

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
REPORT TO THE HOUSE OF DELEGATES

RESOLVED, the American Bar Association supports negotiation proposals to the United States Trade Representative regarding access to foreign markets for U.S. lawyers through permanent establishments consistent with, and as expressed and incorporated in, the ABA's "Model Rule for the Licensing of Legal Consultants" in the United States

**American Bar Association
Model Rule for the Licensing of Legal Consultants
August 1993**

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association approves the "Model Rule for the Licensing of Legal Consultants" consisting of ten sections as set forth below;

BE IT FURTHER RESOLVED, that the American Bar Association recommends that each State not presently having a rule for the licensing of legal consultants adopt such a rule conforming to the Model Rule and that those States and the District of Columbia having such rules conform them to the Model Rule; and

BE IT FURTHER RESOLVED, that the text of the Model Rule shall read as follows:

MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS

§ 1. General Regulation as to Licensing

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

- (a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
- (b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;¹
- (c) possesses the good moral character and general fitness requisite for a member of the bar of this State;
- (d) is at least twenty-six years of age;² and

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

² Section 1(d) is optional; it may be included as written, modified through the substitution of a lesser age than twenty-six years, or omitted entirely.

- (e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

§ 2. Proof Required

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

- (a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;
- (b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;
- (c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and
- (d) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the [name of court] may require.

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

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

§ 4. Scope of Practice

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

- (a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to [citation of applicable rule]);
- (b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;
- (c) prepare:

- (i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or
- (ii) any instrument relating to the administration of a decedent's estate in the United States of America;
- (d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;
- (e) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State;
- (f) be, or in any way hold himself or herself out as, a member of the bar of this State; or
- (g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
 - (i) his or her own name;
 - (ii) the name of the law firm with which he or she is affiliated;
 - (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and
 - (iv) the title "legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]".

§ 5. Rights and Obligations

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

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

[rules of court governing members of the bar]; and the rights and obligations of a member of the bar of this State with respect to:

- (i) affiliation in the same law firm with one or more members of the bar of this State, including by:
 - (A) employing one or more members of the bar of this State;
 - (B) being employed by one or more members of the bar of this State or by any partnership [or professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
 - (C) being a partner in any partnership [or shareholder in any professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
- (ii) attorney-client privilege, work-product privilege and similar professional privileges.

§ 6. Disciplinary Provisions

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

- (a) Every person licensed to practice as a legal consultant under these Rules:
 - (i) shall be subject to control by the [name of court] and to censure, suspension, removal or revocation of his or her license to practice by the [name of court] and shall otherwise be governed by [citation of applicable statutory provisions]; and
 - (ii) shall execute and file with the [name of court], in such form and manner as such court may prescribe:
 - (A) his or her commitment to observe the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] and the [rules of court governing members of the bar] to the extent applicable to the legal services authorized under Section 4 of this Rule;
 - (B) an undertaking or appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;

- (C) a written undertaking to notify the court of any change in such person's good standing as a member of the foreign legal profession referred to in Section 1(a) of this Rule and of any final action of the professional body or public authority referred to in Section 2(a) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person; and
 - (D) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the clerk of such court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such clerk by means of a duly acknowledged supplemental instrument in writing.
- (b) Service of process on such clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of \$10. Service of process shall be complete when such clerk has been so served. Such clerk shall promptly send one of such copies to the legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such legal consultant at the address specified by him or her as aforesaid.

§ 7. Application and Renewal Fees

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

§ 8. Revocation of License

In the event that the [name of court] determines that a person licensed as a legal consultant under this Rule no longer meets the requirements for licensure set forth

in Section 1(a) or Section 1(c) of this Rule, it shall revoke the license granted to such person hereunder.

§ 9. Admission to Bar

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

§ 10. Application for Waiver of Provisions

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

REPORT

Introduction.

The ongoing globalization of commercial activity by American businesses makes it imperative that U.S. lawyers be assured of the right to provide advice and assistance to their clients wherever the clients desire that assistance. The proposal before the House seeks ABA support for a recommendation to be presented to the U.S. Trade Representative ("USTR") to assure American lawyers the right to establish offices in the other countries that have signed the General Agreement on Trade in Services ("GATS") on the terms the ABA has approved for the rights of foreign lawyers to establish themselves in this country, as reflected in the ABA Model Rule for the Licensing of Legal Consultants.

In 1994, the United States signed the GATS, as one of the agreements creating the World Trade Organization ("WTO"). Legal services are covered by the GATS. The GATS provides for "progressive" (i.e. further) liberalization of market access for all types of services. The first round of negotiations was to begin within five years. In fact, on November 14, 2001, the United States agreed to a timetable for these negotiations as one of the results of the WTO Ministerial Meeting in Doha, Qatar. By June 2002, all signatories (including the United States) must submit their requests for market access in the service sectors of their trade partners. By June 30, 2003 the United States must submit its offers of market access for various market sectors. Thus, before the August 2002 Annual Meeting of the ABA the USTR will be obliged to file in Geneva the requests of the U.S. in the "legal services sector." The USTR has specifically asked the ABA for guidance in preparing this request to be submitted in June 2002. No offer of access to the U.S. market will be required (or submitted) at that time. Moreover, in the context of international trade negotiations, a country's offers are often different from, and in economic sectors apart from, the sectors in which market access requests are filed.

Under WTO procedures, signatories to the various agreements from time to time will thereafter continue to negotiate expansions of access to their markets accorded to nationals of other signatories. The United States has already indicated that foreign lawyers may practice here under the Legal Consultants Rule adopted by the several states. The instant proposal supports a request by the United States, in the context of further GATS negotiations, that American lawyers be assured the same right to establish offices in other GATS member countries. The instant proposal does not address "transient access" for lawyers who do not seek to open permanent offices abroad. In essence, this proposal seeks on a global basis the principles the ABA has been urging the Japanese Government to adopt for the past 20 years. The requests directed to Japan bore fruit and at least two dozen U.S. firms (and some English and other European firms) have since then been allowed to

open offices in that country. Similar efforts were pursued in assuring rights to open offices in China as that country becomes a WTO member.

The fact that the United States may request such "market access" for its lawyers does not imply that it must be prepared to offer identical and reciprocal treatment for foreign lawyers wishing to open offices in the United States. The negotiations in the WTO are consciously designed to enable countries to request concessions on market access for particular goods or services that they wish to export without accepting the same terms for imports of the same goods or services. While relatively few foreign countries have expressed an interest in seeking rights of establishment for their lawyers in the United States, this request can be made without a commitment to accord identical treatment to foreign lawyers in this country, but it is, in fact, consistent with existing policies adopted by the ABA in 1993.

The ABA notes that the regulation of the legal profession in the United States is the primary responsibility of the judicial branch of government. In 1993 the House of Delegates approved the "Model Rule" and urged the several States and the District of Columbia to adopt it for the licensing of foreign legal consultants in the United States. Since then, 24 States, including most of these with major centers of international trade, such as New York, California, Illinois and Texas, as well as the District of Columbia, have enacted such a rule. The ABA is continuing to urge all States to adopt the Model Rule or a rule consistent with the 1993 Model, and the proposal that is before the House asks that it be used as a model for foreign countries as well.

The stake of the U.S. legal profession and the ABA in these negotiations

The magnitude of U.S. interest in opening offices abroad cannot be precisely measured, but it is suggested by the fact that approximately 100 U.S. law firms already have one or more foreign offices. The majority of those offices are in London and in other cities of members of the European Union. However, offices have been opened in Eastern Europe, Japan, China, Australia, Canada, Mexico, Brazil and Indonesia, to mention the most significant locations for current world trade. Department of Commerce statistics, that probably understate the value of exports of U.S. legal services, report that "exports" of U.S. legal services were valued at more than \$2.8 billion in 2000. While many of these services were provided from domestic offices, a large part was either generated by foreign offices or actually performed in such offices of U.S. firms. The exports exceeded by a factor of more than 500% the value of "imports" of legal services.

Although U.S. law firms have been allowed to open offices in many countries, their rights to continue their practices are generally not guaranteed by treaty, and in some countries are prohibited or severely restricted. Under the auspices of the General Agreement on Trade in Services (GATS) members are seeking binding commitments to assure a liberal regime for legal and other professional services in as many member states as are prepared to sign. The Office of the United States Trade Representative (USTR) is conducting those negotiations on behalf of this country. It has specifically requested input from affected private sector representatives and invited the American Bar Association, as the principal membership organization of the U.S. legal profession to support its efforts. The USTR believes that U.S. economic interests should assist it in negotiating sensible rules affecting their products and services. Therefore, if the ABA is to affect the course of negotiations on legal services access abroad, it should adopt the present (or a comparable) proposal.

The scope of the Proposal for which support is sought.

The Section of International Law and Practice urges adoption of the accompanying Resolution to express ABA support for the principles under which U.S. lawyers may obtain and secure rights to practice from offices abroad.

The "Model Legal Consultant" Rule adopted by the ABA and in force in one form or another in 24 jurisdictions addresses the issue of permanent establishments by foreign lawyers in this country and is the counterpart of the attached proposal. The Model Rule does not address transient practice in the US by foreign lawyers. This is a subject with which the ABA's Commission on Multijurisdictional Practice is dealing and as to which no consensus has yet emerged in that body. Nevertheless, the ABA need not await the Commission's Final Report to support the attached Recommendation and the Commission has agreed to support consideration of this Resolution at this time.

Respectfully Submitted,

Robert E. Lutz, II Chair, Section of International Law and Practice February 2002

EXECUTIVE SUMMARY

1. Summary of the recommendation.

The resolution urges the USTR to seek to secure adequate foreign market access for U.S. legal service providers in the ongoing negotiations of the General Agreement on Trade in Services on terms consistent with the ABA's Model Rule on the Licensing of Legal Consultants adopted in 1993.

2. Summary of the issue which the recommendation addresses.

US lawyers wish assurance that they may open offices in foreign countries, to use there the home firm name, to employ and become partners of local lawyers, to be employed by local lawyers, and to engage in a practice of law that is not unduly limited in scope, location, permitted legal form of association and ease of obtaining needed support services. These are the core principles of the 1993 ABA Model Rule.

3. An explanation of how the proposed policy position will address the issue.

The USTR should seek from our trading partners commitments to adopt rules consistent with the ABA's Model Rule that the ABA has asked US states to adopt to permit foreign lawyers to practice here.

4. A summary of any minority views or oppositions which have been identified.

The Section of Legal Education and Admissions to the Bar and the Center for Professional Responsibility expressed objections regarding the original resolution. However, their objections have, we believe, been overcome through the revision in the proposal as now presented.

GENERAL INFORMATION FORM

1. Submitting Entities:
Section of International Law and Practice
2. Submitted By:
Robert E. Lutz, II
Chair
Section on International Law and Practice.
3. Summary of Recommendation.
The resolution urges the USTR to seek to secure adequate foreign market access for U.S. legal service providers in the ongoing negotiations of the General Agreement on Trade in Services consistent with the principles of the ABA's "Model Rule for Licensing of Legal Consultants".
4. Approval by Submitting Entities.
Approved by the Council of the Section of International Law and Practice at its fall meeting in Monterey, Mexico on October 13, 2001.
5. Has this or a similar recommendation been submitted to the House or Board previously?
This recommendation was initially submitted to the Board of Governors on November 10, 2001 and again on February 1, 2002. The Board deferred action to enable the House of Delegates to consider this matter and, prior to modification, suggested further deferral in the light of the request of the MJP Commission. The Commission has now withdrawn its request for deferral.
6. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
These principles are consistent with the ABA's Model Rule for the Licensing of Legal Consultants, adopted by the House of Delegates at the 1993 Annual Meeting. They are also consistent with the ABA's general support of the World Trade Organization and a liberalized, rules-based system of international trade.
7. What urgency exists which required action at this meeting of the House?
The U.S. proposal on legal services must be presented to the GATS in Geneva by June of 2002 pursuant to the Ministerial Declaration at the Doha Conference, and ABA endorsement of the proposal is, therefore, urgently solicited.

8. Status of Legislation.
None
9. Cost to the Association. (Both direct and indirect costs.)
None
10. Disclosure of Interest.
None
11. Referrals.
All ABA Sections and Divisions
12. Contact Persons. (Prior to the meeting.)
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14. Contact Person Regarding Amendments to this Recommendation.

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