

American Bar Association
Section of Legal Education and Admissions to the Bar

Report of the Special Committee on International Issues

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INTRODUCTION

The legal profession, like every other segment of American economic activity, has been affected by the development of a global economy. Just as American attorneys increasingly represent clients on an international basis and in foreign venues, foreign attorneys¹ increasingly seek to provide legal services in the United States. Over the years, the Section of Legal Education and Admissions to the Bar through its Council, committees, members and staff, has participated in a number of ABA initiatives relating to the globalization of the practice of law and legal education. Examples include the development of model rules on practice for Foreign Legal Consultants in this country, the representation on the ABA Task Force on International Trade in Legal Services, providing advice and assistance to foreign law schools with regard to courses of study and accreditation matters, sponsoring and participating in conferences and meetings addressing various aspects of international legal practice and bar admission matters, and assisting with the ABA Rule of Law Initiative (ROLI) on matters relating to legal education in foreign jurisdictions.

Despite these varied activities, the Section and its Council have not undertaken a comprehensive review of the impact of international issues on legal education and admission to the bar up to this point. Thus, consistent with the directive of the 2006 Section Strategic Plan that the Council develop a plan to “ensure participation in discussions relating to international trade in legal services and the appropriate role of the Section in the international arena”, Council Chair Randy Hertz appointed this special Committee to undertake such a comprehensive review. The Committee is comprised of current and former Council members, members of the judiciary, legal academics and private practitioners. While directed to review all international developments or issues affecting the work of the Section, the committee was specifically charged with considering the following issues:

- (1) a model rule for the admission of foreign lawyers to practice law or sit for bar examinations in the various United States jurisdictions;
- (2) the accreditation of non-US law schools;
- (3) coordination with other ABA entities;
- (4) additional information on the international activities in which ABA-approved law schools are engaged; and
- (5) the accreditation of LL.M. programs.

These issues reflect not only the Council’s interest in maintaining a working relationship with other ABA entities regarding international initiatives, but also the important role of the Section in assisting state supreme courts and bar admissions administrators in their public protection responsibilities by insuring that persons licensed to practice law (i) have the requisite legal education; (ii) are fully conversant with the American rules of professional responsibility and the substantive law governing the

¹ The term “foreign attorney” is used in this report to denote an individual who received his or her legal education outside the United States. While the term may include persons who have been licensed to practice law in a foreign jurisdiction, it is not limited to those individuals.

responsibilities of lawyers to clients, courts, and others; and (iii) meet all character and fitness standards. Traditionally, the Section has provided the licensing authorities assistance in this regard primarily through accreditation of US-based law schools. It has not accredited foreign-based law schools. Because of the diverse legal systems and educational basis for legal practice that exist internationally, the various state licensing authorities are facing increased challenges in determining what prerequisites and under what conditions a foreign attorney should be granted the opportunity to practice law in this country. Thus, a major focus of the Committee involved exploration of methods by which the ABA can provide such information to the state supreme courts and bar admissions administrators.

The Committee considered its charge to:

- engage in information-gathering and discussion culminating in recommendations that provide the Council with background information; and
- provide a roadmap or blueprint for making informed decisions on the issues raised.

To meet this charge, the Committee met in person, by conference call and through email exchange. Subcommittees addressing three basic areas were created to address the charges given the Committee:

- (1) accreditation of LL.M. programs and foreign law schools;
- (2) a model rule for the admission of foreign attorneys; and
- (3) further development of information and coordination with other ABA entities and ABA-approved law schools with regard to international legal education and initiatives.

Committee research and surveys expanded the information base available to the Committee. Following these efforts, the Committee adopted the recommendations contained in the attached report. In submitting this report and its recommendations, the Committee has attempted to provide the Council with information on the current factual context relating to the issues raised. In this way the Committee has attempted to provide the Council with a context for each recommendation. This report also identifies factors that accompany each issue raised as well as the pros and cons accompanying the recommendations made. Finally, the report identifies matters that should be considered in implementing the recommendations.

The Committee, through its Chair, is available to meet with the Council as it considers the recommendations of the Committee and the appropriate next steps.

Respectfully submitted,

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I. ENHANCING THE DECISION MAKING PROCESS FOR THE ADMISSION OF FOREIGN ATTORNEYS SEEKING TO PRACTICE IN THE UNITED STATES

Inherent in the charge to the Committee was the presumption that foreign educated attorneys are or will be allowed to practice law in this country. Three of the five issues presented to the Committee reflect the reality that persons who earned their first degree in law outside the United States, that is in foreign law schools, are applying for admission to practice law in the United States and over half of the states currently have some provisions allowing such practice under a variety of conditions.² The Committee did not, therefore, debate or consider *whether* such foreign attorneys should be allowed to qualify for bar admission in this country, but what mechanisms could be advanced to insure that foreign attorneys seeking such qualification do indeed have a legal educational experience comparable to that required of American educated applicants and therefore sufficient to support a conclusion that such individual be given the opportunity to practice law in this country. Determining the conditions under which these foreign applicants should be allowed to sit for a bar examination in an American jurisdiction is a complicated question, taxing the time and expertise available to bar examination administrators. Thus, the focus of our analyses and recommendations is on:

- (1) Whether expanding the Section's accreditation function to include legal education delivered in foreign jurisdictions and LL.M. programs are mechanisms to enhance reliable information available for state supreme courts and other bar administrators when making these decisions; and
- (2) Whether providing a model rule for the admission of foreign attorneys is another mechanism to assist in these decisions

Addressing these issues should begin, however, with a review of the current status of international legal practice and the admission of foreign lawyers to practice law in this country.

A. LANDSCAPE

1. International Trade Statistics – Why U.S. Clients Might Want Access to Foreign-Educated Lawyers

There are a number of reasons why U.S. clients might want a foreign-educated law graduate available in the U.S. to help them. In 2008, for example, the U.S. had exported \$1.836 trillion of goods and services and imported \$2.517 trillion in goods and services.³ In 2007, which is the most recent year for which statistics are available, there were \$20 trillion in foreign-owned assets in the U.S. and \$17.6 trillion in U.S.-owned

² The term "foreign law school" does not include ABA-approved law schools with campuses outside the United States.

³ See http://www.bea.gov/newsreleases/international/trade/trad_time_series.xls.

assets abroad.⁴ Moreover, this international trade is not confined to the largest U.S. states. Every state in the country except Hawaii exported more than \$1 billion of goods and services in 2008, and many of them had eight-figure exports.⁵

Because many of the transactions underlying these statistics undoubtedly involved both foreign and domestic lawyers, it should come as no surprise to learn that there is a significant amount of international trade in legal services. For example, in 2007, which is the most recent year for which this data is available, the U.S. exported \$6.4 billion in legal services and imported \$1.6 billion.⁶ Moreover, these statistics do not take into account international legal services trade by affiliates, sometimes called GATS Mode 3.⁷ Thus, in 2006, U.S. law firms' foreign offices provided \$2.7 billion in legal services; in 2004, foreign firms' U.S. offices provided \$28 million in legal services.⁸

⁴ See <http://www.bea.gov/international/index.htm#trade>.

⁵ See TradeStats Express-State Export Data, 2008 Exports of NAICS Total All Merchandise to World, <http://tse.export.gov/MapFrameset.aspx?MapPage=SEMapStateDisplay.aspx&UniqueURL=irbonbefysgelqfhna2kyg55-2008-4-7-18-3-47>. This government website lists, in descending order, 2008 state exports of goods and services: Texas \$192,143,623,000; California \$144,813,263,000; New York \$79,596,240,000; Washington \$66,884,598,000; Florida \$54,271,961,000; Illinois \$53,444,522,000; Ohio \$45,487,882,000; Michigan \$44,871,354,000; Louisiana \$41,926,763,000; New Jersey \$35,478,965,000; Pennsylvania \$34,448,471,000; Massachusetts \$28,292,500,000; Georgia \$27,509,317,000; Indiana \$26,507,146,000; North Carolina \$25,075,644,000; Tennessee \$23,237,044,000; Wisconsin \$20,552,773,000; Puerto Rico \$19,963,530,000; South Carolina \$19,831,864,000; Arizona \$19,742,359,000; Oregon \$19,362,668,000; Minnesota \$19,158,620,000; Kentucky \$19,089,372,000; Virginia \$18,932,505,000; Alabama \$15,845,709,000; Connecticut \$15,313,059,000; Missouri \$12,834,416,000; Kansas \$12,475,251,000; Iowa \$12,093,346,000; Maryland \$11,378,740,000; Utah \$10,293,513,000; Colorado \$7,667,991,000; Mississippi \$7,300,836,000; Nevada \$6,118,992,000; Arkansas \$5,778,809,000; West Virginia \$5,630,720,000; Nebraska \$5,408,858,000; Oklahoma \$5,058,052,000; Idaho \$4,987,721,000; Delaware \$4,894,215,000; New Hampshire \$3,746,116,000; Vermont \$3,596,426,000; Alaska \$3,569,108,000; Maine \$3,011,497,000; New Mexico \$2,779,521,000; Virgin Islands \$2,763,015,000; North Dakota \$2,759,672,000; Rhode Island \$1,976,689,000; South Dakota \$1,644,608,000; Montana \$1,390,440,000; District of Columbia \$1,195,897,000; Wyoming \$1,080,992,000; Hawaii \$963,998,000; Unallocated \$45,954,458,000.

⁶ See U.S. Department of Commerce (USDOC). Bureau of Economic Analysis (BEA). International Economic Accounts, U.S. International Services: Cross-border Trade 1986-2007, and Services Supplied Through Affiliates, 1986-2006. "Table 7: Business, Professional, and Technical Services." 2001-2005, 2006-2007. <http://www.bea.gov/international/intlserv.htm>. (The same data appears in http://www.bea.gov/scb/pdf/2008/10%20October/services_tables.pdf.) For confirmation that this is the most recent data available, see Telephone Interview with Dr. Tamar Asadurian, U.S. International Trade Commission and Laurel Terry (March 25, 2009).

⁷ Article 1(2) of the General Agreement on Trade in Services (GATS) refers to four different "modes" of supply of a service. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter GATS]. For additional information on these four modes and what they mean in the context of legal services, see INTERNATIONAL BAR ASSOCIATION, GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (2002), available at <http://www.ibanet.org/images/downloads/gats.pdf> [hereinafter IBA GATS HANDBOOK].

⁸ U.S. Department of Commerce (USDOC). Bureau of Economic Analysis (BEA). International Economic Accounts, U.S. International Services: Cross-border Trade 1986-2007, and Services Supplied Through Affiliates, 1986-2006. "Table 9: Services Supplied to Foreign Persons by U.S. MNCs Through Their Nonbank MOFAs: NAICS-Based Industry of Affiliate by Country of Affiliate, 1999-2006, <http://www.bea.gov/international/intlserv.htm> (accessed January 28, 2009) and U.S.

Recent census data reveals another reason why U.S. clients might want access to foreign-educated lawyers in the U.S. The 2000 U.S. Census included information on foreign born residents. Between 1990 and 2000, **every jurisdiction** had at least a 19% increase in its foreign-born population.⁹ Moreover, all except five jurisdictions had **at least** a 30% increase in its foreign population, with nineteen jurisdictions having more than 100% increase. The states with the largest percentage increases are not necessarily the states one might predict – they are Alabama, Arizona, Arkansas, Delaware, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee and Utah.¹⁰ While not all of these foreign born residents are likely to have family law, inheritance or business relationships with their country of origin, it stands to reason that the more foreign-born residents who live in a state, the more interactions they will have with their home country. And many of these interactions may be facilitated by the involvement of both domestic U.S. and foreign-educated lawyers.

2. **Existing ABA Foreign Lawyer Policies**

Undoubtedly in recognition of these kinds of statistics, the ABA Commission on Multijurisdictional Practice (MJP) included two foreign lawyer recommendations in its package of reforms. MJP Recommendation 8 urged all states to adopt rules permitting foreign lawyers to practice as a foreign legal consultant (FLC) without taking a U.S. qualification examination.¹¹ MJP Recommendation 9 recommended adoption of a Model Rule for Temporary Practice by Foreign Lawyers that would allow a foreign-educated lawyer to engage in temporary practice (sometimes called “fly-in fly-out” or FIFO) on terms similar to the MJP rules for domestic lawyers.¹² MJP Recommendations 8 and 9 currently are the only ABA policies that address foreign lawyer practice rights. There are three areas, however, in which the ABA might have foreign-educated lawyer admission policies, but does not. First, even though some states permit pro hac vice admission by foreign lawyers,¹³ the ABA does not have a policy on this issue.¹⁴ Second, even though

Department of Commerce (USDOC). Bureau of Economic Analysis (BEA), International Economic Accounts, U.S. International Services: Cross-border Trade 1986-2007, and Services Supplied Through Affiliates, 1986-2006. "Table 10: Services Supplied to U.S. Persons by Foreign MNCs Through Their Nonbank MOUSAs: NAICS-Based Industry of Affiliate by Country of Affiliate, 1999-2006." <http://www.bea.gov/international/intlserv.htm> (accessed January 28, 2009).

Unlike the statistics in note 6, supra, these statistics measure trade by “firm” rather than by individual lawyers. See also Telephone Interview with Dr. Tamar Asadurian, U.S. International Trade Commission and Laurel Terry (March 25, 2009) (confirming that 2004 and 2006 are the most recent years for which this kind of data is available.)

⁹ The Foreign-Born Population: 2000, Census 2000 Brief at 3 (Dec. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf>.

¹⁰ Id.

¹¹ ABA COMM’N ON MULTI-JURISDICTIONAL PRACTICE, REPORT 201H: LICENSING OF LEGAL CONSULTANT (2002), available at <http://www.abanet.org/cpr/mjp/201h.doc>.

¹² ABA COMM’N ON MULTI-JURISDICTIONAL PRACTICE, REPORT 201J: TEMPORARY PRACTICE BY FOREIGN LAWYERS (1993), available at <http://www.abanet.org/cpr/mjp/201j.doc>.

¹³ See, e.g., Pennsylvania Rules of Court, Rule 301 of the Pennsylvania Bar Admission Rules. Effective September 2007 (“An attorney, barrister or advocate who is qualified to practice in the courts of another state or of any foreign jurisdiction may be specially admitted to the bar of this Commonwealth for purposes limited to a particular matter.”); Illinois Supreme Court Rule 707. Pro Hac Vice, available at

twenty-five jurisdictions permit a foreign law graduate to sit for a bar examination under certain circumstances,¹⁵ the ABA does not have a Model Rule for the Admission of Foreign-Educated Applicants. Finally, although six states permit foreign in-house counsel to work for their employer in the U.S. provided they register with the state,¹⁶ the ABA does not have a policy on this issue.¹⁷

In addition to these ABA policies, it is perhaps worth noting that certain entities within the ABA have called upon the ABA and others to foster greater recognition of foreign lawyer qualifications.¹⁸

http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artvii.htm#Rule707 (“Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he or she is employed.”); Michigan Rule 8.126 Temporary Admission to the Bar, available at <http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2004-08-Order.pdf>. (“Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court or before an administrative tribunal or agency in this state when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case.... For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country.”)

¹⁴ Report 201f of the ABA MJP Commission provided a model pro hac vice rule, but did not address the issue of whether it should be available to foreign lawyers. See <http://www.abanet.org/cpr/mjp/report-201f.pdf>.

¹⁵ See infra notes 20-23 and accompanying text.

¹⁶ The states that have foreign lawyer in-house counsel rules are Arizona, Connecticut, Delaware, Virginia, Washington, and Wisconsin. See DEL. SUP. CT. R. 55.1 (2005), available at <http://courts.delaware.gov/Rules/?supremerule55-1.pdf>; WASH. SUP. CT. R. 8 (2007), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr08; VA. SUP. CT. RULE 1A:5 (2006), available at <http://www.vsb.org/site/members/cc-rule1a-5>; See CONN. SUP. CT. R. 2-15A; Rules of the Superior Court Regulating Admission to the Bar, Amendment to Sec. 2-15A – Foreign Law Degree or Law License-Effective January 1, 2009, available at http://www.jud.ct.gov/CBEC/housecounsel.htm#Amendment_to_Sec._2-15A; DEL. R. PROF’L CONDUCT 5.5 (as revised in 2007), available at http://courts.delaware.gov/Rules/?DLRPP_Oct2007.pdf; WIS. SUP. CT. R. 10.03(4)(f) (adopted July 30, 2008), available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=33576>.

¹⁷ The Section of Legal Education and Admission to the Bar recently agreed, however, to consider this issue. In exchange for this agreement, several individuals and entities agreed not to oppose during the August 2008 ABA Annual Meeting the proposed Model Rule for the Registration of In-House Counsel.

¹⁸ See ABA CEELI, *Globalization and the Challenges Facing Legal Education: the GATS, Mobility and Recognition of Qualifications* (September 2005), http://www.abanet.org/rol/publications/discussion_paper_legal_ed_globalization_2005.pdf; and ABA CEELI, *Legal Education Reform: The Development of Quality Assurance Mechanisms, Standards, and the Role of Quality Assurance and Accreditation Agencies* (September 2005), http://www.abanet.org/rol/publications/discussion_paper_legal_ed_quality_assurance_2005.pdf. These are discussed the Report’s Appendix C.

3. Are the States Interested in Having the ABA Assist in Providing Methods or Information to Assist in Decisions Regarding Admission of Foreign Law Graduates?

The Committee, through one of its subcommittees, circulated a seven-question questionnaire to state supreme courts and bar admissions officials, which is included as Appendix A. Questions 1 and 2 asked whether states ever allow foreign-educated applicants to sit for a bar examination or be admitted on motion. Twenty-five responding jurisdictions said they will allow a foreign-educated applicant to sit for a bar examination under certain circumstances; seven jurisdictions will admit a lawyer on motion under certain circumstances. Question 6 asked state officials whether they believed that they had received more applications from foreign-educated applicants for full admission in the past five years than they did previously. More than half of the respondents who permit admission of foreign-educated applicants said that they had seen an increase in admission applications from foreign-educated applicants.¹⁹

For those states that admit foreign-educated applicants and those states that were willing to consider doing so in the future, the questionnaire asked two open-ended questions about what the ABA could do to help. A number of states sought specific information.²⁰ In addition, the questionnaire asked states whether it would be useful to have additional information available describing foreign legal education, foreign admission rules, foreign Character and Fitness evaluations or particular U.S. legal education programs (such as an LL.M.) that the foreign-educated applicant may have

¹⁹ Some jurisdictions keep statistics and provided urls to this information. It would be useful to consolidate all webpage locations that include statistics on foreign-educated applicants. See, e.g., Texas Board of Law Examiners, July 2008 Applications, available at http://www.ble.state.tx.us/Stats/stats_0708.htm and http://www.ble.state.tx.us/Stats/main_stats.htm; The State Bar of California, GENERAL STATISTICS REPORT, JULY 2008 CALIFORNIA BAR EXAMINATION, available at <http://calbar.ca.gov/calbar/pdfs/admissions/Statistics/JULY2008STATS.pdf>.

²⁰ Some of the information states requested included the following:

- Information on any foreign law schools which are regularly accepted by other states, particularly ones in Canada, England, Australia, New Zealand;
- Is the foreign law school's coursework equivalent to that of an ABA-accredited law school?
- Is there one central licensing and one central disciplinary authority in a particular country?
- How can one verify licensure in a particular country?
- Foreign education specifics: courses taken; whether it was classroom or self study, and the number of classroom hours;
- Impact of this on non ABA-accredited U.S. graduates;
- Develop a standard, facilitate (or establish a clearinghouse for) obtaining independent confirmation from foreign jurisdictions as to the foreign attorney's educational background, admission to practice in the foreign nation, current standing and character and fitness;
- Identification or verification of countries that are English common law countries;
- Identification or verification of countries in which English is language of instruction in law;
- A central clearinghouse or organization that can verify degrees, licenses, years of practice and other relevant information;
- Identification of legitimate law schools in foreign countries and legitimate colleges and universities in foreign countries;
- Tables or charts or expositions of equivalencies for degrees, degree requirements, course of study, law school programs, degree programs, accreditation or accreditation standards, etc.

attended. Of the 38 jurisdictions that responded to this set of questions, 31 indicated an interest in receiving more information about foreign legal education, 32 indicated an interest in receiving more information about foreign admission rules; 31 indicated an interest in receiving more information about foreign character and fitness requirements²¹ and 22 indicated an interest in receiving more information about the U.S. legal education programs that the foreign-educated applicants attended. The survey responses also contained information about resources that some states have found helpful with regard to these issues, including the International Handbook of Universities²² and indicated that the Supreme Court of Texas was in the process of putting together a Task Force to examine these issues.

The survey showed that there is strong interest by the states in having the ABA facilitate the collection and centralization of information about the admission process for foreign law graduates, but did not ask about support for development of a model rule. We note that the states have been relatively slow to adopt the ABA's two existing foreign lawyer qualification policies – namely, MJP Recommendation #8 and #9.²³

The demonstrated interest in additional information regarding qualifications of foreign attorneys was bolstered by an examination of the historical data from the National Conference of Bar Examiners. This data is reproduced in Appendix B following this report, and shows that, overall, there was a 268% increase in the average number of foreign-educated applicants who sat for a bar examination during the first three years for which there are statistics. (1171 average per year for 1992-95 compared to 4315 average per year for 2005-07). There was a 129% increase even if one excludes California and New York, which have the largest number of foreign-educated applicants who sit for a bar examination. (Excluding California and New York, there were, on average, 111 foreign educated applicants each year during 1992-95; there were 255 average applicants per year in 2005-07). This data thus supports the conclusion that there is strong interest among the states in having ABA assistance in this area.

²¹ One jurisdiction noted that validation of foreign documents is difficult. Another jurisdiction explained that its biggest concern was the inability to do a thorough character and fitness check for foreign applicants. These complaints are consistent with those noted in other fields. The U.S. Department of Education, for example, maintains an extensive webpage that addresses the topic of diploma mills and fraud. See U.S. Department of Education, International Affairs Office, Accreditation and Quality Assurance: Diploma Mills and Fraud (12/2007), available at <http://www.ed.gov/about/offices/list/ous/international/usnei/us/fraud.doc>.

²² This state reported that this reference manual is published by Palgrave Macmillan and is available both in book form and online.

²³ See Terry Table on State Implementation of MJP Recommendations #8 and 9. As of January 23, 2009, eight states had adopted or changed their FLC rule following the ABA's MJP recommendation and seven states had adopted a foreign lawyer temporary practice rule. See. http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf.

4. Are There Other Reasons Why the ABA Might Want to Consider Developing Initiatives for Enhanced Support for Decisions Regarding Admission of Foreign Attorneys?

In addition to the interests of the states discussed above, other developments support the increased involvement of the ABA in this area. The Conference of Chief Justices (CCJ) has asked the ABA to conduct further work in this area. In January 2007, the CCJ adopted two resolutions that are relevant to the Committee's charge:

Resolution 7: NOW, THEREFORE, BE IT RESOLVED that the [CCJ] urges each state supreme court to consider permitting individuals who have graduated from an Australian University and have been admitted to practice in Australia, and who meet the state requirements regarding experience, character, and fitness, to sit for the bar examination and if they pass that examination, to be admitted to the practice of law in the state.

Resolution 8: NOW, THEREFORE, BE IT RESOLVED that the [CCJ] urges the American Bar Association Section on Legal Education and Admission to the Bar to consider developing and implementing a program to certify the quality of the legal education offered by universities in other common-law countries.²⁴

In addition, the U.S. federal government has signed several international agreements that address the issue of "recognition" of qualifications. These "recognition" provisions are included, inter alia, in the Lisbon Convention, in the General Agreement of Trade in Services (GATS), in free trade agreements such as the U.S.-Australia Free Trade Agreement (FTA), other bilateral FTAs, in the recent APEC Legal Services Initiative, and in a European initiative called the Bologna Process, which now has a "global dimension."

By way of brief example, the U.S. is a signatory to the Lisbon Convention, although it has not ratified it.²⁵ The Lisbon Convention governs recognition in higher education.²⁶ The U.S. Department of Education administers many of the Lisbon Convention's provisions. The U.S. Networks for Education Information (USNEI) in the DOE was created by executive action to implement essentially information exchange,

²⁴ See Conference of Chief Justices, Resolution 7 Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations (Feb. 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html> [hereinafter Resolution 7]; Conference of Chief Justices, Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar (Feb. 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol8AccredLegalEducCommonLawCountries.html> [hereinafter Resolution 8].

²⁵ This means that the U.S. is not obligated to comply with the Convention, but is under an obligation to refrain from acts which would "defeat the object and purpose" of the Convention. See Vienna Convention on the Law of Treaties 1969, Art. 18, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Nevertheless, Dr. Stephen Hunt from the U.S. Department of Education has advised us informally that the U.S. operates as if it had ratified the Convention.

²⁶ The Lisbon Convention was prepared under the joint auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the Council of Europe.

clearinghouse functions, and transparency directives.²⁷ Key aspects of the Lisbon Convention have been summarized as follows:

- Holders of qualifications issued in one country shall have adequate access to an assessment of these qualifications in another country; and
- The responsibility to demonstrate that an application does not fulfill the relevant requirements lies with the body undertaking the assessment.²⁸

The U.S.-Australia Free Trade Agreement (FTA) provides another example of a U.S. recognition obligation that applies to legal services. This FTA includes a provision that states:

The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional services suppliers and to provide recommendations on mutual recognition to the Joint Committee.²⁹

It also requires the establishment of a working group and requires that this group consider:

- (a) procedures for fostering the development of mutual recognition arrangements among their relevant professional bodies;
- (b) the feasibility of developing model procedures for the licensing and certification of professional services suppliers; and
- (c) other issues of mutual interest relating to the provision of professional services.

The ABA would be an appropriate body to foster the required dialogue about recognition procedures and model rules.³⁰

Although the U.S. is not a signatory to a European initiative known as the Bologna Process, this initiative is an additional reason why the ABA might want to address lawyer “recognition” issues and develop a Model Rule for Admission of Foreign-

²⁷ The DOE has a webpage on professional qualification recognition, <http://www.ed.gov/about/offices/list/ous/international/usnei/us/profrecog.doc>.

²⁸ See Bologna Secretariat, The Lisbon Convention - What is it?, available at http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/LRC/Lisbon_for_pedestrians.pdf. For the text of the entire Convention, see Convention on the Recognition of Qualifications Concerning Higher Education in the European Region CETS No.: 165, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=165&CL=ENG>.

²⁹ United States-Australia Free Trade Agreement, U.S.-Austl., ch. 10, annex 10-A, Mar. 3, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.htm.

³⁰ The GATS also contains provisions relevant to recognition. WTO Members are still engaged in efforts to fulfill the requirements of Article VI:4 and develop “any necessary disciplines” on qualification, licensing and technical standards. For additional information, see the ABA GATS Track 2 Webpage, http://www.abanet.org/cpr/gats/track_two.html which includes the WTO’s draft disciplines, current ABA policy on this issue, law review articles and other resources.

Educated Applicants. As explained in greater detail in the Appendix, in ten years (from 1998-2007), the Bologna Process grew from 4 EU countries to 46 European countries, almost 50% of whom are **not** EU members. Its ten “action lines” include promoting higher education mobility, recognition, and quality assurance. The Bologna Process has dramatically changed European higher education in general and legal education specifically.³¹

The Bologna Process is important in the U.S. for several reasons. First of all, it changes the conditions of competition for U.S. higher education institutions. Second, it is worth following because the U.S. Department of Education, which accredits the ABA, is paying close attention to the Bologna Process. Third, as of 2005, the Bologna Process ministers recognized the “global dimension” of their objectives. Finally, it is clear that the Bologna Process is likely to have an impact in the U.S. For example, in April 2009, the *Chronicle of Higher Education*, *New York Times* and other media reported that universities in three states (Indiana, Minnesota and Utah) will begin pilot projects, funded by the Lumina Foundation for Education which are based on the Tuning Project, which is an offshoot of the Bologna Process,³² to make sure that certain degree programs reflect a consensus about what specific knowledge and skills should be taught.³³

5. Existing Rules on the Admission of Foreign Law Graduates in the U.S.

a. State Treatment of the Issue of Admission of Foreign Law Graduates

The existing regulatory approach of U.S. jurisdictions toward admission of foreign law graduates ranges from complete rejection to admission on motion.³⁴ Despite these extremes, more than half of all U.S. jurisdictions fall into a middle group that allows foreign law graduates to qualify for the bar examination under certain circumstances.³⁵ This middle group is comprised of two camps. On one hand are those

³¹ For a detailed understanding of the Bologna Process, its actors, initiatives, and impact on higher education, see Laurel S. Terry, The Bologna Process and its Impact in Europe: Much More than Degree Changes, 41 *Vanderbilt J. Transnat'l L.* 107 (2008).

³² For information on the Tuning Project and why initiatives such as this could be relevant to U.S. legal education, see Laurel S. Terry, The Bologna Process and its Implications for U.S. Legal Education, 57 *J. Legal Ed.* 237 (2007).

³³ See, e.g., Tamar Lewin, Colleges in 3 States to Set Basics for Degree, A19 (April 9, 2009); Tuning College Degrees, *Inside Higher Ed* (April 8, 2009), <http://www.insidehighered.com/news/2009/04/08/tuning>.

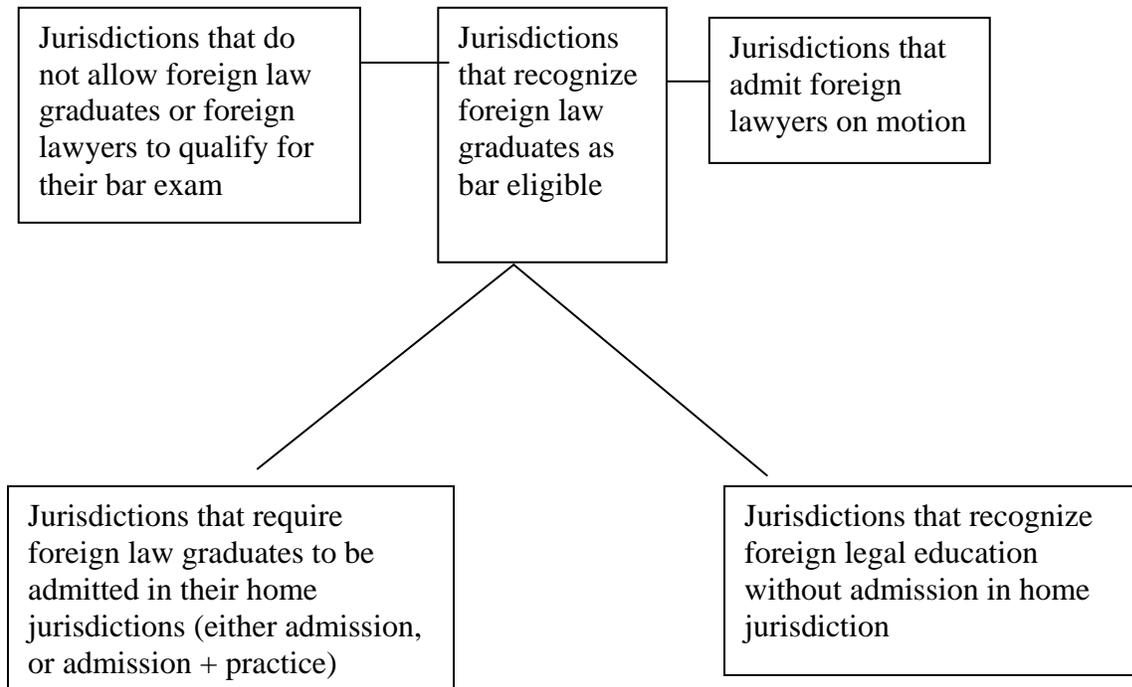
³⁴ At least one state allows non-U.S. lawyers to waive into the bar, without examination, under certain circumstances. See Mass. R. Sup. Jud. Ct 3:01 §6.2, available at http://www.mass.gov/courts/sjc/docs/Rules/BBE_proposed_rules_clean_copy.pdf (visited 4/20/09) (authorizing admission on motion for attorneys educated outside and admitted in their home jurisdiction, who have practiced or taught for at least 5 of the last 7 years and whose education is deemed “equivalent to that provided in law schools approved by the American Bar Association.” (§6.2.3)).

³⁵ The National Conference of Bar Examiners (NCBE) reports in its Comprehensive Guide, Table X (column heading, “if graduates of foreign law schools are eligible to take the bar examination under the rules in your jurisdiction, are any of the following required”), available at http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide.pdf (visited 4/20/09), that 27 jurisdictions admit foreign educated law graduates, exclusive of those jurisdictions that require admission in another U.S. jurisdiction as a condition to qualification for the bar. According to the same source, approximately 14 of

jurisdictions that premise bar eligibility on admission (or a combination of admission and practice experience) in the foreign law graduate’s home country. On the other hand are those jurisdictions that accept graduation from a foreign law school as a condition for qualification to sit for the bar, without regard to admission in the home jurisdiction.

The approaches described so far can be mapped out as follows:

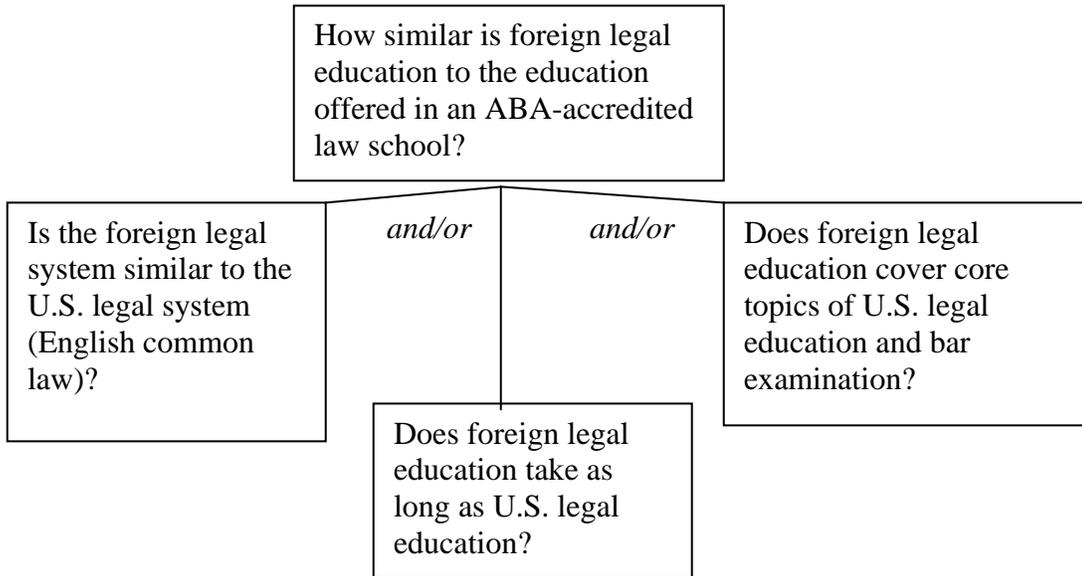
Qualification and admission of foreign lawyers and law graduates:



For those U.S. jurisdictions that recognize foreign legal education (apart from foreign admission) as relevant for bar eligibility, the challenge is what sort of reliance to place upon foreign legal education. Many jurisdictions try to assess whether an applicant’s foreign legal education was similar to the education offered in an ABA-accredited law school. This assessment might be based on similarity of the foreign legal system, which typically means a preference for common law systems based on the law of England. Alternatively, the assessment might be based on whether the foreign legal education took approximately the same amount of time as does a J.D. degree earned in an ABA-accredited law school. A third approach to an assessment of similarity considers whether the topics covered in the foreign legal studies approximate the topics covered in ABA-accredited law schools and on the typical U.S. bar examination. Jurisdictions might impose more than one of these “similarity” tests as a condition to bar eligibility. These approaches to assessing similarity might be mapped as follows:

the 27 jurisdictions permit foreign educated law graduates to qualify for the bar examination without first being admitted to practice in their home jurisdictions.

Bases for assessing similarity of foreign legal education and U.S. legal education:



Even with a determination of similarity or comparability based on one or more of the above criteria, many jurisdictions also require some coursework in a U.S. ABA-accredited law school. The typical requirement is the LL.M. degree, which generally is an approximately 20 credit hour, one-year degree program in which students take mostly courses from the second- and third-year curriculum.³⁶ The requirement of study in a U.S. law school often is tied to coursework in particular subject areas, whether those specifically tested on the bar (DC), denominated “basic courses in American law” (NY) or identified as first-year law school courses. Many jurisdictions require the U.S. law school coursework to be completed as part of a degree program, while others require only a certain number of credits apart from a degree; in each case, the U.S. legal education component generally is capable of completion in approximately two semesters of study. In addition, certain jurisdictions specifically require the teaching to be accomplished while students are physically present in the U.S., while other jurisdictions do not consider the location significant.³⁷ The level of detail of the rules on U.S. legal education indicate

³⁶ For more information on LL.M. degree requirements for foreign law graduates, see Silver, “Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers,” 14 *Cardozo J. Int’l & Comp. L.* 143 (2006).

³⁷ At the 2009 ABA Section of International Law Spring Meeting, representatives from California, DC, and New York addressed the substantive and durational elements in their rules for foreign law graduates. Some of these representatives seemed interested in having foreign law graduates spend time in the U.S., not just for purposes of gaining U.S. legal education, but also to gain familiarity with U.S. culture. The link between law and its context was definitely on their minds, and they were concerned that someone without familiarity might have difficulty practicing here. This is reflected in the current NY rule on admission of foreign law graduates (New York Rule 520.6(b)(1)(ii)).

an attempt to provide exposure to a sort of typical U.S. law school experience, whether through course work or through a required immersion in U.S. culture through physical presence in the country.

Certain U.S. jurisdictions place an additional condition on applicants who are foreign law graduates before recognizing them as bar eligible: being licensed to practice in the applicant’s home jurisdiction. The distinction between foreign law graduates and qualification to practice is an important one. The ABA already has two existing model rules addressing those foreign applicants who are qualified in their home jurisdictions, the Model Rules on the Licensing of Foreign Legal Consultants and on Temporary Practice by Foreign Lawyers. In contrast, this report has focused on recognition of foreign legal education without regard to qualification to practice under foreign law. This distinction between foreign law graduates and foreign qualified lawyers is one that any model rule must address.

Finally, many states authorize the court or bar authorities to waive application of the formal requirements for foreign law graduates, either through appeal to the court or through a formal petition process.

In sum, most state rules allowing foreign-educated applicants to sit for a bar examination might be categorized as falling into one of several basic approaches or typologies. States that are considering whether to allow foreign-educated applicants to sit for a bar exam might consider it helpful to consult these typologies as a way to review the most common approaches:

Typologies for Admission of Foreign Law Graduates and Lawyers:

Each of the two rows under the header row offers a basic set of conditions, described under “Basic Conditions.” In each case, the basic condition can be modified by also requiring some U.S. legal education (Column (b)), that the graduate be admitted as a lawyer in her home jurisdiction (Column (c)), or that the graduate also have a certain number of years of work experience following admission in the home jurisdiction (Column (d)). As a result, there are 8 possibilities listed here.

Basic Conditions	Only with some education in the U.S. (either (a) a U.S. LL.M. or other post-J.D. degree, (b) specified courses, topics or credit hours, or (c) both)	Only with qualification/admission as a lawyer in home jurisdiction	Only with a certain number of years of practice experience pursuant to admission in home jurisdiction
1(a) Applicants who graduated with a 1st degree in law, in which instruction is in English and the legal system of the country of instruction is based on the common law	1(b)	1(c)	1(d)

2(a) Applicants who graduated with a 1st degree in law in any jurisdiction, regardless of language of instruction and nature of legal system	2(b)	2(c)	2(d)
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b. Additional Challenges Identified By States With Rules on Admission of Foreign Law Graduates

Some of the states that allow foreign law graduates to sit for a bar examination identified additional challenges they face in administering their rules. One problem, perhaps unique to New York, is the workload generated by the volume of foreign-educated applications. In the survey, the New York representative explained that:

Determining proof of a candidate’s eligibility to sit for the bar exam under the foregoing rules involves a major investment of staff time. It is a labor intensive process that requires an individualized review of each candidate’s file, including examination of the transcripts and educational records of the person’s foreign education and period of study at an American law school. Moreover, for the July exam, when up to 2,000 files must be examined, this review process must be completed within a very brief window of time – between June 15 and the beginning of the second week of July when seat tickets must be issued. Eligibility proofs are not required until June 15 because many of the candidates do not complete their educational programs until June, and many transcripts are not available before that time.³⁸

Thus, it would be helpful if this “timing crunch” issue could be addressed, particularly in light of the substantial increase in foreign law graduate applicants.³⁹

In sum, it appears that it would be useful for the ABA to facilitate further discussion about whether assistance could be made available to states with respect to the practical and logistical issues related to foreign-educated applicants.

6. How Do Other U.S. Professions Handle the Issue of Foreign Recognition?

Other U.S. professions handle the issue of foreign-qualified applicants in a variety of methods, some of which differ significantly from the processes used to consider foreign-qualified legal applicants. The results of the Committee’s research to date and some of preliminary conclusions are set out below.

As noted earlier, the U.S. Department of Education, through the USNEI, maintains a website that addresses the issue of recognition of foreign professional

³⁸ New York’s amended response to questionnaire.

³⁹ New York representatives explained that in 1997, 15% of its applicant pool was foreign-educated. Ten years later, 28% of its applicant pool was foreign-educated.

qualifications.⁴⁰ It does so, among other reasons, to implement the U.S.’s Lisbon Convention commitments. We contacted the Department of Education to learn if they have any additional information beyond what is on this webpage – they do not. We therefore did a review of the 25 professions available on the U.S. Department of Education’s (DOE) “Information for International Students and Professionals” webpage⁴¹ entitled, “Professional Recognition.”⁴² This analysis revealed the following:

- 1 profession has a special exam for foreign qualified practitioners;
- 1 profession has recognition agreements with several countries;
- 11 of 25 profession groups seem to have a single group that reviews qualifications;
- 8 out of 25 (including law) have no nationally recognized credential evaluation service(s).⁴³

After conducting this preliminary overview, the websites of the seven professions were examined to determine how foreign professionals in the following fields can qualify to practice in the United States:

- 1) Accounting;
- 2) Architecture and Landscape Architecture;
- 3) Dentistry;
- 4) Engineering;
- 5) Medicine;
- 6) Nursing;
- 7) Optometry.⁴⁴

Each of these professions was analyzed to determine how it treated the issues listed below for foreign professionals seeking U.S. qualification: a) Degree Equivalency; b) Pre-Training Experience; c) English Language Proficiency; d) Examination; and e)

⁴⁰ U.S. Department of Education. USNEI. International Affairs Office: “Recognition of Foreign Qualifications: Professional.”
<http://www.ed.gov/about/offices/list/ous/international/usnei/us/profrecog.doc>.

⁴¹ U.S. Department of Education. USNEI. International Affairs Office: “Information for International Students and Professionals.”
<http://www.ed.gov/about/offices/list/ous/international/usnei/us/edlite-students.html>.

⁴² U.S. Department of Education. USNEI. International Affairs Office: “Recognition of Foreign Qualifications: Professional.”
<http://www.ed.gov/about/offices/list/ous/international/usnei/us/profrecog.doc>.

⁴³ Id. These eight professions are: 1) Counseling; 2) Funeral Services; 3) Law; 4) Marriage and Family Therapy; 5) Massage Therapy; 6) Osteopathic Medicine (Osteopathy); 7) Podiatric Medicine (Podiatry); and 8) Psychology.

⁴⁴ The following professions found on the U.S. DOE list were not included because, for various reasons (primarily that they lack any kind of rigorous, uniform approach), they did not contain significant applicability to the legal profession: 1) Allied Health Professionals (includes a number of different professions and overlaps with Nursing); 2) Chiropractic; 3) Cosmetology; 4) Dietetics; 5) Occupational Therapy; 6) Physical Therapy; 7) Pharmacy; 8) Social Work; 9) Teacher Certification; and 10) Veterinary Medicine.

Cost. A summary of this information appears in the following chart:

	DEGREE EQUIVALENCY	TRAINING REQUIREMENTS	LANGUAGE REQUIREMENTS	SPECIAL EXAMS	COST
ACCOUNTING	U.S. equivalent of a BA/BS or higher	None	CPA exam given in English	CPA exam, IQEX exam + state requirements	CPA Exam = \$533 avg. IQEX Exam = \$800 avg.
ARCHITECTURE	U.S. equivalent of a BS in engineering or higher	5+ years of foreign experience	English tested via essay or passing an English course at a U.S. college	ARE exam + state requirements	\$1,500-\$1,700
DENTISTRY	Foreign DDS/MD, + repetition of last 2 years of U.S. dental school	None	All licensing examinations given in English, + TOEFL for admissions into last 2 years at U.S. dental school	NBDE I, NBDE II, + state/regional clinical licensing exam	\$85
ENGINEERING	U.S. equivalent of a BS in engineering or higher	None	All licensing examinations given in English	Same licensing exam taken by U.S.-educated engineers	\$375
MEDICINE	4 years in an approved foreign medical school	U.S. residency/fellowship	All licensing exams given in English, + an additional exam in written and oral spoken English proficiency	U.S. Medical Licensing Exam	\$3,130-\$4,475
NURSING	Equivalent of a U.S. Registered Nurse degree + documentation of HS diploma	“Sufficient” classroom instruction and clinical practice	Passing score on CGFNS/TOEFL/TOEIC	CGFNS International Qualifying Exam, + state licensing exam	\$1,976.25-\$4,985.25
OPTOMETRY	U.S. equivalency of a Doctor of Optometry	None. Residency optional.	All licensing examinations given in English	Same licensing exam taken by U.S.-education optometrists	\$100-\$160

This review of information available on the USNEI webpage indicates that there is no streamlined manner in which foreign qualifications are measured regarding international professionals who want to practice their professions within the U.S. Some Committee members had a lengthy conversation with USNEI Manager, Dr. Stephen Hunt regarding the advantages and disadvantages of using a single credentialing organization. Perhaps not surprisingly, he indicated that where multiple credentialing organizations are authorized, there can be problems with consistency. He also reported on differences in the professionalism of credentialing organizations. Thus, to achieve consistency, he felt there would be some advantages to an approach that designated a single organization, especially one operated by the profession itself. One disadvantage of this approach is

cost. He described the experience of a profession that had established such a service only to disband it later because it proved more expensive than anticipated. Hunt believes that conflating the international credential evaluation process into one organization per profession could be an efficient manner to compare foreign-trained professionals, despite the expense.⁴⁵

Although Hunt did not discuss this possibility, a compromise approach might be to bifurcate the assignments. A licensing body might choose to recognize a single (or just a handful of) credentialing organization that performs a technical review on issues such as whether the degree-conferring university exists, whether classes are taught in English, whether a particular country has a common-law system, etc. This entity could work in conjunction with a second entity, that would determine the substantive requirements and standards that are applied by the technical review entity. Thus, it would be this second entity, rather than the technical reviewing body, that would determine issues such as which courses constitute substantial equivalency to a U.S. legal education, if substantial equivalency is a requirement.

State responses to our questionnaire suggested that it might be useful if the ABA could establish standards and procedures for determining equivalent legal education outside the United States and provide graduates of foreign law schools an ABA international equivalent degree. Once the foreign law school curriculum was assessed, the ABA could create two separate lists, one containing foreign law schools whose graduates have automatic standing to take state bar examinations in the U.S., and a second list containing law schools whose graduates would have to complete specific courses for equivalency to apply. This is similar to what the federal government does with respect to certain GS positions. It is also similar to what some other countries do with regard to assessing foreign qualifications. For example, as is noted in further detail below, Australia publishes a list of jurisdictions and the classes required to gain exemption from a full Australian legal education requirement.⁴⁶ (An applicant from the United States, for instance, would have to complete Real Property and Australian Constitutional Law to gain exemption from the full Australian legal education requirement.)

After reviewing U.S. state regulation of other professions, the Committee suggests that any future group consider whether collaboration with a credentialing organization would prove helpful to state supreme courts with regard to their assessment of applications of foreign law graduates. Further analysis of whether and how to structure such collaboration with regard to substantive and technical aspects of application information is warranted. In this regard, it may be useful to work with other entities (such as the National Conference of Bar Examiners (NCBE) and Law School Admission Council (LSAC)) that are active in the field.

⁴⁵ Interview with Dr. Stephen Hunt, U.S. Department of Education and Committee Members Carole Silver, Robert Lutz, and Laurel Terry, Washington, D.C., April 15, 2009.

⁴⁶ Australia Assessment Guidelines, Academic Exemptions - Rule 97: Oversees Applicants.

7. How Do Other Countries Handle Admission of Foreign Law Graduates?

At the outset, it should be noted that although some countries have liberal admission rules for foreign-educated applicants, the most liberal U.S. states are among the most liberal jurisdictions in the world.⁴⁷ Although many countries do not have separate admission rules for foreign applicants, there are several jurisdictions that do. An examination of these jurisdictions reveals interesting approaches that might be worth further exploration if and when the ABA sets about to draft a model rule. A key concept is the composition and procedures of the entities that review foreign applications.

Australia and Canada are perhaps most analogous to the U.S., since both of them have a state-based admission system. Australia has established a central entity called the Law Admissions Consultative Committee (LACC).⁴⁸ The LACC consists of representatives of the Law Admitting Authority in each Australian jurisdiction, the Committee of Australian Law Deans, the Australian Professional Legal Education Council and the Law Council of Australia. It is generally responsible to the Australian and New Zealand Council of Chief Justices, which appoints the chairman of the Committee. It explains its role as follows:

LACC's main role is to forge consensus between the bodies represented by its members on matters relating to the academic and Practical Legal Training requirements for admission to the Australian legal profession, the accreditation and appraisal of academic and Practical Legal Training institutions and courses, and other matters related to admission to the Australian legal profession.

In October 2008, the LACC issued a report entitled *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission*.⁴⁹ It is beyond the scope of this report to summarize this document, but several points are briefly noted: First the uniform principles allow foreign-educated applicants to qualify as an Australian lawyer provided certain courses and skills have been met. Second, the exact nature of the courses depends on the foreign applicant's original training. Third, graduates from some foreign countries must take more "make-up" courses than graduates from other countries.

Canada also has state-based admission but uses a national committee to evaluate foreign applicants. The Federation of Law Societies of Canada (FLSC) is the umbrella organization for the state-based Canadian regulators. (It is distinct from the Canadian Bar Association, which is comparable to the ABA.) The FLSC webpage includes information

⁴⁷ During the April 2009 Section of International Law conference, panelist Stephen Denyer, who is an English solicitor who works for Allen & Overy, commented favorably about the degree to which New York and California seemed genuinely interested in accommodating foreign lawyers, indicating that this was much less likely to happen in Europe. Another foreign commentator privately advised Committee members that other countries do not worry about full admission rules as much as the U.S. because they have relatively few applicants since their legal market is not as desirable.

⁴⁸ See Law Admissions Consultative Committee, available at <http://www.lawcouncil.asn.au/lacc.cfm>.

⁴⁹ See LACC, *Uniform Principles for Assessing Overseas Qualifications* (October 2008), available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=30440EFC-1C23-CACD-22AD-FF00728F08CE&siteName=lca.

about Canada's *National Committee on Accreditation (NCA)*:⁵⁰

The National Committee on Accreditation establishes certain educational and practicing criteria that must be met before an applicant will be considered to be qualified for admission. The funding of the committee comes from fees paid by the applicants for admission. The existence of this Committee avoids the need for each Law Society to establish its own committee to deal with such applicants. It is administered through the offices of its executive director, Professor Vern Krishna, Q.C., at the Common Law Section of the University of Ottawa Law School. Over 900 inquiries resulting in more than 300 applications are processed each year by this Committee.

Like the Australian system, the Canadian system imposes different conditions depending on the country in which the applicant trained. Indeed, the Canadian system goes further than the Australian system in that it reserves the right to distinguish among applicants based on the law school they attended and their grades.⁵¹ Although a December 2008 FLSC consultation suggested that the NCA should perhaps abandon its rules that differentiate based on where the foreign-educated applicant was trained, this suggestion was not followed.

England and Wales, like Canada and Australia, uses a qualification system for foreign-educated applicants that differentiates among lawyers depending on the country in which they trained. This set of rules is called the Qualified Lawyers' Transfer Test (QLTT).⁵² The QLTT recently has been the subject of several consultations as a result of the 2007 U.K. Legal Services Act, which significantly changed the regulation of legal professionals in England and Wales.⁵³ Nonetheless, it is worth noting that in England, as

⁵⁰ National Committee on Accreditation, <http://www.flsc.ca/en/foreignLawyers/foreignLawyers.asp>.

⁵¹ In considering applications from candidates with common law backgrounds, the NCA takes into account the following criteria:

- Nature of the academic institution attended and, where available, its accreditation by national law associations (e.g., ABA or AALS approval);
- Length of academic law program;
- Subject matter studied (e.g., law or mixed law/social sciences/humanities; if law, the contents, depth and relevance to Canadian law and circumstances);
- Undergraduate pre-law education;
- Academic performance, grades, and class standing obtained (e.g., top 25 percent of class, bottom 25 percent of class, first class, second class, acceptance in home jurisdiction of standing achieved, etc.);
- Language of instruction in academic law program;
- Admission to law society or bar by written examination in home jurisdiction;
- Professional legal experience, if any, including length of such experience (e.g., 1-3 years, 3-5 years, over 5 years); and
- Nature and quality of professional practice.

NCA, Evaluation Guidelines at C(1), available at <http://www.flsc.ca/en/foreignLawyers/guidelines.asp#evaluation>.

⁵² See Solicitors Regulation Authority, Qualified Lawyers Transfer Test, <http://www.sra.org.uk/solicitors/qltt.page>.

⁵³ See, e.g., Solicitors Regulation Authority, Qualified Lawyers Transfer Scheme, 9 February 2009, <http://www.sra.org.uk/sra/consultations/1454.article>

in Australia and Canada, the number of examinations that a foreign applicant must complete is based on the lawyer's country of qualification.⁵⁴ It is also noteworthy that the QLTT rules, like the Australian and Canadian rules, are substantially more detailed than typical of an ABA model rule.

The approaches of these three common-law countries merit further study. Some of the ideas that might be worth exploring further include (a) the creation of a national entity that is responsible for making recommendations to state authorities about the qualifications of foreign-educated applicants, and (b) development of detailed guidelines for evaluation of foreign law graduates.⁵⁵

As a final note on foreign admission systems, the Committee recognizes that for over ten years, the European Union has had a directive that allows Europeans lawyers from one EU country to establish themselves permanently in another EU country.⁵⁶ The Lawyers Establishment Directive, 98/5, requires a foreign lawyer to register in the "host" jurisdiction.⁵⁷ That lawyer must comply with the host state's rules and is subject to some limitations with respect to certain kinds of court and peculiarly "local" work. In general, however, admission is freely available without conditions. This system was imposed on EU countries as a result of European Court of Justice cases construing the EU Treaty and pressure from the European Commission. Many lawyer regulators initially were very hostile to this system of open recognition. Since the adoption of Directive 98/5, however, opposition has largely fallen away. There have been very few disciplinary complaints. This is true even though the Directive permits free movement among civil law and common-law countries, among countries with very rigorous admission requirements and countries with more lenient requirements, among countries that have different languages and different legal histories and cultures. Thus, the EU experience suggests that recognition, which seems impossible at the outset, may ultimately come to be accepted. We recognize that such a system may be impractical in the U.S. because of the long standing tradition of individual state regulation over bar admission.

⁵⁴ It is also worth noting, however, that U.K. solicitors have a relatively small "monopoly." Thus, U.S. lawyers who practice in England are able to do things that we in the U.S. would call legal work, even if the U.S. lawyer has not qualified as a solicitor. Thus, to some degree, the issue of full admission of foreign lawyers is quite different in England than it is in the U.S. See generally, U.K. Legal Services Act, available at http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1-11g1.

⁵⁵ All three of these jurisdictions have lengthy provisions that might be called "schedules." This type of approach might merit further consideration.

⁵⁶ Because this Directive is based on the European treaties, it is limited to EU citizens. Thus, a U.S. citizen who has qualified as a lawyer in one EU country may not use this directive to practice in another EU country.

⁵⁷ See Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77/36, March 14, 1998), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/etablissement_versio1_1182256162.pdf; see also CCBE, Free Movement of Lawyers' Committee, http://www.ccbe.eu/index.php?id=94&id_comite=8&L=0 (includes many resources).

B. POSSIBLE SECTION INITIATIVES

The landscape described above clearly supports the proposition that state supreme courts and bar administrators as well as clients and foreign lawyers would welcome initiatives by the Section that served to improve the quantity of high quality information necessary to make determinations relating to admission of foreign lawyers to the practice of law in this country.

Currently, the accreditation function of the Section informs the state supreme courts and bar administrators about the quality of the educational experience of an applicant. Overwhelmingly in the United States, acquiring a J.D. degree from an ABA-accredited law school satisfies the educational prerequisite established to qualify an applicant to sit for the bar examination. Expanding the accreditation function to the foreign educational experience is then one way to provide the type of information necessary to make the admission decisions at issue. Another expansion of the accreditation process that would provide helpful information to bar administrators would be the accreditation of LL.M. programs, because many foreign trained attorneys seek to qualify for admission to the bar in this country through the acquisition of an LL.M. from an ABA-approved law school. Another avenue of assistance could be the adoption of a model rule for the admission of foreign attorneys. These proposals were specifically identified in the Committee's charge.

1. Expansion of Accreditation Activities

a. Rationales for expansion

The Committee identified several reasons that might be offered as to why the scope of the Section's current accreditation efforts should be expanded, some of which may be more compelling than others and some of which do not seem to justify further action. Each is briefly summarized below.

(i) Assisting Supreme Courts

Probably the most compelling justification for why the scope of the Section's current accreditation efforts should be expanded is that in doing so the Section would be able to provide state supreme courts with a basis for deciding whether a person holding one of the degrees under these programs should be permitted to sit for their bar examinations and perhaps other conditions. Currently, states must decide on their own whether applicants holding a degree from a non-ABA accredited law school should qualify for bar admission in their state. The ABA accreditation function provides an important mechanism to ensure a certain base line of quality assurance about the educational program of the applicant. In its absence states have been left on their own to respond to increased pressures internationally to allow foreign lawyer access to U.S. practice. The response of the states has not been

uniform with New York and California being the most liberal in allowing access, but many states simply denying applications of these applicants.⁵⁸

There are increased client needs, domestically and abroad, and legitimate interests in fostering a global legal marketplace and it is important for the U.S. to be a significant player in establishing the standards for that practice. The increased pressures for foreign practice in the U.S. and for Americans to practice abroad will continue, with or without American cooperation, and thus it behooves us to ensure the intellectual and educational fitness of bar applicants, to the extent their educational backgrounds justify ABA accreditation. In other words, the conversation is now going on globally and will continue to do so with or without ABA or U.S. participation. Preferably, it will be with it.

(ii.) *Status of Foreign Legal Consultants*

The current program of certification of "foreign legal consultants" has produced a system that many believe allows (as a practical matter) a broader scope of practice than that intended because of difficulties with oversight. Adopting formal accreditation standards for foreign programs may provide a clear avenue for those foreign lawyers who want to practice more broadly on behalf of their clients in the United States. Additionally, concern has been expressed over whether persons working as foreign legal consultants have an understanding of the ethical standards and regulations governing the practice of law in U.S. jurisdictions. Admission tied to completion of an accredited LL.M. program could require students to have some exposure to the professionalism standards of U.S. jurisdictions and help to alleviate that concern.

(iii.) *Seal of Approval*

Some foreign law school programs report interest in ABA accreditation, not so that their graduates can practice in the United States, but effectively as a "seal of approval" to obtain international recognition of their program, particularly when there is no local or other international accreditation process available. The Committee found this rationale for expansion of accreditation insufficient to recommend that the ABA develop standards for assessing those programs. In the absence of understanding that the goal of accreditation is to help foster U.S. bar admissions, it would be difficult, if not impossible, to determine what other standards would suffice to obtain a "seal of approval." The problem, not only of developing criteria without a clear purpose and for varying systems with differing goals, but also of implementing such a program would result in the ABA effectively becoming a "world accreditor." The Committee concluded that the huge expenses and much larger group of programs which would be included in this endeavor would undercut the Section's ability to achieve something more directly tied to its traditional mission.

⁵⁸ In fact, it might be more accurate to state that the pressure too has been unequal, since New York and California receive more applications from foreign attorneys than other US jurisdictions. It is difficult to determine, however, whether this is a result of their liberal regulations or other factors, or both.

(iv.) *Accrediting LL.M. programs*

At present, the Section does not approve or accredit LL.M. programs, but acquiesces in a school's addition of such programs as long as it finds that they do not detract from the school's ability to provide a compliant J.D. program. Such programs vary widely in content and approach and are undertaken by both US law school graduates and graduates of foreign law schools. Some suggestions have been made that it might be useful to consider accrediting LL.M. programs because such accreditation could assure a certain quality base line for the protection of the students in the program and potential employers of those graduates. Despite these legitimate goals, the Committee determined that the Section should remain focused on accreditation for bar qualification, not as offering a "seal of approval." To move down this trail would be immensely costly for schools and the Section, in terms of staffing and use of other resources, and, given the high priority of addressing the needs of the profession and the courts in the modern globalized practice setting, it was deemed preferable that the Section deploy its efforts there.

Nonetheless, the content of LL.M. programs, even absent ABA accreditation, is important for those foreign students reliant on this degree as a partial basis to qualify to take a U.S. bar examination under a particular state's admission rules. Thus it is helpful to think of other methods, short of accreditation of LL.M. programs, to provide that assistance.

Based on the above considerations, the Committee concluded that even though some rationales were insufficient to justify expansion of the accreditation function, qualitative information regarding foreign legal education was needed and accreditation remains as a viable method of providing that information. Nevertheless, for the reasons discussed below, the Committee could not recommend such expansion of the accreditation function. Rather, the Committee proposed an alternate approach.

b. *Challenges of expanded accreditation*

The challenges and questions accompanying the expansion of accreditation differ based on the nature of the program sought to be accredited. The Committee identified three types of programs considered for expanded accreditation: (1) foreign law schools that are located outside the United States, not sponsored by a US law school, teaching non-US students; (2) those foreign law schools modeling their programs under current ABA standards; and (3) LL.M. programs offered by American law schools to foreign law graduates. The distinction between the first two categories is that the schools in the first category seek accreditation of their programs as they exist; schools in the second category seek to qualify for accreditation under the same ABA standards applied to US law schools. The overarching question that needs to be answered in each of these settings is: whether and what initial or additional course of study should be required of a graduate of a non-U.S. law school in order to provide reasonable assurance to the state supreme courts that the graduate is qualified to be considered for bar admission?

(i.) *Accreditation of foreign law schools (Category 1)*

Accreditation of law schools in this category would require a new and expanded system of accreditation standards because these programs can vary dramatically, including on the basis of the jurisprudence of the legal system that is taught and the level (undergraduate or graduate) of education. Nonetheless, if the standards that are developed are sufficiently demanding, then it should not matter what type of program is seeking accreditation and it would be preferable not to try to approach rulemaking by drawing distinctions between types of programs. Rather, the focus should be on base standards that need to be present in any program. For example, one needs to consider how much common law needs to be taught in the program. Additionally, the duration of the program may be significant. To that extent, looking at the qualifications of the people who are in the program and considering what threshold requirements they had to meet before entering needs to be considered.

New York appears to allow graduates of foreign law programs that are based in common law countries and that have been locally accredited to sit for the bar when the State has determined that the local accreditation system and curricular requirements are sufficiently rigorous to meet its standards. Thus, it might be useful to consider a "two pronged" approach. This would allow the ABA to consider as part of its accreditation process schools in countries that have a local accreditation system, depending on a finding regarding the rigorous nature of that local system and whether the criteria used there provide adequate quality and content assurance. In countries that do not have such a system, newly developed accreditation rules would apply to each school that sought approval. This two-pronged approach could lessen some of the burden on the Section.

(ii.) *Accreditation of foreign law schools who seek to model their programs under current ABA standards (Category 2).*

This type of program is presented by a school now being developed in China and it is believed that others may seek to follow that example. The Committee agreed that the Section should abandon any notion of territorial restrictions in accreditation. Thus, whether a law school located in a foreign country is operated by local residents or is a "branch" of a U.S. law school or somehow otherwise working in cooperation with a U.S. law school should not influence the answer to the question whether it can be accredited. Any law school, wherever located and whoever runs it, that develops a program that meets all the current ABA accreditation standards for United States J.D. programs should be allowed to seek accreditation. There may ultimately be problems in meeting all of the ABA standards and the standards should not be applied lightly because of a school's foreign location, but there is nothing that should deter a school from trying the existing route.

(iii.) *Accreditation of LL.M. programs offered by American law schools to foreign law graduates.*

Currently, as noted earlier, the Section merely acquiesces in LL.M. programs and does not accredit them. These programs vary widely, and although most states will not allow

the LL.M. degree to be a sufficient credential to allow a foreign applicant to sit for the bar, New York (and apparently several other states) do. There is considerable confusion about the content of LL.M. programs and their appropriateness as preparation for bar qualification. It may be preferable for the Section to decide to accredit these programs and develop standards for doing so, specifying for example core curriculum or the like to ensure graduates have sufficient exposure to basic U.S. law principles to be qualified to sit for the bar. For this purpose, it would not matter whether the LL.M. program was limited to foreign students, or admitted both foreign and domestic law students. The key is whether the LL.M. degree can be a satisfactory credential for the foreign graduates who seek to apply for state bar admissions.

While the predominant model of these programs presently is one of foreign-trained lawyers coming to the United States for one-year of legal studies, it should not matter where the program is offered. (The current New York rules do now require that the LL.M. study occur in the United States.) That is, a U.S. law school might offer such a program in Switzerland, for example, and whatever LL.M. accreditation rules that were developed should be applied. Similarly, a foreign law school might seek to develop an LL.M. program to meet accreditation standards. It seems difficult to justify many geographical restrictions. But, once expanded abroad and offered by non-U.S. law schools, several challenges in developing appropriate standards arise.

For example, to the extent that such programs are offered abroad, standards may need to be developed regarding faculty credentials to ensure that those offering the courses, particularly in common law subjects, are trained in those areas. Yet, it would be impractical, if not impolitic, to require only U.S. law professors to teach in these programs to ensure baseline quality. Further, in foreign countries many law faculty are not full-time employees and are expected to practice. This is but one example of a major cultural difference and consideration might need to be made about current standards concerning percentages of full-time faculty necessary to adequately staff such a program. In this new milieu, a number of concerns may be heightened. Thus, one approach might be, at least at the outset of allowing such programs, to provide that when offered on foreign soil, the program have at least some U.S. law school affiliation or participation to ensure an understanding of what is entailed from the U.S. accreditation standpoint.

Recommendations and Conclusions Regarding Expansion of Accreditation

1. We appreciate the desire of foreign law schools to have their programs evaluated against the Standards of the ABA, and we acknowledge such accreditation or approval would assist U.S. bar administrators and state supreme courts in making bar admission decisions regarding foreign applicants. However, after consideration of the above issues regarding expanded accreditation, the Committee has concluded that the Council should not expand into accreditation of those foreign law schools in the first category above. The sheer number of foreign law schools, coupled with the complexity and diversity of foreign law programs, the limited expertise that currently exists to devise appropriate standards, the staff resources that would be required, among other factors, outweigh this particular approach. An alternative approach is discussed later in the report.

To the extent that these foreign programs would like to seek the advice of the ABA Section (or representatives from it) as to ways they can improve their programs, the ABA can and should be willing to help. The Committee also recommends that the ABA work with those foreign jurisdictions that seek assistance in developing a local or regional accreditation system to insure that the process is rigorous and reliable.

2. Accreditation of foreign law schools seeking accreditation by complying with current ABA standards, the second category recognized above, is currently available to schools seeking such accreditation. Although meeting current standards may be difficult, schools are not precluded from applying. The Committee recommends however, that the Council consider exempting these foreign law schools from compliance with certain procedural or non-substantive standards which are peculiar to this country, such as the requirement that law students must graduate from an undergraduate institution accredited by organizations certified by the U.S. Department of Education.

3. The Committee does not recommend that the ABA accredit LL.M. programs directly. Rather, the Committee recommends that a range of criteria be developed that would allow the ABA to advise state supreme courts and bar administrators that a graduate meeting the criteria was sufficiently educated in U.S. law that he or she could be allowed to apply to take the state bar exam even though the primary law degree was from another country.

The criteria that might be considered would be focused on the course of study pursued by a foreign student in the U.S. law school program, consideration of how that relates to the individual's prior education credentials or other related admissions matters, and, perhaps, the success of the student in the LL.M. program or consideration of whether the student was graded on the same scale as other U.S. students. Inherent in the determination that such student had successfully completed the program would include the concept that they had "competed successfully" with U.S. students at an ABA-accredited law school. These criteria mentioned are possibilities and should not be viewed as exclusive. They are the kinds of things that might be considered, recognizing that as the Standards Review Committee develops some standards, other matters might be taken into account. The criteria might be presented as a form of recommended "best practices" to the state supreme courts and bar administrators, with schools able to certify to the courts that particular graduates have met those criteria.

There are two advantages to this approach. First, schools would not need to change their current LL.M. programs or go through an elaborate costly accreditation process in order to assure their foreign graduates that they could apply to sit for a bar exam. Rather, those schools that wanted to offer that extra opportunity to foreign applicants simply could ensure that the program followed by such an applicant met the ABA foreign LL.M. criteria. Second, the ABA also would not need to run another large accreditation process, reviewing all LL.M. programs to determine which ones should be accredited. It could continue its current acquiescence review.

The adoption of such an approach likely would lead to some U.S. graduates from

schools that do not have ABA accreditation seeking to acquire an LL.M. with the ABA-foreign criteria from an ABA accredited school. Such student might anticipate that gaining that credential would qualify him or her to take a bar exam in a state that otherwise requires ABA accreditation. There is a concern that this could be viewed as circumventing the general ABA accreditation rules. Because it may be difficult to treat those US graduates differently from the foreign attorneys who acquire the LL.M. with the ABA foreign LL.M. criteria the Council, state supreme courts and bar admission administrators will need to acknowledge and address this possibility.

2. Develop a Model Rule for the Admission of Foreign Attorneys

The second initiative identified in the Committee's charge was the development of a model rule for the admission of foreign attorneys. Again we begin with the rationales supporting and opposing this type of initiative.

a. Perceived Advantages and Disadvantages of Model Admission Rule for Foreign Law Graduates

The Committee sought to identify the arguments that are typically offered in support of, and in opposition to, this type of rule. This list should not be viewed as a dispositive or comprehensive list of the advantages and disadvantages of developing a model rule on foreign-educated applicant admission. But this list is useful to set out many of the common arguments because they might serve as a springboard for additional thought, research and discussion on the issue of a model rule for admission of foreign-educated applicants.

At the outset, the development of a model rule will capture the collective wisdom and experience of the various jurisdictions. A model rule provides a vehicle by which this information can be synthesized and transmitted to aid the states as they grapple with these issues. A related argument is that it is inefficient to ask each state to invent the wheel and develop the knowledge base and approach suitable for foreign-educated applicant admission. They argue that it would be much more efficient for an entity such as the ABA to do this.

The development of a model rule also will assist in encouraging convergence around uniform standards agreed to by a number of jurisdictions. If publicized, the "typologies" identified above may increase the likelihood that states will coalesce around a limited number of basic models.

The development of a model rule also will provide stability, reliability and transparency to the admission process for foreign-educated applicants in and among the various jurisdictions. Anecdotal evidence suggests that the approach often is ad hoc, even in states that have rules.

A model rule also acknowledges and responds to the reality that the globalization of business, trade and economics has also globalized the practice of law. The various treaties and free trade agreements require that the jurisdictions acknowledge this

occurrence. A model rule will give U.S. jurisdictions a tool with which to meet the demands that are and will continue to be made to bar admission authorities.

Another argument is that a model rule would further the regulatory objective of protecting clients and the public since the statistics at the beginning of this report clearly show that there is a need for foreign-educated lawyers. Rule proponents argue that the lack of a rule will not change the trade realities. They ask “who is handling the legal work for all of this foreign investment and trade?” The implication is that if foreign-educated lawyers are in a state anyway, it is better to have them there regulated, rather than unregulated.

Another argument in favor of a model rule is that if global business cannot function because of restrictions in the regulatory system, its representatives may protest, which could result in a loss of regulatory authority.⁵⁹ Thus, if the legal profession does not develop its own recognition principles (as required by various international agreements), it may find less than optimal rules forced upon it.

At the same time, there are a number of arguments weighing against a rule for admission of foreign law graduates.

First, simply with regard to allocation of resources, the ABA might conclude that a model rule is unwarranted at this time because the foreign-educated applicant numbers do not justify the institutional investment of time. Thus, in a world of limited human and financial resources, foreign law graduate admission is not a high priority.

Second, it may be that admission is the wrong focus. During the organizing conversations for the 2009 ABA Section of International Law Spring Meeting panel on standards of qualification for foreign law graduates, representatives from New York, California and the District of Columbia discussed the issue of foreign law graduates who sit for their bar examinations with no intention of practicing in the U.S. or that particular state law. Instead, each acknowledged that many foreign law graduates use U.S. bar admission (and particularly NY bar admission) as an additional credential to indicate legitimacy and achievement in their home country, similar in significance to U.S. graduate legal education. One consideration, then, might be whether it is possible to distinguish between those foreign law graduates who intend to practice in the U.S., those who intend to advise on the law of a particular U.S. jurisdiction while practicing in their home country, and those who intend only to indicate general achievement or legitimacy. The bar representatives on the panel did not express particular enthusiasm for this idea of creating separate categories of licensure, and were particularly concerned that they would be unable to monitor or enforce these category boundaries.

⁵⁹ For an example of this argument in another context, see Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice: Why and How the New Regulatory System Being Put in Place in London May Lead to Changes in U.S. Lawyer Regulation and Why London May Replace New York as the World Headquarters for Legal Services*, 19 *Professional Lawyer* 1 (2009), available at <http://www.law.georgetown.edu/legalprofession/documents/May-27-2009-AnthonyDavis-Paper.pdf>.

One also could argue that it is premature for the ABA to undertake this process until there is greater uniformity on domestic MJP issues. The admission rules for lawyers educated in the U.S. are not yet uniform notwithstanding the move to uniformity of the adoption by a number of jurisdictions of the MJP Commission recommendations and the recommendations contained in other model rules such as the FLC rule. One might argue that until there is substantial uniformity for U.S.-educated law graduates, it is unreasonable to expect uniformity on the more difficult foreign-educated applicant issue and therefore it is not a productive use of the ABA's time to work on a model rule in this area. In short, the MJP issue shows that it will be difficult to craft a rule that is substantive and comparably uniform and yet acceptable to most jurisdictions.

Another argument against a model rule focuses on the practical difficulties associated with such a rule. Not all foreign lawyers engaged in globalization are educated in common law countries; rather, there is a wide array of foreign legal education. There appears to be a lack of a reliable evaluation of foreign legal education that would make implementation of a model rule difficult. Moreover, information on foreign legal education would need to be updated regularly because national approaches to legal education change.⁶⁰ States may also find it difficult to find the resources to do an adequate character and fitness check on foreign citizens. If domestic lawyers are subject to such a check, but foreign applicants are not, this could cause divisiveness among the bar, particularly the local bar. Indeed, such a rule might prove divisive within the U.S. even without differential rules such as these.

Finally, the most commonly expressed concern addresses the relationship of the current ABA legal education accreditation system to bar eligibility. The concern is that it will be difficult for states to grant recognition to foreign-educated graduates without also granting recognition to those who graduate from non-accredited law schools in the U.S.⁶¹ If the ABA develops a model rule for admission of foreign law graduates, it should carefully consider whether and how to distinguish foreign-educated applicants from graduates of unaccredited domestic law schools.⁶² Some may believe that it will be difficult to retain the ABA accreditation process in its present form if states loosen their requirement that applicants must have earned a first degree in law (the J.D.) from an ABA-accredited law school, or that recognition of foreign legal study should go hand-in-

⁶⁰ Korea and Japan have shifted from undergraduate to graduate legal education in the last five years, for example.

⁶¹ We note, for example, that in a recent petition challenging California's rule that requires lawyers from other states to sit for an attorney's bar exam, the petitioner argued that because of its adoption of a foreign legal consultant rule, California provided greater opportunities to foreign lawyers than to lawyers from other states. See Joseph Robert Giannini, *Bring Out-of-State Bar Licensing Into 21st Century*, The Forum (May 21, 2009). It should be noted, however, that foreign legal consultants are qualified as lawyers in their home countries and receive only a license with a limited scope of practice in the U.S., whereas lawyers from other states who pass the attorneys' exam will receive a full license. Regardless of whether petitioner's comparison is apt, it indicates that applicants are likely to compare the rules for foreign lawyers and out-of-state lawyers.

⁶² Although some Committee members are confident that such a distinction can be drawn, others are less certain. But all agree on the necessity of articulating such a distinction or granting graduates of unaccredited law schools similar opportunities to qualify, for example, by earning an LL.M. at a U.S. ABA-accredited law school.

hand with recognition of study in an unaccredited law school. Perhaps students who cannot gain admission to an ABA-accredited law school will attempt to enroll in a foreign law school program and seek entry to the bar in the U.S. by way of their foreign credentials.⁶³ To the extent this would be considered to undermine the existing ABA accreditation system, the ABA may view this as a negative development.

Despite these arguments against the development of an ABA model rule for admission of foreign law graduates, the Committee believes that the need for such a rule outweighs the disadvantages. The concerns described above, however, contributed to the shape of this report. The Committee concluded that rather than hurriedly preparing a report outlining the shape of a model rule, it is prudent to study these issues further in order to reach an optimal resolution.

Recommendations and Conclusions on Development of A Model Rule on Admission of Foreign Attorneys

Although the recommendations presented regarding expansion of the accreditation function reject the per se expansion of that function to foreign legal educational regimes as well as American LL.M. programs, the recommendations nevertheless offer a range of initiatives that the Council is uniquely positioned to consider that could provide state supreme courts and bar administrators with highly relevant information for the admission decision required for foreign attorney applicants. As indicated previously, the Council can establish a body to identify educational criteria such as core common law courses, professional responsibility understanding or legal reasoning and analysis experience that a foreign attorney must show either through his or her legal education at home or, in combination with this, through additional education in an ABA-accredited law school. Such initiatives would assist the bar administrators and the state supreme courts in establishing their criteria for and decisions on foreign attorney admission.

The creation of this criteria, however, was suggested principally in conjunction with legal education courses taken in the context of LL.M. programs taken at ABA-approved law schools. Nevertheless, the bar administrators and state courts are, and will continue to be, presented with applicants seeking to sit for a bar examination who have a foreign legal education but who have not taken an LL.M. program here. Making the admission decision on the basis of the applicant's foreign legal educational experience remains elusive because of the lack of or difficulty in obtaining reliable information. The lack of this type of information is particularly troublesome when considering the substance of a model rule.

The need to develop criteria identifying the core elements of a legal education sufficient to satisfy the public protection responsibilities of licensing authorities is clear. The next and equally important step is to be able to apply these core elements to the myriad of foreign legal education regimes in a manner that will enable all the licensing

⁶³ Note, however, that language difficulties and even nationality restrictions may make this unattractive or unfeasible.

authorities to make appropriate decisions on admission of foreign attorneys. Here too the assistance of the ABA alone or in conjunction with other groups or consortiums will be invaluable to the states.

This exercise might be a staged level of presumptions regarding the educational experience and thus the qualification of foreign attorneys. For example students who obtain a law degree from law schools physically located outside the United States but either are a part of an ABA-approved law school or have a curriculum indistinguishable from that of an ABA-approved law school may qualify for admission in the United States without additional course work. Next, the ABA may consider identifying a category of students who matriculate in a common law jurisdiction or a law school with a common law curriculum⁶⁴ where the curriculum they completed met certain criteria (e.g., the curriculum was comparable to that of an ABA-approved law school, accreditation by a governmental entity, a course of study of a specific duration, a credible means of testing educational achievement) such that admission to a U.S. bar was justified without further study. A third, and more difficult situation, is the graduate from a non-common law jurisdiction, a hybrid common/civil law jurisdiction or a common law jurisdiction that does not comply with the type of criteria just described. In this case, further legal education might be required, such as an LL.M. from an ABA-accredited law school meeting designated criteria as suggested above.

Whether staged presumptions or another paradigm of qualifying educational criteria are ultimately pursued, some type of qualitative evaluation of the educational experience of a foreign attorney applicant will be required to determine whether that applicant possesses sufficient qualifications to practice law. As demonstrated, that evaluation is complicated and will require a significant amount of expertise and effort both in the creation and application of the criteria. When such criteria are identified, a model rule can be of significant assistance to the state supreme courts and bar admission authorities. To this end, the Committee offers the following recommendations for consideration by the Council:

1. The Committee recommends that the ABA facilitate the collection and centralization of state information about the admission of foreign-educated applicants. We recommend that the type of information collected include information about the number of applications, the backgrounds of those applying (including whether an applicant has been admitted to practice in her/his home country, and if so, the length of time s/he has practiced the law of the home country), the countries from which they are coming, and whether they passed the bar examination in that jurisdiction and have been admitted to practice there. There is a strong demand for this information by the states, the national government, regulators, and policymakers. At this time, the Committee considers it premature to advise whether the ABA, the NCBE, LSAC or some other entity is in the best position to collect this data and make it publicly available.

The primary objection may be that it is burdensome to provide this additional information. But in light of the information that states already provide to the NCBE, we

⁶⁴ Some jurisdictions teach a hybrid curriculum including both common law and civil law.

do not consider this to be a significant barrier and think the information will be sufficiently useful to all the entities listed above to justify the burden.

2. The Committee recommends that, following the collection of information set out in the above recommendation, the ABA prepare a report that summarizes both the substantive requirements and the procedures used in the various states with respect to the admission of foreign-educated applicants. To the extent that actual practice may differ from published guidelines, we believe that the drafters of the report should make serious efforts to describe what actually happens in practice, rather than simply describe formal legal requirements. This information-sharing would allow the various states to see the choices available to states that are considering the issue of allowing foreign-educated lawyers to sit for a bar examination. We further recommend that the ABA refine and publicize the regulatory “typologies” for admission of foreign law graduates, described in more detail in this report, so that states are aware of the approaches currently used by other states. The Committee believes this will facilitate convergence by states around a limited number of regulatory approaches.

3. The Committee recommends that the Council endorse the concept of preparing a Model Rule for the Admission of Foreign Law Graduates. The number of foreign-educated applicants has been increasing and approximately half of the states allow at least certain categories of foreign-educated lawyers (such as common-law-educated lawyers) to sit for a bar exam under certain circumstances. The states are interested in having guidance on this issue, and the ABA currently has no policy on this issue. If the Council eventually decides to develop a Model Rule, the Committee recommends that it should address each of the categories of foreign-trained law graduates who may wish admission to a U.S. bar. These categories are (i) the graduate of a U.S. J.D. program abroad; (ii) the graduate of a common law legal education program abroad whose course of study (which must be described) suffices to permit eligibility for a U.S. bar without further education; and (iii) the graduate of a foreign law school abroad, whether in a civil law, common law, or hybrid common law/civil law jurisdiction, whose course of study coupled with an LL.M. degree (both of which must be described) suffices to permit eligibility for a U.S. bar.

The arguments against the possibility of adopting a Model Rule include the following: the fact that the states have been slow to adopt the ABA’s other foreign lawyer model qualification rules (MJP recommendations #8 and #9); the task of creating a new model rule and monitoring and assisting state adoption likely would be very labor intensive; such a rule might create pressure from U.S. graduates of non-accredited law schools; and it might be useful to let the issue “percolate” more, especially if additional information is collected and disseminated. We also note that of the approximately 50% of states that allow foreign-educated applicants to sit for a bar examination under certain circumstances, many states are more comfortable doing so for common law lawyers (although some states permit civil-law-educated lawyers to sit for a bar exam upon completing an LL.M. or a certain number of credit hours in an accredited U.S. law school.) We do not find these counterarguments sufficiently compelling to foreclose the possibility of a Model Rule.

4. Although the Committee made much progress in our consideration of the issue of a Model Rule for Admission of Foreign Law Graduates, and recommend consideration of such a rule, the Committee concludes that it would be premature at this point actually to draft the content of a rule and that further consideration is appropriate. If the Council agrees to recommend that an appropriate ABA entity further consider the issue of a Model Rule for Admission of Foreign Law Graduates, we recommend that the designated entity consider the following issues:

- Would it be appropriate for an ABA Model Rule and report to set forth, perhaps in bracketed language, alternative approaches to a Model Rule? In doing so, the entity might want to consider, among other things, one or more of the “typologies” noted in this report;
- Would it be appropriate to designate an existing ABA entity (or recommend the creation of a new entity) that would provide assistance to states in evaluating applicants with regard to the substantive standards applicable to foreign-educated applicants? For example, for those states that permit applicants who have a common-law legal education to sit for the bar exam, such an existing or new entity could develop a list of countries (or institutions) whose graduates would be presumptively eligible to sit for the bar exam in states that have the common-law rule?
- If the ABA adopts a Model Rule for Admission of Foreign Law Graduates, would it be appropriate for the accompanying report to reference the “regulatory objectives” that the ABA relied upon when developing its recommendations?⁶⁵
- Would it be appropriate for the legal profession to do what some state professional regulators have done, which is to bifurcate the substantive decisions about what is required for foreign-trained lawyers to qualify as applicants for admission and the “technical” issues related to the validity of the application and degree (e.g., is the diploma a forgery, is the institution a diploma mill, etc.?). The Committee believes that it would be worthwhile to explore further the idea of collaboration with other entities that have expertise in addressing these more technical issues. Even states such as New York, which have sufficient applicants to justify an “in-house” process, have expressed interest in receiving assistance in reviewing applications from foreign-educated law graduates. While the states would retain ultimate decision-making power, and while this

⁶⁵ Ideally, all rules relating to the admission and regulation of all lawyers should be based on a jurisdiction’s specific regulatory objectives with respect to the maintenance of professional standards and the protection of the public in connection with the practice of law. Sometimes such regulatory objectives are expressly stated, as in the U.K. Legal Services Act. See Section 1 of the 2007 U.K. Legal Services Act, available at http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1-11g1. At other times, they are implicit. Like all rules, a model rule with respect to the admission of foreign-educated lawyers should be informed by valid regulatory objectives.

process would be optional (like the NCBE's character and fitness services), some states might find it desirable to set the policy parameters, but "outsource" some or all of the foreign-educated applicant review process.

II. INFORMATION GATHERING

In addition to considering issues related to the admission of foreign attorneys, Council Chair Randy Hertz directed the Committee's attention to the ongoing need for the Section to collaborate with other ABA entities on international activities and for further study of the international initiatives undertaken by ABA-approved law schools. Finally, the Council Chair asked the Committee to consider the establishment of a permanent Section committee addressing matters of international practice and legal education.

A. COLLABORATION WITH OTHER ABA ENTITIES ON INTERNATIONAL ISSUES

A number of ABA sections are engaged in initiatives affecting the international practice of law and legal education in foreign countries. Examples include the International Law Section, the Business Law Section and the ABA Task Force on International Trade in Legal Services. One of the ABA entities engaged in international work most related to issues involved in legal education is the Rule of Law Initiative (ROLI). ROLI implements legal reforms in more than 40 countries. Many of ROLI's initiatives involve the establishment or enhancement of legal education regimes as well as standards for the practice of law. In the past, Section representatives and the staff have been involved or consulted with regard to the activities of other ABA entities, but the Council has not placed the responsibility for acquiring relationships and information from these entities with any particular group. Consequently, the Section's involvement tends to be on an ad hoc basis, without any historical institutional memory or input.

Recommendations and Conclusions Regarding Collaboration

The Committee recommends that the Council establish a permanent committee on international issues that would be responsible for monitoring the international activities of the ABA that are relevant to the Section's mission. Based on this information gathering, the new committee should bring activities to the attention of the Council when relevant or needing Council action. The Committee suggests that this group could also be charged with setting the preliminary criteria for LL.M. programs and evaluation and recommendations regarding the qualifications for admitting foreign attorneys recommended above, subject to review by the Standards Review Committee, Bar Admissions Committee and Council. The Committee further recommends that the Council pursue the possibility of establishing continuing liaison relationships with the ABA entities involved in international initiatives. Such liaisons presumably would be members of the new committee. The Consultant and Section staff have established a renewed working relationship with the staff of ROLI that will allow the Section and

proposed committee greater participation and information regarding ABA international initiatives. Greater involvement in ROLI activities was also a recommendation made to the Council by the Special Committee on International Legal Education Activities chaired by Jim White in 2006-2008.

B. INFORMATION OF INTERNATIONAL ACTIVITIES OF ABA APPROVED LAW SCHOOLS

ABA-approved law schools have for years been involved in offering legal education courses in foreign countries. Many of these have been in offered in the summer months but some law schools have maintained a more permanent academic presence in the foreign country. As indicated earlier in this report, new and different approaches to providing legal education outside the United States by ABA-approved law schools are expanding at a rapid pace. A survey of the various activities was conducted by the Special Committee chaired by Jim White and the results were reported to the Council in August 2008. Jim White updated that survey for this Committee's consideration. (A copy of the survey questions is attached as Appendix C to this report.)

Recommendations and Conclusions Regarding Information

This Committee recommends that elements of that survey become a standardized part of the annual questionnaire filed by ABA-approved schools. It is important to have this information not only as part of the continuing oversight function of the Accreditation Project, but to allow the section to be proactive rather than reactive in the area.

III. APPENDIX

Appendix A: Questionnaire Sent to States on Foreign Law Graduates Admission Experiences

BACKGROUND TO THIS QUESTIONNAIRE:

Anecdotal evidence suggests that state Supreme Courts increasingly are being asked to allow foreign lawyers to sit for a bar examination or to be admitted on motion. Although the ABA has a Model Foreign Legal Consultant Rule and a Model Rule for Temporary Practice by Foreign Lawyers, the ABA currently has no model rule that addresses the topic of foreign lawyers who seek full admission to a U.S. bar.

The ABA Section of Legal Education and Admissions to the Bar recently created an international committee that has been asked to make recommendations to the Council regarding future work. One of the three subcommittees is chaired by North Dakota Chief Justice Gerald VandeWalle and has been asked to make a recommendation regarding the desirability of developing policies or resources regarding the admission of foreign lawyers. This subcommittee would like to know if there is work the ABA could undertake that would be helpful to the Supreme Courts with respect to the issue of full admission for foreign lawyers. It would be very helpful to us if you could complete this brief questionnaire about the work that you would find most useful. ***We would appreciate it if you could use the “reply” function on the email and return this brief questionnaire by March 20, 2009.***

1. Does your state allow some or all foreign lawyers to sit for a bar examination?

Yes _____ No _____

2. Does your state grant admission by motion to some or all foreign lawyers?

Yes _____ No _____

If your answer to question #1 or #2 was “yes”, please continue below. Even if your answer to #1 and #2 was “no”, if you might be willing to consider admitting foreign lawyers if additional assistance were available, please respond to question #3:

3. If your state rules require you to do an evaluation of any of the elements listed below, is there particular work that the ABA could undertake that would be helpful to you as decide whether to allow a foreign lawyer to sit for the bar exam? For example, would it be of assistance to you in your state if you had available:

(a) Foreign Legal Education: Information about the legal education generally (or a particular law school) in a particular country (including whether it is an undergraduate degree or a graduate degree and whether there is an accrediting or regulatory agency for legal education in the jurisdiction)

Yes No

(b) Foreign Admission: Information about what is required in a particular country in order to be admitted as a lawyer in that country?

Yes No

(c) Foreign Character and Fitness Evaluation: Information about whether the foreign country has a character and fitness requirement?

Yes No

(d) U.S. Legal Education Requirements: Information about a particular U.S. LL.M. program (or other U.S. legal education program) the foreign lawyer may have attended?

Yes No

4. Is there other information that you would find helpful to have?

5. Is there any other work the ABA Section of Legal Education and Admissions to the Bar could undertake that would be useful in relation to your review of applications for admission from foreign law graduates and lawyers?

6. Does it seem that your court has received more applications from foreign lawyers for full admission in the past five years than in did previously? (While we would welcome statistics on this point, we are also interested in your subjective impressions if the statistics are not easily available.)

7. If we wanted to follow-up with the individuals in your state about your rules or practices, who would be the best person to contact (and what is their contact information)?

If you questions, ideas or suggestions or want to know more, feel free to contact North Dakota Chief Justice Jerry VandeWalle at GVandeWalle@NDCOURTS.GOV

**Appendix B:
Summary of Statistics for Bar Examination Applicants Educated in Law Schools
Outside the U.S.**

(Excerpts from National Conference of Bar Examiners, Bar Admission Statistics,
<http://www.ncbex.org/bar-admissions/stats/>)

Prepared by Laurel Terry (LTerry@psu.edu) April 22, 2009

Year	Taking	Passing	Pass Rate Percent	Taking (Excluding NY & CA)	Passing (Excluding NY & CA)	Pass Rate Percent (Excludi ng NY & CA)	Number of States in Which Foreign- Educated Candidates Took a Bar Exam
1992	1080	--	--	108			14
1993	1164	--	--	107			10
1994	1269	--	--	119			10
1995	1390	--	--	107			12
1996	1539	504	32%	109	37	34%	15
1997	1840	747	41%	136	36	26%	18
1998	2160	843	39%	108	28	26%	17
1999	2385	994	42%	77	12	16%	14
2000	2793	1152	41%	114	47	41%	18
2001	3323	1468	44%	107	46	43%	19
2002	3329	1240	38%	140	47	34%	20
2003	3394	1433	42%	243	126	52%	18
2004	3490	1328	38%	239	96	40%	17
2005	3571	1183	33%	234	64	27%	20
2006	4505	1424	32%	270	86	32%	18
2007	4869	1559	32%	260	70	27%	21

Note, overall, there was a **268%** increase in the average number of foreign-educated applicants who sat for a bar examination during the first three years for which there are statistics. (1171 average per year for 1992-95 compared to 4315 average per year for 2005-07).

There was a **129%** increase even if one excludes California and New York, which have the largest number of foreign-educated applicants who sit for a bar examination. (Excluding California and New York, there were, on average, 111 foreign educated applicants each year during 1992-95; there were 255 average applicants per year in 2005-07).

Appendix C: Survey of Law School International Programs

Name of Law School:

Name, title, and email of respondent to the survey:

First, Last Name

Title

Email Address

Which of the following programs does your school administer?

(Please also name the location of where each program is held)

- Student Exchange
- Faculty Exchange
- Summer Program
- Semester Abroad
- Year Abroad
- LL.M. Partially Abroad
- Foreign Consortium Participation
- Joint Institute
- Joint Clinical
- Scholarly Collaboration
- Cooperative Non-Academic