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# FOREIGN LEGAL CONSULTANTS IN WISCONSIN

KENNETH L. PORT\*

## I. INTRODUCTION

In 1996, the Supreme Court of Wisconsin denied a petition requesting a new Supreme Court rule that would have recognized Foreign Legal Consultants [FLCs] in Wisconsin.<sup>1</sup> Since the trend in many other jurisdictions, both within the United States and without, is to allow such licensure, this decision by the court is most unfortunate. In fact, in 1993, after many years of discussion,<sup>2</sup> the ABA adopted a Model Rule for the Licensing of Legal Consultants.<sup>3</sup> The primary reason given by the Wisconsin Supreme Court for denying the motion was that the proposed rule was inconsistent with the Model Rule and the reasons for these inconsistencies were not sufficiently explained in the petition.<sup>4</sup> Currently, twenty states and the District of Columbia have adopted a rule recognizing FLCs,<sup>5</sup> and many more states are considering adopting such rules.

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1. See *In re* Creation of Supreme Court Rules: SCR Chapter 41-Licensing Foreign Legal Consultants, Order No. 95-13 (proposed November 13, 1996) [hereinafter "Supreme Court Rules"].

2. See William R. Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALB. L. REV. 199 (1975).

3. See Licensing of Foreign Legal Consultants, Summary of Action Taken by the House of Delegates of the American Bar Association, Aug. 1993, p. 29 [hereinafter "Model Rule"]. This is reproduced in its entirety in the Appendix.

4. See Supreme Court Rules, *supra* note 1.

5. The jurisdictions are: Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, and Washington. See ALASKA R. GOV. ADMIS. TO THE BAR 44.1; ARIZ. R. S. SUP. CT. R. 33(f); CAL. R. CT. 983; CONN. R. SUPER CT. CIV. 24 A-F; D.C. R. BAR 46(c)(4); FLA. ST. BAR R. 16; GA. R. ADMIS. PT. D; HAW. SUP. CT. R. 14; ILL. SUP. CT. R. 712; IND. SUP. CT. ADMIS. & DISC. R. 5; MASS. SUP. JUD. CT. R. 3:01 6.2; MINN. SUP. CT. ADMIS. R. 7; MO. R. BAR 9.05; N.J. R. GEN. APP. R. 1:21-9; N.M. R. GOV. FOR. LEGAL CONSULT. 26-101; N.Y. R. APP. CT. 521.1; N.C. R. BAR Ch. 1, Subch. F 84A; OHIO R. GOV. ADMIS. TO THE BAR 11; OR. R. ADMIS. 12.05; TEX. SUP. CT. R. GOV. ADMIS. TO THE BAR 14; WASH. SUP. CT. R. ADMIS. TO PRAC. 14). For a

In New York alone, over two hundred individuals are licensed as FLCs.<sup>6</sup> There is a growing body of literature that indicates that there are many positive and very few, if any, negative effects on local legal communities that have adopted such rules.<sup>7</sup>

This essay is not intended as criticism of either the Wisconsin Supreme Court or the proposed rule which the court denied. Rather, this essay intends to present the common sense rationale for why a new supreme court rule in Wisconsin recognizing FLCs is vitally needed and why all lawyers in Wisconsin should energetically support such a rule. These reasons greatly outweigh any reservations that members of the court or the bar may have regarding FLCs. As a vehicle to encourage open debate regarding this issue, the Model Rule is included in the Appendix.

Although there truly are numerous arguments to support an FLC rule, this essay focuses on two. The first argument is to improve the quality of legal services for "out-bound" legal work—direct investment in foreign countries such as Japan, France, or Germany by American corporations. The second reason a rule is important in Wisconsin is to ensure that Wisconsin is not left out of the globalization of legal services.

## II. DEFINITIONS

Some people seem threatened or concerned about what an FLC might do in Wisconsin. Because virtually all of the concern expressed appears to be simply a misunderstanding of the FLC's role, it is important to define exactly what FLCs should be allowed to do in Wisconsin. First, FLCs do not compete with Wisconsin lawyers because they offer

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much more thorough analysis of the FLC issue concerning all of the United States, see Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 KAN. L. REV. 453, 477-83 (1997); Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998) (providing a very helpful analysis of the inconsistent and varied requirements of the various state FLC rules).

6. See Needham, *Licensing of FLCs*, *supra* note 5, at 1139.

7. See, e.g., Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989); Kelly Charles Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767 (1983); William R. Slomanson, *California Becomes Latest State to Consider "Foreign Legal Consultant,"* 80 AM. J. INT'L L. 197 (1986); John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT'L L. & POL'Y 975 (1997).

expertise most Wisconsin lawyers do not possess and Wisconsin lawyers possess expertise and a license most FLCs will not possess.<sup>8</sup> In fact, an FLC in any given law firm should actually attract work. It appears that some of the international legal work originating in Wisconsin is currently farmed out to law firms in Chicago because Illinois has an FLC rule.<sup>9</sup> Therefore, Illinois law firms can employ FLCs and have more in-house expertise than Wisconsin law firms. At least that seems to me to be the perception among the consumers of legal services in Wisconsin. Having an FLC in Wisconsin, therefore, would create more business opportunities for Wisconsin lawyers because they would have a level of in-house expertise comparable to Chicago law firms.

Second, an FLC in Wisconsin should be prohibited from practicing American law.<sup>10</sup> In fact, having known many FLCs in other jurisdictions, both in this country and in foreign countries, it is my opinion that there are virtually none who would even dream of dispensing any legal advice regarding American law unless they are admitted to the bar of some United States jurisdiction. Rather, these people are engaged in the valid and important business of answering questions about the laws of their *home* jurisdiction. Therefore, if the attorney is from Japan and admitted as a "Bengoshi" there, as an FLC in America he or she would only dispense legal advice regarding the laws of Japan. This is only common sense. The argument or the concern that if an FLC rule is adopted in Wisconsin the Supreme Court will be too busy tracking down and punishing foreign lawyers writing wills in Rhinelander is neither historically nor factually supported in any of the other United States jurisdictions with FLC rules.<sup>11</sup>

Third, some sort of restrictions regarding the scope of practice are

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8. A good example of the activities or advice an FLC is engaged in is demonstrated by the rather impressive amount of professional writing they engage in as a class. See, e.g., Mao-chang Li, *Legal Aspects of Labor Relations in China: Critical Issues for International Investors*, 33 COLUM. J. TRANSNAT'L L. 521 (1995) (the author of this article is an FLC at Law Offices of Min, Sohn & Kim, Seoul, Korea; LL.B., LL.M., Beijing University Law School; Diploma, Hague Academy of International Law; LL.M., Harvard Law School); Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT'L & COMP. L.J. 585 (1997) (the author is an FLC in Seoul, Korea, a member of the Connecticut and New York bars).

9. See ILL. SUP. CT. R. 712 (1990).

10. See Model Rule, *supra* note 3 at 219, 224 (implying that the most important restriction on FLCs is that they are not allowed to practice United States law unless they are qualified to do so).

11. Apparently only one FLC in the twenty-three year history of the FLC rule in New York has ever lost his license due to misconduct as an FLC. See Hope B. Engel, *New York's Rules on Licensing of Foreign Legal Consultants*, 66 N.Y. ST. B. J. 36, n.4 (1994).

necessary. Neither we nor foreign lawyers should be offended by the Wisconsin Supreme Court imposing narrow restrictions concerning who may dispense legal advice regarding the laws of foreign jurisdictions in Wisconsin.<sup>12</sup> Therefore, any FLC rule should clearly delineate that FLCs can only give advice regarding their home jurisdiction and not regarding Wisconsin law or any other United States jurisdiction unless they are specifically admitted to that United States bar as a regular attorney.

Fourth, some sort of qualitative review and control obviously must be maintained to ensure the competency of FLCs. Many jurisdictions require that FLCs have five or more years of experience in their home jurisdiction, for example.<sup>13</sup> Although American lawyers abroad complain about these types of restrictions, they are clearly necessary to confirm that FLCs are minimally competent. Because Wisconsin clients and lawyers will rely on FLCs without any other knowledge of their competency, it is important that any FLC in Wisconsin possess at least minimal skills in their home jurisdiction. The title "Foreign Legal Consultant" should only be conferred if foreign lawyers meet a set standard of competency.

This issue of professional competence is a serious consideration. The specter of a flood of unregulated, unsupervised and unscrupulous foreign attorneys preying on the citizens of Wisconsin is certainly troubling and unwanted. Although the likelihood of foreign lawyers engaging in such conduct in Wisconsin is almost non-existent (or at least significantly outweighed by the commercial and social benefits such foreign attorneys could bring to Wisconsin), a rule in Wisconsin could easily address such a problem. Any FLC rule in Wisconsin should authorize the courts to impose discipline and supervise cases of professional conduct with respect to these foreign attorneys. The rule should also place an affirmative burden on the applicant to prove competency. Finally, and perhaps most importantly, FLCs should be specifically limited to the types of duties they can perform. Their expertise should be limited to advising United States companies and individuals who may want to en-

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12. In fact, even the European Union places restrictions on the practice of law by non-nationals of each country. See Bernhard Schloh, *Freedom of Movement of Lawyers Within the European Economic Community*, 9 ST. LOUIS U. PUB. L. REV. 83, 88-99 (1990) (discussing efforts to achieve the free movement of lawyers within the European Economic Community); Crabb, *supra* note 7, at 1770-87 (addressing barriers faced by American attorneys attempting to engage in a legal practice in foreign countries).

13. See, e.g., ILL. SUP. CT. R. 712(a)(1) (requiring five years of practice in the last seven years).

gage in business activities in that foreign country.

Secondarily, FLCs should act as a conduit to refer incoming legal work from their home jurisdiction to the American law firm with which they would be associated.<sup>14</sup> No FLC rule currently in existence in the United States allows FLCs to set up practice on their own. Rather, all FLCs should be affiliated with and/or sponsored by an American law firm. In this manner, the public interest is served by insuring competence and extensive supervision, and the domestic legal market is protected because these foreign attorneys are proscribed from performing domestic legal functions.

Therefore, FLCs function not to take work away from Wisconsin lawyers. In fact, they are intended to create more work for Wisconsin lawyers by attracting in-bound investment and related work and to allow Wisconsin lawyers to become licensed FLCs in other countries. Furthermore, FLC rules are intended to facilitate access to competent foreign legal counsel. No one versed in this issue expects FLCs to start dispensing legal advice regarding American law at such an alarming rate that it would justify their complete expulsion from the United States as a class.<sup>15</sup> Rather, with clear restrictions on what FLCs can and cannot engage in and some minimal qualification procedure to ensure competence, everyone should be protected.

### III. EXPERIENCE IN OTHER UNITED STATES JURISDICTIONS

Traditionally, states have been wary of licensing legal consultants because of four major areas of concern. Professional incompetence, accountability, encroachment on domestic legal markets, and reciprocity are all typically suggested as reasons for disallowing such licensure. The Wisconsin Supreme Court is rightly concerned about such issues. Their function is to protect the public interest and the interests of the local bar. However, it is important to note that New York approved the licensure of FLCs in 1974.<sup>16</sup> Since that time, fourteen more states have

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14. Andrew Pardieck, *Foreign Legal Consultants: The Changing Role of the Lawyer in a Global Economy*, 3 IND. J. GLOBAL LEGAL STUD. 457, 461 (1996) (demonstrating the need for more foreign counsel in international practice).

15. However, for the contrarian argument that the movement to license FLCs has slowed, and for the xenophobic argument that FLCs are part of a long term conspiracy where their goal is to wait until States admit them to the regular bar to engage in the regular practice of law in that state, see Erica Moeser, *The Future of Bar Admissions and the State Judiciary*, 72 NOTRE DAME L. REV. 1155, 1173-75 (1997).

16. See Engel, *supra* note 11, at 36.

opened their doors to FLCs,<sup>17</sup> including several that compete directly with Wisconsin for the purpose of attracting international business and trade. As of this writing, no state has reported having any significant problems in these four areas of concern arising from the licensure of FLCs. This fact bears repeating. In over twenty-three years, there has been no significant evidence that any state has not been able to overcome potential areas of abuse by tailoring its proposed rule to protect the public interest and the local bar from the aforementioned areas of concern. Other states' rules, like Illinois Rule 712, are instructive because they illustrate how, through statutory construction, these areas of concern have been addressed successfully.<sup>18</sup> Moreover, they show that if other states are willing to allow licensure, Wisconsin must follow or risk losing legal business to law firms in states that allow such licensure.

Another fear of opponents of licensing foreign attorneys has been that foreign lawyers may escape liability for any malpractice by fleeing to their home country, thus eliminating any redress of complaints by American clients. Again, on the surface, the concern is valid, but may be exaggerated. A rule allowing licensure of foreign attorneys could prevent this lack of accountability by requiring advance written consent to service of process through the clerk of the court of Wisconsin in any case involving allegations of professional misconduct prior to licensure. Courts would then be certain to hold personal jurisdiction over the foreign attorney.

Another safeguard that a proposed rule allowing licensure of foreign attorneys would contain is requiring proof of professional liability insurance or proof of financial responsibility in cases of misconduct. This ensures that clients in the United States are given adequate redress of grievances associated with FLCs. This type of protection insures that U.S. clients can rely on the fact that claims of misconduct or malpractice will be effective against FLCs. Also, the FLC should be associated with a specific American law firm, whose malpractice policy should cover the conduct of the FLC. Again, carefully drafting the rule can solve the problem of accountability.

These arguments presume that accountability is actually an issue that has caused some damage or concern to American clients. I have searched in vain to find any significant problems that justify a xenophobic approach to this issue. If there are such actual cases, they are not reported.

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17. *See id.*

18. *See* ILL. SUP. CT. R. 712(e).

Another issue related to the accountability of FLCs is the fear that FLCs will hold themselves out as regular members of any state bar. This problem has also been effectively dealt with by other states. Illinois Supreme Court Rule 712 takes another step in preventing abuses by limiting how foreign attorneys can conduct business. Foreign attorneys in Illinois must not use any title other than FLC and are prohibited from in any way holding themselves out as attorneys licensed in Illinois or as attorneys licensed in any United States jurisdiction.<sup>19</sup> Because so many states have now adopted rules governing the licensure of foreign attorneys, it appears that solutions are being found to the challenges of licensure.

Perhaps the most effective obstacle to the licensing of foreign attorneys as legal consultants has been the local bar's fear that FLCs will infringe on the domestic market for legal services. As stated previously, licensure may in fact increase the legal work available for local attorneys. The evidence from other states' experience with FLCs is that when foreign lawyers advise their foreign clients, they often rely on the expertise of a local U.S. lawyer to understand the appropriate U.S. law. The foreign attorney will seek local advice when advising a foreign client because of the need to understand the specific U.S. law that may be applicable. The result is not beggar-thy-neighbor competition, but rather, effective collaboration leading to an increase in business for the local bar.

Another protection of the domestic market for legal services that can be included in a proposed rule is that of a prescriptive list. For example, Illinois Supreme Court Rule 712 specifically enumerates legal services which FLCs are prohibited from providing.<sup>20</sup> The list is so extensive that it is not feasible to list them all here, but that same unfeasibility serves as evidence that the domestic market can indeed be protected. A proposed rule can prevent any threat to the domestic legal market by expressly prohibiting FLCs from preparing instruments regarding property, testamentary matters, marital relations, child custody, personal injury, U.S. immigration law, or in any way holding themselves out as a member of the local bar. With these parameters in place, the nature of the relationship between the local attorney and the FLC is symbiotic. In this relationship, members of the bar will be able to call upon the legal consultant locally for advice as necessary, and conversely, they themselves can expect to be asked by the legal consultant for ad-

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19. *See id.*

20. *See id.*



vice on a great many issues covering a wide variety of situations. This is a much more productive atmosphere than the current vacuum of knowledge in which legal practitioners, both foreign and domestic, operate today.

#### IV. WISCONSIN AND THE GLOBALIZATION OF LEGAL SERVICES

One of the primary stumbling blocks to the globalization of legal services has been the notion of reciprocity. Reciprocity requirements were created to deal with concerns over asymmetrical market access by domestic bar members.<sup>21</sup> Domestic attorneys in any jurisdiction in the world have been hesitant to give access to their market where they enjoy the ability to charge near monopoly rents if they do not enjoy access to other markets. This position has been very damaging to the necessary globalization of legal services as the markets in which goods and other services flow have become increasingly globalized.

For example, Japan long used the lack of any provisions for Japanese attorneys to practice as legal consultants in the U.S. as an excuse to prevent U.S. attorneys from practicing in Japan.<sup>22</sup> In the Foreign Lawyers Act of 1986, Japan specifically prohibited any foreign attorney from practicing in Japan if the home country, or state in the case of a U.S. attorney, did not provide for such reciprocal practice. As states such as New York have opened up their practice to allow FLCs, Japanese law allowed New York attorneys to practice in Japan as FLCs. The lesson seems simple: opening up practice in one country will cause a reciprocal opening in another. Irrespective of this, a state may protect itself and insure reciprocity by simply inserting a reciprocity requirement. This requirement would simply state that an FLC could not be licensed within the state's jurisdiction unless a lawyer from that state enjoys a reciprocal right.

Therefore, in an attempt to rationalize concerns over asymmetrical market access, various countries and the individual states in the United States which have FLC rules established the notion of reciprocity.<sup>23</sup> Un-

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21. See Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-border Legal Services*, 19 HOUS. J. INT'L L. 95, 133 (1996).

22. See generally Crabb, *supra* note 7 (detailing the history of restrictive practices in licensing foreign lawyers in Japan).

23. Japan, for example, between 1986 and 1995 allowed licensure of American attorneys under their FLC statute only if that attorney's home state jurisdiction had an FLC rule that allowed licensure of Japanese FLCs there. See J. Ryan Dwyer III, Comment, *The Door Only Opens Out: Japan's Special Measures Law for Regulation of Foreign Attorneys*, 18 U. HAW.

der the traditional reciprocity requirement of FLC rules and statutes, unless the state in which an individual is admitted to practice law has an FLC rule, even countries with an FLC statute would not allow that American attorney to be a member of its FLC bar. If that attorney's state adopts such a rule, its attorneys can be considered for FLC status and will be allowed to charge for giving advice regarding the laws of its home jurisdiction in that foreign country.

In an attempt to deal with these concerns about asymmetrical market access and to facilitate the globalization of the provision of legal services, the United States urged that legal services be included in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).<sup>24</sup> (Unfortunately, as the leading voice of including legal services in the rubric of GATT, it is rather distressing that the United States has the most complicated systems for foreign lawyers.<sup>25</sup>) Addressed in the General Agreement on Trade in Services ("GATS"),<sup>26</sup> after much debate and diplomacy, the final resolution may be no resolution at all. However, the intent of GATS is now interpreted by some countries to require the relaxation of reciprocity.

For example, Japan has now relaxed its rather strict reciprocity to allow a much more liberal application of reciprocity.<sup>27</sup> Today, an attorney from a GATT member nation does not have to show specific reciprocity to be admitted as an FLC in Japan. Japan reserves the right to

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L. REV. 257, 266 (1996). For more discussion on FLCs in Japan prior to 1995, see KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 291-316 (1996); Robert J. Walters, "Now That I Ate the Sushi, Do We Have a Deal?"—*The Lawyer as Negotiator in Japanese-U.S. Business Transactions*, 12 *Nw. J. INT'L. L. & BUS.* 335 (1991).

24. For an exhaustive and rather authoritative discussion of the notion of GATT as being the principal mechanism for globalizing the provision of legal services, see Annie Eun-ah Lee, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT*, 13 *B.C. INT'L & COMP. L. REV.* 91 (1990).

25. See Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 *HAMLIN L. REV.* 667, 678 (1997) (stating that the United States system is complicated because of multiple bars and differing standards between the state bars).

26. 19 U.S.C. § 3571 (1994).

27. See Law No. 66 of 1986, art. 10-3-2 as amended by Law No. 91 of 1995. There is some room for interpretation regarding these amendments, however. The new provision states that "the Minister of Justice *may* approve [a foreign legal consultant's application] . . . if its non-approval would undermine the faithful performance of an international treaty [to which Japan is a member]" (emphasis added). This has been mistranslated as *requiring* the Minister of Justice to approve such applications. See Dwyer, *supra* note 23, at 268. ("The amendment provides that 'the Minister of Justice *shall* give approval [to a foreign attorney's application] when the non-approval violates the sincere implementation of treaties and other international agreements'" (emphasis added)).

require specific reciprocity from GATT non-member nations. As the list of GATT non-members is rather limited, this rule might be interpreted as a rather progressive attempt to comply with the most favored nation clauses of GATT and GATS.<sup>28</sup> Although this is clearly not an abolishment of reciprocity, it is certainly more in tune with the spirit of GATT and GATS than most American FLC rules which still require specific reciprocity.<sup>29</sup>

Therefore, the traditional notion of reciprocity in licensing FLCs has quickly become outdated.<sup>30</sup> Today, with the passage and implementation of NAFTA,<sup>31</sup> TRIPS, GATT, the European Union, etc., the world is quickly becoming a more and more confined place in which to practice law.<sup>32</sup> Much of the world is now ahead of Wisconsin (and most other American states) in its openness to FLCs. Other nations have recognized the need for FLCs in order to ensure the highest quality of legal services possible for their own businesses and citizens.<sup>33</sup>

The primary goal is to open up foreign markets to competition for American goods and services including the provision of legal services. Allowing FLCs in the several states encourages this process. In fact, rather than being a threat to the market for legal services in any given jurisdiction, the existence of FLCs enhances and enlarges the market. Law firms today seem to be intent on being "full service" law firms. A law firm in Wisconsin is not "full service" if it has to refer to an FLC in Illinois or New York for reliable advice about direct investment in

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28. See Dwyer, *supra* note 23, at 268.

29. Of course, specific reciprocity still has considerable value as many countries have been slow in relaxing the reciprocity requirements as required under GATT. Therefore, although the reciprocity rationale may no longer provide a justification for an FLC rule in Wisconsin to gain access to Japanese or French FLC markets, it still provides very positive rationale for gaining access to FLC markets which have not yet complied with GATT.

30. See Robert F. Taylor and Philippe Metzger, *GATT and Its Effect on the International Trade in Legal Services*, 10 N.Y.U. INT'L L. REV. 1 (1997).

31. Under NAFTA, reciprocal licensing of attorneys and engineers is an important aspect of this regional agreement. See North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-United States, art. 1210; Annex 1210.5, 32 I.L.M. 289, 605 (1993). Some states, such as Arizona, have already amended its rules of practice to permit Mexican foreign legal consultants to practice Mexican law in Arizona. See AZ. SUP. CT. R. 33(f) (1994); see also Barker, *supra* note 21, at 99; Michael J. Chrusch, Comment: *The North American Free Trade Agreement: Reasons for Passage and Requirements to be a Foreign Legal Consultant in a NAFTA Country*, 3 ILSA J. INT'L & COMP. L. 177 (1996).

32. See Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Service*, 16 MICH. J. INT'L L. 941 (1995); Burr, *supra* note 25.

33. See Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century From Now?*, 1 J. INST. STUD. LEGAL ETHICS 297, 312 (1996).

France or Japan. Furthermore, even if access were asymmetrical, the jurisdiction with the FLC has a market for legal services which is larger by the size of the FLC component.

#### V. CONCLUSION

The concerns regarding licensure of FLCs are well-intentioned but unfounded. The impact of licensing FLCs has been entirely positive for those jurisdictions in the United States with the foresight to implement such rules. The trend that started in New York and spread to other states has spread for good reason.

As a professor of law in an American law school, I am often surprised how little some of our most impressive students know anything about outside of the boundaries of the United States. That used to be acceptable. In this international market for legal services, it is no longer so. Without the assistance of an FLC, Wisconsin attorneys are isolated from a very useful source of knowledge and this isolation may prove to be both economically and professionally dangerous in the future. They are left to advise their clients without the benefit of an important resource that would help them understand comparative legal systems. This is a potentially destructive environment that leaves attorneys to make important legal decisions regarding foreign law without appropriate guidance. If the important concerns of professional competence, accountability, destruction of domestic legal markets, and reciprocity had caused problems for states that have already implemented such licensure, then it would make sense for Wisconsin to wait and see if more effective provisions could be developed. However, this has not happened. Other states have convincingly demonstrated that it is possible to construct a rule to counteract the foreseeable risks of licensing foreign attorneys as legal consultants. The ABA has agreed by adopting its Model Rule for the Licensing of Foreign Legal Consultants. Moreover, the increase in international business and trade in states where this has been done should be enough to persuade the Wisconsin Supreme Court to adopt a similar rule.

An appropriate FLC rule in Wisconsin would foster international business and investment in this state. It would provide new opportunities for Wisconsin lawyers in foreign jurisdictions. It would generate a resource pool to help all people in Wisconsin get easier access to legal advice regarding direct investment in foreign countries without having to go to Chicago, New York, or Tokyo to obtain these same services. These benefits clearly and significantly outweigh any risks of abuse. For these reasons, we should all support the adoption of a rule licensing

Foreign Legal Consultants in Wisconsin.<sup>34</sup>

## APPENDIX

### MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS

#### § 1. General Regulation as to Licensing

In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:

- (a) is 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 a public authority;
- (b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;
- (c) possesses the good moral character and general fitness requisite for a member of the bar of this State;
- (d) is at least twenty-six years of age;<sup>\*\*</sup> and
- (e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

#### § 2. Proof Required

An applicant under this Rule shall file with the clerk of the [name of court]:

- (a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;

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34. I have attached the ABA's Model Rule on FLCs as a starting point for debate. Given the intent of GATT and GATS, it might be wise to change language in Section 3 on reciprocity to allow a more relaxed standard as Japan has done.

<sup>\*</sup>Section 1(b) is optional; it may be included as written, modified through the substitution of shorter periods than five and seven years, respectively, or omitted entirely.

<sup>\*\*</sup>Section 1(d) is optional; it may be included as written, modified through the substitution of a lesser age than twenty-six years, or omitted entirely.

(b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and

(d) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the [name of court] may require.

### § 3. Reciprocal Treatment of Members of the Bar of this State

In considering whether to license an applicant to practice as a legal consultant, the [name of court] may in its discretion take into account whether a member of the bar of this State would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the bar who is seeking or has sought to establish an office in that country may request the court to consider the matter, or the [name of court] may do so sua sponte.

### § 4. Scope of Practice

A person licensed to practice as a legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

(a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission pro hac vice pursuant to [citation of applicable rule]);

(b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;

(c) prepare:

(i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or

(ii) any instrument relating to the administration of a decedent's estate in the United States of America;

(d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;

(e) render professional legal advice on the law of this State 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 qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State;

(f) be, or in any way hold himself or herself out as, a member of the bar of this State; or

(g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:

(i) his or her own name;

(ii) the name of the law firm with which he or she is affiliated;

(iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

(iv) the title "legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."

## § 5. Rights and Obligations

Subject to the limitations set forth in Section 4 of this Rule, a person licensed as a legal consultant under this Rule shall be considered a lawyer affiliated with the bar of this State and shall be entitled and subject to:

(a) the rights and obligations set forth in the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] or arising from the other conditions and requirements that apply to a member of the bar of this State under the [rules of court governing members of the bar]; and

(b) the rights and obligations of a member of the bar of this State with respect to:

(i) affiliation in the same law firm with one or more members of the bar of this State, including by:

(A) employing one or more members of the bar of this State;

(B) being employed by one or more members of the bar of this State or by any partnership [or professional corporation] which includes members of the bar of this State or which maintains an office in this State; and

(C) being a partner in any partnership [or shareholder in

any professional corporation] which includes members of the bar of this State or which maintains an office in this State; and

(ii) attorney-client privilege, work-product privilege and similar professional privileges.

## § 6. Disciplinary Provisions

A person licensed to practice as a legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State and to this end:

(a) Every person licensed to practice as a legal consultant under these Rules:

(i) shall be subject to control by the [name of court] and to censure, suspension, removal or revocation of his or her license to practice by the [name of court] and shall otherwise be governed by [citation of applicable statutory provisions]; and

(ii) shall execute and file with the [name of court], in such form and manner as such court may prescribe:

(A) his or her commitment to observe the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] and the [rules of court governing members of the bar] to the extent applicable to the legal services authorized under Section 4 of this Rule;

(B) an undertaking or appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;

(C) a written undertaking to notify the court of any change in such person's good standing as a member of the foreign legal profession referred to in Section 1(a) of this Rule and of any final action of the professional body or public authority referred to in Section 2(a) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person; and

(D) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the clerk of such court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State,



whenever after due diligence service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such clerk by means of a duly acknowledged supplemental instrument in writing.

(b) Service of process on such clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of \$10. Service of process shall be complete when such clerk has been so served. Such clerk shall promptly send one of such copies to the legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such legal consultant at the address specified by him or her as aforesaid.

#### § 7. Application and Renewal Fees

An applicant for a license as a legal consultant under this Rule shall pay an application fee which shall be equal to the fee required to be paid by a person applying for admission as a member of the bar of this State under [rules of court governing admission without examination of persons admitted to practice in other States]. A person licensed as a legal consultant shall pay renewal fees which shall be equal to the fees required to be paid by a member of the bar of this State for renewal of his or her license to engage in the practice of law in this State.

#### § 8. Revocation of License

In the event that the [name of court] determines that a person licensed as a legal consultant under this Rule no longer meets the requirements for licensure set forth in Section 1(a) or Section 1(c) of this Rule, it shall revoke the license granted to such person hereunder.

#### § 9. Admission to Bar

In the event that a person licensed as a legal consultant under this Rule is subsequently admitted as a member of the bar of this State under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed superseded by the license granted to such person to practice law as a member of the bar of this State.

#### § 10. Application for Waiver of Provisions

The [name of court], upon application, may in its discretion vary the application of or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

