

# Foreign Attorneys: The Right to Practice

## *Pros and Cons in Permitting Foreigners to Practice*

An attorney from another country has traditionally been barred from practicing law in the United States. The states have zealously guarded the right to practice law by formulating strict requirements for admission to the Bar.<sup>1</sup> An often repeated reason for refusal to allow the foreign lawyer to practice law is incompetence.<sup>2</sup> The foreign attorney probably is competent to advise on matters dealing only with the law of his native country. In fact, he could be categorized as a specialist<sup>3</sup> of that particular foreign law. Conversely, the foreign lawyer is merely a layman<sup>4</sup> as to the law of any state of America. If a foreign attorney only needed to be able to advise a client on his native country's law, he would be well qualified. But rarely would advice on some facet of foreign law not entangle itself with some local law of the state wherein the client resides. "Whenever advice on foreign law may affect rights or interests under local law, it is essential, for the client's protection, that the attorney also have a proper understanding of the local law."<sup>5</sup> An example<sup>6</sup> is the foreign attorney procuring a foreign divorce for a United States' resident. The attorney must be aware of the effect of the divorce upon the property rights of his client.

With the rapid increase in the United States of foreign business investments, the demand for lawyers competent to advise expertly on foreign and comparative law will continue to grow.<sup>7</sup> The

---

1. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1981).

2. See, e.g., *State ex rel. Boynton v. Perkins*, 138 Kan. 899, 28 P.2d 765, 769 (1934) ("The ultimate purpose of all regulations of the admission of attorneys is to . . . protect the public from incompetent and dishonest practitioners.") (quoting *Rosenthal v. State Bar Examining Comm.*, 116 Conn. 409, —, 165 A. 211, 213 (1933)).

3. See *In re Roel*, 3 N.Y.2d 224, 227, 144 N.E.2d 24, 28 (1957).

4. *Id.*

5. Note, *Legal Services by Foreign Attorney Applying Foreign Law Constitute Unauthorized Practice*, 36 TEX. L. REV. 356, 357 (1958).

6. *Id.*

7. Comment, *International Legal Practice: Restrictions on the Migrant Attorney*, 15 HARV. INT'L L.J. 298, 322 (1974).

postwar industrial and international trade growth<sup>8</sup> has intensified the need for the presence of foreign lawyers in our country. "Such advice is essential<sup>9</sup> to persons contemplating investments abroad, planning to enter into contracts . . . in foreign jurisdictions, or owning real property situated in foreign countries."<sup>10</sup> Aliens in the United States for whom English is not a native language would naturally prefer to obtain legal advice from a fellow national who speaks the same language fluently.<sup>11</sup> This foreign attorney would understand the legal consequences of actions taken in the United States which will affect the client in his native country.

Allowing foreign lawyers to practice would benefit American lawyers because of the grant of reciprocity by other countries.<sup>12</sup> American attorneys planning to become international lawyers may be prohibited from opening offices in a foreign country if the United States refuses to allow that country's lawyers to practice freely here.<sup>13</sup> The French, who have the reputation of liberality in matters dealing with foreign attorneys,<sup>14</sup> enacted a law in 1972<sup>15</sup>

---

8. Comment, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967).

9. See *In re Roel*, 3 N.Y.2d 224, 235, 165 N.Y.S.2d 31, 40 (1957). Judge Van Voorhis in his dissenting opinion stated:

In this century when the United States has become the creditor nation of the world and when the ramifications of our industrial, commercial, financial and recreational lives extend to every corner of the globe it is especially improbable that the legislature intended to preclude the giving of legal advice in this state to our citizens concerning those far-flung enterprises by trained lawyers from abroad who are equipped to give accurate information and opinions regarding them.

2 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 135 (1947).

10. Note, *Problem of Foreign Law: Should Practitioners be Licensed?*, 9 SYRACUSE L. REV. 275 (1958).

11. Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A.J. 1154, 1155 (1973).

12. See, Comment, *supra* note 7, at 329.

13. Herzog & Herzog, *The Reform of the Legal Professions and of Legal Aid in France*, 22 INT'L & COMP. L.Q. 462, 481 (1973).

14. Lund, *supra* note 11, at 1156.

15. LAW No. 71-1130 of Dec. 31, 1971, *Journal Officiel de la Republique Francaise* Jan. 5, 1972, p. 131, (1972) *Dalloz, Legislation*, p. 38. The effective date of the law was fixed by Art. 79. This French law provides that foreign nationals may only practice foreign and international law if the nationals' countries offer reciprocal rights to French lawyers. See Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALB. L. REV. 199, 206 (1975) for a discussion of this law.

which specifically allowed a foreign lawyer to practice in their country on the condition that reciprocal rights were granted to French lawyers within five years.<sup>16</sup> Although the French reciprocal rule may be applied with discretion by the authorities,<sup>17</sup> American attorneys in France may find their practice severely limited unless the United States relaxes its prohibitions on the foreign attorneys' right to practice.

### *Restrictions on the Foreign Attorney*

The Supreme Court of the United States did make one inroad for the foreign attorney in 1973.<sup>18</sup> The Court decided that a state Bar cannot exclude a qualified applicant based on citizenship<sup>19</sup> alone.<sup>20</sup> Although most states do have some residency requirement prior to admission to the Bar,<sup>21</sup> the requirement of residency for one year has been struck down under the due process and equal protection clauses.<sup>22</sup> The courts have held that there is no rational connection between an attorney's ability to practice law and a one year pre-admission period.<sup>23</sup>

A significant obstacle to a foreign attorney's admittance to a state Bar is the requirement most states<sup>24</sup> have that its bar members graduate from a law school either accredited by the American Bar Association or approved by the Board of Law Examiners.<sup>25</sup>

---

16. Herzog & Herzog, *supra* note 13.

17. *Id.*

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

19. The court decided that the requirement of citizenship violated a resident alien's rights via the equal protection clause. The court noted that resident aliens are a suspect class and deserve strict scrutiny. *Id.* at 721.

20. *Id.*

21. Comment, *supra* note 7, at 324.

22. *See, e.g., Potts v. Honorable Justices of the Supreme Court of Hawaii*, 322 F. Supp. 1392 (D. Hawaii 1971) (the court invalidated a six months requirement); *Lipman v. Van Zant*, 329 F. Supp. 391 (N.D. Miss. 1971); *Webster v. Woford*, 321 F. Supp. 1259 (N.D. Ga. 1970). *See also Note, Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831 (1971).

23. *Smith v. Davis*, 350 F. Supp. 1225, 1229 (S.D. W. Va. 1972); *see generally, McLendon, Residence Requirements as Prerequisites to State Bar Admission*, 5 J. LEGAL PROF. 227 (1980).

24. Comment, *supra* note 7, at 325.

25. *See, e.g., ILL. S. CT. R. 703(b)* (1982); *N.Y. CT. APP. R. 520.4(b)* (1982).

This precondition has been upheld<sup>26</sup> a number of times on the grounds it is not "arbitrary, capricious and unreasonable."<sup>27</sup> Regulation of the legal profession has "traditionally been the prerogative of the individual states."<sup>28</sup> Such state control would seem to preclude the United States as a whole from responding to the French reciprocal agreement<sup>29</sup> unless Congress decides to preempt the field of Bar regulation by statute.<sup>30</sup>

With each state comparatively free to regulate who may become members of the Bar, the foreign attorney will face an almost useless struggle in attempting to become a member. In the leading case of *In re Roel*,<sup>31</sup> the New York Court of Appeals held that the mere giving of legal advice constituted the unauthorized practice of law. The case involved a Mexican attorney who was not a member of the state Bar, but who had been advising clients on Mexican law. The Supreme Court of California as late as 1974 followed New York's lead.<sup>32</sup> In every state the concept of the practice of law includes not only the giving of legal advice but also the preparing of legal documents and courtroom appearances as well.<sup>33</sup> The primary reason that the mere giving of legal advice is prohibited is the attitude that such advice would allow unregulated practice of law.<sup>34</sup> It is argued that the public must be protected with some form of licensing from incompetent or immoral attorneys.<sup>35</sup> The numerous state Bars have been organized for this particular purpose. To allow foreign lawyers to give advice without being licensed and supervised would defeat the very purpose of Bar organization.

---

26. See, e.g., *In re Courtney*, 162 Conn. 518, —, 294 A.2d 569, 572 (1972); *In re Batten*, 83 Nev. 265, 428 P.2d 195 (1967). Cf. *Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036 (D. N.J. 1975) (held requirement from an accredited law school valid but exempted those in the experimental foreign attorney program), *aff'd*, 546 F.2d 418 (3rd Cir. 1976).

27. *Hackin v. Lockwood*, 361 F.2d 499, 504 (9th Cir. 1966).

28. Comment, *supra* note 7, at 322.

29. *Id.*

30. See *id.* at 331 for a detailed discussion.

31. 3 N.Y.2d 224, 144 N.E.2d 24 (1959).

32. *Bluestein v. State Bar of California*, 13 Cal. 3d 162, 529 P.2d 599, 118 Cal. Rptr. 175 (1974).

33. Comment, *Interstate and International Practice of Law*, 31 S. CAL. L. REV. 416, 417 (1958).

34. Note, *Legal Services by Foreign Attorney Applying Foreign Law Constitute Unauthorized Practice*, 36 TEX. L. REV. 356, 357 (1958).

35. *Id.*

*Possibilities of Foreign Practice in the United States*

The foreign attorney may yet have an avenue to "practice" law without attempting to meet the qualifications a state Bar imposes. In *Application of New York County Lawyers Association*,<sup>36</sup> the court declared the giving of advice by a Mexican attorney was unauthorized practice of law but specifically granted him the right to advise lawyers admitted to the Bar on the law of Mexico.<sup>37</sup> The rendering of such advice may prove a valuable commodity for an American attorney dealing with international matters. Yet if the foreign lawyer is free to give advice without some form of licensing, the client will go unprotected as to that lawyer's competency or ethical standards of conduct.<sup>38</sup> The client may also be subject to a higher fee due to double fee splitting<sup>39</sup> between the American and foreign attorneys.

According to some commentators,<sup>40</sup> the decision in *In re Roel*<sup>41</sup> may have bridged the gap in allowing foreign lawyers to give advice to members of the Bar. Although nowhere in the opinion is there any restriction upon "a foreign lawyer acting as a consultant to duly admitted members of the Bar on matters of foreign law concerning the latter's clients,"<sup>42</sup> it would seem that advice to a New York lawyer for a client would be as much the practice of law as directly advising that client<sup>43</sup> "unless the New York lawyer assumed responsibility for the correctness of the advice."<sup>44</sup> Taking such responsibility may leave the New York attorney vulnerable to

---

36. 207 Misc. 698, 139 N.Y.S.2d 714 (1955).

37. *Id.* at 699, 139 N.Y.S.2d at 716. *But see* *Societe Jean Nicolas Et Fils v. Mousseux*, 123 Ariz. 59, 597 P.2d 541 (1979) (French attorney acting as co-counsel for advice only to a qualified member of the Bar is unauthorized practice) (dictum).

38. Note, *supra* note 10, at 278.

39. Comment, *Aliens' Rights, the Public Interest and the Practice of Foreign Law*, 10 STAN. L. REV. 777, 778 (1958).

40. *See, e.g.*, Decision, *Unauthorized Practice by Mexican Attorney in New York Held a Violation of Section 270 of the Penal Law*, 3 N.Y.L.F. 440 (1957).

41. 3 N.Y.2d 224, 144 N.E.2d 24 (1957).

42. Reisler, *The Roel Case—A Landmark Decision on Unlawful Practice*, 1957 N.Y. ST. B. BULL. 369, 372 (1957).

43. Decision, *supra* note 41, at 442. *But see* Note, *supra* note 10, at 281 (the *Roel* case did not decide the question of foreign lawyers advising New York lawyers).

44. *In re Roel*, 3 N.Y.2d 224, 235, 144 N.E.2d 24, 30 (1957) (Van Voorhis, J., dissenting).

a malpractice suit.

Some states<sup>45</sup> do have a program wherein a foreign attorney may be admitted to the Bar without examination. New York<sup>46</sup> in particular will allow a foreigner to become a member of the Bar if he has been admitted to practice as an attorney and counselor-at-law in the highest court<sup>47</sup> of another country. This policy is limited to lawyers from countries whose jurisprudence is based upon the principles of the English Common Law.<sup>48</sup> The New York Appellate Division has discretion<sup>49</sup> to allow foreign attorneys to use this program to gain admittance and has specifically allowed foreigners from England,<sup>50</sup> Pakistan,<sup>51</sup> and the Philippines<sup>52</sup> to practice while denying Italians<sup>53</sup> and Mexicans.<sup>54</sup> This provision is further limited in two respects. First, a foreign lawyer must have practiced in his native country's highest law court for a period of at least five years.<sup>55</sup> Second, this lawyer must have graduated from an approved law school in his country which would be the substantial equivalent of a legal education acquired from an approved American law school.<sup>56</sup> The court has vested the State Board of Law Examiners with the power to determine which schools in other countries are qualified.<sup>57</sup> Although this provision will allow some foreign attorneys to be admitted to the Bar, there remains a need for some type of licensing procedure whereby an attorney from another

45. ILL. S. CT. R. 705(a) (1982); CAL. R. REGULATING ADMISSION TO PRACTICE LAW IN CAL., rule IV (1982).

46. 22 N.Y.C.R.R. § 520.9 (1982).

47. See *In re Wray*, 157 A.D. 905, 142 N.Y.S. 186 (1913) (an English solicitor did not fall within the rule as he had not been admitted to the highest court of his native country).

48. 22 N.Y.C.R.R. § 520.9(a)(1) (1982).

49. *Id.*

50. See *In re Wray*, 157 A.D. 905, 142 N.Y.S. 186 (1913) (Although it denied solicitor's request for admission, the court noted that if the requirements are met, an English solicitor will be admitted).

51. *Shaikh v. Appellate Div. of Supreme Court*, 39 N.Y.2d 676, 350 N.E.2d 902, 385 N.Y.S.2d 514 (1976).

52. See *Pascual v. State Bd. of Law Examiners*, 79 A.D.2d 1054, 435 N.Y.S.2d 387 (1981).

53. *In re Maggio*, 27 A.D. 129, 51 N.Y.S. 1055 (1898).

54. *In re Roel*, 3 N.Y.2d 224, 144 N.E.2d 24 (1957).

55. 22 N.Y.C.R.R. § 520.9(a)(2)(i) (1982).

56. 22 N.Y.C.R.R. § 520.9(a)(3) (1982).

57. See *Pascual v. State Bd. of Law Examiners*, 79 A.D.2d 1054, 435 N.Y.S.2d 387, 388 (1981).

country who cannot meet the stringent requirements of the special Bar admittance program can practice.

In 1975 the New York legislature followed the advice of many commentators<sup>58</sup> and enacted a statute<sup>59</sup> providing for special licensing for foreign attorneys to practice in the state. This provision allows a foreign attorney to become a "legal consultant,"<sup>60</sup> and in fact he must specifically refer to himself as such. This legal consultant must have practiced in another country as an attorney for at least five of the seven years immediately preceding his application to practice.<sup>61</sup> He must possess and prove the same good moral character as required of a member of the Bar.<sup>62</sup> Other prerequisites include actual residency<sup>63</sup> by the foreign attorney and that he be over twenty-six years old.<sup>64</sup> The foreign attorney admitted under these provisions must observe the *Code of Professional Responsibility of New York*<sup>65</sup> and acquire professional liability insurance.<sup>66</sup> Both these provisos serve to protect the client from incompetent or immoral foreign practitioners.

The legal consultant is limited in his scope of practice primarily to rendering advice on foreign law. He is specifically prohibited from court appearances<sup>67</sup> or the preparation of any instrument in respect to the rights or duties of a United States resident. He cannot give advice on the law of any state.<sup>68</sup> These rules<sup>69</sup> do not exclude from practice foreign lawyers who come from common law jurisdictions and do allow much needed advice from lawyers who are citizens of France, Germany, Japan, and other civil law based countries. The legal consultant should not prove to be a source of competition for a duly admitted member of a state Bar. The for-

---

58. See, e.g., Comment, *supra* note 8, at 1298.

59. N.Y. JUD. LAW § 29 (McKinney Supp. 1974). For Court of Appeals rules, see 22 N.Y.C.R.R. § 521 (1982).

60. 22 N.Y.C.R.R. § 521.3(g) (1982).

61. *Id.* § 521.1(a).

62. *Id.* § 521.1(b).

63. *Id.* § 521.1(c).

64. *Id.* § 521.1(d).

65. *Id.* § 521.4(a)2(i).

66. *Id.* § 521.4(a)2(2).

67. A legal consultant may only appear as an expert witness or *pro hac vice*.

68. 22 N.Y.C.R.R. § 521.3(e) (1982).

69. See Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALB. L. REV. 199 (1975) for a comprehensive discussion on the legal consultant in New York.

eign lawyer must still defer to an American attorney as to court appearances, preparation of documents, and advice on local law.<sup>70</sup> New York's legal consultant should prove a happy medium for both the American and the foreign attorneys.

### *Conclusion*

Industrial, financial, and commercial activities of American citizens and businesses have extended tentacles to all parts of the world. This economic growth necessitates accurate legal advice by lawyers from abroad who are trained to give opinions regarding these foreign enterprises. The public requires these foreign attorneys, not only for affairs abroad, but also for aliens in the United States who need a fellow countryman to properly serve their needs. Although there are compelling reasons to restrict the foreign attorney's practice, some form of admittance should be considered. The New York legal consultant rules adequately take into account such considerations as competency and Bar regulation to protect the client; yet the rules still allow the foreign attorney to directly advise clients on foreign matters without the cost of a middleman. New York's licensing procedure should serve as a model for other states concerned with the need for foreign attorneys.

*Cynthia Joyce*

---

70. Comment, *supra* note 7, at 323 n.167.