

AMERICAN BAR ASSOCIATION

INTERIM REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE

COMMENTS FROM THE LAW SOCIETY OF ENGLAND AND WALES

1. Recommendation 5, p32

The Law Society of England and Wales (the Law Society) welcomes the recommendation that the ABA encourage states that have not yet adopted the ABA Model Rule for the Licensing of Legal Consultants to do so.

The Law Society would, however, like to point to difficulties raised for foreign lawyers in general and English solicitors specifically by Section 1(b) of the ABA Model Rule for the Licensing of Legal Consultants. We understand that this section is optional, but in those cases in which it is adopted by a State it has tended to exclude many solicitors from the opportunity to register.

We understand that section 1(b) is designed to have the effect of conferring parity of treatment on foreign lawyers and U.S. lawyers from out of state but it is, nonetheless, more onerous than that required of U.S. lawyers coming to work in England and Wales who may practise home law under their own title regardless of the number of years previously spent in practise.

2. Recommendation 5.1 p32

The Law Society welcomes the proposed rule amendment easing the position of foreign lawyers to carry out legal services on a temporary basis without having to seek admission as a legal consultant.

3. The Regime for Foreign Lawyers in England and Wales

We refer to the regime for foreign lawyers in England and Wales and attach our full original submission for ease of reference.

The Law Society neither registers or regulates foreign lawyers unless they either wish to enter into partnership with solicitors or are EU lawyers, in which case they fall under the provisions of the Establishment Directive.

This liberality covers both the temporary provision of legal services by short visits and the permanent establishment of a law office in the UK.

The Law Society is not aware of any problems relating to foreign lawyers and their practice in the UK. If a complaint against a foreign lawyer did arise the Law Society would notify the foreign lawyer's home bar of the complaint who would then deal with the complaint under its own rules.

4. GATS and the Implementation of the Commission's Recommendations

The Law Society asks the Commission to look towards the current round of GATS negotiations and to impress more urgency on individual states in their adoption of the Commission's recommendations 5 and 5.1. The widespread adoption by individual states of more liberal rules affecting foreign lawyers wishing to work in the U.S. will add strength to the bargaining position of the U.S. as it presses for more open markets for its own lawyers abroad.

In addition we recommend to the Commission that the Commission monitor the ways in which its recommendations are adopted by States in order that the liberalising intent of the Commission's work is reflected in implementation.

5. Temporary provision of Services in another jurisdiction – professional responsibilities of a lawyer

In page 2 of your covering memorandum you specifically invite views on the professional responsibilities of a lawyers temporarily rendering services in another jurisdiction. The Law Society's experience in this respect may be useful.

The temporary provision of services in another jurisdiction within the E.U. is governed by the Services Directive (extract attached). Under the Services Directive the lawyer is not required to take out indemnity insurance or to undertake any other obligation in relation to the bar of the jurisdiction visited. The Services Directive came into effect in 1977 and we are not aware of any problems in relation to its operation in this respect. In England and Wales the position is the same in relation to foreign lawyers from other jurisdictions.

Annex 1

**Submission by the Law Society of England and Wales to the ABA
Commission on Multijurisdictional Practice**

June 2001

MULTI-JURISDICTIONAL PRACTICE
The experience of the Law Society
of England and Wales

(1) INTRODUCTION

This paper looks at the experience of the Law Society of England and Wales (the professional body for over 80,000 solicitors) with the concept of multi-jurisdictional practice. This experience has been obtained by the Society in two ways: in its own right, as a result of the free market in legal services which is current in England and Wales; and as part of the UK's membership of the European Union, which has resulted in a single market for legal services throughout the 15 Member States of the EU.

(2) THE REGIME FOR FOREIGN LAWYERS IN ENGLAND AND WALES

There have been foreign lawyers practising in England and Wales, mainly in the City of London, for many years now. The Law Society neither registers nor regulates these lawyers. This arises mainly from the fact that the provision of legal services is, in any case, open in the UK. Anyone is entitled to offer advice on English law, whether legally qualified or not. So, the thinking runs that if a greengrocer or taxi driver can provide legal advice for reward in England and Wales, why cannot a foreign lawyer? There are some activities reserved to lawyers: conveyancing, probate and litigation (including advocacy). The title of "solicitor" - or, for that matter, of "barrister" - is also reserved, and it is a criminal offence for anyone to hold themselves out to be a solicitor or barrister if they are not so qualified.

Accordingly, the Law Society does not know how many foreign lawyers there are in England and Wales, nor does it know what these foreign lawyers do. There have been surprisingly few, if any, problems with these lawyers over the years (for instance, over the last five years, there have been no problems). It is believed that this is because, by and large, the foreign lawyers who come to this jurisdiction are members of the excellent and successful big foreign law firms who can afford to open offices abroad, and who in any case set high standards for the rest of the international legal profession. The Law Society would not in any case deal with whatever problems might arise, because it does not regulate the lawyers concerned, and their home bars would be expected to take appropriate action. However, over recent years at any rate, no such action is known to have been necessary.

There have been some inroads into this libertarian attitude towards foreign lawyers over recent years. The first occurred when multi-national partnerships were introduced. The Law Society permits solicitors to enter into partnerships with certain foreign lawyers (who belong to legal professions which have been recognised for the purpose by the Law Society). But these foreign lawyers must register with, and be regulated by, the Law Society. Secondly, the Establishment Directive – of which more detail is given below – has introduced obligatory registration and local regulation for EU lawyers established in England and Wales. But lawyers who do not fall within these two categories – for instance, US lawyers in London who are not in partnership with English solicitors – remain unregistered and unregulated by the Law Society.

The liberality covers both the temporary provision of legal services by short visits and the permanent establishment of a law office in the UK. The Law Society makes no distinction between these two forms of practice for the purposes of permitting lawyers to practise within its jurisdiction (although the EU does – see more below). The UK's immigration provisions, which are of course not the responsibility of the Law Society but of the government, have not, in the experience of the Law Society, caused any difficulty for lawyers under either the services or the establishment head to practise in England and Wales, proof of which can be found in the great number of foreign lawyers in the City of London. Immigration is not an issue for the Law Society nor, it is believed, for the foreign lawyers seeking to practise in the UK.

The Law Society does not, either, for the purposes of services or establishment, draw distinctions between lawyers from different countries. As already stated, the legal services regime in the UK is almost completely open to anyone, whether legally qualified or not, and so it has never been thought necessary, if a greengrocer can give legal advice for reward, to say that a lawyer from Ruritania cannot. The question of which country a particular lawyer comes from is, apart from the EU Directives mentioned below (which apply only to EU citizens with EU professional titles), a matter of importance in two matters only: first, the ability to go into partnership with an English solicitor, where the profession of the particular foreign lawyer has first to be recognised by the Law Society for the purpose of regulation; and second, the ability to qualify as a solicitor through the Law Society's aptitude test, of which more detail will be given below.

The lesson that the Law Society draws from this experience over many years is that the free movement of lawyers brings few, if any, problems with it. Indeed, it is believed that, on the contrary, it brings many benefits. The City of London has flourished as one of the principal international legal centres as a result of the ease with which foreign lawyers have been able to establish and practise within it. This, it is believed, has brought economic and know-how advantages to English law firms themselves.

(3) THE POSITION WITHIN THE EU

The single market provisions of the European Union relating to lawyers have been introduced over a number of years. There have been three directives, dealing with three separate topics.

The first was the Services Directive (77/249) which was passed in 1977. This Directive applies to the temporary provision of cross-border services within the EU (and not permanent establishment in another Member State). The clauses relating to professional rules, and which rules govern, are attached as Annex A to this paper. A Member State can require that appearances in the host court should be in conjunction with a local lawyer, but the European Court of Justice has ruled that the visiting lawyer has a primary right to provide any services relating to the proceedings, subject only to a minimal requirement (in practice, little – if anything - more than an introduction to the court) to act in conjunction with a local lawyer. It would not be right, for instance, to insist that the host lawyer must actively participate throughout the proceedings. There have been few, if any, problems relating to the Services Directive.

The second Directive was the Mutual Recognition of Diplomas Directive (89/48) in 1989. This allowed lawyers to acquire the professional title of lawyer in another Member State much more easily than previously. Instead of having to re-qualify fully for the Bar or Law Society in that other Member State, the migrating lawyer would only have to pass an aptitude test set by the relevant professional body in order to acquire the title. (Denmark alone among Member States does not have an aptitude test, but is satisfied by a period of adaptation.) The aptitude test is allowed to test only those aspects of the law in the host Member State which are different and unique. In other words, the underlying assumptions behind the 1989 Directive are that lawyers in the EU come from equivalent and respectable legal jurisdictions, and that their lawyers are qualified to a similar level. As a result, it is further assumed that lawyers should be able to acquire the professional title of another Member State by being tested in that other Member State's special features, and not by having to re-qualify fully from the beginning. Several hundred EU lawyers have become solicitors under this Directive over the last 10 years. Again, it is not believed that there have been any problems arising from these new admissions to the solicitor's profession.

The Law Society has extended the benefit of this Directive to a range of professions outside the EU. It concluded that, since it had developed a test through which lawyers from different legal systems and cultures (say, from France or Greece) could more easily qualify as a solicitor, it would be sensible to extend the possibility of taking this test to others who came from similar legal systems. So, lawyers from many common law jurisdictions, for instance, including from the United States, are now able to qualify as solicitors by taking a maximum of four papers (at least one is waived for common law lawyers, and often more are waived). It should be stressed that the Law Society does not look at how the lawyer qualified - say, from which law school or after how many hours of study. It recognises that different cultures have different methods of qualifying its lawyers, some with more stress on the academic, others with more stress on the practical. It looks at the professional title gained in the other country. Once it has recognised the title for the purposes of taking the aptitude test, then all lawyers with that title can take the test, with the possibility of becoming solicitors.

The third EU Directive in the legal services field was the Establishment Directive (98/5), which was passed in 1998, and should have been implemented by 2000 (some Member States are still in the process of implementing it). This Directive built on the previous two, but pushed liberalisation of legal services within the EU even further. Its main provision is that it permits lawyers from one Member State to establish themselves permanently in another Member State under home title. As such, these established lawyers are permitted to practise home law, host law and third country law. Within the UK, conveyancing and probate are still excluded from the scope of practice of lawyers who establish from other Member States (other than those who come from Member States which do not have notarial systems). Lawyers who wish to appear before the courts, similarly to the provisions of the Services Directive above, may be required to do so in conjunction with a local lawyer, if such representation is reserved to lawyers in the particular Member State.

Regarding which professional rules govern, the concept of "double deontology" applies to established lawyers, which means that they are subject to both home and host professional rules. The full provisions of Article 6 and

7 of the Directive are attached as Annex B to this paper. However, a brief mention of the principal provisions may be helpful here. Article 6.1 of the Directive states:

“Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.”

Article 7.1 of the Directive states:

“In the event of failure by a lawyer practising under his home-country professional title to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply.”

It is too early to say what problems are likely to arise out of the implementation of the Directive, since EU bars and law societies are still in the early stages of registering migrating lawyers. There are a number of initial problems relating to recognition of professional indemnity insurance, compulsory payments to be made to host bars, the interlocking of compulsory continuing education schemes, and the different scope of practice of lawyers in Member States. These are in the process of being resolved.

As for “double deontology”, it is recognised that this may in time lead to problems which will need to be resolved. At present, there is a Code of Conduct binding on all EU lawyers in cross-border cases, called the CCBE Code (the CCBE being the Council of Bars and Law Societies of the EU, which brings together all EU bars and law societies). The Code applies to “all professional contacts with lawyers of Member States other than his own; and the professional activities of the lawyer in a Member State other than his own, whether or not the lawyer is physically present in that Member State”. There are difficult questions being discussed at present within the CCBE as to whether the CCBE Code will apply to lawyers established under the Establishment Directive or not.

Nevertheless, the primary rule of the Establishment Directive is understood by all - that is, that host state rules govern. It is this principle which is used to resolve difficulties as they arise.

There is one other aspect of the Establishment Directive which is worth mentioning, and that is that it changed the coverage of the Mutual Recognition of Diplomas Directive (89/48) for certain lawyers. A lawyer established in another Member State, who has practised host law during three years, is now entitled to acquire the host title after those three years without having to take an aptitude test. That means more or less automatic integration into the host title after three years of establishment (Article 10). This applies just to EU lawyers, and not to those from outside the EU, who will still – if their profession is recognised for the purpose – have to take the aptitude test if they wish to become solicitors.

(4) CONCLUSION

The United Kingdom is unusual in not registering or regulating foreign lawyers. Most jurisdictions which permit foreign lawyers to practise within their territory do so on condition that the foreign lawyer registers and is regulated by the local bar. Despite the Law Society's own experience of a relatively trouble-free regime for foreign lawyers within the UK, it recognises that other bars and law societies abroad do want registration and regulation. The principle which has been found to be the easiest to work with is "host bar rules", meaning that it is the professional rules of the local bar which will govern transactions conducted within the jurisdiction. Under the EU Establishment Directive, lawyers from another Member State are to be treated in exactly the same way as host state lawyers. That is a principle which the Law Society is happy to commend to others who are considering introducing multi-jurisdictional practice.

Annex 1

Extract from Services Directive

Extract from the Services Directive (77/249)

Article 4

1 Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State.

2 A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

.....(3 is irrelevant for these purposes).....

4 A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

