]

The 1993 amendments made other significant changes to Part 521. The residency requirement was removed and replaced with a requirement that an applicant intend to practice as a legal consultant and maintain an office in New York.[53] The five of seven years prior practice requirement was changed to three of five years.[54] The amendments also added provisions setting out the rights and obligations of foreign legal consultants, including the consultant's entitlement to the attorney-client privilege, work-product privilege, and similar professional privileges.[55] The amendments also removed the restriction on the preparation of pleadings or other papers in connection with legal proceedings.

To summarize, at present, an applicant for a legal consultant license must satisfy five basic requirements. First, the applicant must be a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or public authority.[56] Second, the applicant must have been such a member in good standing and actually been en-

51. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Nov. 17, 1993), adding new N.Y. COMP. CODES R. & REGS. tit. 22, § 521.4(b)(1).

52. N.Y. COMP. CODES R. & REGS. tit. 22, § 521.3(g) (2003).

53. *See id.* 22, § 521.1(a)(5).

54. *See id.* 22, § 521.1(a)(2).

55. *See id.* 22, § 521.4(b)(2).

56. *Id.* § 521.2(e)(Appellate Division); *Id.* § 521.7 (Court of Appeals).

gaged in the practice of the law of the applicant's home country for at least three of the fives years immediately preceding the application.[57] Third, the applicant must possess the good moral character and general fitness requisite for a member of the New York Bar.[58] Fourth, the applicant must be over 26 years of age, and fifth, the applicant must intend to practice as a legal consultant in New York and to maintain an office in the State for that purpose.[59]

A person licensed under Part 521 is entitled and subject to certain expressly enumerated rights and obligations. A legal consultant is considered "a lawyer affiliated with" the New York Bar, subject to certain practice limitations, which will be discussed later.[60] A legal consultant may be affiliated with members of the New York Bar by employing, being employed by, or forming a partnership with one or more Bar members.[61]

Legal consultants are subject to the basic professional, ethical, and disciplinary constraints. They are entitled and subject to the rights and obligations set forth in the applicable Lawyer's Code of Professional Responsibility, or arising from the other conditions and requirements that apply to a member of the Bar under the rules of court governing attorneys at law.[62] They are also subject to professional discipline in the same manner and to the same extent as members of the Bar.[63] Accordingly, they are subject to control by the appellate division, including censure, suspension, removal or revocation of a consultancy license.[64] Legal consultants are also under an obligation to notify the authorities of any disciplinary action against them in their respective home countries, and to designate the clerk of the appellate division department in which they reside as their agent for service of process in New York.[65]

The scope of a legal consultant's practice is expressly limited by Part 521. A legal consultant may not appear for a person other than himself or herself as an attorney in any court, other than upon

57. N.Y. COMP. CODES R. & REGS. tit. 22, § 521.1(a)(1) (2003).
58. *Id.* § 521.1(a)(2).
59. *Id.* § 521.1(a)(4), (5).
60. *Id.* § 521.4.
61. *See Id.* § 521.4(b)(1)(i)-(iii).
62. *Id.* § 521.4(a).
63. N.Y. COMP. CODES R. & REGS. tit. 22, § 521.5.
64. *Id.* § 521.5(a)(1).
65. *Id.* § 521.5(a)(iii)-(iv).

admission *pro hac vice*.[66] Recall, however, that the restriction on the preparation by a legal consultant of pleadings or other papers in connection with legal proceedings was removed in 1993. There are other, specific legal instruments that a legal consultant may not prepare. Legal consultants may not prepare any instrument effecting the transfer or registration of real property located in the United States.[67] Legal consultants may not prepare wills or trust instruments for the testamentary disposition of property located in the United States and owned by a resident of the United States, or any instrument relating to the administration of a decedent's estate in the United States.[68] They may not prepare any instrument involving marital or parental relationships of a United States resident, or the custody or care of the children of such a resident.[69]

Legal consultants may not "render professional legal advice on the law of [New York] or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person" duly licensed to engage in the general practice of law.[70] A legal consultant may not hold himself or herself out as a member of the New York Bar.[71] However, legal consultants may carry on their practices under their own names, the name of the firm with which they are affiliated, and titles authorized in their home country.[72] They may also use the title "legal consultant" in conjunction with the words "admitted to the practice of law in" the foreign country of the consultant's admission to practice.[73]

B. New York Bar Admission for Foreign Lawyers

The second principal means by which a foreign-educated attorney might lawfully provide legal services in New York is by formal admission to the New York Bar. The rules governing the formal admission of attorneys to practice in New York are found in Part

66. N.Y. COMP. CODES R. & REGS. tit. 22, § 521.3(a) (2003).
67. *Id.* § 521.3(b).
68. *Id.* § 521.3(c)(1)-(2).
69. *Id.* § 521.3(d).
70. *Id.* § 521.3(e).
71. *Id.* § 521.3(f).
72. N.Y. COMP. CODES R. & REGS. tit. 22, § 521.3(g)(i)-(iii) (2003).
73. *Id.* § 521.3(g)(iv).

520 of the Rules of the Court of Appeals. Part 520's approach to those foreign-educated applicants who seek to satisfy the requirements for Bar admission through the use of a foreign education or practice, or both, has seen considerable development over the years. Ultimately, the trend has been away from relying exclusively on foreign legal education and practice as a qualification, and towards relying upon the New York State Bar Examination to determine the qualifications of a foreign-trained attorney for admission to the Bar.

In 1972, the court of appeals essentially adopted the modern version of Part 520.[74] Nonetheless, it perpetuated some of the rules as they existed prior to 1972.[75] One such rule equated admitted lawyers from foreign common law jurisdictions with admitted lawyers from other states for admission to the New York Bar without examination. Under former section 520.8 of the court's 1972 rules, the appellate division was vested with the discretion to admit on motion, without examination, five-year veteran foreign-trained practicing attorneys from common law based countries. The rules contained no provision allowing admission without examination for an attorney admitted in a foreign jurisdiction whose jurisprudence was not based upon the English common law.

Under the pre-1970 rules, an applicant who could not satisfy the admission and practice requirements in order to be admitted without examination, could seek admission through the Bar examination. However, several requirements had to be met to sit for the Bar exam, including United States citizenship and present or intended New York residency.[76] The applicant also had to have graduated from an "approved" domestic law school, or have completed a four-year study of law in the law office of an attorney admitted in New York.[77]

"Approved" law schools did not include foreign law schools, other than to recognize a year abroad as part of an approved course

74. *See In the Matter of Amendment of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law* (July 7, 1972).

75. *See, e.g., Rules of the Court of Appeals for the Admission of Attorneys and Counselor-at-Law* (1971).

76. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.2(a) (2003).

77. *Id.* § 521.1(a)(6).

of study in the United States.[78] Thus, an applicant with only a foreign law education was generally barred from taking the New York Bar exam, unless that applicant had credits from a foreign law school expressly recognized by waiver order of the court of appeals.[79]

Responding to a 1973 United States Supreme Court decision striking a citizenship requirement for admission to the Connecticut Bar,[80] the court of appeals removed the United States citizenship requirement from the rules governing admission without examination and eligibility to sit for the Bar exam.[81] This change made admission to the Bar available to many more foreign applicants than was previously possible.[82]

In 1977, however, the court of appeals tightened the admission without examination rules for both foreign as well as domestic practitioners by requiring such applicants for admission to establish that their "legal and pre-legal education" was the "substantial equivalent" of the educational requirements for eligibility to take the New York Bar exam.[83] The court vested the responsibility for evaluating the "substantial equivalency" of each applicant's foreign legal education in the State Board of Law Examiners.[84]

Two significant changes were made to Part 520 in amendments adopted in November 1979.[85] First, the state residency requirements were removed from both the provisions governing admissions with examination and admissions without examination. This reflected the court's then recent ruling that such requirements vio-

78. N.Y. COMP. CODES R. & REGS. tit. 22, § 523.4(k) (2003).

79. *See* Douglass G. Boshkoff, *Access to State Bar Examinations for Foreign-Trained Law School Graduates*, 6 HOFSTRA L. REV. 807, 807, 810 (1977).

80. *See In re* Griffiths, 413 U.S. 717 (1973).

81. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Oct. 12, 1973).

82. *See, e.g., In re* Shaikh, 39 N.Y.2d 676 (1976) (concerning the admission without examination of a resident alien admitted in Pakistan, a country the court of appeals previously recognized as an English common law jurisdiction with the contemplation of N.Y. COMP. CODES R. & REGS. tit. 22, § 520.8(a)(1)).

83. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Feb. 18, 1977).

84. *See id.* adding new subparagraph (c) to N.Y. COMP. CODES R. & REGS. tit. 22, § 520.8.

85. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Nov. 20, 1979).

lated the Privileges and Immunities Clause of the United States Constitution.[86]

Second, and more significantly, the rules were amended to provide a much more detailed version of the educational requirements for eligibility to take the New York Bar exam, specifically addressed to foreign-educated lawyers. As originally adopted, this new section 520.5 provided that an applicant who had studied law in a foreign country was qualified for the Bar exam, provided the foreign legal education satisfied the following requirements. First, the applicant's foreign legal education had to be "equivalent in duration" to one in an approved American law school. Second, the foreign country had to be one whose jurisprudence was based upon the principles of the English common law and the course of study completed by the applicant had to be the "substantial equivalent" of an American legal education. If the applicant could not satisfy both elements of that second requirement, the applicant could still qualify to take the Bar examination if he or she successfully completed a 24 credit hour program of study in professional law subjects in an approved law school in the United States, or met the educational requirements in an approved law school in the United States for a masters or doctorate graduate degree in law. The State Board of Law Examiners was responsible for evaluating the educational credentials of an applicant seeking to take the Bar exam under section 520.5. Notice that this change opened the exam eligibility door for the first time to lawyers from non-common law countries, providing their legal education in their home countries met the durational requirements of the Rules.

In 1987, the court of appeals eliminated admission without examination for foreign-educated attorneys.[87] Although the rules retained a provision providing for the admission of attorneys without

86. *See* Gordon v. Comm. on Character and Fitness, 48 N.Y.2d 266 (1979). *See also* Court of Appeals Order (Dec. 13, 1979) (authorizing the State Board of Law Examiners to amend its rules or adopt new rules to give effect to the holding of the *Gordon* case).

87. *See In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (Jan. 16, 1987); *In the Matter of the Amendment of the Rules of the Court of Appeals for the Licensing of Legal Consultants* (June 4, 1987) (corrected order); *see also* Court of Appeals, Public Notice (Feb. 3, 1987).

examination, motion applicants needed an American — not a foreign — law degree.[88]

The 1987 amendment otherwise retained the section qualifying an applicant with a substantively equivalent English common law degree to sit for the Bar exam.

In 1998, the court of appeals made several significant changes in the requirements for eligibility of foreign-educated lawyers to sit for the New York Bar exam. Previously, the rules only provided for the 'cure' of substantively - - not durational - - deficient foreign legal education by completion of a 24-credit program of study at an approved American law school. The 1998 amendments reduced the required credits from 24 to 20, but expressly required that the program of study include "basic courses in American law".[89] Second, the amendments also permitted, for the first time, the 20 credit program of study to cure *durational* deficiencies in a substantively equivalent common law school graduate's applicant's foreign legal education. Third, the rule was amended to permit attorneys admitted in common law countries based on either durationally equivalent law school or law office training, or a combination thereof, to cure any substantive deficiency by completing the 20-credit program of study in an American law school.

This is where we stand today.

IV. THE REGULATION OF FOREIGN EDUCATED ATTORNEYS: INTERNATIONAL TREATIES

A. *The General Agreement on Trade in Services (GATS)*

In April 1994, the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT) concluded with the creation of the World Trade Organization (WTO). The GATS, which is one of the several multilateral trade agreements signed at the conclusion of that round of negotiations, was the first multilateral agreement to apply to the international trade in services, rather than goods. As of January 1, 2003, 144

88. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10(a)(3) (2003).

89. *Id.* § 520.6(b)(1)(ii). Admitted English solicitors may take advantage of a second alternative educational requirement to qualify for taking the bar examination. *Id.* § 520.6(b)(2).

countries have joined the WTO and thus, are signatories to the GATS.[90] The United States joined the WTO on January 1, 1995.[91]

Legal services were among the services actively negotiated during the Uruguay Round and ultimately included in the GATS. The inclusion of legal services within the Uruguay Round negotiations was due to the efforts of the international section of the American Bar Association (ABA) and the United States Trade Representative (USTR).[92] Both the ABA and the USTR believed that the interests of United States legal professionals, and United States trade policy in general, would be advanced if legal services were included in GATT negotiations.

I do not claim any expertise in this area, and much of what I know comes from Terry Cone's treatise on International Trade in Legal Services, which I heartily recommend to you. What follows is more in the nature of an introduction. First, I will examine key provisions of the GATS and its general operation. I will then discuss the specific obligations the United States has undertaken with respect to legal services.

1. GATS General Obligations

Upon adoption of the GATS, a signatory assumes certain general obligations and disciplines applicable to the trade of all services that fall within the ambit of the agreement. Among the most significant obligations relevant to the regulation of legal services are those concerning most-favored-nation (MFN) treatment, domestic regulation, recognition, and progressive liberalization.

The obligation of MFN treatment requires that "[w]ith respect to any measure covered by [the GATS], each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords

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90. *See* World Trade Organization, *Trading into the Future: The Introduction to the WTO: The Organization: Members and Observers, at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 2, 2003).

91. *Id.*

92. For a history of the Uruguay Round's negotiations concerning legal services, *see* CONE, *supra* note 33, 2:2-2:13. For a discussion of developments since GATS' entry into force, *see* Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1019-66 (2001).

to like services and service suppliers of any other country."[93] The MFN treatment provision is a kind of equal protection clause for trade partners. However, a member can maintain a measure inconsistent with MFN by listing such a measure on a list of Article II Exemptions.[94] In principle, such exemptions are to be terminated within ten years.[95]

As to domestic regulation, the GATS obligations require that those affecting trade in services are administered in a reasonable, objective and impartial manner and not be more restrictive than necessary to ensure the quality of the service.[96] The Council for Trade in Services is authorized to adopt guidelines to discourage unduly burdensome regulations.[97]

The GATS provisions on recognition provide that, for purposes of fulfilling its standards or criteria for the authorization, licensing, or certification of services suppliers, a member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country.[98] It further provides that such recognition may be based upon bilateral agreements and, "[w]herever appropriate, recognition should be based upon multilaterally agreed criteria. In appropriate cases, members shall work . . . towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services, trades, and professions."[99]

The fourth significant, generally applicable principle a member undertakes under the GATS is the principle of progressive liberalization. Under article XIX of the GATS, members agree to enter

93. *See* General Agreement on Trade in Services (GATS), April 1994, art. II(1), *available at* http://www.wto.org/english/tratop_e/serv_e/0-gats_e.htm (last visited June 2, 2003).

94. GATS, art. II(2), Annex on Article II Exemptions.

95. *Id.* Annex § 6.

96. GATS, art. VI(4), (5).

97. *Id.* art. VI(4). The Council for Trade in Services' first efforts in this regard began with creation of a Working Party on Professional Service that, in turn, began development of disciplines on the accountancy sector. *See* Terry, *supra* note 92, at 1015-16, 1027-38. At present, disciplines for the legal sector are not being developed. *See* Terry, *supra* note 92, at 1037-38, 1046-48.

98. *See* GATS, art. VII(1).

99. GATS, art. VII(1), (5).

into successive rounds of negotiations "with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access."[100]

2. GATS Specific Commitments

In addition to the general obligations a signatory assumes under the GATS, certain additional obligations are imposed with respect to a particular service sector, such as legal services, if a country lists that service sector on its Schedule of Specific Commitments. For such listed service sectors, a member agrees not to maintain or adopt certain market access limitations, such as limitations on the number of service providers through such means as numerical quotas, monopolies, exclusive service suppliers, or application of economic needs testing.[101] A member also agrees that, with respect to sectors listed in its schedule, it will accord national treatment to services and service suppliers of any other member, that is, "treatment no less favorable than that it accords to its own like services and service suppliers."[102]

Both the provisions on market access and national treatment allow a country to list service sectors subject to limitations and conditions agreed to and specified in its schedules.[103] In addition, members are authorized to negotiate and list in their schedules additional specific commitments regarding qualifications, standards or licensing matters.[104] Through this mechanism, a member may essentially grandfather domestic regulations that are inconsistent with the GATS' general principles. If a member includes an existing law in its schedule, it has the right to continue applying that law, even if it is inconsistent with the market access, national treatment, or other general provisions of the GATS.

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100. GATS, art. XIX(1).
101. *See id.* art. XVI.
102. *Id.* art. XVII(1).
103. *See id.* art. XVI(1), XVII(1).
104. *See id.* art. XVIII.

3. The United States' Commitments Under the GATS

Examination of the List of Article II MFN Exemptions and the Sector-Specific Commitments filed by the United States reveal the extent of this country's international commitments with respect to legal services. The United States claimed no MFN exemptions for legal services. Thus, the United States is committed, with respect to the trade in legal services, to treating all WTO members no less favorably than it treats its most-favored trading partner.

The United States has, however, listed *specific* commitments with respect to legal services in its schedule of Sector-Specific Commitments.[105] The commitments are organized into two subsectors: (1) the provision of legal services as or through a qualified U.S. lawyer (admitted attorney subsector), and (2) consultancy on the law of the jurisdiction where the service supplier is qualified as a lawyer (legal consultancy subsector).[106] With respect to the admitted attorney subsector, the United States has indicated that in all states, services must be supplied by a natural person and partnership in law firms is limited to persons licensed as lawyers.[107] The United States has also indicated that, in certain states, not including New York, in-state or United States residency is required.[108]

With respect to the legal consultancy subsector, the United States' specific commitments are listed by state.[109] The section on New York essentially tracks the requirements, limitations on scope of practice, and rights and obligations provisions of Part 521 of the Rules.[110]

Having listed in its Schedule of Specific Commitments the various states' laws concerning the admission of attorneys and the licensing of legal consultants, the United States has reserved the right to continue applying those laws, even if the laws are inconsistent with other commitments under the GATS.[111] Thus, the key

105. For a summary of the United States' commitments contained within its Schedule of Specific Commitments, *see* WTO, *Services Database*, *at* http://tsdb.wto.org/wto/WTOHomepublic.htm (last visited June 2, 2003).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See* Terry, *supra* note 92, at 1010.

aspects of New York's rules for the licensing of foreign legal consultants, at least as they existed when the GATS was adopted, have been "grandfathered" into the GATS regime. With respect to the admission of attorneys, New York's requirement that services be supplied by a natural person, and that partnership in law firms is limited to licensed attorneys have also been grandfathered. On the other hand, by failing to list an MFN exemption or include the limitation in its Schedule of Specific Commitments, the United States arguably may not have grandfathered the reciprocity provisions of New York's rule governing admission without examination[112] or its rule authorizing the appellate division to consider reciprocity when deciding whether to license a foreign legal consultant.[113]

V. THE STATUS OF FOREIGN-EDUCATED LAWYERS IN NEW YORK TODAY

A. Foreign Legal Consultants

The number of licensed foreign legal consultants has seen a steady increase over the years since Part 521 was adopted. Between June 1974 and June 1995, over 200 legal consultants were licensed.[114] As of November 2002, just over 300 legal consultants were licensed.[115] By far, the first department of the New York appellate division has licensed the most legal consultants. As of November 2002, there were more than 200 foreign legal consultants licensed in the first department.[116] The second department comes in second, with just over ninety licensed consultants.[117] The third department has only three licensed legal consultants and the fourth department has only two.[118]

As of September 1993, licensed legal consultants represented 45 different countries.[119] England had the largest representation with over forty licensed consultants.[120]

112. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10(a)(1)(iii) (2003).
113. *See id.* § 521.1(b) (2003).
114. *See* CONE, *supra* note 33, at 3:29.
115. This information was obtained from the Unified Court System's intranet site.
116. *Id.*
117. *Id.*
118. *Id.*
119. *See* Engel, *supra* note 39, at 36.
120. *See id.*, at 36 n3.

Foreign legal consultants appear to be a relatively well-behaved group, at least insofar as official discipline is concerned. I am aware of only two reported cases in which the ultimate penalty of revocation of a legal consultant's license was imposed.[121] In one, the legal consultant held himself out as an attorney in the State of New York, both in advertising and in signs at his office, failed to use his authorized title of "legal consultant," and entered into a partnership to practice law with an attorney without disclosing to his partner his status as a legal consultant.[122]

In the other, *In re Dhar*,[123] a legal consultant's name was stricken from the roll of licensed legal consultants based upon his default in responding to complaints and failing to cooperate with the Grievance Committee of the New York Appellate Division, Second Department.

B. Admission of Foreign-Educated Attorneys

Between July 1985 and July 1995, a total of 3,729 foreign-educated lawyers passed the New York Bar examination.[124] Overall, those attorneys enjoyed a 45.5 percent passage rate. In the July 2003 bar examination alone, over twenty percent of the New York State bar examination applicants — over 2100 applicants — had foreign law training. They had about a forty percent pass rate.[125]

CONCLUSION

Judges, practicing lawyers, legal teachers and scholars constitute a vital collective enterprise for the orderly development of the law and its application in a way that both promotes stability and confidence in the rule of law, yet reflects our most enduring values as a people. We should never forget Chief Judge Cardozo's view of the lawyer as an "instrument or agency to advance the ends of justice."[126] Lawyers engaged in the international practice of law -

121. *In re* Pinto, 546 N.Y.S.2d 886 (App. Div. 1989); *In re* Dhar 665 N.Y.S.2d 433 (App. Div. 1997).

122. *See Pinto*, 546 N.Y.S.2d 886.

123. 665 N.Y.S.2d 433.

124. *See* CONE, *supra* note 33, 3:29.

125. Telephone conversation with Nancy Carpenter, April 14, 2003. Actual number: 2123.

126. *People ex rel. Karlin*, 248 N.Y. 465, 471.

whether as transactional enablers or advisors, or as advocates before tribunals - cannot be exempt from a role or responsibility in this collective enterprise.

That, in my view, forms the underlying premise in all of our legislative and regulatory rules governing the licensing and supervising of foreign-educated lawyers. That is why, before foreign-trained lawyers are admitted to the Bar, we insist on completion of a period of formal academic legal studies in which they are exposed to our common law tradition of adjudication, of the accommodating, weighing and balancing of competing values and interests tailored to the individual case — a pluralistic methodology especially appropriate for American society, the most pluralistic on earth. That is why we require the imposition of standards of both good character, individually examined, and fitness — including passing rigorous examination.

It was personally very satisfying to have been part of the process of reaching a fair balance between the special needs of the globalization of legal services, so important for the preeminence of New York in the world economy and insuring that all lawyers licensed to practice here are able and willing to fulfill their role in the collective enterprise I have described.

The accommodation represented by the current rules is, to be sure, not a final one. It will change as social relationships and needs within our own society and our place in the global community change, just as they have in the past. But the changes must not ignore the unique role lawyers play in America - to maintain a just society under the rule of law. We are not just any traded service. We, especially our international lawyers, must remain vigilant in this respect.