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Practicing the Law of the World from New York

PRACTICUM: FORM AND POLICY

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Delivery of International Legal Services in the Coming Decade

Editor's Note: The following is an edited transcript of the presentations made at the Annual Meeting of the International Law and Practice Section of the NYSBA on 23 January 2002 at the New York Marriott Marquis.

I. The Increasing Trend Towards Treating Legal Services as a Commodity in International Trade and International Trade Agreements

A. Introductory Remarks

ROBERT J. LEO: Welcome. This program is entitled "Delivery of International Legal Services in the Coming Decade." The topic to be covered by our first panel is "The Increasing Trend Towards Treating Legal Services as a Commodity in International Trade and International Trade Agreements." We are very fortunate to have a distinguished panel to talk to you about this.

Now let me introduce the members of our panel. Bernard Ascher has joined us from the Office of the U.S. Trade Representative (USTR). If you don't know who the U.S. Trade Representative is, that's fine; you don't need to know the particular person. The Office, however, is very important to U.S. trade policy and is very lean and mean. The Office consists of about two hundred people, I believe, and is located near the Executive Office Building in Washington, D.C. The Office is fully charged with the negotiations for all the U.S. trade agreements, the Free Trade Area in the Americas (FTAA) Agreement, and the World Trade Organization (WTO). Its staff keeps track of U.S. trade policies around the world: bilateral agreements, everything. They are the experts. The Office attracts the cream of the crop from other organizations and agencies in Washington, pulling them off for duty, with some of them then not wanting to go back to their prior employers. They put in long hours and do a great job for the country. And you can tell they are good, because I put in my application about twenty years ago, and they never hired me. So they have a very good sense of what they need.

Let me now introduce the co-moderator, Aureliano Gonzalez-Baz. He is with the law firm of Bryan, Gonzalez Vargas & Gonzalez-Baz, in Mexico City and New York and about forty other locations.

AURELIANO GONZALEZ-BAZ: Almost.

MR. LEO: And Aureliano has been very involved in the NAFTA procedure and the legal services issue.

We have Bernard Greer with us from the firm of Alston & Bird. And Ben is also very involved in this issue and has chaired a number of related panels.

And Jaime Cortes Rocha is also here. Jaime is with the firm of Mijares, Angoitia, Cortes y Fuentes from Mexico City. Jaime has been very involved in this issue on the Mexican side of the NAFTA negotiations.

Professor Sidney Cone unfortunately sends his regards and regrets he cannot attend. He's teaching at Harvard Law School this morning, and he was not able to switch his schedule.

So we have our panel assembled. I'm going to take the advice of my mother, who said, "When you're surrounded by people more intelligent than yourself, shut up and sit down!"

Thank you very much. Let's go. Aureliano!

MR. GONZALEZ-BAZ: As all of you now know, and as has been brought to light in very significant legal cases in these last weeks, governments are tending more and more to consider legal services to be a commodity. This is something that the private sector is challenging. The whole purpose of this program is to give you perceptions of and views on the issue and to offer you some insight as to what's going on.

We have, as our first speaker, Bernard Ascher, who will tell us about the position of the U.S. government and how it has developed, especially in the course of NAFTA negotiations, so that we can then use Mexico as a practical example in this matter.

B. A USTR Perspective

BERNARD ASCHER: Thanks, Bob and Aureliano. It really is a pleasure to be here. If you read my bio you would see that I was born, bred and educated in New York. It is a pleasure to be here with you to discuss legal services as a commodity in trade.

Before we get started, I must advise you of two caveats in the interest of full disclosure. First, I'm not a lawyer. I'm sometimes mistaken for a lawyer. But I want to make this clear so I don't get charged with practicing law without a license. As one of the few non-lawyers in the room, I'm flattered that you have invited me to speak here. Second, the views that I state here are entirely my own and do not represent the views of the Office of the U.S. Trade Representative or any other government agency.

USTR, as Bob mentioned, is a small agency with about two hundred employees. It is not a new agency. It

is about forty years old. It's not part of the Commerce Department. It is located organizationally in the Executive Office of the President. It is a White House agency. The current U.S. Trade Representative is Robert Zoellick. Our role is to help formulate and coordinate the administration of U.S. trade policy and to represent the United States in trade negotiations.

In my job as Director of Service Industry Affairs, I get to work on a variety of services, including distribution, health care, education and professional services. Thus, I have a good opportunity to compare one service to another and to compare legal services to other professional services with respect to the nature of the service and the manner in which it is delivered to clients or consumers at home and abroad. And I get to meet some interesting people.

A few months ago I served on a panel with a Dutch professor who told a cute story about two swimming instructors, one German and one Dutch. They became very friendly, and the Dutch instructor invited the German instructor to Amsterdam. And during that visit the German swimming instructor fell into the canal. He began thrashing around, saying, "Help, save me!" and the Dutch instructor said, "But you're a swimming instructor, you can save yourself." And as the German went down for the third time, his last words were, "But my credentials are not recognized in the Netherlands!" Now, that may be a little far-fetched, but it is a good example of the types of national and international problems confronting professionals.

Now, let's get to the subject of this panel: The increasing trend towards treating legal services as a commodity. I give credit to the organizers of this event. They have framed the subject in a provocative way. It has helped to attract all of you here today.

I suppose the basic question is whether legal services should be subject to trade agreements. And, if so, why and how? But the inference of comparing legal services to a sack of potatoes, a commodity, puts a special spin on the issue. Some might consider that being treated as a commodity is demeaning, almost insulting. In many respects the legal profession is unique. For example, the body of law differs from place to place, whereas the human body and the body of biological and medical sciences are universal. But each profession claims to be unique in some ways, and in that respect, they are all similar.

One feature that professional services have in common is the way in which they can be delivered to foreign clients. There are basically four modes of delivery.

- *Mode one comprises cross-border services where the service itself crosses the border.* Thus, for example, legal advice and opinions can be sent across borders by telephone or e-mail. Legal briefs and reports can be sent by regular mail. The same is true for medical advice and for examination reports. It is true for other services as well. Educational course materials, for example, can be transmitted electronically to a student in another country.
- *Mode two is where consumption is abroad.* The consumer crosses the border. A foreign client can cross the border and visit law firms in another country. Just as medical patients can visit hospitals and students can visit universities outside their home countries.
- *Mode three is local presence.* Services are supplied through a branch or subsidiary in another country. When permitted to do so, law firms can set up shop in another country. Hospitals can set up clinics, and universities can set up educational facilities outside their home countries.
- *Mode four involves the movement of persons where the service provider crosses the border.* Lawyers or doctors or faculty members can travel abroad for a temporary period to provide their services in another country.

These four types of delivery are encompassed in the concept of trade and services. Specific obligations on services that countries undertake pursuant to WTO trade negotiations are recorded in national schedules by mode of delivery. These schedules for services are similar to tariff schedules for goods. So, one might conclude that, at least in this respect, legal services are similar to potatoes or other commodities or other services because they are all within the scope of trade agreements.

From an historical perspective, this is a rather new occurrence. Only about six years have passed since services became part of international trade agreements. With the completion of the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreement that created the World Trade Organization, five decades of tariff negotiations on goods produced a great expansion of international trade with phenomenal worldwide economic growth. It is hoped that in coming years similar results can be achieved for services through the reduction of obstacles by means of international transactions.

Law is arguably the most international of business professions. The increasing integration of the world's economy in recent years has generated a growing demand for lawyers to assure compliance with the various countries' laws when projects and transactions take place across borders. In a sense, legal services constitute a sort of infrastructure for international trade and investment. Many clients choose to rely upon the services of professionals who are already familiar with the firm's business and have delivered high-quality servic-

es. Many seek a law firm with diverse capabilities, enabling one-stop shopping. Other clients find that they want to rely on specialists and want those specialists to be available to them worldwide.

Annual revenues from U.S. exports of legal services have grown from less than $100 million in 1986 to more than $3.2 billion in 2000, according to U.S. balance of payments statistics. Many suspect that, because of the difficulty of compiling such data, these revenues are probably understated. Now, let's stop for a minute and think of what $3.2 billion in exports means. That's equivalent to exports of about 150,000 automobiles. So it's big business.

The U.S. Trade Representative receives inquiries and complaints from lawyers and law firms on their own behalf as well as on behalf of their clients—complaints about obstacles they have encountered in conducting international business. Most of the legal services complaints relate to problems of market access, that is, problems in setting up establishments abroad as well as difficulties faced by individual lawyers in qualifying to practice in other countries. Some countries limit the practice of law to local nationals. And some deny foreign lawyers an opportunity to demonstrate their qualifications or to meet local requirements. Some countries also prevent lawyers or law firms from establishing law firms with other lawyers. USTR is sensitive to these complaints and tries to be responsive by obtaining as much information as possible on each situation, by consulting with other foreign government officials, and by seeking to negotiate remedies.

We are currently engaged in multilateral negotiations on services in the World Trade Organization. Those negotiations began in January 2000 as a result of an agenda for progressive lateralization built into the WTO agreement, the General Agreement on Trade in Services known as the GATTS. You probably read in November about a ministerial meeting in Doha, Qatar. At that meeting some one hundred forty countries agreed to comprehensive negotiations on a variety of trade issues, including trade in services. This will give new impetus to the ongoing negotiations on services. The U.S. legal profession has been active in the current negotiations through the Coalition of Service Industries (CSI), as well as through an Industry Sector Advisory Committee (ISAC) known as ISAC 13. ISAC 13 is an Industry Sector Advisory Committee on services.

The U.S. legal work group has developed a draft negotiating proposal for consideration by the U.S. government. Here's what the proposal would do if adopted. It would enable individual American lawyers to serve as foreign legal consultants (FLCs) abroad on law as to which they are qualified. They would not have to take exams and satisfy the more burdensome requirements of full qualification to practice in the host country. Although subject to local bar rules, their practice would be limited to certain activities.

As in the case of the twenty-four U.S. jurisdictions that now license FLCs, Americans licensed under the proposal would not be authorized to go to court in the host country and could be subject to other limitations on the scope of their practice. For example, as with the U.S. FLC rules, they may not be permitted to prepare documents for recordation of real estate transactions or divorces. Their basic required qualification, however, would be that they are licensed in their home country and are in good standing in the profession. The lawyers would be required to meet the same professional rules that apply to host country lawyers. And the proposal would do the following for law firms. It would help U.S. firms to open law offices in other countries and would authorize formation of partnerships and other forms of organization that are available to host country lawyers. And it would enable U.S. firms to enter into partnerships with, employ, or be employed by host-country lawyers.

The Coalition of Service Industries maintains that its proposal is consistent with the rules maintained by jurisdictions in the United States that permit foreign lawyers to practice as legal consultants. Thus, it would not compromise the ability of any state judiciary in the United States to decide whether or not to authorize FLCs. As previously noted, twenty-four jurisdictions currently permit the practice of FLCs, including the states with the largest centers of commercial significance, namely, New York, California, Florida, Texas, and Illinois. Also, the proposal would not create any conflict between the concerns of U.S. firms that have established or wish to establish offices abroad and U.S. firms that do not have a similar interest but who may wish to provide services on a cross-border basis.

The proposal would apply to the "mode three" transaction, setting up offices abroad. It would *not* apply to "mode one" transactions, that is, cross-border transmission of legal advice or information by mail, telephone, e-mail or other media. Nor would it apply to "mode two" transactions, that is, advice or information provided to clients visiting from abroad. And it would also not apply to "mode four," that is, rights or restrictions respecting lawyers visiting clients in another country for a short period of time to provide advice. With respect to mode four, the pending proposal on legal services neither recommends nor contemplates any changes. It is common practice for U.S. lawyers to offer temporary services in other countries. We're not aware of any problems resulting from such practice. However, we will be working with other countries to seek ways of facilitating temporary entry through special provisions.

So where do things stand from USTR's perspective? USTR is reviewing the proposal, but it is receiving mixed signals from the American Bar Association, as mouthpiece for the legal profession. CSI's proposal has been endorsed by the ABA Section on International Law and Practice (SILP) and was vetted with a large number of American law firms that have foreign offices, approximately one hundred firms in all, who raised no objections. SILP submitted the proposal to the ABA Board of Governors for approval in October 2001. However the ABA's Center for Professional Responsibility (CPR) recommended that the Board of Governors defer action until the Association's Multijurisdictional Practice Commission issued its interim report recommending an ABA policy governing multijurisdictional practice. CPR's memorandum to the ABA Board of Governors raises reciprocity issues, namely, that requests by other countries for comparable rights in the United States may compromise the state judiciary regulation of the profession. The CPR memorandum states, "We therefore question whether the state supreme courts, which retain the power to regulate the practice of law in the United States, will appreciate the American Bar Association adopting a policy that supports federal government negotiation of that power." CPR also raised questions concerning the right of establishment, the scope of practice, and the form of practice of foreign lawyers in the United States. Its rationale appears to be that, if it is unethical for a lawyer in one state to give advice on a law in another U.S. jurisdiction, it is equally unethical to give advice to a client on a temporary visit to another country.

The Board of Governors then chose to refer the matter to the ABA House of Delegates for discussion at the midyear meeting in February, as recommended by the Committee on Professional Responsibility. So the matter is now before the U.S. legal profession. Bear in mind that we face a deadline in the WTO services trade negotiations: our requests of other countries must be submitted by June 30, 2002, which means that we need industry input about two months prior to that date, or even sooner for inter-agency review. Also, we are considering an early submission of requests to set a good example for the other countries and to give greater momentum to the negotiations. On legal services, we will await clearer signals from the profession.

Thank you very much for this opportunity to bring these international matters before you today. I look forward to discussing the subject in the panel discussion.

MR. GONZALEZ-BAZ: Thank you very much, Bernie.

Before we go on to the position of the foreign lawyers, I would like to ask Bernard Greer to come on up and give us his perspective. He has a special interest in the issue since he spent a couple of years in a Paris law office some time ago. He is licensed as a foreign legal consultant, a *Conseil Juidique,* in France.

C. An International Business Perspective; The Role of the IBA

BERNARD L. GREER: Thank you, and it's very nice to be here. Actually, I bring to this program a number of years of experience in practicing international business law with commercial law firms, but also I am here in my capacity as Secretary General of the International Bar Association. I will talk a little bit more about what the IBA does in this area in a minute, but I have to say that anything I say this morning is not representative of the opinion of the International Bar Association. It speaks through its counsel. Sometimes I think these opinions that I express are not even my own, but in any case, I'm not speaking for the IBA this morning.

I'm going to talk first to just underscore a major problem in dealing with issues of this nature—and Mr. Ascher has so very well illustrated this. And that is that the market moves inexorably. At the same time, the bodies that regulate the profession both in the United States and elsewhere resemble hundreds, if not thousands, of ships passing in the night: they don't talk to each other very much. They have only recently begun to focus on these issues. I actually wrote an article about this fifteen years ago, long before even the Uruguay Round and well before anyone had dreamed of GATTS.

Globalization and technology are continuing to make it very easy for lawyers and legal advice to move across borders. I like to use the analogy of a weather map, viewed against and superimposed on a political map. If you replace weather patterns with the movements of people, capital, goods and services across borders, you can see that those movements really don't respect national borders too much, and technology is facilitating that.

Regulation, on the other hand, is a patch. And that's what we're dealing with. Regulation, I think, you have to face as squarely as you can. It is very often not relevant to the way law is practiced. In Georgia, my jurisdiction, for example, it is a misdemeanor for any one of you to come to Georgia and hand out a business card that says you're an attorney in New York. And if you come, our regulators are all in orange sunglasses, and they are going to get you. But the truth is that, although everybody laughs about that law, it is a political reality. The legislature, which consists of mainly small town litigators who don't give a flip about all of this, is not about to change that. And so regulation is simply not relevant to the way law is practiced, mainly by the big commercial firms. But you'd be surprised how many smaller firms get involved in international business. I got a call from a lawyer in Mississippi a few

years ago who had a domestic relations case that involved the kidnapping of a baby and the spiriting away of the child to France. So everybody runs into cross-border practices, and this creates a lot of regulatory issues.

Establishment is the one issue that people most focus on in the GATTS negotiation and in the NAFTA negotiation. But there are many others that have been posed by globalization and are becoming hot buttons. The privileges of transient lawyers: there's no consensus on that. The privilege that a lawyer—whether that person is company counsel or a lawyer traveling from the U.S. or coming into the U.S.—the nature and extent of that lawyer's attorney/client privilege is unclear. There is no regulatory consensus on that issue. Company lawyers themselves are not entitled to the privilege even in their home countries sometimes.

We have in our firm the anomaly of having been hired by general counsel of a French company, but we can't talk to him, because he's not entitled to the privilege. Directly on matters of U.S. law, we have to talk to the executives of the company, and then sometimes the word filters back, through a procedure that we don't understand, to the general counsel. But we don't communicate directly with general counsel. There are lots of words you could use to describe that situation, but anomalous will do for the moment.

As for arbitral tribunals, their status is unclear in many jurisdictions. There is also no regulatory consensus around the world concerning Internet practice, as well as other issues, for example, attorney discipline. Next week I'm scheduled to speak at the ABA midyear meeting on the cross-border aspects of lawyer discipline. People from Europe and the U.S. are on that panel, and I look forward to it. Although I don't think I'll be able to give them much practical advice, it is an interesting issue. The point is that we really have to move toward a consensus, because law firms are in the anomalous position of advising their clients to obey the law, while increasingly the law firms themselves are flaunting the rules. For example, I was in Brazil four years ago with a client working on a joint venture there. And the client was going to lease space in a nice office building in São Paulo. It happened that the space they took was next door to an office on which the sign of one of the so-called Magic Circle firms from England was placed. And so I asked the leasing agent how they were able to be there. She said, "Oh, they are really not here." I laughed. Well, of course they were there. And there was a reason for them to be there, because there is a market for their services. Lawyers and their law firms sometimes just wink at the rules in order to take advantage of those market trends, and I suggest to you that that is not necessarily healthy.

There is nothing in the headlines about Enron that suggests that we ought to relax professional standards. In fact, the debate in the next months is surely going to focus on how we can improve professional standards.

Now, as for the International Bar Association (IBA), its structure is very much like that of the ABA, but in practice it's quite a bit different. It has, as a governing body, a council, which consists of representatives of one hundred eighty bars and law societies, including the American Bar Association, all the major European bars, and national bars from around the world, as well as some city bars. The IBA Council is attempting to reach consensus views on regulatory issues. And, when the IBA Council speaks, it speaks with some authority.

But as you can imagine, a council with representatives from Algeria to Zimbabwe and every place in between takes a while to develop a consensus and speaks only on broad general principles. But when we do speak, we speak in terms of professional values, and I think that is an important point to make. The debates about GATTS—and I think GATTS is a very good thing, because without GATTS, the bars would be farther behind than they are in coming to grips with these very important issues—create independent pressures on all the professional organizations, not just those in the U.S., to come to grips with the implications of cross-border practice.

That's what we're doing in the IBA, and we have submitted to the World Trade Organization four resolutions, all of which are couched in the core values of the profession. And there is consensus on that. How we harmonize those core values with local regulations is not going to be easy, but we believe that it must be done. Thank you.

D. The NAFTA Joint Recommendation and the Model Rule: A Mexican Perspective

MR. GONZALEZ-BAZ: I would like to ask Jaime Cortes Rocha to talk to us about what the experience in Mexico has been with respect to services rendered by foreign lawyers in conjunction with the North American Free Trade Agreement.

JAIME CORTES ROCHA: Well, first of all, I would like to thank Jim Duffy for this invitation. I am very glad to be here with you. Unfortunately, we don't have the same weather that we had in Ixtapa last year. But I'm very glad to see the friendly faces that we met there, and we hope to have a very fruitful session here. I am a member of the Mexican Bar Association, and a delegate from the bar to the Mexican Committee of International Practice.

NAFTA is one of the first treaties that raised the issue of internationalization of legal practice, taking into account the globalization trend that affects all areas

of human activity and seems to be irreversible. As we say in Mexico, globalization will be with us forever.

Unfortunately, for us lawyers, the issue of cross-border practice or international practice, which is of the utmost importance for the legal profession, was negotiated as an appendix to NAFTA, as if our services were a commodity or just another business service, and not reflective of any concern for our sacred profession, which prides itself on striving for the highest values of independence, the avoidance of conflicts of interest, and the preservation of client confidences. To deal with these issues, NAFTA followed the "limited licensing" or the "foreign legal consultant" approach to regulate foreign lawyers for the limited purpose of permitting them to practice the law of their home jurisdiction in the host country, subject to restrictive rules for establishing and associating with individual lawyers or firms licensed in the host country.

NAFTA recognized the need for close cooperation toward eliminating barriers and facilitating the cross-border delivery of legal services. It encouraged the development of joint recommendations by the relevant professional bodies of the three signatory countries for licensing foreign legal consultants and permitting the establishment of associations or partnerships between fully licensed lawyers of one country and foreign legal consultants of the other two countries.

The treaty established that attorneys licensed in Canada, Mexico or the U.S. may act as legal consultants in the territory of the other member countries with respect to the law in which they are licensed to practice. With Canada it was agreed that a lawyer from a Canadian province would be permitted to enter into a partnership or association with lawyers licensed in Mexico, subject to reciprocity and to certain restrictions, such as the requirement that the majority of the association or partnership members must be Mexican lawyers. Canadian law firms may be established in Mexico to provide foreign consultancy service, subject also to reciprocity. Canadian lawyers may practice in Mexico only as foreign legal consultants; they may not practice in or advise on Mexican law.

Lawyers licensed in the United States were given the same rights as lawyers licensed in Canada with respect to being licensed as foreign legal consultants and establishing foreign legal consulting firms in Mexico. However, no rules on forming partnerships or other associations with Mexican licensed lawyers were agreed upon with the U.S. under NAFTA. The treaty also established that the scope of such associations and the licensing of foreign legal consultants should be negotiated by the relevant professional bodies of the three NAFTA countries with a view toward developing a joint recommendation. For such purposes, a joint recommendation and a model rule on foreign legal consultants were developed by the representatives of the legal professions of Canada, the U.S. and Mexico after four years of intensive negotiations in the three countries. This process was concluded by a formal signing ceremony in Mexico on June 19, 1998.

The model rule relating to foreign legal consultants set forth certain licensing requirements that include the following: the licensure and good standing of the applicant in the applicant's home country; reciprocity; the good character and reputation of the applicant; minimum practice experience, which is five years; liability insurance and bond indemnity as required in the home jurisdiction; and submission to the regulatory body in the host country. The scope of practice of the foreign legal consultant under the model rule encompasses advice on the law of the foreign country or on international law. The foreign legal consultant may not appear in court or in any administrative procedure, except as permitted by the law of the host country. The foreign legal consultant may act as an arbitrator or as counsel in arbitration. The following is an overview of the provisions of the model rule relating to association and similar matters:

- A law firm based in any NAFTA country may establish in another NAFTA country to provide legal consultant services through its members licensed as foreign legal consultants in the host country.
- A foreign legal consultant may enter into a partnership or form a law firm with one or more lawyers of a firm licensed in the host country, except that, in the case of Mexico as the host country, all the partners of the firm must be fully licensed Mexican attorneys or licensed foreign legal consultants in Mexico. The foreign legal-consultant-licensed partners should not outnumber the Mexican-licensed partners, and the management of the firm must be entrusted to the Mexican-licensed partners.
- A lawyer licensed or a firm headquartered in any NAFTA country may employ a lawyer licensed in other NAFTA countries, except that, in the case of Mexico as the host country, no Mexican-licensed lawyer may be employed by a foreign legal consultant or a firm of foreign legal consultants.
- A law firm of any NAFTA country may enter into an alliance or other form of economic arrangement, other than a partnership, with a lawyer licensed or a firm headquartered in other NAFTA countries. A foreign legal consultant practicing in a host country may continue to be an employee of or associated with a lawyer or law firm in the home country.

The Canadian and the Mexican delegations delivered the joint recommendation and model rule to their respective governments immediately after they were signed in Mexico in order that they could be discussed in the Free Trade Agreement commissions established by the treaty. Unfortunately, these joint recommendations, although signed by the chair of the American delegation, apparently have never been formally presented to the U.S. government, nor have they been submitted for discussion to the NAFTA commission. Consequently, until other rules with respect to the cross-border practice of law through foreign legal consultants are implemented, the basic provisions established in NAFTA will continue to apply with reservations made by each country, especially Mexico.

We believe that the joint recommendation is an important basis for the practice of law across borders and should serve as a starting point for the future. There are points in the general recommendation that could be improved upon and resolved. It would be advisable to begin implementing NAFTA and the joint recommendation and then initiate discussion among the professional organizations of the three countries to define the points on which new agreements might be reached.

In summary, according to NAFTA and the joint recommendation, lawyers of any NAFTA country may continue to travel and practice on a temporary basis the law of their licensed jurisdiction in other NAFTA countries. Lawyers of any NAFTA country may establish a foreign branch office with licensed foreign legal consultants in any other NAFTA country. Lawyers and firms of any NAFTA country may form regional and worldwide alliances subject to certain limitations. And lawyers may practice in arbitration proceedings as arbitrators or counsel.

In conclusion, let me point out some principles that should not be overlooked in dealing with the matter of international practice. First, the new practice environment and the trend towards globalization should not change *per se* the basic fundamentals of our practice. Second, the growth of international trade and investment does not justify relaxing regulation of the legal profession so as to authorize the unlimited practice of unlicensed lawyers or lawyers educated and qualified in different legal systems. Third, the demands of our clientele for time and cost efficiency should not excuse lawyers from their professional responsibility within their authorized scope of practice. Fourth, the requirement for licensing a foreign practice in a foreign jurisdiction does not constitute a discriminatory barrier. And fifth, we cannot sacrifice the traditional regulation of our profession to the need to facilitate the conduct of international business. Thank you.

MR. GONZALEZ-BAZ: Thank you very much, Jaime. Before we open this up for questions and answers, I would like to give some comments.

I think it is most regretful that the countries do not recognize the realities of what happens in the business world and in the legal profession today. We have a great deal of respect for jurisdictions that do allow foreign lawyers, in a fairly straightforward, clean, transparent way, to become foreign legal consultants. New York is a very good example, because at least it allows you to come and do it here. We cannot say that, by not recognizing these realities, Mexico does not work. Without any question it does. But by not establishing an office, the companies and firms don't hire Mexicans and don't pay local taxes. When they are allowed to open up an office, they become part of the community. They can be supervised and they have the same standing as everybody else. But I do not believe that there is a lawyer here from a foreign country that does not recognize the fact that the large international firms—German, English, and American—operate worldwide. The big ticket items are theirs, without sharing the work and the benefits and the profits with local lawyers. And a lot of it is because the local lawyers and the local bars are so concerned about "being able to practice in a court," while no international lawyer wants to appear in a court. I do not know of an international lawyer that wants to go into a court in Mexico under any circumstances. They don't want to appear in court. But they do all the banking and all the securities work. They do an enormous amount of privatization work.

There's now a Canadian firm advising on how to implement multi-service contracts for the effective privatization of the gas utilities: you know, a Canadian firm outside Mexico, working out of a hotel room in the Four Seasons. This is the reality. So it would make sense to allow them to work as such, to open up offices on a much simpler basis in the same way in which many jurisdictions (e.g., New York) permit this.

This is a reality. You get on a plane, whether it be in São Paulo or Madrid or Paris, and fifty percent of the passengers on a Monday morning are lawyers. Maybe one or two percent have an office in that particular city; the majority practice without an office. So I think that we're missing the boat and the opportunities. Instead of bringing in foreign counsel that have competent, worldwide, state-of-the-art, high professional standards, we are missing out on the potential that this would have. And I think we are going to regret it in the future. A good example has been the United States. The U.S. lets you come here. You apply the same supervision and hierarchical standard. We should learn from that and implement it as well. That's my personal opinion.

MR. ASCHER: Thank you. What I would like to do is just clarify some of the points that have been made

about the NAFTA negotiations on foreign legal consultants. First of all, under the NAFTA agreement, the negotiations concerning foreign legal consultants are in the hands of the experts themselves: the representatives of the law firms, representatives of the profession, representatives of the regulatory authorities, and it's not in the hands of the federal government for the most part. Now, what happened in the NAFTA negotiations was that an agreement was reached, and it was initialed by all of the representatives of the profession, with the objective, as Jaime mentioned, to present this to the parties for ratification. Now, what that means is that each of the parties has to look at this agreement and determine whether the agreement is consistent with the NAFTA. Now, while the U.S. side was undertaking this review, several American law firms, with law offices in Mexico, came to us and were very upset that this agreement contained provisions that would affect their business, their established business in Mexico, because, they said, the agreement contained provisions that were not part of Mexican law and new restrictions were being imposed by the agreement. And what they were referring to was the ability of American lawyers to open offices and hire Mexican lawyers and to associate with Mexican lawyers. And above all, the problem—and Jaime mentioned these provisions—the problem was that in Mexico you could not have a majority of foreign legal consultants running a law firm. It would have to be a majority of Mexican-licensed lawyers. And Mexican-licensed lawyers would have to have control of the firm. And there was fear, not only that the Mexican-licensed lawyers would have control of the management in Mexico, but also that this control requirement would extend to the firm's headquarters in the United States because the wording was so broad.

And what we did at USTR was to organize a meeting. We brought together those who had negotiated the agreement—and I must say the people who negotiated the agreement negotiated in good faith, they were conscientious, they did a good job. I attended one negotiating session as a guest in Vancouver and found that the U.S. side had three representatives, other than me; whereas the Mexican side—and this is in Canada—the Mexicans had about fifteen representatives, and the Canadians had about ten. So the U.S. side was really run by a very small delegation. And they didn't have perfect knowledge of all of these facts and wondered, you know, where have these American law firms practicing in Mexico been all this time? Why haven't they given us this information?

So the upshot for the U.S. government was that we had to check the facts. We had to find out whether there was a restriction of this type currently existing in Mexican law, or whether this was a new restriction being imposed as part of this agreement. We consulted with our Mexican counterparts, the Mexican government, and we didn't get clear answers. A clear answer would be yes, it is a new restriction, or no, it isn't a new restriction. We got some very equivocal kinds of responses, which to us meant it's probably a new restriction. And so it raised questions in our mind whether this is really consistent with the NAFTA.

Now, as I understand it, this was raised at the commission level. The trade ministers did raise this. The Mexican trade minister, supported by the Canadians, raised this. And our U.S. Trade Representative responded to it and told the same story that I have just told you now. So as things currently stand, I understand that there have been contacts between the U.S. and Mexican bars. There are still hopes that this agreement can be brought back on track. But at the present time, it's in a state of limbo. So I hope that clarifies the situation.

MR. GONZALEZ-BAZ: From a legal standpoint, yes. But, I think, from a practical standpoint, it is a moot issue. Because the practicalities are that there has not been any firm that has wanted to open up in Mexico that has not done so. Period. That's the reality. The fact is that, out of maybe ten lawyers in a firm, two are members of the Mexican firm and eight are members of the foreign firm, and legally they are able to circumvent any restriction because no one digs deeply, and you get around it. So that's not much of a concern.

We are involved because there's no way to practically enforce the restriction. You have ten visiting lawyers, or five or seven, and they can be there indefinitely, and they can effectively run the firm, the way the procedures are. It would be helpful for us to recognize this, and just let it be out in the open. You're right; it is a new regulation. The restriction does impose something upon foreigners that it does not impose upon Mexicans, and the fact is that it is moot because it is not even enforced. It can't be enforced.

MR. ASCHER: I understand what you're saying, but this is really something that's very important to the firms that are operating there now. They have told us that this would amount to an expropriation if this new rule for foreign legal consultants were adopted. And if it were implemented, they would really lose their businesses in Mexico.

MR. GONZALEZ-BAZ: We feel, if they were to challenge the new rule through the court system, it would be knocked down. The rule cannot be enforced.

MR. ASCHER: They don't even want to face the threat of that.

MR. GONZALEZ-BAZ: Probably so. That has to change. I don't think Mexico really appreciates the effect of this rule. There were good intentions in attempting to salvage it. But it is like prohibiting lawyers and accountants from working together. In

Mexico, it's a reality that it's being done. I think the rule has to be set aside. It's moot.

Do we have questions, please?

MR. ASCHER: One more point before we get to the questions.

MR. GONZALEZ-BAZ: Yes, sir.

MR. ASCHER: There is another way, and that is through the current World Trade Organization negotiations, where you could have not only just the NAFTA countries but all of the countries or a large percentage of the countries adopting foreign legal consultant rules.

MR. GONZALEZ-BAZ: Yes, absolutely. No, we would encourage that because it would make it transparent. It would make it clear. Just like in the States, it would be a recognition of the facts, allowing the law to reflect actual circumstances. The provision at issue does not allow that to happen in Mexico, and as a consequence we think it is a moot issue, and we are really not concerned about it. Again, from a practical standpoint, it happens. It is much better to face what happens, recognize that firms are there, and let them open up offices and become normal good citizens like anybody else and go about their business.

E. Questions and Comments

AUDIENCE MEMBER: I have a question for Mr. Ascher. As you know—and you mentioned that—foreign legal consultant regulation in the United States is on a state-by-state basis. The ABA, which is apparently taking the lead role vis-à-vis the USTR, is basically advisory only. New York State has probably the most foreign legal consultants of any state in the country and is extremely interested in this issue. Would it be worthwhile to help you meet your deadline if New York State, through the State Bar Section here, took an active position, an active role and presented an active position to you?

MR. ASCHER: Yes, that would help very much. And you remind me that, in the case of the NAFTA foreign legal consultant rule, New York State did take a position opposing the draft agreement, and it was also opposed by the Texas bar. So, thank you. Yes, it would help.

I think what needs to happen is that we need to hear more from those who are concerned about international business. Because there are about a million lawyers in the country, and only a small percentage are really engaged in the international business. And if they don't speak out, the other 900,000 are going to carry the day. They are going to look very narrowly at the state-by-state approach, and they are going to stick with the past and not move to the future. Thank you.

JAMES DUFFY: I just wanted to add one comment. Bernie, you may recall that I was one of the three people in Vancouver because we had called everybody, and none of the people who ultimately opposed the joint recommendation, although invited, attended.

I would like to point out that the joint recommendation simply requires that the jurisdiction have a rule that is no less restrictive. New York, in our opinion, has an FLC rule that is far broader than the NAFTA joint recommendation. So, in effect, it would be very easy to allow the joint recommendation to come into effect in New York. Because our rule is broad enough.

The practical consequence of that is that the joint recommendation requires an annual review among the three parties. And had we done that, we would have had now I guess four or five annual meetings. And the sole purpose of those annual meetings would be to liberalize the joint recommendation. So I think we sort of missed out on an opportunity here.

I'm not aware of any law firm that really wants to be in Mexico that hasn't been able to be there. I think that Jaime can second that all of these law firms that are there are well respected, well regarded, and welcomed as colleagues. And I don't think there have been any practical issues.

MR. GONZALEZ-BAZ: Absolutely. Mr. Greer, do you have any additional comments?

MR. GREER: Well, a couple of things. First, in my experience, the Achilles' heel of the U.S. position is that many of the state bars simply don't have regimes that are consistent with those of the USTR and the major states, including New York, Illinois, and our state, Georgia, for example. And this gets thrown up to me as an American in connection with my IBA work all the time. But it really has undermined the U.S. position, because it is fundamentally inconsistent.

The second point is—and I just throw this out because it was one of the problems with the position of those who are reluctant to open up their local regimes—that an actual abuse has not been shown in many cases.

I was talking recently with the president-elect of the CCBE, a gentleman named Rupert Wolf from Salzburg, Austria. And, as some of you probably know, it took eighteen years within the European Union for the bars and the European Union Commission to negotiate the establishment directive, which finally went into effect in 1998. And there was a great fear in Salzburg that there would be a flood of German lawyers who would cross the border, set up in Salzburg, and take business away from the local lawyers. And he said that they have found out that the reverse is true. The Austrian lawyers are going to Munich to set up an office and are busier than they have ever been. So there is a fear that a liber-

alization will take business away from local lawyers. And I don't know of any surveys on this subject, but it would be interesting and perhaps give comfort to those who are worried about that. If a survey were to be taken, I suspect that actually the reverse is true. And certainly the opportunity for local lawyers to be trained in these big-ticket capital market transactions, working with a major firm, would be a great educational opportunity.

Having said all that, I am fundamentally troubled personally by the fact that, in pursuit of the market, law firms simply ignore local restrictions. I think over time we have to change that. In extreme cases, in Slovakia recently and in India, the local authorities and the bars have actually tried to have these sort of "gray market" lawyers arrested. That has been stopped in Slovakia, and in India it's in litigation at the moment. This is unfortunate. I think the answer—and this is not going to be easy for any of us—but the answer is to face all of these issues squarely and not throw the baby out with the bath water by forgetting professional values along the way.

MR. GONZALEZ-BAZ: May I ask Jaime for a quick response, please.

MR. CORTES ROCHA: Yes, I would like to clarify some issues here. Because you may get the impression that Mexican law, that the joint recommendation, bans any possible cross-border practice. And I would like to say that the joint recommendation that was signed by the three countries in terms of foreign legal consultants applies exactly the same rules as the ones you have here in New York and the ones that are proposed under the IBA recommendation.

So I think, in terms of foreign legal consultants, we are open in Mexico—and this was also the purpose of the joint recommendation—to allowing foreign lawyers to practice on a temporary basis, or even by establishing themselves in the foreign country, but only to practice the law of the jurisdiction in which they are licensed to practice. And that's the same here in New York. And that's the recommendation of the IBA.

The only point of discussion here is in terms of establishing foreign firms to practice in the country and to employ local lawyers. That is a big issue, and that is the one that has been opposed in Mexico. And in the joint recommendation there was a solution for this. First of all, it is permissible to establish an association with foreign firms, except that the foreign firms cannot establish an office in Mexico just by employing non-Mexican lawyers. There has to be a Mexican presence there. And according to the law, the practice of a Mexican lawyer cannot be controlled by a nonlicensed person, and the provisions regarding majority control by Mexican-licensed lawyers serve to satisfy this law, that is, to ensure that the practice of Mexican lawyers is not controlled by nonlicensed lawyers.

What is proposed is to continue the discussion on these issues, but of course I would like to make clear that there is no opposition to allowing cross-border practice in Mexico.

MR. DUFFY: Thank you to all of my panelists today. For those of you who were here, I would also like to add my thanks for a very, very interesting and well-thought-out discussion.

II. How Lawyers and Firms Are Positioning Themselves to Serve International Clients in Today's Environment

A. Introductory Remarks

MR. DUFFY: I would just like to introduce the topic briefly. We are going to move from a somewhat theoretical discussion to some more practical issues. How are law firms positioning themselves in order to take advantage of the opportunities that exist in the international arena?

Some of our lawyers are going to be people from large law firms that have only one jurisdictional presence. Others are going to be representatives of legal mega-firms, and others will be representatives of relatively small firms—which should be encouraging, as many of our members might be asking how, practicing as very small law firms or perhaps even as sole practitioners, they can participate in these international practice opportunities that people are talking about. Well, you will hear that from some of our next panelists as well.

So at this point, Michael, if you are ready. Here is the second panel.

MICHAEL MANEY: Good morning. This panel is really dealing with various alternative ways of delivering legal information and international context.

If you can posit the way it was fifteen or twenty years ago, you basically had law firms operating in their own jurisdictions, in many cases within a single state. I can remember that in Germany the law firms would only be in their own *Land* or individual state, and very rarely would they expand beyond that state, much less beyond the country. A few would have outposts in different jurisdictions, and then suddenly they started expanding. The German firms started moving either to different states or different cities, and they started merging, and pretty soon they started merging across borders.

Many of the firms that were independent ten years ago have been merging and forming alliances. Much of

this has occurred because of the removal of restrictions and because of acquisitions across borders.

Within the European Union there has been great consolidation. And what we are not going to deal with today, although it is brooding on the horizon, is the multidisciplinary competition from the accounting firms. Although given the way one of the accounting firms has been acting recently, maybe that competition isn't so formidable.

Now, how have the different firms reacted? Well, in some cases there have been cross-border mergers to form what we call mega-firms. We will have a speaker on that. In some cases there are alliances or associations, and we have a speaker on that. In some cases firms have focused on particular areas of practice and tried to develop capabilities in just those limited areas, and I'm going to speak on that. In some cases they have developed what we call "best friends" or "good friends" relationships; we'll have a speaker on that. And in some cases they have created what we call niche models, trying to be a really superb boutique in a particular practice area.

What we'll start off with is what I'll refer to as the "London model," and that is what many of the sort of Golden Circle firms have done, merging the national firms to form these international mega-firms. On that topic we have a distinguished speaker, Terence Kyle, of the firm of Linklaters & Alliance. Terence is head of their North American operation. He will speak to that.

Next will be what I'll call the "association model," and that is the association of independent firms. We have Carl Anduri, who is the president of Lex Mundi, who will speak on that.

Then we have the "targeted focus model," as I call it, involving cross-border capabilities in particular areas of practice. And I will speak to you about what Sullivan & Cromwell have been doing in that.

Then we have the "best friends"/"good friends" model, which means having preferred relationships among independent firms. Job van der Have, who is the managing partner of Nauta Dutilh of the Netherlands, will speak on this.

Then for the "niche model" we have two speakers: Allen Kaye from the law office of Allen E. Kaye, P.C., who will discuss his firm, and Jack Zulack from Flemming, Zulack & Williamson. We'll start with Carl Anduri and the association model.

B. The Association Model

CARL ANDURI: Good morning, I'm the oldest speaker, without Power Point, so I get to go first.

Now, one of the speakers from the prior program, Ben Greer, forgot to mention that he had with him copies of an article that he had prepared along with Steve Nelson entitled *The WTO and the Legal Profession*. So if anyone would like a copy of this, it's available. I'll put them up on the table, and you can get them.

What I would like to do is start off with an informal poll:

— Could I see a show of hands of those of you who are part of a firm that is a member of a law firm association? Okay, there are a number.

— And then can I see a show of hands for those of you who are consumers of legal services as corporate counsel? Okay, very few.

— And could I see a show of hands of those of you who are consumers of legal services as corporate counsel or outside counsel but, at least on an average of once a month, you're handling a matter where you need to bring in a lawyer outside your jurisdiction to help—so more than twelve times a year. Well, that's quite a number.

— Now let's double that: more than twenty-four times a year you refer a matter out to counsel outside your jurisdiction. Okay, still a number of hands. Very interesting.

The topic that this panel is addressing is how lawyers and law firms are positioning themselves to serve international clients in today's environment. For years many law firms have had, as part of their strategy, becoming a member of a law firm association. There are literally hundreds of law firm associations. If you're curious, you could take a look at the list that appears in the four-volume Martindale-Hubbell international directory.

Law firm associations come in all shapes and sizes. Some are regional, some are global. Some are exclusive in the sense that they do not allow their members to belong to other associations, and they expect a member firm to send work only to other member firms. But most associations, including Lex Mundi, are nonexclusive. They do permit members to belong to other associations. They do not require work to be sent only to other members. Work is referred out to the firm that's best for the client. Some associations seek out particular types or sizes of firms as members. Some associations seek out firms that are full-service firms that are among the largest firms in their jurisdiction. Others seek out mid-size full-service firms, and others seek out small or boutique firms as members. Some associations have no permanent professional staff and are run out of the office of the president or chair of the moment. Others have a full complement of professional staff.

For some firms, association membership is their only international strategy. But others combine association membership with other strategies being discussed by this panel, such as the "best friends/good friends" model or the target and focus model. An association membership is consistent with each of these strategies. In fact, some firms employ all three of these strategies at the same time. Each of the models the panel will discuss this morning has advantages and pitfalls. I will focus on law firm associations and discuss the benefits of membership advantages over other models from the law firm's perspective, advantages over other models from the client's perspective, and pitfalls of association membership.

Now, why do law firms join associations? Virtually all associations have the potential to provide benefits to members in three broad areas that will help member firms serve clients better. The first area is the sharing of information. Associations help members share information on subsequent legal developments. They also help members share information on law firm technology, law firm marketing, and law firm administration. The second broad area is access to firms and lawyers outside the firm's home jurisdiction. This access to high-quality lawyers in other jurisdictions allows a member firm to serve its existing clients more effectively. This extra capability also helps a firm attract potential clients. The third area is participating in the activities of the association and developing relationships with other member firm lawyers, which should result in new work being referred by other member firm lawyers.

In addition to these benefits, a firm may wish to belong to an association as part of a strategy because of certain internal firm considerations. For example, an independent firm may not want to merge into a mega-firm because its partners wish to retain local control over such matters as whether lawyers are let go when the economy turns down, or what practice areas are supported by the firm. Association membership provides a firm with outside support without giving up local control. Another example is that a firm may have clients who need help in a particular jurisdiction but not enough work to support an office in that jurisdiction. Association membership helps provide services to these existing clients; it helps attract new clients without having to maintain additional offices.

Now, why might a client find a firm that has chosen a law firm association model as part of a strategy of effectively positioning itself to serve international clients? In other words, what advantages are there to association membership from the client's point of view? First, the member firm has access to independent firms and lawyers outside its own jurisdiction that are accustomed to working with other member firms to serve international clients. And a lot is implied in that in terms of the ability to work with other firms. Second, the billing rates of the association member will most likely be less than those of a global firm or a multi-branch international firm, because the member firm has not had to incur the expenses necessary to maintain foreign branch offices. Third, the member firm and the other members of the association are more likely to be full-service firms offering expertise in the full range of services that may be needed by a client. A global firm may be strong in all its offices in some practice areas, such as corporate finance, but not as deep in areas such as real estate law or employment law. A branch of a multi-branch international firm may not have sufficient depth in all necessary practice areas as compared to an independent firm in that jurisdiction. Fourth, a member of an association has the flexibility to call on the firms and offices that are best for the particular project and for the particular client. If the relevant member firm is wrong for the assignment, the other member firm is free to recommend a non-member firm that is more appropriate to the client's project. There is no economic incentive to stay within the association.

Now, whether or not joining an association can be effective in positioning a firm to serve international clients depends a great deal on the association and its member firms. All the models that our panels are discussing this morning have advantages as well as pitfalls that must be avoided. In the case of associations, the pitfall is that the association will turn out to be in effect little more than a directory with the members viewing the membership dues as payment for a directory listing. Now, even if the directory listing is located on a Web site that can be widely accessed, this view of the association will limit its utility. It may be, however, that the membership fee is so low that it is cost-effective to consider it in the same category as a directory listing. But, if a firm wants to get the full potential, full potential benefits of its association membership, it has to be part of an association whose members are committed to realizing the full potential of the association. In order to reach its full potential, an association needs to evolve into an organization whose members have potential clients outside the organization, feel comfortable calling on lawyers and other member firms to assist them because they are familiar with them, because they are colleagues who are familiar with them, or because they have some assurance that the quality of assistance and responsiveness will be high. In other words, when the association is limited to the ability to see somebody's name on a list, it is not going to work. There has to be personal contact somewhere along the line and some assurance that, when you make that call and you ask for help, you're going to be getting somebody who is good.

Now, how does an association achieve this? First and primarily it has to focus on the quality of its mem-

bership. The association has to emphasize quality when it brings in new member firms. And it has to put in place procedures that will enable it to replace a member firm if the member firm is not providing high-quality responsive services. Second, an association has to develop client-service standards to which its members will adhere. And it needs to be prepared to enforce those standards by replacing member firms if necessary. Third, an association needs to institute procedures and programs that enable and encourage member firm lawyers to exchange information and to get to know each other better. These include periodic conferences, lawyer-exchange programs, active subgroups focusing on particular practice areas, and a full range of communications devices: Web site, newsletter, directory, e-mail. All of these things take a great deal of work on the part of the association member firms. But if they are not done, the association runs the risk of being little more than a directory.

If an association can do these things well, then it will prove to be a very cost-effective strategy for its member firms and very attractive to clients. Thank you.

C. The London Model

MR. MANEY: Our next speaker is Terence Kyle from Linklaters. He will discuss what we refer to as the "London model."

TERENCE KYLE: Good morning, ladies and gentlemen. And thank you, Michael, for your introduction. I am very pleased to be offered the opportunity today to represent Linklaters and to explain our strategy in relation to the delivery of international services. I've been right in the middle of the development of Linklaters's current strategy during most of the last seven years, whether as managing partner of the whole firm or as chief executive of Linklaters & Alliance, and most recently as managing partner for the Americas.

Today's discussion is about the delivery of cross-border legal services. In considering this issue, I think it is critical to differentiate between what is a particular firm's strategic objective and what are the methods it adopts in order to obtain that objective. Each of the tag-line descriptions attributed to the different members of this panel by Michael in his introductory remarks reflects a different tactical approach rather than a particular strategic objective. Any firm has to keep its eyes fixed on its strategic objective but at the same time maintain flexibility as to how it achieves that objective.

Linklaters's strategy, put simply, is to be one of the world's leading premium global law firms. In order to achieve that aim, we determined some years ago, having looked at our position in the markets both in Europe and elsewhere in the world and having listened to what our clients were saying to us, that we needed to have a much greater "on the ground" presence. We needed to operate under a single brand. We needed to maintain the highest quality of service and advice. We needed to adopt an integrated approach with close cooperation between offices and practitioners. And we needed to provide a blend of English, U.S. and civil lawyers, both in client teams and in practice areas.

In the past five years, Linklaters has been as flexible as it could be in the means it adopted towards our strategic aim. We followed the combination route as when we established Linklaters & Alliance in 1988 with five other European law firms. We sought to grow organically as we established a network of offices in central Europe or in Spain. We have entered into joint ventures in Singapore and São Paolo. And finally, and this has undoubtedly been a major focus of attention, we have formed a large part of Linklaters & Alliance from a true merger between Linklaters and, sequentially, Oppenhoff & Radler in Germany in January of last year; Lagerlof & Leman in Sweden last year; and most recently DeBandt, van Hecke, Lagae & Loesch of Belgium this year.

All these steps were taken solely to move us towards achieving our strategic goal. But taking all this action obviously has to have some end purpose. It is not an end in itself. What does it mean for clients? We believe it provides them with what they want, a single source for their advice, no matter how wide-ranging or complicated the transactions on which they have sought our help. It enables them to choose the person who acts as their primary contact, and it brings together the various strands of effort and advice from other offices within the firm or even from other firms. It provides clients with experience both in the local marketplace and internationally that is top quality. We have always sought to combine or merge with market leaders in any particular jurisdiction. Clients also get the benefit of a common way of working and of a common approach to how transactions are handled on their behalf, and they have an understanding of what they can expect us to do for them. Clients are able to have the same expectations as to service, delivery and quality wherever they may come to the firm.

From the firm's point of view, perhaps the single and to my mind most important result of a merger is the removal of tensions about money which can be definitely present in a bilateral or multilateral relationship, no matter how close or effective. This results from the adoption of common sharing in a single profit pool. It binds together partners in all countries, regardless of their background and their previous experience. It removes the tensions as to which client to serve, which client to ignore.

A merger also benefits management in developing the firms' client relationships. It enables the firm to concentrate on those clients that it is agreed should be the

firm's premium clients. It is operating as one body to optimize the services we provide to those clients and to ensure that our resources are managed to provide those services effectively. Merger offers the opportunity to take advantage of the benefits of economies of scale, particularly where there is a need to invest significant sums in systems in order to provide the firm with the wherewithal to carry out its business most effectively. A merger also offers the opportunity to adopt best practices in terms of the organizational structure of the firm as a whole and the relationship between practice areas and the jurisdictional practices.

Additionally, a merger offers benefits for people who work in the firm. It provides lawyers and non-lawyers with significant career development opportunities. It offers a chance to work in different countries and to work with different people in market-leading transactions. It provides a significant boost to the firm's attractiveness to potential recruits, whether they are lawyers, finance specialists, IT specialists, business managers, or HR managers. It also offers a chance to concentrate a significant effort on training people from many different countries and backgrounds in terms of common standards, common approaches, and a common attitude towards the servicing of clients.

At the same time, I don't pretend that a merger or series of mergers doesn't produce a number of issues, which have to be addressed. First and foremost is the question of integration, the need to bring together different cultures and ensure that the different practice areas work together coherently to provide the best service to clients. There is a need to determine what management structures will most effectively bind together the whole firm and to ensure that it operates sufficiently. There's also the need to remain vigilant to ensure the preservation of the quality of service and of the standards at which that service is delivered, to ensure that these are maintained at the highest possible levels, and to meet the expectations of our clients.

Thank you very much.

D. The Targeted Focus Model

MR. MANEY: The approach that Sullivan Cromwell took is a little different. I think—and I have the benefit of being the panel chair of looking at all the presentations—most of us approached the same issues and with many of the same considerations. The way we came out may be a little different, but we all were analyzing many of the same pros and cons.

We rejected the merger route. We realized we had to do something. For years we had thought—and I know we are considered arrogant and I guess we are—that we were one of the best American firms. We also thought that if you needed counsel in Germany or Mexico or France, you ought to go to a German or Mexican or French law firm—not to try to do it in-house. We were perfectly happy dealing with the very best German firms or French firms or Mexican firms, but we suddenly saw them evaporating. They were being acquired.

So we thought, well, we have to do something. Merger was not something we chose. Partially, and quite honestly, we were a little late. But mainly we were not interested in practicing local real estate law or trusts and estates law or all the other things that a local firm would be doing. We were more interested in certain focused areas. We were also not wanting to take on the quality-control issues of taking an entire firm, which would have a certain amount of dead wood. And also, quite honestly, there were totally disparate profit profiles. Some firms in some countries had considerably lower earnings than what we were used to. I'll just cite one thing that I think Linklaters is up against. I think the British practice is to retire at fifty-five or so, and in Germany they retire much later, and here we retire much later. That's a cultural adjustment that they are facing I'm sure.

So we decided, no, merger is not the route to go. The alliance model or the good friends model, which will be dealt with very shortly, we thought, is really a temporary solution because what happens when your alliance partner or your good friend merges with somebody else? Then you're sitting there all alone.

We could take the niche model, saying, "Okay, we are going to be a good American firm, and, when people want a good American firm, they come to us, and we are basically not going to be an international player." I'm sure my friends at Cravath would not characterize it that way. We said no, we can't do that.

What we realized, first of all, is that these mergers were an opportunity. There were very fine individual lawyers who were probably not entirely happy with some of the mergers that were going on, so there were opportunities to pick off individual lawyers. We felt that in particular very focused areas we could develop the capability in house by building from within.

Here is one example, and it is one where we are very limited. In project finance you go through beauty contests to determine who is going to be hired as counsel. Usually you haven't decided what governing law is going to be applied to this project. And the London firms would say, "Oh, we can do it whether it is New York law or English law." And we were saying, "Well, if it is New York law, fine, we can do it; if it is English law, we can associate with a London firm," and we'd lose out. So we were very lucky that we found a very fine project finance English solicitor, brought him in, and now he's a partner. Consequently we are now able to say we can do it either way, so, when the choice of

law is made, we can handle it. But we are not in the process of practicing all English law; it is just that one focused area.

We have done the same thing in France and Germany but only in mergers and acquisitions, corporate finance, and tax. And we are building. We have taken in three new partners in France. We have taken in two new partners in Germany. We are going to build on that model and train lawyers, but they are all part of the firm, the same sharing of profits, and they are the same culture.

We've actually had very good luck using American lawyers in the antitrust competition area, because the European Union is closer to the American federal model than the pre-European Union Europe was. Competition law is very similar to American antitrust law, so we've had our American antitrust lawyers practicing in the competition area.

That is our focused model, and it may develop further, and it may not. But that's the approach that we have taken. Thank you.

E. Best Friends/Good Friends Model

MR. MANEY: Our next speaker is Job van der Have, of Nauta Dutilh in Rotterdam, with the best friends/good friends model.

JOB VAN DER HAVE: Thank you very much, Michael. I'm a man coming from a small country. Maybe the firm would have been better off if it were larger, but that's exactly what my short presentation will be about, to give you some idea of the perception of the internationalization of the legal market from a small country like Holland because what Dutch firms face applies to a number of other firms in Europe.

First, let me tell you a few things about our firm. We go back a long time. We go back to 1724. We are the largest law firm in Holland. Holland has a tradition of very international law firms. We have 106 partners, 475 lawyers *in toto*. Our home markets are Holland and Belgium; we are looking at Hamburg, but that's not a necessity in our strategy of independence. We have offices in Amsterdam and Rotterdam. In Brussels, we practice competition and local law. In New York and London, we practice Dutch law, Dutch law only. And in Paris and Madrid we have small local outfits. Our core practice is corporate, banking, corporate finance, M&A and tax. We have a number of strong niche practices that make us, we think, broad and lean.

The Dutch market is a relatively small market, but it has its attractive features. We have very good relationships with holding companies, and we represent a few very large banks and multinationals. The Dutch market was a closed shop fact until about four or five years ago. Developments came to us a little bit later than they did in the U.K. and the U.S. The U.K. firms appeared first, and at the top of their list were obviously firms in Germany, France, Italy and Spain. But, because of the features I have mentioned, they also found Holland an interesting place to be. We had about five top firms in those days. U.K. and U.S. firms were hardly present. We had a small banking operation, and that was Baker & McKenzie. Then certain developments started to hit Holland as well: the internationalization of the legal market, with the increase at that time of large cross-border transactions leading to demand for cross-border legal services. As a result, U.K. firms and some U.S. firms became interested in Holland as a place to be to satisfy client demand.

As a development apart from that, the Big Five accounting firms began to set up their own legal departments and tried to lure away partners of the larger Dutch firms.

At that time we had three options. We considered those three: merge with a UK or U.S. firm; merge with one of the Big Five accounting firms; or remain independent. We chose to remain independent. And I'll tell you why.

Why not a UK or U.S. firm? There is a definite difference in capacity. The Dutch market doesn't allow for the kind of fees that firms can charge in London. We have a lower profitability and lower profit shares. This meant that perhaps only twenty-five to fifty partners would have joined in a merger, and partners in certain practice areas or individual partners in our core practices group would probably not have been welcome in a merger with a U.K. or U.S. firm.

Second, and very important for our firm, we would have lost a lot of referral work from U.K. and U.S. firms. The cultural differences would also have been quite large, and it would have taken a lot of time and energy to overcome them. What was also very important for us is that we are a great partnership. We have a long tradition and a very strong culture, and we wanted to remain in control of our own destiny.

If we merged with one of the Big Five accounting firms, obviously the accountants would have been in control. That would have meant that we might have lost many top lawyers who would have feared not being able to remain at the top of their practices and would therefore have decided to leave the firm. Conflicts of interest presented another huge issue. When we were approached by one or two accounting firms, the conflicts issue became apparent from the very first meetings. Cultural differences would have been enormous, even larger I think than in a merger with a U.K. or U.S. law firm. And again we wanted to remain master of our own destiny. So our decision was again to stay independent.

The market environment we have today requires you to build, maintain and expand your relationships with other independent firms in the major jurisdictions, on a nonexclusive basis. This is very important for us in view of all the referral work we get from outside Holland, mainly from the U.K., U.S., Germany, and France.

So, nonexclusivity is essential here. That is why we try to establish relationships that we call "best friends/good friends." I think one of the differences between ours and the Lex Mundi approach is that we are a bit more focused and really want to concentrate on the top firms in all the major jurisdictions. We don't want to dilute our energy. We are a relatively small firm in a small market, and we want to concentrate on the top of the market in niche jurisdictions.

But as a traditional partnership we also needed to do something about our management structure. We changed to a corporate governance and decision-making structure so as to manage the firm in a more businesslike manner. I am one of two managing partners on our managing board. The decision to change to the corporate form was taken in 1999.

Now, what does it mean and why do we choose to remain independent? We want to work with other leading independent firms around the world—all around the world, but concentrating in major jurisdictions. How does it benefit the client? We think it offers the best legal service available. It is also a very flexible approach, because clients often have their own relationships locally that they want to use, and that's fine with us, but it also means that we always must have a choice of firms. So rather than build up a relationship with one firm in particular, we always want to have a choice of more than one, especially if we refer work to one of the other countries. This approach also gives us far greater access to referral work. We can provide a full range of legal services, and we can identify the best lawyers for the job. Also important for our clients, our approach does not mean larger teams or greater expense. This is a very important issue in the Dutch market today. I think a wide spectrum of Dutch clients recognize that they not only get better service but they are also not paying higher fees: nothing wrong with that!

The participating firms do not need to worry about exclusivity or profit sharing or compromising their independent traditions and culture. Nor do they need to incur the cost and bear the burden on management time in connection with integrating the merger firms. On the other hand, you do need to put in a lot of time and energy to build these good friends/best friends relationships and maintain them.

We are achieving much in realizing our objective of offering the same kind of seamless service that the global firms are endeavoring to offer—the same seamless service of the highest quality, at a competitive price, based on common standards and a single team. As I have mentioned, you need to put a lot of energy into making this work: joint training, joint pitching, and the exchange of know-how. All of these are very important, and we work hard in these areas with the firms we have chosen and who have chosen us in the various jurisdictions.

Now, what has happened to the Dutch market? These names may not mean much to you, but in fact we are the only independent top law firm left in Holland. All the others have either merged, split, disappeared, or what have you. I believe that, of the ten top U.K. firms, eight have some sort of presence by now in Holland. Two don't have a presence there and don't seem to want any presence there. So, there has been quite a radical change in our market. For us, that's good, to the extent at least of a lot of referral work because, for instance, New York firms are not inclined to refer work anymore to firms that are competing with them in their home markets. They'd rather send work to us than to a local branch at one of the global firms. That's obviously an advantage.

If you evaluate our strategy—and I have mentioned one of the advantageous trends just now—we think there's a growing appreciation of our strategy on the part of both international and national clients. We have some clear advantages over one-stop-shop firms: we are more competitive when it comes to the market for high-value, non-commodity legal services. That's a distinction clients seem to appreciate more and more. Global firms are very good at certain things and not so good at others, and those other things we think can be the high-end top work, which falls squarely within our individual approach, which allows us to offer the best advice to clients at competitive prices. What we don't have is a common brand, and that's obviously a handicap. But we still think our approach is optimal in terms of quality, independence and flexibility. Lastly, our strategy of independence is working very well for us: we have seen a substantial increase in our profit; we have a lockstep system; our partners share the same values and same goals; and, last but not least—and very important in the market—we are able to attract many good people with our strategy.

F. The Niche Model

JOHN F. ZULACK: I can sort of summarize what I'm going to say in a few words: exactly what Job said, but smaller. My name is Jack Zulack. I'm with the firm of Flemming, Zulack & Williamson, and I'm going to talk about the role of the small niche firm in the international legal business market.

Now, what is obvious to all of us is that the legal market is rapidly changing. The two key changes in the

legal business is that the "profession" is now a competitive business, and the market is increasingly international. Law firms are larger than they have ever been. Our law firm has thirty people. Linklaters has three thousand plus, more or less. Clifford Chance has thirty-six hundred lawyers.

We have discussed various different types of firms today. We think there are advantages now for the small firm, and here they are. The first advantage is value, and we are going to get into what that means. But value is something that we think a small firm can offer to clients. We think that we can offer high-quality services at significantly lower rates than large firms, in certain circumstances.

There is a disadvantage. And it's a major disadvantage for small firms, and that is marketing. We do not have a brand name, and we do not have a proximate relationship to the international client. Those are very significant disadvantages for small firms that have to be overcome. So here is the tension. How do you provide value when you essentially don't have a brand name, and you don't have an office where most of your international clients are located? Now, here are some opportunities to provide that value. The opportunities for the small firm are contrary to what lots of people say in the press. They are greater today than they have been at any time in the past thirty years. And I am going to go through them in the context of how we have seen these opportunities play out at our firm. There are also challenges—very significant challenges—for the niche firm, and we are going to go through them as well.

To illustrate metaphorically what we're up against—and it's been very well presented here—the advantage of the brand name is that many people throughout the world think that it is better to deal with a well-known name and pay more money than to deal with the local beverage. Singapore Cola may be as good, and it may be made by the same bottler, it may be the same high quality, but, even though it costs more, people want Coke. So how do you overcome that? I am going to walk you through the experience in our firm. And essentially all small firms face exactly the same challenges that my firm does.

The first challenge, which has actually become an opportunity, is technology. In the past large firms had huge advantages over small firms. Technology has essentially leveled the playing field. We now all have basically laptop computers, e-mail, and litigation support systems. We have offices that are standardized. We have the Internet and electronic law libraries. When I started practicing, a large firm had tremendous resources that were unavailable to the small law firm. That's no longer true, and we could spend three hours discussing these particular resources.

Second, there is the opportunity afforded by the English language. And this has been a revolution that I have seen in the past ten years, now that the international client insists upon speaking English. I speak French fluently and I used to lecture in French. Now I have difficulty finding opportunities to speak French to my French or Swiss clients. They all want to speak English because they want to improve their English. And just a note, that's business English, not our English, not the British English. Business English is the number-one language in the world today. And you don't have to take a special course to learn basic business English. You have to pronounce the word "deb-tor" instead of "det-or" because in business English it's got to be literal. But nevertheless, it is an advantage for the lawyer in a small law firm. You have the language facility both in the documents and in the spoken language. There are significant advantages in our field (i.e., as litigators) to knowing a second language well. It is a tremendous advantage, but it's not essential.

The third opportunity is globalization. With your laptop you can essentially, from anyplace in the world, access your server in your office, both at locations and files. When I answer my telephone, a client doesn't know whether I am in Paris or in New York. We are in a mobile world. Clients now come to New York frequently; we go frequently to visit our clients. We really are a much smaller world.

And the fourth opportunity is cost. We can bill at lower hourly rates. The London litigation law firms now charge approximately £500 (or about $725) an hour. They provide great value, but we do too. And we, as many of the other firms here, bill at a much lower rate. If you're not part of a larger bureaucracy, you can have billing practices that are tailored to the client and the culture, as well as lower overhead costs for positioning yourself in the global marketplace. For instance, we have fabulously beautiful offices downtown that are approximately half the price of an office, say, at 787 Seventh Avenue, where a lease has recently been signed for $80 a square foot. You can also have lower salaries.

Now, if you're going to be a successful law firm, you still must identify your core competency. A small law firm cannot do all things. Our core competency is litigation. You have to ask yourself: What is it about your core competency that is international? Ours is international because we represent clients whose main businesses and countries of origin are outside the United States that have legal disputes in the United States. You also have to ask: Why do you do what you do as well as any other lawyers in the world? And then you have to ask yourself: Why is it that what you do is a special area of concentration?

Now, as Aureliano said, I don't want to be an international lawyer in a Mexican court, and there are lots of

lawyers here and there are lots of lawyers throughout the world who say, "I don't want to be a lawyer litigating in the New York court." There are many, many New York litigators who think they can handle international litigations, and they can, but not well, until they have the experience. I don't have time to go through what that experience is and what the distinctions are.

Let's talk now about marketing. The issue is how to market. And that's the big challenge. One of the things we do is try to identify and complement other law firms. We do not try to compete with law firms. We complement large firms in conflict work. We get lots of work from large law firms, foreign consultants who don't want to go into New York or other U.S. courts. There are many ways that a small firm does not compete with but complements the spectacular level of legal services that you see in all forms and represented by people at this table. The idea for a small firm is to find your niche, pitch to the niche, and complement the other large law firms that are doing work in different areas.

Thank you very much.

MR. MANEY: Allen Kaye.

ALLEN KAYE: My name is Allen Kaye, and I'm the other speaker on niche practices. I practice United States immigration, naturalization, visa and consul law. That is my core competency. My organization is "IMMLaw," the National Consortium of Immigration Law Firms. Please note that our Web site can be found at www.immlaw.com, www.immlaw.org, or www.immlaw.net.

Now what is IMMLaw? IMMLaw is a national consortium of immigration law firms. How did it start, and why did it start? Well, we wanted to compete with some of the large multistate immigration law firms, and there are really just one or two. But at the same time we wanted to stay independent. We saw the advantages of an association, and you will hear the advantages of an association from Paul Anduri. We wanted to do better marketing, and we wanted to better serve our clients. So we started by looking for what we thought was the best immigration lawyer in each jurisdiction. We came up with seventeen members in seventeen states, including Washington, D.C., all of whom were AV-rated in Martindale-Hubbell.

We're mostly all small firms. Job van der Have has spoken about reasons to stay independent. We all wanted to stay independent. Mike Maney said his firm was more interested in certain focus areas. We are more interested in one focus area: immigration, naturalization and visa/consul law. Even though we are mostly small firms, all independent, collectively we have fifty attorneys practicing almost exclusively in our field. We have over two hundred legal staff, including one hundred forty paralegals, and, as stated above, seventeen offices in seventeen jurisdictions, all independent. We have been together for ten or more years. We have among our members four past presidents of the American Immigration Lawyers Association. We have five authors, seven law professors, and two former general counsel of the American Immigration Lawyers Association.

Now, in terms of activities, we have a monthly conference call, usually on Sunday night. I conduct the conference call. It is amazing to have seventeen lawyers on a conference call and to have everybody have an opportunity to talk. Somehow we have learned to coexist. We have in-person meetings about four times a year in different parts of the country, communicate frequently by e-mail, and engage in a constant sharing of technology.

One of our goals is to provide the highest quality legal services to our clients. One way we seek to accomplish this is through our in-person meetings where we generally have an agenda and bring in outside speakers, as well as through e-mail communications and occasional lecturing. If somebody in Los Angeles is giving a lecture, he may call on a few other IMMLaw members of other jurisdictions to lecture with him. We gave a lecture in Washington some time ago to the foreign diplomatic corps. We also have the opportunity to make one-on-one telephone calls to members. If I have a problem in San Francisco, I can call on a member in San Francisco who has expertise in that particular area. This is one of the principal advantages of membership in the association. While we all practice autonomously, we share our knowledge, expertise, ideas and information constantly, and our clients benefit from this. We're taking advantage of some of the points that others today have mentioned. Jack talked about the advantage of small firms. We are all small firms. Mike Maney talked about his firm's being interested in certain focus areas. We are more interested in a certain focus area—immigration-related work is all we do. Job van der Have talked about reasons to stay independent. We want to stay independent. We are free to refer cases to our colleagues in any of the jurisdictions, and we don't have to if we don't want to. So it is very flexible, and it has proved to be very beneficial to us as practicing immigration lawyers and to our clients.

You can see more about IMMLaw on our Web site. I don't think there are very many other consortia of law firms in the United States, and there aren't any other consortia of immigration lawyers. All of us are members of the American Immigration Association. I'm a past president. That organization has five thousand members. It is very difficult to do a conference call with hundreds of people. This is a very small group, and we have been working together for ten years. Again, we

have found it to be to our benefit as well as to our clients' benefit. Thank you.

G. Questions and Comments

MR. MANEY: I'm going to stand here basically just to moderate. We will open it to questions and answers. Does anybody on the panel have a question that I can throw at one of the other speakers? Isabel.

ISABEL FRANCO: Yes, two questions. One is for you and the other one is for Job. So, Sullivan Cromwell has opened offices in London and Paris?

MR. MANEY: The question was do we have offices in London and Paris? We had offices in those jurisdictions, and we had many more offices before World War II. Before World War II, we had offices in more places than we have today. But having an office and practicing American law is different from practicing the domestic law of the country where you're located. What is innovative is that for the first time in our history we've taken in lateral partners who are practicing French lawyers, practicing German lawyers, practicing English solicitors. That's the major change that we felt we had to do.

MS. FRANCO: Thank you. And could you elaborate a little bit on how you structure the cost to the clients when you deal with your international law firms that you choose in the different countries? Because that's one of the greatest problems that I always find. Once you're working with other law firms, you add to the cost when you are leading a project and then you hire us, for example. How do you deal with that? Because it seems to me the cost always compounds rather than being more cost-efficient.

MR. MANEY: You sound like Linklaters.

MR. VAN DER HAVE: Well, the question indeed is a good question. I think we are too far north and maybe not in a position to say much about that. We're a small country and a small market. One of the reasons to remain independent for us is that we want to be involved in the large transactions that come out of New York or London. So obviously a U.K. or U.S. firm will have to lead and would have the problem of explaining the cost situation. Obviously, some clients have a preference for having separate bills from each law firm. And then on other occasions they want one bill. That is sometimes very attractive. I think Terence Kyle can tell you more about how that works. Obviously, the challenge to us is to be very cost-effective. Because we don't have the cost of overhead that the globals have, I think we are in a position to do that. But it obviously depends very much on what the client wants and what kind of work the client's giving you.

MR. MANEY: Terence, did you want to comment on that?

MR. KYLE: I think that a transaction that involves a number of law firms or practitioners in different countries is going to be more complicated and is likely to cost more than if you're just dealing with one firm in one jurisdiction. I wouldn't necessarily accept that, just because you involve other firms and other jurisdictions, the costs ratchet up exponentially.

I think as a client you have a better chance of getting value for your money and the quality of service you're entitled to expect if the parties providing advice on the transaction are all working towards a common end. And certainly from our perspective we believe that that's best provided when they are members of one firm rather than having one person orchestrate the advice that comes from a number of different sources, where there may be different dynamics that affect the enthusiasm with which the lawyers at that particular firm approach the task at hand.

MR. MANEY: Another question?

AUDIENCE MEMBER: This is not directed at any one person. There are global alliances of accounting firms, law firms and now multidisciplinary (MDP) firms. I'm wondering if anybody has any comment with respect to what are the MDP issues associated with the law firm that joined one of these multidisciplinary global alliances or networks?

MR. MANEY: Well, I think I'll respond to that. The District of Columbia permits a form of that. I think there is a law firm that had a consulting firm subsidiary. And if you're forming an alliance, I don't think you lose the independence. If you are independent and you have an alliance with somebody, you could joint venture. I know we have worked on projects where we have gone in as a team with an investment banking firm and an accounting firm to pitch for a project. I think, if you had a merger, then you would have all of these conflict issues that would come up, and you would have to confront those, the very same thing you confront when you're dealing with multidisciplinary practice.

MR. KAYE: Will that be discussed on the last panel today?

MR. MANEY: Yes, I think it is. So we will defer to the "Herding Cats" panel coming up next.

Yes.

AUDIENCE MEMBER: I would like to add a slight postscript to what Carl was talking about in regard to the slippery slope between the simple directory and the international association of law firms.

Just in the interest of full disclosure, I am and my firm is a New York member of an international law firm consortium, Mackrell, and we have about eighty members. In connection with that, I delivered a talk just

about this time last year in Austria and did some research. I sent out a questionnaire to find out just exactly what the various consortia do to try to establish quality for entry into their organizations and how they then monitor quality compliance after that. To my surprise and chagrin, an overwhelming number of the law firm consortia really do not go through any serious vetting practice to take their members on. That was very surprising to me, because obviously one sees the world the way one normally experiences it: we do this sort of vetting, and I think probably our organization does as well, and many others do. But an overwhelming number do not. So if anybody is thinking about joining a consortium, it would seem to me, as a matter of not only self protection but also client protection, that you really need to understand just exactly what that vetting process is. And if they let you in very easily, you have to assume they let a lot of other people in very easily. You may not want them to be your colleagues.

On the other, and very briefly, once people are in, there is a self-policing element to the quality. That is, if the word gets around in the consortium that you don't do your job, that you don't answer your e-mails, that you put their matters at the bottom of the list, even if they don't run you out on a rail—which does happen by the way—you will find that you're not getting the business that you had anticipated.

So without going into the details, it seems to me that in the right international consortium you have most of the benefits and relatively few disadvantages, according to our panel today.

MR. MANEY: Do you want to add to that, Carl?

MR. ANDURI: Thank you very much. I couldn't agree more on that. One of the things I said in my written materials is that, if a firm becomes a member of an association, the most important thing for it to do is to become an unrelenting advocate for quality within the organization. That's just the number-one thing that a member firm has to do, and associations just have to be absolutely sure about the quality of the members and have to have mechanisms to maintain the quality.

Let me just say that, looking at Job van der Have's slides, what I found very interesting was that his slides could have been my slides. I couldn't agree more with the strategy that his firm is pursuing in terms of wanting independence. And that strategy is basically true for all of the Lex Mundi member firms. I think the only difference between your strategy and the strategy of the Lex Mundi member firms is that you're focusing on a narrower group of law firms, whereas Lex Mundi has 154 members, one for each state and one for the countries outside the States.

AUDIENCE MEMBER: I have a question first for Terence. What happens with regard to clients who go to jurisdictions where you have offices, where you can't actually offer full service practice? That's my first question.

My second question, Michael, is for you. And Sullivan Cromwell is an absolutely fabulous firm, as we know, but I find it rather disconcerting if you meet someone like this and offer a project finance lawyer in English law, I would be very concerned if I were a client with regard to that.

And my third question relates to the point about what firms are left for you. And you say you want to work with good-quality foreign law firms. Well, there certainly aren't that many left now that don't actually have an association with London and English law firms. There may be from New York.

MR. KAYE: Mike, it might be good for each speaker for you to repeat the question.

MR. MANEY: I think the first question was directed to Terence.

MR. KYLE: If I heard the question correctly, it was what do we do if a client approaches us in a jurisdiction where we have an office but where we can't provide help to that client from that office?

The answer is we would recommend that they go and approach a local firm that has the capacity to deal with the particular problem they've got, just as we would do in many cases. We do not provide practice across the board. We do premium work for premium clients. That does not mean we do everything for everybody; we have never done that and never will do that. Our clients, if we can't help them and we feel we better service them by recommending they go somewhere else, then we do that. We can always point them to people we know that can help them, rather than try to pretend we can do everything for everybody all the time.

MR. MANEY: The question posed to me: Would the client be a little worried if we had only one English project finance lawyer? We have one project finance partner who is English-qualified. We have about ninety lawyers who are doing project finance work all over the world. But the English partner is the one who reviews the opinions being given under English law.

AUDIENCE MEMBER: That might still be a little bit of a concern.

MR. MANEY: I think there was a third question.

MR. VAN DER HAVE: The question about which firms are left, especially in the U.K., I think. It's true, there are not many left. But there are still a number of very good firms that we do a lot of work with. We'll cross that bridge when we get to it.

But I think in Europe one often tends to forget that there are a host of very good firms in the U.S., which definitely have the ability of remaining independent and not building up any network on the continent of Europe. Most U.S. firms are not interested in building up any network in Europe, so I think that will provide a substantial amount of referral work, a huge amount.

MR. MANEY: Another question?

AUDIENCE MEMBER: Yes, I have a question for Mr. Zulack. I'm a U.S. attorney practicing abroad, and I want to know how Linklaters handles U.S. attorneys practicing abroad in reference to changes in U.S. law?

MR. KYLE: I think your question was how do we deal with U.S. attorneys practicing outside the United States that work for Linklaters?

AUDIENCE MEMBER: Yes, in foreign offices.

MR. KYLE: We deal with them exactly the same way as we deal with the U.S. attorneys working in Linklaters's New York office. The firm provides a system of disseminating information about changes in United States law and practice and in the areas in which we work. Those are made available either through the publicly run electronic systems or through the firm's own knowledge Intranet and are processed by training and know-how staff in London and disseminated to lawyers on the ground.

AUDIENCE MEMBER: I would like a comment on the interplay between what you've been discussing here and the prior discussion, which I assume some of you at least have heard about, in regard to the restrictions on the practice of law across international boundaries. I have a feeling there's a disconnect. I don't see that this discussion reflects a problem on that front, which was the subject of a great deal of discussion there, and they may be worrying about the wrong thing.

MR. MANEY: Well, I'll take one shot at this. I think all of these strategies have to assume the regulatory environment. For example, we have an office in Tokyo. We have Japanese lawyers who are associated, but they are not part of our firm because it is not permitted. We do not have an office in Mexico City, because it's a problem. Although we have spent an awful lot of money on American Airlines going down there. I think all the people here are assuming the regulatory environment. We, for example, have to be aware of the limitations in the English market. We don't have English barristers in our firm. That's not permitted. Does anybody else have a reaction?

AUDIENCE MEMBER: What you're saying is obviously true, but what I was wondering was whether it's a particular problem, whether it cramps your style, whether you can't wait until somebody liberalizes something. It seems you're working around it all very smoothly.

MR. MANEY: We are about to be thrown off. I'll just end with one comment. Years ago I was hoping the Japanese would not allow U.S. lawyers to open an office there, so we wouldn't lose too much money. Once our competition opened an office in Tokyo, we had to open an office in Tokyo, and it is very expensive.

Thank you all very much.

MR. DUFFY: I want to thank Mike and his panelists for presenting us with some very interesting ideas.

III. Herding Cats: The Challenge of Getting Lawyers from Multiple Jurisdictions Working Together in a Quality Law Firm—Issues of Secrecy, Privilege, Culture and Technology

A. Introductory Remarks

MR. DUFFY: I would like to introduce our next panel, which is entitled "Herding Cats," which I think is a very apt title. In discussing this early on with some of the speakers, I pointed out that, in the United States, you normally are not entitled to ask questions like, "Are you married?" "How old are you?" And yet, in our office in Monaco, every resume we get not only states the age, marital status, but often also states the religion.

Of course, in New York you certainly are very cautious about what you say to your female employees. Yet, if I don't tell my secretary in Monaco or in Mexico, "That's a pretty dress you're wearing today," both of them would think I was ignoring them. They just wouldn't feel that I was appropriately appreciating them as people. Those are just two very, very minor issues that one has to address as we approach these solutions that we have heard about from our past panelists.

How do you bring all of this together into a single firm or into a single model where you are cooperating closely across cultural differences, legal differences, and personal differences?

Without further ado, may I turn the podium over to you, Joel Henning?

JOEL HENNING: My name is Joel Henning. I'm a senior vice president and general counsel of Hildebrandt International. I recognize many of you. We work in law firms and legal departments and governmental/legal organizations all over the world, and we have offices from London to San Francisco and do a great deal of work internationally. In fact, we have worked not only with law firms and legal departments, but we have advised several of the Big Five accounting firms on their legal services strategies in Europe and in certain parts of Latin America. We have also advised a

number of various organizations involved in mergers. We have been involved with merging international law firms as well as national law firms, and advising various consortia affiliations and so on.

As you know, the title of this program is "Herding Cats: The Challenge of Getting Lawyers From Multiple Jurisdictions Working Together in a Quality Law Firm—Issues of Secrecy, Privilege, Culture and Technology." Let me first of all say that our technology expert, who is my partner, Kurt Canfield, is—speaking of globalization—in the Netherlands today, and he couldn't get back. My apologies, so I'll be talking very briefly about technology.

Let me take this opportunity to introduce my two colleagues on this panel. They will speak after my initial rather general remarks about what's driving all of this and why we're finding more and more people becoming involved in these consolidated global organizations.

We will hear first from Tomaso Cenci, who is an Italian lawyer based here in New York and heads the New York office of the largest law firm in Italy, Gianni, Origoni, Grippo & Partners. Tomaso is the chairman of the European Law Committee of the International Law and Practice Section of the New York State Bar.

Phil Berkowitz, who we'll then be hearing from, is a partner in the international firm of Salans, Hertzfeld. He's the chairman of their employment law department. Phil was previously with Epstein, Becker & Green, and he is the past Chair of the International Law Section of the New York State Bar and the founding Chair of the International Employment Law Committee.

What we are going to do is start at a general level, then Tomaso will be talking about a number of people issues, and then we'll get down to some specific legal issues involving personnel in these global organizations. Phil has over twenty years of experience representing international law firms and international companies in employment-related issues.

B. Increase in Multijurisdictional Opportunities

MR. HENNING: With that, I will kick this off. What I'm going to talk about are some of the obvious things. Capital and human resources are gravitating toward the most attractive opportunities, and those are increasingly multijurisdictional. I think a number of us here today are touching on that. Technology is what makes much of this possible. Certainly it is what makes large multijurisdictional practices possible, and that leads to the inexorable growth of legal organizations.

We heard a lot today about organizations that have managed to stay small and do quite well, even in the international arena. But the fact is that there are these relentless pressures, and we are seeing them all the time. After a brief falloff following September 11, we have found the interest in mergers and consolidations is more intense than ever.

Now, all of this has combined with the decline of the medieval legal guild. Clearly, it was the last of the medieval guilds to decline. I would say it took from 1985 to 1990 before the medieval guild concept disappeared: that plus the devaluation of legal services on the part of clients throughout the world are heralding change. Clients no longer find us lawyers to be medicine men, shamans, or mystics whom they may hate but have to deal with and have to pay, whatever the bill might be. As we've heard already this morning, that's no longer true. It is partly because of the disappearance of the medieval guild and partly because clients are a lot more sophisticated. We'll talk a little bit more about that. This has given way to a very changing and competitive landscape, causing several alternative multijurisdictional strategies to appear.

Well, we needn't say much about the fact that capital is moving these days across borders at lightning speed, in real time, as a result of technology, and a huge part of the global economy has opened up to all of this. This in turn has subjected all of us—not just lawyers—to a raising of the bar with regard to global performance, whether we remain in small organizations or choose to become part of large multinational ones. And it has led to a war for talent.

We are now in a soft economy, not only here but also in many places abroad, if not everywhere in the world. The fact is there's a decline in the supply of top talent, the best and the brightest in the legal community, as well as in other professional communities. It's a scarce resource, and that's caused an intensifying look for talent. Now what does that do? It drives people to the highest compensation opportunities. And they have changing expectations in the long run as to where they expect their careers to take them. And each of us has to think about this as we decide whether we can afford to remain small in terms of the need for human resources.

One of the things I hear from the highest-quality small-firm clients that I work with is that we can compete for clients if we can get in the door. We have a good crack at prevailing in any beauty contest with regard to acquiring clients. We can keep clients. We can do the work. The biggest problem—and this is as true today in this soft economy as before—is getting and keeping the people we need in order to get the work done. So the result is that a lot of this talent—not all by any means, because there are all kinds of lifestyle choices—is being driven towards these larger multinational enterprises, including but not limited to legal enterprises.

Now, we have global systems, which depend, as I said before, in part on technology but also on a global strategy and a global culture. What do I mean by that? Everybody in the enterprise has to work very hard on behalf of clients' global needs rather than their own local interests.

We heard before about a survey that was taken with regard to quality controls on the part of networks and affiliated groups of law firms. And the speaker said he was stunned to find that there was very little quality control there, and it's true. If you can't make a promise to your global clients that there will be uniformly high quality among the offices that you claim are part of the global network, then clients are going to be obviously less interested.

In my view there are very few law firms, even those with many offices, that really have achieved a truly global system where that promise of quality really exists. I would say that among the biggest firms in the world, the firms with thousands of lawyers, I would say there is possibly one that arguably is truly a global law firm. I'm not going to mention names now. I might at lunch, however, if you press me.

On the other hand, there are examples of companies, businesses and other professionals that have done better in terms of being able to provide truly global services. I don't look for good models in the legal profession: when I'm advising my legal clients, I try to bring to them the best of what's happening in the business community. Omron, a Japanese company for example, which makes, among many other things, those gizmos that United Airlines and other airlines use now when you get on the airplane and your ticket goes into this gizmo and a stub pops out the other end. That's very often an Omron machine. They also make parts for automobiles, parts for high-tech digital cameras, and so on. They have a truly global business. And their customers know that they will be serviced as well in Louisville, Kentucky, as they will be in Kazakhstan. And there aren't very many law firms, if any, that can make that claim.

Now technology is paving the way, and it is enabling people to do all this stuff to reach a huge number of potential clients and customers, to develop networks with suppliers, and to serve clients at much greater speed, and, what is ultimately very important, at a much lower cost, even though the investment in technology is obviously very great and creating much more competitive and very transparent markets. The economy that technology has created differs from the old. It operates obviously much faster. It often values intellectual property over tangible assets. It has borderless markets. It results in various kinds of combinations and alliances. And it has made it possible to create the kinds of law firms that we are now seeing.

We heard before about Linklaters being able to keep its U.S. lawyers high up on the curve of knowledge, and I'm sure that most of that is done through technology. So it's truly transforming law firms, making it possible for people to do their work without necessarily getting on airplanes all the time or even being in offices at all. We are finding increasing numbers of lawyers who can operate very effectively on a global basis from Aspen, Colorado. Clients want immediate response, and they can get immediate response from law firms that are high up on the technological curve.

So what is the perfect virtual law firm? It has a one-firm look and feel with systems that are transparent. You don't know where people are, and you don't care. They could be in one office; they could be in any office. An example of that—and this is national, but it is a pretty good example—is Stanford University, under its former general counsel, Mike Roster. He was using lawyers from Ropes & Gray; Pillsbury Madison & Sutro; and McCutchen, Doyle. Ropes & Gray didn't even have a West Coast office. And the face book that he put out for all of the clients (including the largest landlord in California, the largest medical institution in California, and obviously a very large educational institution), as well as the clients of the legal department of Stanford University, had no idea whether people were from Ropes & Gray, McCutchen, Pillsbury Madison, or in-house. It in fact worked pretty well.

As a result of all these forces, we are finding that the number of mergers is increasing substantially. In the United States you can see that there's very substantial growth. On the first day of 2002, ten additional mergers were announced. Internationally, we are seeing the same kind of growth in merger activity with sixty-seven in 2001, and seven of them announced on January 1st of this year, 2002.

The number of lawyers in the top-twenty law firms is increasing substantially. According to the *National Law Journal*, the total number of lawyers in the top-250 firms has increased very dramatically from twenty-three thousand in 1980 to over one hundred thousand today.

I mentioned before the decline of the medieval guild. Now the medieval guild was a wonderful thing. It was the best of worlds for guild members because you could be very careful about who was admitted. You could be very careful about the quality of your work. You could have very high standards. You could tell your client when the quality product was going to be delivered. And then of course, you could tell your client how much it was going to cost. None of that of course obtains today. Today, clients see that the legal marketplace is very stratified. Obviously there is high-level work, bet-the-company work, a great deal of expertise work, and then you have bread-and-butter work and

commodity work. The difference today is that clients understand the difference and are prepared to pay top rates for bet-the-company work, but they are not prepared to pay top rates for commodity work and bread-and-butter work.

These devalued law firms create opportunities for various kinds of law-related services in different models to emerge. You have virtual law firms, ancillary businesses, consulting firms, and dot-coms, and you have the multidisciplinary practices. And that of course means a loss of monopoly for all of us former guild members in this changing and competitive landscape.

Now, a lot of people feel that the Enron fiasco is going to put a considerable dent in the movement towards multidisciplinary practice, and certainly it will slow it down. There tends to be an overexuberance in Washington with regard to the reaction and reactionary legislation. But in fact, if you look at what clients wanted, it's almost inevitable that, in order to do the best job for global companies, accountants need to be able to draw upon other services and other skills: consulting skills and indeed legal skills. And if you look at consulting organizations, major consulting organizations, you find that increasingly they have to draw upon accountancy skills and legal skills. So it seems to me that, despite setbacks, even in this country, there is going to be an inevitable movement towards multidisciplinary practice here, as there has been already elsewhere.

So what does that mean in terms of law firms that want to be responsive to this changing market? Strategic planning has never been more important. It is essentially impossible to develop an effective and successful international firm if you don't have a very strong domestic base because an international strategy has to grow out of your domestic strategy. You can't say that it's time now to be bigger. It is time now to enter Europe, to enter Asia, to enter Latin America. You have to look at your competitive position. You have to determine what it is that you're strong in, and then you have to be able to invest heavily in being able to extend that strength into other countries.

Again with regard to the people issues, as we will hear, sometimes the biggest problem is being able to attract the right people with the right skills to develop your international strategy out of your domestic strategy.

What you need is a strategy that provides you with a consistent market position across all locations. In talking with somebody here today we were discussing the problems in setting up shop in New York and referring clients from a European country—that is, referring inbound clients to New York lawyers—because the inbound clients from the European countries simply aren't used to the rates that are charged by the top New York law firms. So how does the European firm deal with that issue here? You have to be very careful about what you maintain within your strategic focus, what you're going to do, and, most important, what you're not going to be. And you have to do that with regard to every location.

The choices are as follows. You can have a pure domestic focus with no international capability. You can develop an international law firm, so long as it is strong in all of the locations, as I said before. You can link up with a Big Five accountancy firm, and we are seeing more firms, not only in Europe but also in the U.S., beginning to entertain that possibility and being intrigued by it. (And I can promise you that two or three of the Big Five are very interested in a strong affiliation with significant American law firms.) And then there are the affiliations. The problem with affiliations is that, other than an occasional referral, it's very difficult, as I said before, to make a guarantee or a promise to your client that the service that your client is going to receive from the affiliate will be equal in quality to the service that you provide.

At this point I am going to turn it over to my colleagues here, in the interests of time. Tomaso.

C. External and Internal Factors Affecting Multijurisdictional Practice

TOMASO CENCI: Good morning, ladies and gentlemen. My name is Tomaso Cenci, and I am the president of Gianni, Origoni, Grippo & Partners, which is a firm member of Linklaters & Alliance. Our experience with this alliance will certainly help me in making this presentation. As you can see, I have chosen the phrase "herd of cats" as part of the title for my presentation. Does a herd of cats actually kill more mice, or do they just meow louder? In fact, I would like to suggest the purpose of my presentation is to understand whether having lawyers come from multiple jurisdictions and work together has actually benefited internally the working environment and externally the clients. Or is it just a lot of noise, but no beef?

Last week I was having lunch with a friend of mine who is a very prominent partner in a U.S. law firm. When I told him that today I was going to give this presentation, he told me, "Well, don't tell the truth to the audience; otherwise, we are going to lose clients." In fact, what I think you can agree upon with me is that there is a general perception, a mystique, at a superficial level among those in environments where lawyers in multiple jurisdictions work together that this situation presents more problems and more pitfalls than advantages, particularly in terms of bureaucracy, and also, even more important, with respect to the clients.

Therefore, I will try to first identify the problems and pitfalls of having lawyers who work in multiple

jurisdictions work in the same environment. And I will also try to pinpoint the risks connected to these problems. Finally, and I think this will be the most interesting part of the presentation, I will speak about the solutions to these problems. I will try to go beyond the superficial view of the difficulties of having lawyers from different countries work together so that we can gain some perspective on a more substantive level that might be useful for us and for our clients.

The topic we are addressing today is particularly interesting because the law firm is the place where the situation of lawyers coming from multiple jurisdictions will initially develop. But this situation also exists in other types of working environments. And I'm thinking of multidisciplinary firms, as well as corporations and multinationals, which are being created or drawn together from different jurisdictions, and also supernational entities, not just the United Nations but also public law entities connected to the United Nations, which also have on their staff lawyers from multiple jurisdictions. So, I believe this topic is particularly interesting not only for lawyers in law firms but also for lawyers working in other environments.

I think that we can characterize the problems associated with having lawyers from multiple jurisdictions working together as being affected by two categories of factors: external factors, which refer to objective problems created by known external item objective problems such as systems of law; and then internal factors.

In respect of systems of law, I'm thinking of the big difference between the common law system and civil law system. But we also know that there are other important systems of law, such as those of the Arab countries and Far East. And also within the same system of law, there are different laws and regulations. And what I found is that sometimes we make the mistake of considering the European Union system as one single system, thereby not understanding the position of the individual European countries. There are a lot of big differences between the laws and regulations in Italy, for example, and those of Portugal, Greece and the United Kingdom. We should also consider that we lawyers are known to be quite individualistic people. Therefore, what we also find is that often there is not much flexibility on our part to try to understand the rationale behind other systems of law. So it is relatively common to find civil-law-system lawyers who tease common-law-system lawyers about the existence of trusts or floating charges. And on the other hand, we find common law lawyers teasing civil law lawyers about particular areas of professional discipline.

Another problem stems from professional laws and regulations. Each country has its own professional laws and regulations. In terms of marketing in Italy, for example, it is only since last year that law firms have been allowed to advertise their services, and there are still important restrictions as to how legal services may be advertised. Privacy and privilege laws also constitute important differences. I believe that Phil will cover them in detail. I wish only to mention that the privacy laws in Europe are very different from those here in the United States: they are much more restrictive and strict in Europe. For example, as you know, U.S. corporations have to meet the safe-harbor requirements set by the EU's privacy laws and regulations. And these may cause a practical problem. For example, the transfer by a European law office of data regarding employees of a target company to the lawyers of another jurisdiction could be a problem under the privacy laws of Italy, for example, even though it would not be a problem here in the United States.

Access to the legal profession is another important issue to consider. We know that this Section and our Association are very much involved in trying to identify and somehow harmonize the possibilities for lawyers who practice in different jurisdictions. As for the status of lawyers here in the U.S. and in the U.K. and other European countries, they are employees of their law firms. This is not true, for example, in Italy, where we lawyers are not employees of our law firms. We are professionals, so we have a VAT number, and our law firm is a client. This contributes to a number of consequences, for example, in terms of salary and other compensation, including fringe benefits. This would have to be taken into account by an entity that engages lawyers from multiple jurisdictions so that the lawyers so engaged are treated equally.

Moreover, there are countries where it is possible for law firms to be incorporated and to have shareholders or partners. There are countries where this is not possible, where lawyers cannot incorporate as an entity because they must be personally and fully liable for their obligations. Another external factor is that the legal services are strongly impacted or affected by the market where the services must be rendered. It is one thing to render legal services in very developed countries; it is quite another thing to render services in less developed countries.

Internal factors can be cultural. You will be surprised how true stereotypes can be. German lawyers are precise, very efficient, and perhaps not so flexible. And it is true that we Italians are much more flexible and certainly less precise, and, again generally speaking, we are a country of very individualistic people. I find that it is not often easy to accept these stereotypes of these different cultures.

Different cultures lead to different methods of work, even if I have to say that here the trend is very clear that lawyers coming from civil law systems are adapting their methods of work to the common law

system. For example, a stock purchase agreement governed by Italian law will very often be created by an international law firm and contain provisions that are typical for lawyers trained in the Anglo-Saxon system. So I must say, with respect to methods, it is my opinion that, at least in the commercial area, the civil law system is adapting itself to the common law system.

There are also problems in terms of conflicts of interests and organizational models, as well as compensation. It is important to find a way to pay equivalent compensation to a lawyer living in Manhattan and to one living in Padua, which is a small city in the north of Italy where the cost of living is completely different. There are also issues of rates, fees, marketing, advertising, languages, and these are factors that are being covered by the other panelists.

So what are the risks connected with these problems? Again, I think there are two types of risks. One is the internal risk of creating tension and disruption in the working environment. This is probably what my friend was referring to last week at lunch. A second risk, which is even more dangerous, is that sometimes there is a perception that the quality of the services that are rendered suffers because of the presence of lawyers coming from multiple jurisdictions.

I just mentioned, for example, that the trend is that a stock purchase agreement created in Italy by a law firm like ours would contain provisions that are typical of Anglo-Saxon models. If the document is prepared autonomously by the Italian firm, the document will be a very good document. But if, as sometimes happens, it gets translated into Italian from an English document, then the product is really terrible, and the client notices that.

Also, and the prior panel has covered this issue, sometimes clients become disoriented and no longer know to whom they should be speaking at the firm. Therefore it is important that the problems I have outlined be resolved so that the firm can offer its legal services in a seamless way. The solutions to be considered align themselves to the external or internal nature of the problems at hand.

With respect to external problems, we see a trend of harmonizing the laws and regulations in various countries, certainly in the European Union, but I would say also in other jurisdictions. This will certainly help to avoid some of the problems that I have enumerated. Thus, as law firms, we need to start lobbying in order to have certain laws harmonized and to accommodate the differences in the ways in which we practice. This is something that is perhaps easy here in the United States, where the concept of lobbying is something very well accepted. It is much more difficult in countries such as those in the Mediterranean area, where the concept of lobbying is associated with a distasteful practice that lawyers should not be involved in. And obviously, the role of bar associations will become stronger and stronger.

With respect to internal problems, as the speakers of the previous panel underlined, there is a need to integrate the lawyers coming from multiple jurisdictions. My experience with our alliance has enabled me to identify ways to solve some of the internal problems. First of all, there ought to be common training. This is particularly important to avoid a different quality standard for the work product. Recruiting is also very important. And in this regard we note that the L.L.M. programs in the U.S. and U.K. are important. (I note that Friday and Saturday here in New York there is a job fair organized by NYU and Columbia University.) At least fifty percent of our lawyers—I'm now talking about Gianni, Origoni, Grippo & Partners—are recruited through NYU and Columbia because we realize it is a way to recruit young lawyers who are willing to work with lawyers coming from other jurisdictions.

It is important also to address issues relating to treat branding and know-how, as well as the social aspects of the firm. The firm should create common know-how, which is not focused on a single legal system, so that, for example, documents are created that are intelligible under different systems and can be used for clients from various jurisdictions.

The management structure of the multijurisdictional entity should not be dominated by a single jurisdiction. It is also important to have a certain degree of flexibility in order to address the various issues that may arise.

A point that I consider crucial is quality control. As discussed by the earlier panel, quality control is something that, regardless of the manner in which the constituent law firms choose to practice together, must be paid particular attention. In fact, there is the risk that having lawyers from multiple jurisdictions work together can compromise the quality of services. I would like also to stress the fact that there are certain firms, certainly in Europe and I think also here in the U.S., that are beginning to consider being certified from a quality viewpoint. In Italy there are already seven law firms that are certified as meeting ISO 9000 standards.

Another issue is IT integration, which was covered in the earlier panel.

The last issue I want to mention has to do with educating the client. Perhaps "educating" is not the right word; perhaps it is explaining to the client that we are going through a phase where we are creating something new, that we are creating a new entity where lawyers work together, even with different backgrounds, that eventually the services will be beneficial

for the client and more efficiently delivered. Perhaps we should explain this to clients from the outset and ask for their patience. In my experience they will accept this, especially because, as I mentioned before, it is very common in corporations and in multinationals to have in-house counsel coming from multiple jurisdictions, and so clients know these problems. And it has been my experience that they accept the fact that there might be a little disruption in internal efficiency.

So my conclusion is that it is simply a superficial and instinctive reaction to assume that having lawyers from multiple jurisdictions come together creates more problems than it is worth in terms of efficiency or other benefits. The real challenge is make a multijurisdictional practice succeed—to convert the problems into opportunities for the lawyers and into advantages for the clients. The previous panel has addressed the different ways in which this might be done. As they said, the overall strategy of firms working together is the same, regardless of the form their association takes; only the tactics are different. I believe that this is a challenge that lawyers will eventually win. Thank you.

MR. HENNING: Just a question with regard to strategy, Tomaso. While you mentioned as an aside that you're a member of Linklaters & Alliance, you have not—at least as yet—merged with Linklaters. As I understand it, your strategy, given all of these problems, perhaps is to recruit and hire only Italian lawyers to practice only Italian law, including in your offices in London and New York. So your strategy has been to sort of narrow the focus and to try to concentrate on your strengths, as opposed to what a number of international firms do, which is to attempt to practice the local law of the communities in which they open offices. Would you comment on that?

MR. CENCI: Yes, this is true. Our strategy is to practice exclusively Italian law, in our offices in Italy and our offices in London and New York. This might change in the future, although I don't think so, honestly. And this is mainly because Italian law differs from English and U.S. law, and New York law, in particular. Italian law is local, not international, law. We'll gradually be degraded by European law, but it is not a system of law that we believe will allow Italian firms to open their own offices in other countries and hire lawyers of other jurisdictions. And we believe that our strategy should be to remain Italian lawyers within a global structure, to be the Italian component of a global law firm.

MR. HENNING: Thank you.

D. Culture; Confidentiality; Privilege; Technology

MR. HENNING: Phil!

PHILIP BERKOWITZ: Thank you, Joel. Thank you, Tomaso. So, Tomaso, I guess you're going to leave us guessing as to whether you followed your friend's advice to tell the truth?

The topics of this presentation are secrecy, privilege, cultural issues and technology as they affect global law firms. By the way, I'm an employment lawyer, as Joel said, so my point of view is going to focus on employment issues. And each of these issues has a particular resonance for law firms.

First of all, to focus on culture initially. Of course, every law firm has its own peculiar or particular corporate culture, just like any other company or any other entity. And while these of course vary from law firm to law firm, I think it's fair to say that some generalities apply to law firms. And the key one is that we often forget as lawyers that we're running a business. We think that our law firm is one big family. We make personnel decisions in a very personal way. As partners in law firms, we're very much used to having our own way. We give advice. We don't take advice. Law firms have their own peculiar hierarchies. They are very different from corporations in that respect. Everybody is a boss in a law firm. There are a lot of chiefs and very few workers. And as I say, we give advice. We don't necessarily take it. Although perhaps that's maybe just me, but that's the sense that I have. So the internal hierarchies have no checks or balances. Unlike a corporation, there is often no personnel department of any significance in a law firm. When is the last time any of you saw your law firm's personnel policies? Are you familiar with the personnel policies in your law firms? Are they distributed? Have you signed off on them? A show of hands, please. Well, that's pretty good, about maybe a quarter of the folks here.

I think if you looked at a significant company matching your firm's revenues, matching your firm's number of employees, you would see a very different answer. Generally speaking, companies tend to have policies. Whether they are well run or not is another issue. But they try to run things in a professional way.

The working conditions in law firms often create their own special problems. The long hours that we all work, the travel, and the relationship between partners and the people who work for them. It is easy to forget as partners that there is a great deal of power in the relationship over the associates. There is a very strong intimidation factor in the relationship. If I may spend another minute on the peculiarities of law firm cultures, let's look at the issue of becoming a partner. What do we focus on in making these decisions? Often the focus is very much on billable hours, or it may be on stereotypes that we may have as to client preferences. Whom would a client prefer to work with? These are highly

subjective views about individuals' qualifications to be a partner.

And there are particular issues when we focus on issues like billable hours concerning women and their advantages in law firms. There are stereotypical views—and we encounter them all the time—concerning whether women who have a family can be sufficiently committed to become partners in a law firm.

Now, all of this of course puts law firms at significant risk of being a defendant in a discrimination lawsuit, a sexual harassment lawsuit. We've seen it over and over again. Keep in mind of course that law firms—and particularly the ones that are represented here today—are often large and multinational businesses. Earnings may be well in excess of $100 million. And we are very attractive targets. People love to sue lawyers. They love to sue lawyers who hold themselves out as examples of what is righteous and what is lawful. It is great to see a lawyer accused of wrongdoing.

To focus on secrecy for a second, moving on from culture. Lawyers often forget their own best advice: there are no secrets in a law firm. Conversations, performance appraisals, memos that you write: you can label them "confidential." Lawyers tend to think that there is an aura of privilege that surrounds their every communication, their every conversation, their e-mails between their partners. The fact is that, if an associate claims discrimination on the basis of sex or harassment, in a litigation they will have access to all memos, all e-mails, even if meant as jokes, that you may have written.

Finally, the issue of privilege. Again, just because we are lawyers there is no special privilege that attaches to our communications. To review for a second the definition of privilege, just keep in mind the following—and you're all familiar with this: (1) a privilege attaches only when legal advice is sought, (2) from a professional advisor acting as a professional advisor, (3) when the communications relate to that purpose, (4) when the communications are made in confidence, and (5) when the communications are made to or by the client. In those cases then a communication may be privileged so long as the privilege is not waived.

I want to touch on technology for a second. Of course we all need to keep abreast of technology, including e-mail. And we've all discovered what our clients demand of us: e-mail, the establishment of Internet Web sites, and intranet communications with clients. But e-mail in particular has created tremendous problems for all companies, and global law firms in particular.

We used to write memos. I don't know how many of you recall writing memos in longhand. Give the memo to a secretary, and the secretary would type it up. She would perhaps proof it. We'd get the document back; we would edit it. We would then consider whether we really wanted to send this thing. We might put it in a drawer overnight and think about it. We'd get it the next day, edit it some more. And then if we were smart, we'd probably tear it up and throw it away. But e-mail is different. It is like a hard wire from not the smartest part of our brain directly to our fingertips. We type out that message, it goes on the computer screen, we press send, and it is gone. It is gone, but it is out there forever. There is no editing process. And e-mail encourages the transmission of comments that we usually look back and say, "Oh, my gosh, why on earth did I send that?"

Any one here who litigates knows of course that discovery has been changed forever by e-mail. There isn't a lawsuit that's filed where there is not a request for hard drives, for every copy of every e-mail, and every communication that we as lawyers have in the law firm—internally, whether in your New York office or with your colleagues overseas—is going to be discovered in any claim of discrimination that an associate might bring.

I know it is not necessary to give examples of the kinds of disasters that e-mail can cause, but I will just say the word "Enron." And I think that if you look at some of the biggest public relations, as well as legal, disasters that have befallen global companies, I think there are often two common denominators: one is the presence of a disgruntled employee who has been let go or otherwise treated in a way that he thinks is unfair, and second is the presence of e-mail.

If you look at Enron, you look at the e-mails that the chairman sent concerning the purchase of shares. Look at Arthur Andersen's advice. The list is endless. So e-mail has changed everything. And the basic message is there is no such thing as secrecy. A secret e-mail can be transmitted worldwide in an instant.

How does this affect what we should do and how we should act? First of all, we should do all we can to try to preserve confidentiality, to the extent that we can. But, second, we should assume that in fact nothing will be kept secret and we should assume that any document we create could end up on the front page of the *Wall Street Journal*.

Now with that background I want to just focus on some of the larger issues that face global law firms. Tomaso made mention of law firm cultures. Every firm has its own culture. And when you're dealing with offices in multiple countries, every office in a different country likely has its own culture. Law firms are like any other business. They need to consider whether it is appropriate to establish global employment practices that take into account the culture of their firm, that take

into account the culture of the particular office, and that take into account the laws that govern the practices of those offices.

For U.S.-based firms, we have these quaint notions of discrimination and harassment that we need to consider as global firms, particularly, U.S.-based firms that have global operations: Are these policies (that is, the policies that we have implemented in our own offices prohibiting discrimination, prohibiting harassment) policies that should be imposed upon our foreign offices? Are these policies that we should raise with our foreign offices and consider imposing on them? Will your partners in Paris laugh if you suggest imposing a sexual harassment policy in the Paris firm?

As for foreign firms, someone earlier made reference to the fact that there isn't a resume he receives that doesn't mention the gender of an applicant or their marital status and perhaps even the person's religion. Foreign lawyers have different ways of doing business. They have different understandings about how they are going to conduct business. And so the cultural issues are different, the legal issues are different. And often we see foreign firms doing business here trying to import into the U.S. their own requirements concerning, for example, notions of cause for termination, the use of contracts—employment contracts—which is not necessarily a common practice here, as well as a lack of any training or any guidance on discrimination and sexual harassment issues.

As further backdrop, we have the same issues facing multinational corporations. We have extraterritoriality of U.S. employment laws. The U.S. employment laws that prohibit discrimination and harassment apply overseas to U.S. companies, to U.S. citizens working overseas. We have the increased discovery and litigation in the United States of overseas employment practices to establish an inference that an employment practice that may be unlawful here but is lawful, for example, in Germany is governing practices in the United States.

There have been a number of decisions in the U.S. in recent years which have permitted plaintiffs to obtain discovery of overseas employment practices in, for example, Italy or Germany, where discrimination is commonplace, and even lawful, so that the plaintiff in a lawsuit in the United States could suggest to the jury that in fact the same criteria are used in the United States.

In light of all this, what are the special problems? How do we avoid these problems? And how do we defend these problems?

First of all, U.S. law firms have hired associates who may be litigation associates, who are particularly aggressive, who know how to file lawsuits. So I think we are unusual in that our potential plaintiffs are associates who are litigation associates trained to file lawsuits. We shouldn't be surprised if they make aggressive plaintiffs in discrimination cases. Further, we have clients who are concerned about it. If we're accused of discrimination, if we are accused of wrongdoing, presenting ourselves to our clients as a business that doesn't know how to run its own business, as a business that is accused of discrimination, presents us with especially difficult problems. So how do we avoid these problems?

First, we need to recognize that we are global businesses. We need to consider establishing corporate governance policies, just as a global business might. We need to consider whether it's appropriate. We should not hesitate to consult with counsel, to the extent that it is necessary, to get advice about particular employment issues and to preserve a privilege that you may want to preserve.

As global law firms, we should conduct audits of our employment practices. We should identify personnel policies that need to be implemented. We should identify potential litigation issues both in local offices and in offices overseas. We should hire professional personnel directors who can guide us through these problems. We should consider coordinating human resource practices both in the United States and overseas: not necessarily having identical practices, not necessarily controlling practices from the United States, but coordinating practices by considering what our culture is and what values we have as a firm. And shouldn't we be coordinating these practices and policies? We should, as any company would, implement training programs—training programs on discrimination and harassment—both here and potentially overseas for partners, for associates, for staff. We should consider implementing training programs for foreign lawyers before they come here, so that they are aware of the laws in the United States and the potential for discrimination and harassment charges.

We should identify particular problem individuals. You've all heard of the $6.9 million jury verdict against Baker & McKenzie in a sexual harassment suit where a partner had been identified as having difficulties working with women over the years, and it was a problem that had never been dealt with. So, we should consider special training for particular problems and special problem individuals. We should be sure that we have policies on discrimination and harassment. We should implement investigation procedures. We should implement special leave-of-absence policies to accommodate women who may be candidates for partnership. We should consider the possibility of requiring arbitration of all employment disputes. We should consider imposing a mandatory mediation policy on our employees.

These are lawful practices that are commonly used in major corporations.

We should have formalized and transparent evaluation policies and procedures for the evaluation of associates, so that, when an individual is denied partnership, there's no mystery as to the reasons. We should consider, in fact, permitting associates to review performance appraisals. We should not write anything down that we would be afraid to show the person that we are evaluating. We should provide training on how to conduct interviews. Somebody mentioned before the practice of conducting interviews, and that's a problem for companies, and it's a problem for law firms.

And how do we defend these cases? I think it is critically important, when we either represent ourselves as lawyers or we represent law firms, to recall that we are special targets. We have a public image. We should consider not only what's best for our client, but also what's best for our client's clients.

Law firms are unique. They are composed of strong-willed, aggressive individuals used to giving and not taking advice. This presents a special challenge for us, and we are attractive targets. We need to remember this as we continue this globalization exercise. Thank you.

MR. HENNING: Let me ask you a two-part question, and then we'll throw it open.

Let's assume the same facts that arguably give rise to a credible allegation of sexual harassment. Hypothetical 1: A U.S. law firm in New York imports a U.K. female lawyer to the New York office of a U.S. law firm. What are her rights with regard to that kind of set of facts? And Hypothetical 2: An Italian—and this is merely hypothetical—an Italian lawyer imported to New York to work for an Italian law firm in New York, with the same set of facts. What, if any, differences might there be?

MR. BERKOWITZ: Well, there's no difference. Everyone working in the United States, in fact, whether they are a legal or illegal alien, is entitled to the protection of U.S. laws. And so, whether you are a U.S. company or a foreign company qualified to do business here, you can be sued for claims of discrimination.

And again, as I mentioned before, a U.S. company that employs U.S. citizens working anywhere in the world, if those individuals are subjected to harassment or discrimination on the basis of their gender or pregnancy, or what have you, they can bring a lawsuit in the United States too for that conduct overseas.

AUDIENCE MEMBER: You said anyone working in the United States, legal or illegal?

MR. BERKOWITZ: The courts have said that even illegal aliens are permitted to bring these claims. If your citizenship, your visa status, if you're not working lawfully, that will not render you an appropriate target for unlawful discrimination.

E. Questions and Answers

MR. HENNING: Questions? While you're thinking of some, let me pose to my two fellow panelists another. And this arises out of Tomaso's presentation. I believe you said, Tomaso, that you think that bar associations will get stronger as the move towards international law firms and globalization proceeds. I think I could argue that they have become weaker in Europe. And I'd be interested if you would elaborate.

And Phil, if you have any thoughts about that, because you've both been active in the bar here, and I'm sure also in Italy.

MR. CENCI: Yes, I believe that bar associations will become stronger, at least in the sense of their representing lawyers' interests before the legislature in connection with expediting changes in the law, and particularly changes in the law affecting professionals. So, you're right, Joel, they might be weakened insofar as their actual representation of lawyers is concerned when compared to the beginning of the century. But in terms of representing lawyers vis-à-vis the legislatures, the bodies in charge of harmonizing the law, it is my opinion and prediction that they will become stronger and stronger.

MR. HENNING: Phil.

MR. BERKOWITZ: I think bar associations have a role to play in educating local lawyers on the issues that we have discussed, certainly.

MR. HENNING: And I guess my counterargument would be that the bar associations are essentially the manifestation of the medieval guild, and that since the medieval guild has disintegrated, so has the real authority of the bar associations.

Any other questions or comments? Okay. Thank you both very much.

MR. DUFFY: Thank you, Joel, Tomaso and Phil for a very interesting presentation.

IV. Where Are We Headed? The Future Possibilities of Regional and Worldwide Service Networks, Advertising Programs Addressed to International Clients, and Law Firm Marketing and Branding Efforts

A. Introductory Remarks

MR. DUFFY: We are now going to move to our final panel of the day, chaired by John Forry. We are going to

start to look at what the future might hold in some of the areas that we have been talking about.

I am going to turn the podium over to you now.

JOHN FORRY: Thanks very much.

The broad subject is: "Where are we headed?" Future possibilities might include regional and worldwide services networks, advertising programs, branding efforts and the like.

We have, in addition to myself (and I am really just acting as a moderator), two other speakers. I'll introduce each of them before I turn the presentation over to them.

Briefly, by way of background I'm a partner with Ernst & Young LLP here in New York. One of my roles is director of the foreign legal services (FLS) alliance. I have also been on the finance committee of the governing board in charge of the Pacific Rim and in charge of the Latin America practice. So I have seen it from the law firm side.

And the Big Five approach, which does vary among the Big Five, nevertheless is one model for going forward. Typically, for example, in the Ernst & Young law alliance, there are about two thousand lawyers in private law firms around the world. There are actually about sixty countries covered by that. Obviously, some of them are very small firms, but others are the first, second, third or fourth largest in their countries, such as in France or Italy, for example, or the Netherlands. That is one model.

But we are going to talk about really two other ways in which law firms can reach out to focus on opportunities that have been typically outside the scope of what law firms have done in the past.

Steve McGarry is probably fairly well known to many of us because he was very instrumental in the creation and operation of Lex Mundi. But his subject is really going to be multidisciplinary organizations, which reach across disciplines in a form of networking.

Arthur Katz is a partner in the New York office of Sonnenschein Nath & Rosenthal. And he's a member of the firm's corporate securities practice group. He is going to speak to us about advertising and related types of efforts by the law firm, if I may say so, as a stand-alone institution or entity. And then, with our second speaker, we'll turn to the idea of networks, of multidisciplinary networks, of various firms.

B. Multidisciplinary Organizations

STEVE McGARRY: I'm going to speak today about multidisciplinary organizations. Everybody in this room has probably had it up to here with multidisciplinary practices and multidisciplinary partnerships (MDPs). Over the past seven years, tens of thousands, if not hundreds of thousands of pages have been written about MDPs by ethics commissions in sixty countries: three-quarters of the United States bar associations have had committees; the ABA has had committees and more committees. It's been studied! And today, in the year 2002, the MDPs continue to grow. There are fifty-three countries in which MDPs are permitted as full partnerships rather than practices. There are a lot more countries and states in which multidisciplinary practices are permitted. You name it, there are tens of thousands of lawyers who currently work or are associated with the Big Five "multi-firms" at this time.

Law firms have been looking around for alternatives. Ancillary practices are one alternative. Another has been networks, law firm networks, as a way of developing worldwide relationships. But what has been overlooked is probably the obvious, which is a multidisciplinary organization or MDO.

What is a multidisciplinary organization? A multidisciplinary organization consists of independent service providers. It's not particularly radical. There is nothing whatsoever that prohibits law firms, businesses or others to associate as independent entities into a group. But they really haven't done so at this point in time. There are no restrictions whatsoever, no ethical or regulatory restrictions.

I would like to cover the MDO concepts, some of the issues involved in the creation of an MDO, and problems and opportunities for being part of an MDO.

At this point in time there is only one MDO consisting of accounting and law firms, which is McIntyre Slater, out of the U.K. There are two types of possible MDOs. One would be the independent MDO, which would basically be a sophisticated yellow pages. Microsoft could create an MDO. It could go out and preselect qualified service providers from around the world and provide them with a database; the service providers could then enter their information into that database. And when they needed another expert in any field, it would simply be a question of going to the Microsoft database and finding that particular expertise. A full one-stop shopping worldwide for services.

The service providers would have no relationship whatsoever with each other. It would be a yellow pages, but a pre-screened yellow pages, and it could be quite lucrative for Microsoft to create something like this. Right now there are models on the marketplace that are precisely this. They just simply have not taken it to this particular level. They could over the next few years, and this could be an alternative for small- and medium-sized firms that want to offer their services worldwide but do not have the capacity to do so. And it

would not just be devoted to legal services but could include all types of services.

The second type of MDO is something I call the "relationship MDO." It's a sophisticated law-firm-network concept where the people, the professionals, actually know each other. They meet; they have a joint publications; they market jointly. The relationship MDO is created by the firms themselves, rather than by some external organization that is trying to make some money. McIntyre Slater is such an organization, even though it is currently limited to accounting and legal services.

The objective of an MDO is to offer one-stop shopping and to offer it on a much broader scale than is currently being offered by the large consulting firms. Large consulting firms have to determine what their priorities are. What is the scope of what it is they are going to offer? Well, an MDO doesn't have to do this. It can bring in all different types of services. That raises a number of issues, as well as opportunities. The question is how do you get information about service providers in Tanzania, in Chile, and Iowa? What kind of transparency can you create in the system? That's an important thing. How do you get to these people that are in your MDO?

The organization has to be global, and it has to also be local. How do you find out who the best service providers are locally? How do you know who the best service providers are globally? Many of the largest firms in the world admit inconsistency of quality from place to place, and it is not a secret that quality varies. How do you do that? That's an issue.

Each of the service providers has its core competencies. They all have their expertise. How do you "mix and match" that into an organization? It would seem to be a very difficult thing to get the right match between local services and international services in such an organization. It is a challenge.

There's also a technology challenge involved. Small firms in remote jurisdictions simply do not have access to the same technology that an Arthur Andersen would have to develop extranets, to collaborate with clients. How do you develop that? An individual law firm even with a hundred lawyers in the United States doesn't have $2-to-3 million a year to invest in the creation of this type of technology. The MDO can offer, by bringing together a thousand different service providers, the opportunity to share the cost of this technology development.

It levels the playing field for law firms and other service providers around the world whose clients want and demand this type of collaboration but who are now simply unable to provide it. There are very practical benefits. I could name thirty-three very practical benefits to it, but I'm not going to name thirty-three because I only have four or five more minutes.

There is sharing of information. Market intelligence: how do you develop market intelligence in a global environment? Well, very easily in an MDO. Everyone identifies whom it represents, and if an opportunity were to develop in a jurisdiction, that information could be shared and a recommendation could be made by someone who actually already represents that particular client.

The law firms—since we are here with lawyers—could offer full services to their clients. If their clients are already expanding to another jurisdiction, they have needs. They need real estate services, engineering services, environmental services, banking services. These can be provided through the corresponding members in an MDO.

The question then is how do you create and develop such an organization? You have to start somewhere. You start by determining who the best firms are and then creating a system to develop the organization. Actually, in the written materials distributed at this program, it says that World Services Group is fictional, but it is actually in the process of being developed. I have started World Services Group, and we already have 127 law firms, which are either number one or number two in their jurisdictions worldwide, with about eleven thousand lawyers who are involved in it, and an extensive organizations committee, including a member of Allen's firm.

We started with the law firms because they are big in their particular jurisdictions. We are now in the process of expanding to other service providers, such as international consulting firms and others that we are in the process of bringing into the organization. The objective of World Services Group is to have fifty thousand to sixty thousand professionals of which fifteen thousand to sixteen thousand would be lawyers involved within the next two years, so as to be able to offer worldwide one-stop shopping.

The system has been created to develop this locally, where each subgroup, say Costa Rica, can input data about local service providers into a common database, and that database can then be shared worldwide. It will be available to corporate clients, general counsel, CFOs, and executives who want to have the same availability of the resource.

This is a process that I see taking the networking concept to the next level. I see it as a way for law firms to participate in the globalization process, to maintain their independence, and to do so in a completely ethical way. That has not been accounted for in the discussion to date, in the thousands of discussions that have taken place on MDPs. Thank you.

MR. FORRY: Art, do you want to take over?

C. Marketing by Law Firms

ARTHUR S. KATZ: I apologize that the mouse attachment apparently is not here. So I'm going to have to sit next to the technology. I was considering, after Tomaso's presentation, to simply title this, "Meowing louder and hopefully better."

Marketing by law firms, frankly, by now, is not such a novel idea. The challenge over time has always been what would be deemed appropriate by the target audience. You have to convince the mice to run toward the meow, which isn't necessarily an easy thing to do.

In order to understand Sonnenschein's perspective on this, I should tell you something about the firm and its unique history. Back in 1985, Sonnenschein was the largest firm in the United States that had only one office, and that office was in Chicago. The firm was well integrated into that city, its culture, its intellectual side, all the things that in older days, in a smaller environment, guaranteed a healthy law practice.

Unfortunately, it is never good to be at one end of a spectrum, and Sonnenschein realized at that time that it should open a second office in New York and was urged by some of its clients to do so. In the last sixteen or seventeen years it has created eight offices across the United States, and about sixty percent of its lawyers outside Chicago. The profile of that kind of firm, together with the fact that it has a minority of lawyers in its oldest location and yet relatively small numbers, forty to seventy lawyers, in each of its other offices, presents a situation where you are trying to service clients off of a capacity of 500 lawyers. And yet in the jurisdictions where you're relatively new, you're not necessarily well-known, and you certainly can't play off the kind of recognition that one has in the community that one has been in for eighty years as one of the largest firms in the city.

So, over time, Sonnenschein came to the realization that marketing wouldn't be such a bad thing to try. And because marketing, like choosing a tie or a scarf or the wallpaper in one's living room, is a very, very personal thing to a firm that hopefully reflects its sense of its culture, its strengths, the way that it's comfortable with presenting itself, I'm going to try to offer you the relevant concepts that we took into consideration. But it necessarily will come out with a Sonnenschein conclusion as to the approach that we felt comfortable with.

We perceived a need to change the way we were approaching making ourselves known to clients and recruits. We were under-recognized. Given the size of the firm and given the markets we were trying to penetrate, we had a need for a greater profile. We had historically a relatively unprofessional, relatively junior marketing staff, some of whom really didn't have a technical marketing background at all. And yet to the extent that we were using them for certain purposes, they were overwhelmed by the need to help with presentations, pulling together practice materials, and the like.

Also, law firms historically have spent a much smaller percentage of their revenues on marketing than have the accounting firms. And John, I don't know what number is typical of Ernst & Young, but I would think most people would say two to five percent on marketing is probably the range for law firms. I think most people would have expected historically for it to be less than one percent, and that was certainly true for us.

There was also a healthy skepticism as to whether or not money spent in that department would really have the kind of return that one would want. But we were finding that we were losing out on opportunities that we internally felt we were qualified to pursue, and part of it was simply people saying, "Sonnenschein who?"

As I said, there were several groups that we had previously been hoping to increase our profile with. And we had a desperate need not only to improve but also to integrate the types of materials that we were making available to the different audiences that we needed to address. One decision that we made early on was to form a marketing committee composed of attorneys. The chairman, who is one of my partners in Kansas City, spent a lot of time getting up to speed on the business aspects of successful marketing. The second step was to bring in someone really at a partner-type level, equivalent to our executive director and our CFO, who are nonlawyers, as a chief marketing officer. Because we realized that we needed someone who could lead the partnership in a consensus direction on trying to brand and present ourselves in a way that was comfortable.

The question is who do you compare yourself to when you're trying to attempt a strategy here? We wanted to be competitive with those firms whom we were meeting in the dog-and-pony shows, but we knew that we didn't have an unlimited budget to do so, and we were aware, much in the way that you've heard this morning, that firms have to focus on what their strengths are, in terms of either taking a niche play or deciding how to operate internationally, if they aren't going to be full-service in several countries. We went through the same process of identifying the areas that we thought would constitute putting our best foot forward, and then hopefully, if we had success in those areas, the broader full-service aspects of the firm would come into play when clients resulted.

It was important also to be comfortable that the image we presented was one that we considered to be honest and provable in terms of the assertions that we made. And it also had to be consistent with where we thought the firm was going geographically and substantively in the near and medium term.

We had undergone a strategic plan for the firm several years ago that identified several areas where we wanted to expand and change the way that we practice. That was integrated into the marketing approach.

The aspect of having a marketing professional was a little bit jarring to some of the partners. I think there's a natural conservatism amongst us towards the idea of even advertising in the first place. And I must say that she challenged us. She was someone who had a background in consumer services and came from a healthcare services company and, before that, had been prominent in certain *Playboy* marketing campaigns behind the scenes.

We had several goals, and let me distinguish here between marketing and sales. Indirectly one hopes that marketing leads to higher revenues for the firm. But the first step is simply to increase awareness of the firm. Let me ask you, how many of you are aware of Sonnenschein or have heard of Sonnenschein? Okay. How many of you had heard of us two years ago? Even more, very interesting. Let me make a note of that for our marketing director.

If I were a litigator, I would have known not to have asked that second question.

We found ourselves in an increasingly competitive market in geographic areas that didn't immediately recognize us. And we decided that, certainly in Chicago and in some other cities, we needed to get some additional expertise. So, many of our junior marketing personnel were substituted for people with explicit experience in things like public relations and advertising. And it was done relatively cost-effectively, because it was more a substitution of personnel than an addition.

The marketer taught us that we needed a "brand promise." And again, there was a discomfort level with the kind of assertion that you might not like a client to make in its own advertisements. We wanted to seem professional, and yet we were told we needed a strong statement. So the way we approached this was really to survey the firm and our clients to try to develop a sense of where we thought we were in terms of the perception of clients and what they associated with us. And we discovered to our satisfaction that people gave us credit, more than they would the average firm, they said, for really understanding the business of the clients that we serve, not just having the technical/legal expertise. So we somewhat presumptuously created as our brand promise: "Retain us, and we will help you grow and prosper." And it's interesting over time how we now take that for granted, despite our initial hesitation at saying something so bold. The clients seemed to receive it quite well.

We had the attorney marketing committee and the professional marketing director closely working together with our policy and planning committee, which is our management committee as well. They approached this by deciding what markets we were trying to attract, worrying about consistency. It is difficult to go after e-business clients and trust companies at the same time with the same image. And we had to figure out how to negotiate that type of thing. Because there were obviously several constituencies within the firm that had different ideas as to who the primary targets should be. We were taught the word "collateral," which basically means your printed materials, Web site and other materials that present the firm.

We traditionally have issued an annual review. This has been true for many years, but I guess its relevant feature is that it tries to present the story of what we've done in the past year as a partnering with our clients to achieve their goals. It was considerably spiffed up as part of the marketing campaign, trying to integrate all of our materials.

You probably noticed that the "o" in our name is yellow. That was not an uncontroversial decision. And it is interesting, and it's part of the test of a program as to how quickly we've become accustomed to it. Although that's not necessarily true for people who see it. We have had some people perceive us because of some of the bold graphics we use, including the yellow "o" as a much more modern, aggressive, open-minded firm.

I've also had a consultant, who, for example, has a black-on-black very elegant brochure, just sort of shake his head and be afraid to tell me what his reaction was. But the important thing, the goal here, was to be noticed, and not in a way that was materially detrimental to our image, hopefully something that got people interested in us.

The surveys we have done have indicated—except in this room—that the recognition factor of the firm has gone up significantly. Particularly in the cities where we've only been located five to fifteen years.

The Challenge of Globalization

By Bernard L. Greer, Jr.

Awareness is growing that some regulations may be inappropriate in a globalized world and that a better balance should be struck between the need for regulation and the necessity to ensure competition.[1]

I. The Impact of Globalization

Perhaps the best way to illustrate the thesis of this article is to ask the reader to imagine superimposing one map of the world on another.

The first would be a standard political map of the world, with each country represented by a different color. In each of these countries there is at least one legal system or jurisdiction—sometimes more than one—and within each jurisdiction there is usually at least one regulated legal profession. Obviously, there are some differences among these various professions. But all of the bodies which regulate their conduct are concerned with the regulation of what most of us would consider the practice of law within the geographic borders of their jurisdictions—and each regulated profession has its own rules governing admission, conduct and practice.

Because these professions are linked to the administration of justice and because the proper discharge of their duties is integral to the efficient ordering of private affairs, they occupy a privileged status within their respective jurisdictions, and their unauthorized (*i.e.*, unlicensed) practices have generally been restricted. While these controls may restrict competition, sound policy reasons support their existence and enforcement. It is important, however, to remember that these professional regimes are historically based on, and traditionally have been administered within, the framework of geographical borders.

As a second step, superimpose upon the imaginary political map one which depicts the world's weather patterns, showing—with arrows and other symbols—the main forces which influence the weather worldwide. Placing the weather map directly over the political map shows clearly that the weather does not respect borders, and that its main trends are influenced by developments which often take place at some distance from a given area.

Now take a final step. Imagine replacement of the weather patterns by symbols depicting the process generally referred to as "globalization"—the increasing movements of people, capital, goods and services across national borders. Globalization has been made possible by the revolutions in communication, information and other technologies and by sweeping political change. The result has been the rapid development of new markets for business and the expansion of developed economies throughout the world. Globalization seems irreversible and—as with the weather—the power of traditional political and other institutions, including the bodies which regulate the legal profession, to control it is limited.[2]

A. The New Practice Environment

Those who practice our profession—in particular, business lawyers—have adapted quickly to this new environment, and globalization has wrought a radical change in the way in which law is practiced. With the dramatic increase of international trade and investment, the extent to which clients and companies are traveling and doing business internationally would have been difficult to imagine even a few years ago.

Consequently, the tasks these clients and companies are asking their lawyers to perform have changed to reflect this remarkable development. To give one example, it is increasingly common for business transactions to be negotiated in one jurisdiction, consummated in another, and financed from one or more additional jurisdictions. Increasingly, the criteria used by clients to select their lawyers are derived from factors other than their formal qualifications and the jurisdictions in which they are licensed. From my own recent experience, I can cite the following examples:

- I know an American lawyer in Paris, who is licensed only in New York and France, but whose current practice involves representation of clients from the Middle East and Europe in Eastern Europe.
- An American firm, which has no branch offices outside the United States, recently represented a French company in a joint venture with a German company in Brazil, the financing for which was provided by French and Japanese lenders.
- A major firm based in England is advising the State of California on the privatization of a state owned utility.[3]

All of us can point to similar examples. The reason for engagements such as those described above is simple: a client, not unreasonably, chooses as its lawyers those who know the client's business and whom it

believes to be the best qualified to provide specific services in a timely and cost-effective manner.

The adaptation of our profession to this new cross-border practice environment has been generally referred to as the "internationalization" of legal services. Although some law firms are following expansion strategies which anticipate clients' needs and demands in new "legal markets," internationalization is more accurately described as a reactive process. As noted above, it is a fact of contemporary life that individuals and companies are traveling and doing business abroad more than ever before. In this environment lawyers (and their firms) are simply following their clients and responding to, or anticipating, their needs. Barring worldwide economic depression or general war—neither of which appears to be imminent—this cross-border activity seems certain to increase even more.

Lawyers and their firms have adapted to these developments in a number of ways:

- Where permitted, they are establishing foreign branch offices.
- They are constantly upgrading their telecommunications capacity, enhancing their ability to communicate almost anywhere in the world instantaneously, and international videoconferencing will soon be routine.
- They are traveling abroad much more than in the past—and to more places—on what can be described as a "temporary services" basis;
- They are forming regional and worldwide alliances with firms in other countries, ranging from loose affiliations of independent firms to more exclusive relationships, including "joint ventures."
- They are diversifying the qualifications of their professional staffs so that they can function effectively in more legal systems and in a greater variety of cultural settings.

The combination of these factors has made legal services much more "portable" and exportable than ever before.

B. The Unchanging Lawyer-Client Relationship

It is important to remember, however, that, while this new environment has radically changed the arena in which lawyers practice, the basic nature of the relationship of lawyers to their clients is, in essence, the same as it is in a purely domestic setting. That is, the lawyer-client relationship remains based upon a foundation of trust and confidence. In fact, those attributes often assume even greater importance in the context of international practice. Once trust and confidence have been achieved, a lawyer may find that the client will ask him or her (or his or her law firm) to perform a wider range of services in more places. It has been said that, as distance increases, relationships assume greater importance. And in the context of cross-border legal practice, the need for the trust and confidence—the bedrock of the lawyer-client relationship—becomes even more essential.

It would be inaccurate to view this process as one involving only large firms from developed countries.[4] In fact, no lawyer or firm is immune to the effects of globalization. Today, it would be difficult to find in any part of the world a lawyer whose practice could be viewed as entirely "local." All countries depend upon international trade.[5] Export transactions and international investments are increasing.[6] Dispute resolution is becoming more international in nature.[7] The internalization of legal practice is not limited to the practice of business law and commercial disputes. Transnational issues may arise in domestic practice, such as divorce or child custody cases.[8] As individual property holdings have become more diversified, multi-jurisdictional taxation and estate planning as well as bankruptcy and other insolvency issues are encountered by local practitioners much more often than in the past.[9] All of these factors illustrate the growing diversity of international legal practice and its increasingly pervasive nature.

The rapid rate at which these changes are taking place highlights the need to understand their impact on the traditional attorney-client relationship. It also illustrates dramatically the need for professional regulation to facilitate and preserve the fundamental characteristics—the core values—of the legal profession: independence; freedom from conflicts of interest; and the confidentiality of client communications. It is these attributes, common to every legal profession, that distinguish the professional work performed by lawyers from ordinary business services.

II. The Challenge to the Regulated Profession

A. Critical Unresolved Issues

The very brief and general sketch of the landscape set out above only hints at the complexity of the questions facing our profession as a result of what can only be described as revolutionary and ongoing change. This new environment has challenged not only practitioners but the authorities which license and regulate our profession. For these bodies, the challenge is to blend the traditional concerns of the regulated profession—competence, ethical conduct and discipline—with the need to address the demands and realities of today's cross-border practice environment. This, in turn, involves the balancing of old and time-honored public interests with the necessity to modernize the framework within which we practice law.

It is appropriate for us to ask how well these bodies are responding to the developments described above, and to compare the relevance of professional regimes to day-to-day practice. Put another way, are professional regimes addressing the issues posed by globalization in a manner which recognizes the need to facilitate the conduct of transnational business while maintaining clear and rigorous professional standards? Two years ago, when I first posed this question, the response was that, with a few exceptions, they do not. Today, however, there are signs that indicate that some national regulatory bodies have begun to take positive steps to address the issues, although it is clear that others—including many in my own country—have not addressed in a thoughtful and comprehensive way the issues arising from the globalization of legal practice.

B. The Need for a Coordinated Approach

The challenge to the legal profession posed by globalization has only recently begun to receive the attention that it deserves.[10] Though many complex issues inherent in globalization are of critical importance, to date no comprehensive examination has been conducted by the organized legal profession, at least not on the scale that seems required. It also seems self-evident that such an examination should not be conducted in a vacuum, but rather should be coordinated by appropriate professional organizations worldwide with a view toward establishing the basis for a more uniform professional regime that provides not only certainty and transparency but also the measure of flexibility necessary to accommodate the transnational delivery of legal services without the interposition of unfair or discriminatory barriers. I am not arguing that standards should be relaxed, only that they should not unreasonably impede the natural course of performance of professional duties and that they should be made clear to all practitioners. When the need arises, lawyers will find ways to provide the services required by their clients—if necessary without reference to the formal professional regime. Certainly, this would be lamentable; but if this proposition is true, we should consider whether rules which may be widely ignored should not be reexamined.

As noted above, to date the response of professional regulatory bodies has been mixed. To the extent it exists, regulation of transnational practice is a patchwork of varying requirements that has not been adapted to the reality of modern practice. In a few jurisdictions, such as England and Wales and Hong Kong, open regimes have been adopted.[11] In others, for example the United States, the situation is muddled: some states have addressed some of the issues listed above (in particular the establishment of foreign branch offices and admission to practice of foreign trained lawyers), while others have not taken any steps to adapt their regimes.[12] Still others, for example France, have adopted rules (including an examination in the local language) that are viewed by some as more restrictive than before, although the French system does expressly accommodate the admission of foreign-trained lawyers through an administration of a special examination.[13] Finally—and most disturbing—some jurisdictions, *e.g.*, India, have taken active steps to force foreign lawyers to cease practice after such firms have in the recent past taken good faith steps to comply with local licensing requirements.[14] Thus, it is fair to say that the legal professions of the world are a long way from achieving consensus on the treatment of cross-border practice—and, in fact, at least in some jurisdictions, they may be moving *away* from accord on the matter. Against a backdrop of increasing transnational activity of all kinds, this failure to address the essential elements of cross-border practice could make the already significant gulf between the reality of modern practice and the bodies which govern legal practice even wider.

C. The Elements of Consensus

At a minimum, I suggest that professional regimes should deal with the following in addressing cross-border practice issues.[15]

- *Core Values*: Establishing the core values of the profession, namely, independence, freedom from conflicts of interest, obligations to the courts and the public, and a duty to maintain client confidences that must be adhered to by *all* lawyers.
- *Cross-border Establishment*: Addressing the ability of a lawyer or law firm from one jurisdiction to establish an office or a permanent presence in another jurisdiction to practice the law of the home jurisdiction.
- *Temporary Presence*: Addressing whether a lawyer or law firm from a jurisdiction traveling to another on a temporary basis may render legal advice or perform other professional services, and the nature and extent of the duties of a visiting lawyer to the host governing body.
- *Scope of Practice*: Defining the permitted scope of practice of a permanent or visiting foreign lawyer practicing under home title, *i.e.*, the legal advice he/she will be authorized to render and the services that may be performed.
- *Privileges*: Specifying the nature and extent of the rights and privileges accorded to foreign lawyers—including confidentiality of client communications.
- *Forms of Association*: Specifying the circumstances under which lawyers may—either locally or on a cross-border basis—form partnerships with

lawyers licensed in jurisdictions other than their own.

- *Company Lawyers*: Regulating the status of company lawyers.
- *Arbitral Tribunals*: Addressing the status of foreign lawyers to appear as counsel before an arbitral tribunal.[16]
- *MDPs*: Specifying whether and under what circumstances lawyers may combine with others in global organizations that offer a range of professional services, *i.e.*, multidisciplinary practices (MDPs).

Very few jurisdictions have addressed these issues in a systematic way.[17] Although there is no general database which provides a systematic analysis of the ways professional regimes have adapted to the process of globalization, the development of a general consensus among the regulatory bodies of the world would create a much more positive practice environment from which clients and the legal profession would derive great benefit.

D. The IBA Experience

Achieving such a consensus with the worldwide legal profession on all of the issues listed above will prove extremely difficult. The experience of the International Bar Association (IBA) on only one of these issues—the status of foreign legal "practitioners" or "consultants"—illustrates that difficulty. It also illustrates that consensus *can* be achieved on the most controversial of issues where the will to reach agreement exists.

As a federation of national bar associations, numbering among its institutional members virtually all of the national governing bodies in our profession, it would seem appropriate for the IBA, acting through its Council, to provide leadership on cross-border practice issues—as it has in other areas, such as promotion of human rights and development of consensus on professional ethics (the IBA Code of Ethics). For more than five years an IBA Committee worked to develop a statement of principles on cross-border issues for its member organizations, and on 6 June 1998 the IBA Council approved—with only two dissenting votes—its "Statement of General Principles for the Establishment and Regulation of Foreign Lawyers."[18]

Since the principles set forth in the statement have been endorsed by a significant majority of the IBA's Council, it can be hoped that they will play a role in the development of a consensus on the treatment of foreign lawyers practicing the laws of their home jurisdiction, *i.e.*, the law which their home licenses authorize them to practice, when they are resident in—and subject to the regulation of—a host jurisdiction. Rules based upon these principles would, among other benefits, expressly confirm the right of the host jurisdiction to regulate such practice—not for the purpose of restricting competition, but to facilitate delivery of transnational legal services.

The importance of a consensus on issues such as this seems to be beyond question. It would, at a minimum:

— Promote the rationalization of the regulatory process, thereby enhancing certainty, reducing risks to practitioners and promoting respect for the regulatory process;

— Bolster the core values which have been the hallmarks of the legal profession;

— Enhance public confidence and economic development by facilitating the delivery of legal services in a way which protects clients' interests; and

— In the process of discussing these issues and the profession's responses to the phenomenon of globalization, contribute to the education of the public and the profession at large.

The arguments made in defense of local rules that impede cross-border practice—the maintenance of discipline, establishment of competence and minimum educational standards—address serious concerns. But in practice—and this should be faced squarely—these restrictions have been used to limit competition and are enforced in a manner designed to protect the local practice environment. In today's environment, it is simply unrealistic to believe that, in the long term, such rules will successfully protect local practitioners or the local bar from the perceived competitive "threat" represented by the foreign lawyer. In the longer term, these restrictions will make it *more difficult* for local lawyers to compete because, in the future, the ability to act effectively on a wider stage will be a primary determinant of success.

III. The Need for Action

I first began commenting on the issues discussed above more than ten years ago.[19] At that time I noted that, while the issues were of some importance, there appeared to be no specific crisis looming on the horizon because they had not been addressed. Today the landscape has changed, and while "crisis" may not precisely describe the current situation, it is of immediate importance for the bodies which govern our profession to develop coordinated regimes which address cross-border practice issues.

Why has this become so important? There are, of course, many longstanding reasons for the legal profession to put its own house in order, not the least of

which is the uncomfortable irony of the fact that, while lawyers are advising their clients to obey the law, they are often finding ways to "wink at" or avoid complying with local practice rules that may be unreasonable and arbitrary. But apart from this, certain recent developments have added greater urgency to the need for national legal professions to develop fair and realistic rules that accommodate the reality of modern practice.

The first of these is the fact that the regulation of professional services, including legal services, is now under the scrutiny of at least one international organization which—in the long term—will have much influence on the future of such regulation. Under the General Agreement on Trade in Services (GATS), professional regulation must be "transparent" (*i.e.*, the rules governing admission and conduct of practice must be clear), and any restrictions on access must be objective and justifiable in the public interest.[20]

Second, the World Trade Organization (WTO), which will administer the GATS provisions on professional services, has the power to issue binding regulations or "disciplines" that supersede national regulatory regimes which are deemed to be anti-competitive. Similarly, as noted in the introductory quotation, the Organization for Economic Cooperation and Development (OECD) has also studied the economic impact of professional regulation on competition and efficiency. If the outcome of these efforts is the conclusion by the member governments of these two organizations that professional regulation is anti-competitive, then the pressure on the bodies which regulate the legal profession to adjust their regulations will increase enormously, and in the end, reform may be forced upon them as the result of outright intervention.

Third, a related development is the entry by the so-called "accounting firms"—more accurately, business service firms—into the field of legal practice through MDPs. These worldwide organizations have made the strategic decision to practice law, and they are doing so on an increasing scale—legally where they can, by stealth almost everywhere. In offering the legal services, these firms argue that professional regimes which do not accommodate MDPs are anti-competitive. There are, in fact, many serious questions of public policy inherent in the combination of the legal, accounting and other professionals in one organization, and in these circumstances it is not at all clear that the fundamental duties of counsel—confidentiality, independence, *i.e.*, the freedom from conflicts of interest, and competence—can be maintained in a "one stop shopping" environment. Although the Enron scandal may at least temporarily slow the advance of MDPs, the failure of national bars to develop rules which promote the delivery of legal services in ways which preserve the essence of these duties can only in the end strengthen the arguments of those who favor MDPs that restrictive regulation is a mask for protectionism. In the absence of meaningful change, we can be certain that these arguments will eventually be made to the WTO and the OECD. It is also likely that they will be made before courts as well.

In all events, these developments make clear that the regulation of lawyers worldwide will be subjected to increased scrutiny in the coming years and that regulatory restrictions will have to be justifiable in the public interest if they are to be allowed to remain in place.

I began by noting that the forces which underlie the globalization of the world's economy are beyond the power of the world's traditional institutions to control: the best to be hoped for is constructive adaptation to a radically changed practice environment. The process of adaptation will not be accomplished in a vacuum. To the contrary, because of the attention focused on professional regulation by the WTO and the OECD and the continuing debate over MDPs, every aspect of the regulation of our profession will be the subject of intense examination and, in the end, will have to be justified, not by protectionist concerns, but by public interests, including the interests of the increasing number of direct participants in the global economy. If that is true, would it not be better for our profession—working through the IBA and national regulatory bodies—to work now to ensure that the fundamental character and independence of our profession are preserved by the development of an international consensus on regulatory principles that promote realistic and flexible regulation that accommodates the realities of the global economy?

Endnotes

1. Organization for Economic Cooperation and Development, Regulatory Reform Project, Draft Chapter on Professional Business Services, 22 October 1996, at 4.
2. *See*, *e.g.*, *Survey: World Trade*, 349 The Economist, 3 Oct. 1998, at 8088; Greer, *Professional Regulation and Globalization: Toward a Better Balance*, *in* Global Law in Practice (1997); Guzman, *Capital Market Regulation in Developing Countries: A Proposal*, 39 Va. J. Int'l L. 607 (1999); Seita, *Globalization and the Convergence of Values*, 30 Cornell Int'l L.J. 429 (1997).
3. *See Law Firm Wins Award for California Work*, Petroleum Times Energy Report, 4 Dec. 1998, *available in* 1998 WL 27358875; *Gong Show*, Times of London, 17 Feb. 1998, *available in* 1998 WL 4819242.
4. It is important to note also that globalization affects developing as well as developed countries. In major commercial centers such a New York and London—where the regimes permit the establishment of foreign branch offices—many lawyers from developing countries have established such offices.
5. *See generally Survey: World Trade*, 349 The Economist, 3 Oct. 1998, at 8088.
6. *See generally* Rosefsky, *Tied Aid Credits and the New OECD Agreement*, 14 U. Pa. J. Int'l Bus. L. 437 (1993); U.S. Department of Commerce, Bureau of Economic Analysis International Invest-

ment Data, *Foreign Direct Investment Position in the U.S. on a Historical-Cost Basis* (1998).

7. *See, e.g.*, Chung, *Essay: Developing A Documentary Credit Dispute Resolution System: An ICC Perspective,* 19 Fordham Int'l L.J. 1349 (1996); International Chamber of Commerce (ICC), *Facts and Figures on ICC Arbitration* (1998).

8. *See, e.g.*, *Japanese Nationality Given to Child*, Japan Policy & Politics, 23 Dec. 1996; Sharp, *The Family Law Section,* 75 A.B.A.J. 105 (1989).

9. *See, e.g.*, Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue,* 28 Law and Policy in Int'l Bus. 1037 (22 June 1997).

10. *See* Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 Fordham Int'l L.J. 53 (1992/1993); Goebel, *Professional Qualifications and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 Tul. L. Rev. 443 (1989); Chapman and Tauber, *Liberalizing International Trade In Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services,* 16 Mich. J. Int'l L. 941 (1995); Trubek, Dezalay, and Buchanan, *The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas,* 44 Case W. Res. 407 (1994); Liu, *The Establishment of Cross-Border Legal Practice in the European Union,* 20 B.C. Int'l & Comp. L. Rev. 369 (1997).

11. King, *Foreign Lawyers in Foreign Jurisdictions: Rights of Practice and Establishment*, 63 Def. Couns. J. 363 (1996); Chiang, *Foreign Lawyer Provisions in Hong Kong and the Republic of China on Taiwan*, 13 U.C.L.A. Pac. Basin L.J. 306 (1995). *See, e.g.*, Liu, *The Establishment of a Cross-Border Legal Practice in the European Union,* 20 B.C. Int'l & Comp. L. Rev. 369 (1997).

12. *See generally,* A.B.A. Sec. of Legal Educ. & Admissions to the Bar and Nat'l Conf. of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements* (1989). *See also* Baraban, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China,* 73 Ind. L.J. 1247 (1998).

13. A.B.A. Sec. Int'l Law & Prac. Rep. to the House of Delegates, *Model Rule for the Licensing of Legal Consultants*, *in* 28 Int'l Law. 207, 216 (1994). *See generally* Grimes, *Une et Indivisible—The Reform of the Legal Profession in France: The Effect on U.S. Attorneys*, 24 N.Y.U. J. Int'l L. & Pol. 1757 (1992).

14. King, *Foreign Lawyers in Foreign Jurisdictions: Rights of Practice and Establishment*, 63 Def. Couns. J. 363, 365 (1996).

15. Please note that this list of issues deals only with the establishment of some sort of physical presence by lawyers and/or their firms in another jurisdiction. No less important—but beyond the scope of this article—are the issues posed by the revolution in technology. Through the use of computers and advanced telecommunications equipment, it is already possible and will soon become commonplace for lawyers in one jurisdiction to deliver services in another without ever physically entering the jurisdiction.

16. Porobija, *Lawyers and Arbitration: Foreign Attorneys as Party Representatives in Arbitration Proceedings,* 2 Croat. Arbit. YearBook (1995); Vic, *Lawyers and Arbitration: Attorneys and Arbitration in Croatia,* 2 Croat. Arbit. YearBook (1995).

17. The best work I know has been done in Canada, by the Inter-Jurisdictional Practice Committee of the Federation of Law Societies. S*ee, e.g.*, *The Inter-Jurisdictional Practice of Law* (22 Jan. 1990).

18. The Statement is attached as Exhibit A. Also attached, as Exhibit B, is another resolution adopted by the IBA Council, dealing with the core values of the legal profession.

19. Greer, *The EEC and the Trend Toward Internationalization of Legal Services: Some Observations,* Symposium, Private Investors Abroad: Problems and Solutions at § 13.05 (1987).

20. General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Part II, Art. VI(4)(a).

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EXHIBIT A

INTRODUCTORY STATEMENT

WHEREAS, the phenomenon known as globalization has resulted in a dramatic increase in the movement of people, capital, goods and services across national borders; and

WHEREAS, the increase in cross-border activity of all types has posed particular challenges to the legal profession, one of the most important of which is the establishment in certain jurisdictions by foreign lawyers authorized to practice in other jurisdictions; and

WHEREAS, the IBA believes that it is desirable and in the public interest for its member organizations to review and consider the manner in which their respective regulatory regimes address all issues posed by cross-border legal practice, including, but not limited to, the issue of cross-border establishment by foreign lawyers; and

WHEREAS, the IBA recognizes and acknowledges that in connection with such review and consideration, the legal profession in each of its member jurisdictions may take into account its own characteristics, influenced, *inter alia*, by its system of laws, historical factors and level of economic development, and, accordingly, legitimate approaches taken to issues of cross-border legal practice may differ in certain respects; and

WHEREAS, notwithstanding the differences among legal professions, certain essential principles are common to all legal professions, and these principles include:

- The commitment to the independence of lawyers and the legal profession;
- The commitment to preservation of client confidences;
- The prohibition against conflicts of interest in the practice of law;
- The maintenance of high ethical standards; and

WHEREAS, notwithstanding the differing approaches to regulation, the IBA believes that all regimes regulating the conduct of the legal profession should reflect and promote these common principles; and

WHEREAS, the IBA recognizes that either of the following two approaches to the establishment of foreign lawyers, may be consistent with the foregoing principles, provided that they are adopted and administered in a manner which recognizes the education and experience of foreign lawyers and facilitates the effective delivery of legal services, and these are:

A. regulation of foreign lawyers by allowing them to become fully licensed to practice the law of the host jurisdiction through examination or otherwise (the "Full Licensing Approach"); and

B. regulation of foreign lawyers as practitioners of foreign law for the limited purpose of permitting them to practice the law of their home jurisdiction in the host jurisdiction without examination or full admission to the host bar (the "Limited Licensing Approach"); and

WHEREAS, the IBA believes that for the jurisdictions represented by its member organizations which have not adopted regimes regulating this aspect of cross-border legal practice: (i) those with the authority to regulate should consider, and (ii) those without the authority to regulate should encourage, the adoption of rules which:

A. are consistent with the common principles described above;

B. promote the rule of law and the respect for lawyers of all jurisdictions; and

C. address the issue of cross-border establishment by adopting either the Full Licensing or the Limited Licensing Approach or appropriate combinations of both;

NOW THEREFORE BE IT RESOLVED THAT the IBA's Council hereby approves the "Statement of General Principles for the Establishment and Regulation of Foreign Lawyers" set forth below as a statement which fairly describes the essential principles on which regulation of cross-border establishment of lawyers should be based; as one which emphasizes and promotes principles which are common to the legal profession worldwide; and encourages those of its member organizations in jurisdictions which have not addressed the issue of cross-border establishment of lawyers to adopt, or encourage the adoption of, appropriate amendments to their regulatory regimes which are consistent with the Common Regulatory Principles and at least one of the licensing approaches set forth therein.

International Bar Association Statement of General Principles for the Establishment and Regulation of Foreign Lawyers

I. Applicability; Certain Definitions

These General Principles apply to the establishment and regulation of "Foreign Lawyers." A "Foreign Lawyer" is: (i) a person licensed or otherwise authorized to practice law in a given country, or internal jurisdiction thereof (the "Home Jurisdiction"), and subject to regulation by a body with the authority to regulate the legal profession (the "Home Authority"), who (ii) desires to become established and thereby authorized to practice law in a country, or internal jurisdiction thereof, other than his or her Home Jurisdiction (the "Host Jurisdiction") by a body with the authority to regulate the legal profession in such jurisdiction (the "Host Authority").

II. Common Regulatory Principles

The Common Regulatory Principles set forth below should govern any regime regulating the establishment of Foreign Lawyers:

A. *Authority to Regulate.* The Host Authority has the legitimate right to regulate the establishment of Foreign Lawyers.

B. *Fairness and Uniform Treatment*. Regulation and/or admission of Foreign Lawyers should be fair, non-discriminatory, and based upon uniformly applied, objective criteria. Any restrictions on the practice of Foreign Lawyers should be justifiable in the public interest in the Host Jurisdiction.

C. *Transparency*. Applicable rules and regulations (including codes of ethics and professional responsibility) governing Foreign Lawyers should be clear and consistently applied.

D. *Public Purpose*. Regulation should be designed and administered in a manner which promotes the interests of clients and encourages and facilitates the effective delivery of legal services to the fullest extent practicable, consistent with the protection of the public in the Host Jurisdiction, the maintenance of professional standards and independence of the legal profession of the Host Jurisdiction.

E. *Access*. Regulation of Foreign Lawyers should promote access to competent legal advice on foreign law in the Host Jurisdiction, subject to appropriate safeguards consistent with these General Principles.

III. Full Licensing Approach

A. Conditions on Issuance of License

Under this approach, the Host Authority should admit to practice any Foreign Lawyer if the applicant:

1. is licensed or authorized to practice law by, and in good standing with, his or her Home Authority;
2. has satisfied reasonable minimum practice requirements;
3. is a person of good character and repute;
4. agrees to submit to the Code of Ethics, or its equivalent, and all other rules and regulations applicable to fully admitted lawyers in the Host Jurisdiction; and
5. has satisfied reasonable qualification requirements in the Host Jurisdiction, by examination or otherwise, provided that (a) due consideration shall be given to the Foreign Lawyer's knowledge and skills acquired through earlier training and experience (whether acquired in the Home Jurisdiction or elsewhere); and (b) any such requirements shall be no more than necessary for the protection of the public, and clients, and the maintenance of public confidence in the legal profession in the Host Jurisdiction.

B. Scope of Practice

A Foreign Lawyer admitted by the Host Authority should have the same right to practice as all other duly admitted members of the Host Authority, and, in addition, should be expressly authorized by the Host Authority to render advice on the law of the Home Jurisdiction and as otherwise authorized by his or her Home Authority.

IV. Limited Licensing Approach

A. Conditions on Issuance of License

Under this approach the Host Authority should grant a license permitting the practice of foreign law if the applicant:

1. is licensed or authorized to practice law by, and in good standing with, his or her Home Authority;
2. has satisfied reasonable minimum practice requirements;
3. is a person of good character and repute;
4. agrees to submit to the Code of Ethics, or its equivalent, of the Host Authority;
5. carries liability insurance or bond indemnity or other security consistent with local law and which, if applicable, is no more burdensome than required by the Host Authority of fully licensed lawyers; and
6. consents to local service of legal process.

B. Scope of Practice

The Host Authority may impose the following conditions and limitations on the scope of the practice of law by Foreign Lawyers to the extent necessary to protect the public:

1. Foreign Lawyers may be prohibited from appearing or pleading in courts or other judicial tribunals in the Host Jurisdiction;
2. Foreign Lawyers may be prohibited from rendering advice on the law of the Host Jurisdiction or other jurisdictions where the Foreign Lawyers are not fully qualified and licensed; and
3. Foreign Lawyers may be required to use a title and make disclosure reasonably designed to inform the public regarding their status.

EXHIBIT B

Resolution
for Consideration by the Council of the
International Bar Association
at Its Meeting on June 6, 1998

Having due regard to the public interest in deregulating the legal profession as presently undertaken by the WTO and the OECD with the aim of

- amending regulations no longer consistent with a globalized economy and
- securing the provision of legal services in an efficient manner and at competitive and affordable prices,

the Council of the International Bar Association, considering that the legal profession nevertheless fulfills a special function in society, distinguishing it from other service providers, in particular with regard to

- its role in facilitating the administration of and guaranteeing access to, justice and upholding the rule of law,
- its duty to keep client matters confidential,
- its duty to avoid conflicts of interest,
- the upholding of general and specific ethical and professional standards,
- its duty, in the public interest, of securing its independence, politically and economically, from any influence affecting its service,

Resolves

that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society and

that any steps taken with a view to regulating the legal profession should respect and observe the principles outlined above.

Transnational Practice of the Legal Profession in the Context of the North America Free Trade Agreement (NAFTA)

By Jaime Cortés Rocha

I. Introduction

The issue of the transnational practice of law has been included in the agenda of a number of recent symposia, congresses and fora of national and international associations and societies of the legal profession for the last two decades. This has especially been the case ever since the trans-border delivery of legal services has been included in recent multilateral trade agreements, such as GATS and NAFTA.

Although the legal profession in Mexico, as in other countries, has for a long time resisted the consideration of the practice of law as a tradeable service and refused to treat its legal know-how, expertise and learned opinions as a commercial commodity, subject to the rules of trade and commercial services, we regretfully must admit that the issues of transnational practice will most likely be treated in the future in the context of multilateral trade agreements—if not in separate international accords or agreements among the relevant professional bodies of the respective countries.

II. Various Approaches

Transnational practice presents a number of issues which are treated differently from one country to the other: professional conduct and responsibility; the scope of attorney-client privilege and professional secrets; fee determination; fee sharing; disciplinary procedures; independence of professional judgment; clients' conflict of interest; etc.

A. Generally

Taking those differences into consideration, there have been three different approaches to the trans-border practice issues, as discussed below.

1. Liberal Approach

According to the first approach, attorneys admitted to practice in one country and their firms should have a reasonable and practical opportunity to engage in the practice of law in the territories of other countries and, for that purpose, to establish offices in such host countries, subject only to conditions for the protection of the public and the effective regulation of the profession, to freely enter into partnership and association with the local attorneys and firms, and to employ and be employed by attorneys of such host countries. This liberal approach was developed by the ABA's Section of International Law and Practice, as it was announced by Jay Vogelson in a lecture to the Mexican Bar in 1993.

2. Full Licensing Approach

The second view, which is called the "Full Licensing Approach," is that all lawyers practicing in a host country, both foreign and local, are required to become fully licensed under the host country qualification requirements, and that lawyers of the host country may not enter into partnership with anyone other than a licensed lawyer of the said country. This view has been defined as the "protectionist" approach by Steven Nelson, former Chairman of the ABA's Transnational Legal Practice Committee.

Indeed, historically the principal barriers for trans-border practice have been the following:

- First, the laws and legal system of the country of qualification. Legal systems are linked to the particular requirements of particular societies. Since there are differences in cultural traditions, nation states are organized in accordance with civil law, common law or other systems.
- Second, differences in educational and training requirements imposed as a condition for the practice of law.
- Third, the prohibition found in many countries, including Mexico, against the entry by lawyers licensed in that country into partnership with a non-fully licensed lawyer, including lawyers licensed in other countries.

3. Limited License Approach

To avoid these barriers, the practice of the Foreign Legal Consultant (FLC) was adopted by many European countries, as well as in a number of states in the U.S., including New York. This "Limited License Approach" permits the licensing of foreign lawyers as foreign legal consultants (or practitioners) without examination, but with certain requirements, such as previous practice experience and good standing in their home country. The practice of the FLC is limited to advice on the law of the home country, as well as on international law. The ABA has shown its preference for the FLC regime over systems which require foreign lawyers to be fully licensed members of the host bar.

B. Developments Under NAFTA

Although we are far from a consensus on the issue, some small but significant advances have been made in recent years. The North American Free Trade Agreement (NAFTA), signed by the United States, Canada and Mexico in 1993 and effective as of 1 January 1994, dealt for the first time with matters relating to the transborder practice of law, as well as the association of foreign attorneys and firms with local firms of the NAFTA countries. This has been a landmark in international law and treaties.

NAFTA recognized the need for close cooperation to eliminate barriers and to facilitate the cross-border delivery of legal services, and encouraged the development of joint recommendations by the relevant professional bodies of the three countries for the licensing of FLCs and the establishment of forms of association or partnership between fully licensed lawyers of a country and FLCs of the other countries.

The Treaty established that attorneys licensed in any of the three countries may act as FLCs in the territory of the other member countries with respect to the law in which they are licensed to practice.

NAFTA also provided for a work program for future liberalization regarding foreign legal consulting services. Evidently, NAFTA followed the ABA's preference for the FLC approach for the provision of transborder legal services.

Under the reservations made by Mexico, it was established that FLCs from a Canadian province would be permitted to enter into a partnership or association with lawyers licensed in Mexico, subject to reciprocity and to certain participation restrictions, such as a majority of Mexican lawyers in the firm.

Canadian law firms are likewise permitted to establish themselves in Mexico to provide foreign consultancy services, subject also to reciprocity. Canadian lawyers may practice in Mexico as foreign legal consultants, but they may not practice or advise on Mexican law.

Lawyers licensed in the United States were given the same rights in regard to licensing as FLCs and establishing FLC firms in Mexico. However, no rules on partnership or association with Mexican licensed lawyers were agreed upon with the U.S, and according to the reservations made by Mexico, it reserved the right to adopt and maintain any measure relating to the provision of legal services and legal consultancy services by U.S. lawyers.

III. The NAFTA-FLC Accord

A. Background

The Treaty also established that the scope of such associations, as well as the licensing and practice of FLCs, should be negotiated by the relevant professional bodies of the three NAFTA countries, with the view to developing joint recommendations.

For such purposes, the representatives of the legal profession of Canada (the Federation of Law Societies of Canada in collaboration with the Canadian Bar Association), of Mexico (the Mexican Committee on the International Practice of Law (COMPID), lead by Barra Mexicana), and of the U.S. (the ABA through its Sections of International Law and Practice and Legal Education of Admissions to the Bar) met regularly in the course of four years, in more than eight rounds of intensive negotiations in different cities of the three countries. The result was an accord on the cross-border delivery of legal services, consisting of a Joint Recommendation and a Model Rule respecting Foreign Legal Consultants (the "NAFTA-FLC Accord"), which was signed by the Chairman of the Delegations of the three countries in Mexico City (in the historic San Idelfonso College) in the evening of 19 June 1998.

B. Features of the Accord and Model Rule

The NAFTAL-FLC Accord recognizes that it is in the interest of the public and of their legal professions to facilitate the cross-border delivery of timely, competent and economical legal services among the Parties within a regulatory regime which protects the public of the Parties, while recognizing the significant differences among them as to the regulation of the practice of law.

The NAFTA-FLC Accord also recognizes that the international practice of law, as required by international relations and under NAFTA, extends beyond the services provided by FLCs, and that, as a matter of public policy, licensing of FLCs cannot be equated to the licensing systems applicable to fully licensed lawyers.

The Model Rule on foreign legal consultants provides the licensing requirements for FLCs, which include good standing in the applicant's home country; reciprocity; good character and reputation; previous practice experience (five years); liability insurance and defalcation coverage, if required in the host country; and submission to the jurisdiction of the regulatory body in the host country.

The scope of practice of the FLC under the Model Rule comprehends the practice of and advice on the law of any country in which the FLC is licensed to practice, or on international law. The FLC may not represent a client in court or in any administrative procedure, except as permitted by the laws of the host country. The FLC may act as an arbitrator or as counsel in arbitration. The FLC could only practice or advise on the law of the host country if so permitted by the host country, which is not the case in Mexico.

A law firm based in any NAFTA country may establish itself in any other NAFTA country to provide legal consultancy services through its members holding FLC licenses issued by the host country.

According to the Model Rule, a lawyer licensed or a firm headquartered in a home country may enter into a partnership or form a law firm with one or more lawyers licensed or with a firm licensed in the host country, except that, in the case of Mexico being the host country: (i) all the partners of the firm must be fully licensed or licensed as FLCs in Mexico, (ii) the FLC licensed partners may not outnumber the partners licensed in Mexico; and (iii) the management of the firm must be entrusted to the partners licensed in Mexico.

A lawyer licensed or a law firm headquartered in any NAFTA country may employ a lawyer licensed in any other NAFTA country, except that, in the case of Mexico being the host country, no lawyer licensed in Mexico may be employed by a non-licensed lawyer in Mexico, or by a non-qualified law firm.

An FLC in the host country may be employed by another FLC licensed by the host country, or by a lawyer licensed or a firm headquartered in the host country.

A law firm of any NAFTA country may enter into an alliance or other form of economic arrangement, other than a partnership, with a lawyer licensed or a firm headquartered in another NAFTA country.

An FLC practicing in a host country may continue to be an employee of or associated with a lawyer or law firm in the FLC's home country.

The Model Rule also included provisions on marketing of foreign legal consultancy services, professional rights and duties, immigration matters, license term and renewals.

C. Discussion

The Canadian and the Mexican delegations delivered the Joint Recommendation and Model Rule on FLCs to their respective governments, immediately after being signed, in order that it could be discussed in the Free Trade Commission established by the Treaty, with the recommendation that the Model Rule be implemented to facilitate the practice by FLCs from the other countries in their territories.

Unfortunately, this Joint Recommendation, although it was signed by the Chair of the American Delegation, apparently has never been formally presented to the U.S. government, nor has it been submitted for discussion in the NAFTA Commission, presumably due to late opposition by the U.S. Delegation.

Consequently, until the rules of the Model Rule with respect to the trans-border practice of law through foreign legal consultants are implemented, the basic provisions established in NAFTA will continue to apply with the reservations made by each country.

IV. Conclusion

We believe that the Joint Recommendation is an important basis for the transnational exercise of the legal profession and could serve as a point of departure for new negotiations in the future.

While there are points in the Joint Recommendation that could be improved and resolved in the future, it would be advisable to begin with the implementation of the NAFTA-FLC Accord and then reinitiate discussions among the professional organizations of the three countries to define the points on which new agreements could be reached.

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The Role of the Small "Niche" Law Firm in the International Legal Business Market

By John F. Zulack

I. Introduction

The delivery of international legal services in the coming decade is likely to result in an increasingly diversified, rather than a homogeneous, market. There will be room for law firms of all sizes, including small "niche" firms with fewer than fifty lawyers.

There will not, however, be room for all law firms. Competition is fierce. The law firms that will survive and prosper in the next decade must respond effectively to the demands of an increasingly sophisticated clientele.

In this article, we will first describe the profound changes that are taking place in the market for international legal services (Part II). Next, we discuss the opportunities and challenges for niche firms in the international market (Parts III and IV). Finally, we describe the efforts that one niche firm has made to compete in the international market (Part V).

II. The Rapidly Changing Market

The legal business has changed profoundly over the past thirty years. The two key changes are that the "profession" is now a competitive business and that the market is increasingly international. Law firms are larger than ever. Large law firms have offices in more locations than ever.

There are sixty-nine very large law firms with five hundred or more lawyers in the United States. Ten of those are megafirms that have in excess of one thousand lawyers. There are also UK-based megafirms, such as Clifford Chance Rogers & Wells, which has in excess of three thousand lawyers. Most of the megafirms have offices in London, Paris, Frankfurt, Tokyo, Brussels, Washington, D.C., and other major commercial, financial and regulatory centers. Clifford Chance, for example, has thirty offices; Sherman & Sterling has approximately seventeen.

Only nine of the sixty-nine largest firms in the United States had fewer attorneys in 2001 than they had in 2000. Indeed, there are one hundred twenty-five large law firms in the United States, with the number of lawyers ranging from two hundred to five hundred.

The major accounting firms have also established multi-disciplinary law practices (MDP) over the past decade that include the provision of legal services. The MDPs have grown in countries which more easily permit lawyers, accountants and other professionals to work together in the same organization—even to share in its ownership—than does the U.S.

Finally, there has been a trend toward building national and international alliances that connect law firms in different cities and countries into a cooperative coalition.

Will size and physical presence in a foreign location determine whether a law firm can compete in the international market? Can the small, "niche" firm with fewer than fifty lawyers and no foreign offices prosper in the international marketplace?

While the niche firm faces significant challenges, its opportunities have never been greater than they are now. The niche firm's principal advantage is value: it can provide services that match the high quality of the megafirms at a significantly lower price. Its principal competitive disadvantage is marketing. The niche firm has neither the brand name nor the proximity to international clients that the megafirms have.

III. The Opportunity to Provide Value

A. Technology

Niche firms have more opportunities to provide value to their clients than at any time in the last thirty years. In the past, large firms had superior, and sometimes exclusive, access to professional resources and support services such as overnight international couriers, sophisticated form files and state-of-the-art libraries. Now the disparate service capacity is a thing of the past. Virtually all law firms have access to the same, standardized resources. The technological revolution of the past two decades has resulted in both a sharp decrease in transactional costs and an increased demand for diversified legal services, including specialized, sophisticated, local services as well as cross-border services. Here are some specific examples.

1. Communications

International communication is faster, cheaper and more democratic than it has ever been. Lawyers can now send e-mails and long, complex documents from their desks without having to incur substantial overnight international courier costs, long-distance telephone and fax charges, and with reduced need for mailing and copying departments. The legal community is

less dependent upon these traditional communication tools than it was before the development of the Internet.

2. Forms

Lawyers almost invariably start with a form when drafting legal documents. In the past, lawyers went to the firm's form file. Larger firms had sophisticated forms that they regarded rightfully as their valuable work product. Now the most sophisticated documents are available electronically. For example, merger agreements, employment agreements and many other transaction agreements are now filed with the SEC and are available on the World Wide Web.

3. Legal Research

The best law libraries today are on commercial servers that are accessible over the Internet. The lawyer no longer needs to make a substantial capital investment in books or in a physical library.

4. Software

Most law firms use the same software programs that are within the economic reach of any firm. Word, Excel, Access, PowerPoint, Outlook and Visio, to name the Microsoft programs, are common throughout the world. Document assembly programs, such as HotDocs®, and litigation support programs, such as Summation and CaseMap, are now easily accessible. That was not the case ten years ago. In addition, electronic billing and accounting systems are available and accessible.

5. Hardware

Today's laptops are more powerful and far less expensive than the "servers" and mainframes of a decade ago.

B. Language

International business people today prefer to conduct their business in English. A generation ago, even though many international legal documents were drafted in English, business and socializing took place in the language of the business person's country of origin. Now, many international business people prefer to speak English with the American lawyer, even if the lawyer is fluent in the international counterpart's native language. While speaking the local language is still a great asset, it is not as indispensable as it was a generation ago. Also, American lawyers have a head start over those who did not grow up reading, writing and speaking English as their native language. American lawyers also have greater experience drafting and interpreting transactional documents that are based upon U.S. forms. In many respects the British and American lawyers at the megafirms have accelerated the establishment of English as the language of international legal business. The prevalence of English has contributed to leveling the playing field for lawyers in small or niche firms.

C. Globalization

International travel is easier, cheaper and faster than ever before. This means that many more international clients come to the United States and many more American lawyers can travel to work with their clients in the clients' home countries.

Also, thanks to global wireless telephone networks and the Internet, lawyers can be in their "mobile offices" anywhere in the world.

As the world of commerce globalizes, it is easier for everyone in the international business community to work and travel productively. Size or resources do not provide any significant advantage in these areas.

D. Cost

Technology, language and globalization level the playing field. The ability to charge less gives the niche firm an advantage over the megafirms. Megafirms charge more because they have higher overhead costs, pay more in compensation to their owners and employees, demand that lawyers bill a high minimum number of hours and incur significant capital costs in acquiring other firms and in establishing new locations. These additional charges get passed along to the client. As a result, the hourly rates at megafirms—admittedly only one method of charging for services—are at least one-third higher than the rates at smaller firms. The bills rendered by megafirms are often significantly larger than the amounts that small firms would charge for similar projects.

In November 2001, litigation partners in large London law firms were charging well over £500 per hour for their work; that's well over $725 per hour.

Some clients are complaining. In January 2001, when a large U.S. law firm raised the salaries of its first-year associates up to as much as $170,000 per year, Sun Microsystems' chief intellectual property lawyer wrote to other outside counsel that handle the company's work, saying that Sun intended "to focus [its] relationship with those firms that understand the importance of maintaining more rational policies." According to Sun's general counsel, "The thing that gets under our nerves is this blind assumption that companies like ours will pay those rates. We are just not going to do it. These law firms are building a cost structure that the market will not support. There's a mindlessness to it."[1]

IV. The Challenges for the Niche Firm

Opportunities are not achievements. The small law firm must do four things to take advantage of its opportunities in the international marketplace.

A. Identify the Firm's "Core Competencies"

The small firm is not a full-service firm. The small firm must find a niche in an area of practice that the large firms do not dominate; an area that complements the work of large firms; or an area in which the small firm performs at least as well and charges significantly less than the large firm.

The large firms dominate large corporate transactional work, including mergers and acquisitions, the issuance of equities, corporate debt or municipal debt, real estate investment trusts and initial public offerings, issuance of asset-backed financing, leveraged buy-outs, asset backed equities, and project finance. Few small firms do this work. Small firms can find a niche doing cross-border corporate and transactional work for small businesses and start-up companies that cannot afford the large law firms.

Small firms can also find a niche within the numerous other areas of international practice, including the following areas: customs; immigration; employment; environmental; health; insurance; intellectual property; international litigation; arbitration and dispute resolution; taxation; and trusts and estates.

Concentration in a field is essential in order to develop the knowledge, experience and levels of excellence that the megafirms generally possess.

B. Establish a Culture That Will Attract and Retain Excellent Lawyers and Staff

The challenge of a small firm is to establish a culture that will attract and retain excellent lawyers. Some intelligent, ambitious, and hardworking lawyers will choose a job that pays less but does not require them to work almost every night and almost every weekend.

Some lawyers who have reached the highest levels of excellence at every stage of their education from high school through law school will decide that their future will be richer and more secure in an environment in which they are not competing with hundreds of their peers for a few places.

The small law firm may have a less bureaucratic and more democratic structure than the large law firm. Some highly motivated individuals thrive in cultures that are difficult to find in megafirms.

Each firm's culture is different. But it is important for the small or niche firm to have a culture that attracts and retains lawyers who have abilities and the motivation similar to those of lawyers at the largest firms.

C. Good Management

The small firm must be rigorous in its case selection. The small firm should not take significant work outside its areas of core competency or work for which it may not be paid. It must collect essentially all of the amounts that it bills. It must keep up to date in hardware and legal software. In addition, it must provide training so that its lawyers and staff know how to use the rich array of electronic tools productively.

D. Marketing

Marketing is the principal area in which large firms and megafirms have a significant advantage over the small firm. The megafirms have learned the power of the brand name or trademark. Like the Coca-Cola Company, the large firms understand that when you are away from home, you should be careful about what you drink and, similarly, about who protects your legal interests. People will pay more for Coke than for Singapore Sweetened Caffeinated Cola, even if the same company bottles the two beverages in the same place using the same local water and very similar ingredients. They will pay more even if in blind tests the local cola tastes better. A law firm that is well known to many people throughout the world, that is identified with high quality, consistency, longevity and that is accessible in numerous locations has a competitive advantage over the small law firm. The small firm does not have the revenue base to dedicate substantial resources to advertising and other expensive forms of marketing that reach a broad audience. Therefore, the small firm must position itself in niche markets where there is a demand for its services. Then, it must market: it must pitch to its niche.

V. The Experience of One Small Firm

My law firm is a small firm (thirty lawyers) that concentrates in litigation. Specifically, we concentrate our work in five areas: commercial litigation, product liability defense work, professional liability defense work, international litigation practice and family law for high net worth individuals.

International litigation, for us, means representing international clients in disputes in New York. International clients are those whose principal place of business is outside the United States. Our international clients are Swiss, French, German, Austrian, British, Italian, Japanese, Brazilian and Chinese.

We began focusing on the international market in France and Switzerland twenty years ago, ten years after the firm was founded. We thought that international litigation would be challenging and profitable and we thought that we had a better understanding of European culture and the French language than most U.S. lawyers did.

We built our international business during the 1980s through working with European lawyers on cases that they had in the U.S. We made a deliberate decision not to open an office in Europe. Our strategy was and continues to be to market our complementary contributions and not to compete with foreign lawyers. We preferred being the New York office of foreign lawyers to being New York lawyers with an office in Paris or Geneva, and we market ourselves as such.

Reputation, relationships and referrals are different outside the United States than they are here. We developed a good reputation and a strong referral network through personal relationships. We have been to Europe at least six times per year for the last twenty years. We met other lawyers, worked with them, socialized with them and their families. We lectured in French on numerous occasions at continuing education courses for French-speaking business people. Developing our international business was hard, tiring work but enriching and challenging.

Most of our international cases were small matters during the early years. During the last decade, however, we have represented some of the largest and most successful companies in Europe in their litigations in the United States. Most of these companies are represented by large firms or megafirms in their transactional work. Large firms and megafirms also represent some of our international clients in their U.S. litigation and would probably like to do all U.S. litigation for these companies. We have been fortunate to get many international matters that we call "big firm cases"—complex cases in which hundreds of millions of dollars are at stake and most of the parties are represented by large firms or megafirms.

We will summarize our international litigation practice in light of some of the opportunities and challenges for the niche firm described above.

A. Technology

We understand the value technology holds for the small firm. Every lawyer has the choice of a powerful laptop or a desktop computer. Travelling to Europe with a portable computer, a heavy Toshiba, as early as 1987, we now use the IBM T23, a state of the art laptop with wireless networking capabilities.

Each lawyer has a Blackberry, a personal digital assistant that forwards and receives e-mail and calendar changes to our office server almost instantaneously. Unfortunately, the Blackberry does not work yet in most places outside North America, but is expected to by the end of 2002.

Eight years ago, we were more advanced than most large firms in using technology to support our litigation efforts. And not only did we have the technology, we used it. In preparation for depositions and trials we would create a database containing hundreds of pages, including imaged documents and transcripts. After storing in advance these hot documents and transcripts on laptops, we were able to search and pull the documents in "real time." While some opposing counsel from large firms and megafirms were utilizing paralegals and associates for these tasks (even in cases that included hundreds of witnesses and hundreds of days of depositions), we were using cutting-edge technologies to achieve the same, and better, results.

Now software companies sell off-the-shelf software, such as Summation and CaseMap, which performs the same litigation support functions as the programs that we created in-house. The programs are now affordable to all firms. The issue now is not whether a firm has the technology; it is whether the firm uses the technology to manage a case more economically, centrally and thoroughly than before. In the past, a large firm with many timekeepers was the only choice for a large, complex litigation. Now fewer timekeepers are required to staff complex, document-intensive cases. Technology has enabled small firms to handle big litigations.

Our firm, like large firms, pays a legal research publisher a monthly fee for the unlimited use of its electronic library. The resources on Westlaw or Lexis far surpass the best megafirm libraries of a generation ago. In fact, our firm now shares the same law library with all of the large law firms.

We do factual research and investigation over the Internet. We frequently use one of the greatest databases and sources of sophisticated forms, the EDGAR database of the Securities and Exchange Commission. The SEC requires all public companies (except foreign companies and companies with less than $10 million in assets and 500 shareholders) to file registration statements, periodic reports, and other forms electronically through EDGAR. Many of the filings contain voluminous exhibits that cover numerous areas of practice. Anyone can access and download this information for free. The address of the Web site is <http://www.sec.gov/edgar.shtml>.

We are also able to access docket sheets from courts throughout the country using the Pacer program. If we want a pleading, filed in the federal court in Los Angeles, for example, we are able to order it by phone and have it sent to us.

These are many examples of how technology has leveled the playing field for firms of all sizes. The use of this technology is an essential part of our international litigation practice.

B. Language

One of the biggest changes we have seen in our practice over the past decade is the necessity for, and

the desire of, people in the international business community to speak business English well. Ten years ago, most clients were relieved if their lawyer spoke their native language fluently. Now, fluency in a language other than English is helpful to the American lawyer, but it is not essential. Today, most of our clients prefer to speak English with us—even when recognizing that our command of their native language is better than their command of English—in order to improve their English skills. The roles have been reversed.

An anecdote will illustrate the point. A few years ago, I was preparing a witness for an important deposition that was to take place in Geneva. The witness formerly worked for a major bank in Geneva and now was a consultant advising commodity traders on financing issues. We had dinner one night and he suggested that we make a pact: he would correct my errors in French if I would correct his errors in English. The offer was genuine, although I doubted it at first, because the witness was born in the United States around 1960, of American parents, and was a graduate of Brown University. When he was fourteen, his father was transferred to Geneva and his family lived there thereafter. His English was fluent, but he did make some mistakes, or so I thought. After determining that the pact was not just a ruse to tell me about my errors in French, I pointed out to the witness that he mispronounced the word "debtor." He always emphasized the "b," pronouncing the word "debtor." I told him that the "b" was silent and he should say "debtor" like "bettor, one who gambles or bets." He continued to say deBtor. Finally, I asked him whether he thought my suggested pronunciation was wrong or only used by speakers of American English. He replied: "Oh, no. I know you are right. But most of my clients are people in the trade finance business here in Europe who use their English only in their business. If I said 'debtor,' no one would understand me."

So, thanks to the globalization of commerce and in part to the expansion of the large firms and megafirms to financial and commercial capitals, any lawyer can manage in most cases with just English.

There is still a great advantage in speaking the foreign language, especially in international litigations where many documents are in the foreign language and witnesses will be more comfortable and their expressed thoughts will be more precise and nuanced if they testify in their native language. Translations are a poor substitute for reading documents in their original form. Interpreters interpret, and in a large-stakes litigation the exact meaning is necessary. Most translators and interpreters do not know the case or the industry as well as the lawyers do. Consequently, translations of industry jargon and slang by professional translators are rough and sometimes inaccurate. The lawyer can insist that the translation accurately reflect the original. The two-language lawyer can be attuned to how adversaries will use testimony to distort what is presented to a judge and jury. A lawyer in the French office of the megafirm cannot feed the lead trial lawyer the meaning of critical documents nearly as effectively as if the two-language trial lawyer has absorbed the information himself or herself.

C. Globalization

Between our trips abroad and our clients' trips to New York, we are in frequent contact with each other. Meetings in person are still essential, despite all of the assistance that technology provides. Now lawyers can have "mobile offices" wherever they are. In 1987, when I replaced my IBM 286 desktop with my first Toshiba portable, I was amazed that the computer was designed to detect whether the electricity was supplied in accordance with U.S. standards or European standards.

Now not only are laptops fourteen pounds lighter, but they run on batteries and the electric current supplied on the airplane or train. When I am not sleeping on a plane, I derive great pleasure from working on my computer.

Ten years ago, lawyers could not connect with their offices over the Internet from their hotel rooms. Ten years ago, lawyers could not receive, edit and send documents that their colleagues sent to them. Now all lawyers can work from many different locations around the world with the same efficacy and efficiency as they could if their correspondent was on another wing or floor at their home office. Our firm also uses Citrix, applications and portal servers that make any place a virtual workplace. With Citrix, we are able to access our applications and documents as if we were in our own office, connected to our office servers.

Finally, wireless telephone technology permits U.S.-based lawyers to be reached at their U.S. cell phone numbers anywhere in the world. So when a client calls me at my New York telephone number, the client does not know whether I am answering the phone in New York or in Paris.

D. Cost

Our hourly rates are approximately one-third less than the rates of large U.S. firms. We do not have billable hours quotas that partners or associates must meet each year to qualify for additional compensation. We work hard and value hard work. Hours billed is a criterion for determining compensation, but it is one of many. Our culture is to give value for every working hour. We believe that culture is reflected in bills. Besides having lower hourly rates, we strive to keep the total amount of our fees and disbursements lower than those of large firms. Our guiding objective is to provide the high quality services expected of the leading large law

firms at a lower cost. In each phase of our work we ask ourselves: "What would our concerns be if we were the owners and managers of our client's business? What billing practices would we consider to be fair if we were the client?"

Unlike many firms, we do not charge for the time spent traveling from our New York office to an international destination. Often, we do not charge our clients for airline travel costs or for hotel costs abroad. We never bill for time spent at lunch with our European clients. If we pay the restaurant bill, it does not show up as a disbursement on the client's bill.

Our overhead costs are generally lower than those of large firms. We occupy 44,000 square feet on the 35th floor of One Liberty Plaza in the financial district of Manhattan. We believe that our office facilities and environment match those of any large law firm in comfort, aesthetics and functionality. However, our real estate costs are about half those of firms located in midtown Manhattan. Large firms need several, large, contiguous floors in the same building. The cost per square foot is often greater for large spaces in prime locations.

Salaries for starting lawyers are lower than the starting salaries at large firms. However, if the lawyers at our firm and large firms were paid an hourly rate for hours billed, the hourly rate would be equivalent. In other words, our lawyers generally bill fewer hours each year than the lawyers at large firms do and receive proportionately less in compensation. Most lawyers work at great intensity on the weekdays and work nights and weekends when required. However, our lawyers do not come to the office on the weekends to ensure that they meet a quota of billed hours.

E. Core Competency: International Litigation

International litigation is a special area of concentration. For a detailed discussion on this subject, see *Representing European Companies in U.S. Litigation* by Bernd Honsel, general counsel of Allianz in Germany, and Gerry Paul, a partner at our firm.[2] Here are a few excerpts from that 75-page work:

> Many European business leaders and senior inside counsel distrust, and even fear, the U.S. litigation system, yet, as a result of economic globalization, increasingly find themselves embroiled in it. This Chapter will discuss the nature of the extensive on-going and multi-faceted communications between European inside counsel and their U.S. outside litigation counsel that are essential when a European company becomes a party to a lawsuit in the U.S. In these cases, the dramatic and fundamental differences between the U.S. and civil law litigation systems at every stage of the process compel a degree of strategic thinking, long-range planning, and close cooperation between inside and outside counsel to which most U.S. litigators—even in large, complex matters—are likely not accustomed.
>
> We will highlight some of the major differences between the European and U.S. legal systems that require a specialized approach to issues that arise in the course of representing European companies in U.S. litigation. We will focus on practical problems that must be addressed at the outset of the retention and then revisited on a regular basis, and we will propose solutions. Among the issues we will cover are staffing (legal and non-legal, inside and outside), budgeting and billing, language differences and translation needs, document handling, and attorney-client and other privilege issues.
>
> We will also discuss the unique needs of European parties to a U.S. litigation at each stage of the lawsuit, and provide guidance for anticipating and addressing those needs. We will cover all stages of a case—from service of process, motion practice, and discovery through trials and enforcement of judgments—in the context of a partnership between inside counsel in Europe and their U.S. outside counsel. At the end of the Chapter, we will provide a practice checklist.[3]

International litigation, as we define it, is fundamentally local. The lawyer representing the international client in New York courts must know from study and from actual experience the state and federal rules of procedure, rules of evidence and the court rules. Most importantly, the lawyer must know the judges in New York. Our small firm has broad practical experience in New York courts. We frequently appear before judges in New York. Our experience in trying both jury and non-jury civil cases and arguing appeals is probably comparable to that of large firms and megafirms at least twenty times our size.

We know the judges and many of the judges know our firm from first-hand experience. A recent example illustrates the point. Several French institutions were sued in New York. Most of the defendants were represented by some of the best large law firms in New York.

We represented one French defendant. The judge dismissed the case for *forum non conveniens*, as all of the defendants had argued in their voluminous submissions. At one point during oral argument, the judge said that providing adequate French translators was a substantial burden on the court. The judge continued that one of the lawyers in this case (a lawyer from our firm) tried a case in front of him a few years ago in which the witnesses' testimony needed to be translated from French to English and he described the process as difficult, expensive and not at all satisfactory. While the judge acted on the basis of the legal arguments set forth in the briefs, a concrete experience with our firm helped our client and the other French defendants from being embroiled in a long and expensive lawsuit in New York.

Many U.S. litigators think there is no difference between representing a U.S. client or a foreign client in a U.S. court. We firmly believe that our experience over the past twenty years gives substantial value to our clients in fulfilling our goals in any U.S. litigation: Get the best result for the client after taking into consideration the amount of legal fees incurred. The more experience other U.S. lawyers have in international litigation, the more they appreciate the special and additional skills needed to render competent services.

F. Marketing

We do not try to compete with the large firms and megafirms in marketing. We need far fewer quality international litigations to occupy us than the large firms need. So our goal is not to make the name of our firm a household name in the international legal market. Our first goal is to continue to work for our outstanding existing international clients whenever they have disputes and need counsel in New York or need assistance in finding counsel in the United States outside New York. Our next goal is to be the "first call" that lawyers in large firms make in conflict situations. Conflicts arise often in international litigation. Sometimes, the large law firm needs counsel to represent officers and directors of the international company that their firm is representing in the litigation. Sometimes, the law firm represents two parties in the same dispute and decides to represent one or neither of the parties. We believe we should be the first call because (1) we have experience and a proven track record of results and high quality work in international litigations of any size; (2) our rates are competitive; (3) as a small firm, we are less likely to have a conflict than another large firm, because increasingly large international clients spread their work around to several law firms; and (4) we will not attempt to steal the client. If another large law firm gets its foot in the door of a major client of the conflicted law firm, there is a good chance that that law firm will try to get future business from that client. We will not. It makes good business sense for us to maintain the relationship with the referring law firm. If the referred client calls us on a new matter, we will refer the client to the referring law firm.

VI. Conclusion

We are confident that international clients will demand value—high quality at fair prices—in the growing market of the future. Well-managed small or niche firms will prosper in the international market, provided that the lawyers at these firms have the vision and flexibility to meet effectively the needs of their increasingly sophisticated clientele.

Endnotes

1. The American Lawyer, April 2001, at 32.
2. Successful Partnering Between Inside and Outside Counsel Ch. 23 (2000) (footnotes omitted).
3. *Id*. at 23-1 to 23-2 (footnotes omitted).

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Conflicts on the Web: Metatags, Linking, Framing and Banner Advertising

By Mark Culbert

I. Introduction

For a business operating a Web site, the more visitors that are attracted to its site and the more pages they view, or "click through," the better. Attracting and retaining visitors is important not only for promoting a business and generating direct sales, it can also play an important part in generating advertising revenue. For those sites that rely on such revenue streams, the number of visitors is often directly proportional to the sums which advertisers are willing to pay.

In an attempt to attract visitors, some Web site owners and operators have employed practices that may be deemed objectionable. In particular, there has been much discussion about the limitations that should be set on the use of metatags, linking, framing and banner advertising. Some of these practices have already come under the scrutiny of courts worldwide, but to a large extent significant issues remain untried.

II. Metatags

Users of the Web may locate and access sites in a number of ways. Often they may already know the URL (uniform resource locator) of the site which they wish to visit. Where, however, the URL is not known, the potential visitor may need to use a search engine.

There are a number of tricks that Web site designers and operators use in an effort to ensure that their particular site is located as high as possible in the list of hits that such searches produce. Including key words as metatags in the HTML (HyperText Markup Language) code "behind" the Web site is one method, though there are many more (*e.g.*, repeating such words within the body of the text or even buying key words from the search engine company). While metatags are not initially obvious, most browsers enable you to view them by clicking on "view" and then "source."

Trademark owners will often include their trademarks as metatags so that anyone searching under that mark will locate their Web site. In certain circumstances, however, use of another's trademark as a metatag may amount to trademark infringement and/or passing off.

In the case of *Brookfield Communications Inc. v. West Coast Entertainment Corp.*,[1] the U.S. Court of Appeals for the Ninth Circuit was asked to consider whether it was permissible for West Coast to use Brookfield's registered trademark, MOVIEBUFF, and/or its domain name, "moviebuff.com," as metatags for its Web site at www.westcoastvideo.com. While the court found that there would be no source confusion, it did find that there would be initial interest confusion. In other words, there was a risk that Brookfield's goodwill might be misappropriated because, even though visitors to the West Coast site would quickly realize where they were, having arrived at that site they might not then necessarily choose to search further for Brookfield's site.

Registered trademark holders were also successful in the U.S. case of *Playboy Enterprises v. Calvin Designer Label*,[2] where the defendant had been using the marks PLAYBOY and PLAYMATE as metatags. However, this case should be compared with another U.S. decision, titled *Playboy Enterprises, Inc. v. Terri Welles*.[3] Terri Welles had been Playboy's 1981 Playmate of the Year and was using the trademarks PLAYBOY and PLAYMATE as metatags for her Web site. The court found that she needed to use the marks in order to refer to her past achievement. If she were not able to use them as metatags, the court felt that it would be more difficult for people to find her Web site and that this could ultimately hinder "the free flow of information on the Internet." It is worth mentioning that Ms. Welles had made sparing use of the marks and, as a result, her site did not appear above the Playboy site in search results.

The case of *Roadtech Computer Systems Limited v. Mandata*[4] provides a useful insight into the approach that courts in the United Kingdom may take to metatag use, albeit at a summary judgment stage. Mandata had been using two of Roadtech's registered marks as metatags for a period of just over two months. Roadtech brought its claim under four heads:

- The user principle (*i.e.*, a claim for a royalty based upon Mandata's use of Roadtech's property).
- The cost of corrective advertising.
- Diversion of trade.
- Loss of goodwill.

Master Bowman thought Mandata's actions to be "a deliberate, albeit unsophisticated appropriation of the

claimant's rights." Summary judgment was given in Roadtech's favor based on the user principle, and Mandata was ordered to pay £15,000 as a royalty. Master Bowman also indicated that as a matter of principle "a plaintiff is entitled to recover as damages a sum representing the costs of publishing advertisements to counter the effect of the infringements of its rights." However, he thought that Roadtech had delayed too long in placing the advertisements to succeed under this head. The Master was also of the view that there was insufficient evidence before him to find in Roadtech's favor on the other grounds of diversion of trade and loss of goodwill.

The need to obtain hard evidence as to loss was evidenced in the more recent United Kingdom case of *Reed Executive Plc et al. v. Reed Business Information Limited et al.*[5] In that case, which concerned both metatag use and search results advertising, the Judge stated that "it will not normally be possible to prove loss merely by virtue of the fact that the site appears on a particular search, if nothing in the search results or in the site itself uses the infringing sign."

Trademarks are also often used by those engaged in a practice known as "overstuffing," that is, using a trademark (or indeed any word) dozens of times in the body of the site. The words can even be typed in the same color as the background so as to be invisible to the viewer. The intention behind this practice is to lead a Web surfer to a particular site, but also to ensure that the search engine will then place the site higher in the list of search results. Some search engines, however, will detect this practice and are likely to put the relevant site to the bottom of the list. In addition, given the decision in *Roadtech*, where such activities entail the unauthorized use of another's trademark, they may also amount to an infringement.

III. Hyperlinks

Web sites often contain hyperlinks which, when activated, cause files from a second Web site to be downloaded. The link can either be embedded in a Web page and activated automatically or, alternatively, it may require the viewer to click on the link, which is usually either an image or a piece of text. This second type of hyperlink is known as a "hypertext link."

While hypertext linking may be beneficial to the linked site because it increases traffic to that site, it can sometimes be objectionable, particularly where deep linking is involved. A deep link bypasses a site's home page. Since home pages often contain advertising or give credit for their content, the owners of sites which are deep linked may object to this practice.

While it is possible to prevent deep linking, technologically speaking, a balance needs to be struck between protecting the rights of those parties whose sites may be the subject of linking and the general interest of the Internet community to encourage freedom of use. If deep linking were prohibited, viewers would always need to be linked through to the homepage and would then need to find the information they required. In addition, there is nothing to stop businesses placing advertisements on pages within the site. Certainly, this was the view taken by the Dutch Court in *PCM v. Eureka Internetdiensten (Kranten.com)*,[6] where the defendant was deep linking into PCM's site and bypassing the homepages. The court thought that the advertisements could have been put next to the individual news items.

The U.S. courts have also considered hypertext linking. In *Ticketmaster Corp. v. Tickets.com, Inc.*,[7] the U.S. District Court for the Central District of California found that it did not amount to copyright infringement, since no copying was involved. Rather, the viewer was automatically transferred to the genuine Web page of the original author.

The Scottish courts have also addressed hypertext links at the injunction stage. In *Shetland Times Limited v. Dr Jonathan Wills & Another*,[8] the court thought that newspaper headlines constituted a cable broadcast program under Section 7 of the Copyright Designs and Patents Act 1988. The claimant argued that the headlines were literary works and that the defendant's activities constituted infringement under Section 17. The counterargument run by the defendant was that the headlines were not original literary works, since there was not the necessary expenditure of labor and skill. The court thought it to be at least arguable that the use of newspaper headlines as links through to another's site could amount to copyright infringement. The case eventually settled, so a final decision was not made by the court.

Web sites that use hypertext links may also use the trademarks of those operating the second site, either by way of using the word mark or a trademarked graphic. In the United Kingdom, this may be permissible under Section 10(6) of the Trade Marks Act 1994 if, in the case of registered marks, such use is for the purpose of identifying the goods or services of the mark owner. However, using a registered trademark in a way that takes unfair advantage of, or is detrimental to, the distinctive character or repute of the mark, may amount to an infringement. In the case of an unregistered mark, if its use causes confusion, and the claimant can establish that it owns the required goodwill in the unregistered mark, then use of such a link could amount to passing off.

In the European Union, linking could also give rise to a claim for database right infringement pursuant to the EU Database Directive.[9] Database right is not a species of copyright, though a database can still attract copyright protection. Rather it is an entirely new kind of right that exists only when there has been investment in obtaining, verifying or presenting the contents of the database. The right restricts two acts: extraction and re-utilization.

While the leading U.K. authority on database rights, *British Horse Racing Board v. William Hill Organization Ltd.*,[10] was not concerned with hypertext links, the German courts have considered the new right in this context. In *StepStone GmbH & Co. KG v. OfiR Deutschland GmbH*,[11] StepStone obtained an injunction preventing Ofir from deep linking to its database of jobs. A similar outcome was obtained in France in a case concerning the search engine Keljob.com.[12]

IV. Framing

Framing is the practice whereby one Web site displays another party's Web site in a smaller window. It allows multiple Web sites to be shown on the viewer's screen simultaneously. In addition, the URL of the first site is shown by the browser instead of the site being framed. This practice may infringe the rights of the owner of the linked page where (i) the linked page contains the owner's trademarks, or (ii) the owner has a reputation in the style and get-up of the linked page.

Issues of copyright may also arise even though technically the practice of framing does not involve copying: the viewer is actually downloading the material to his/her computer. It could be argued, however, that providing the link that causes unlicensed use of copyrighted material of itself would amount to infringement. This has been the approach of at least one German court.[13]

There is no U.K. authority on framing and the U.S. case of *Washington Post v. Total News, Inc.* settled. In that case, the Washington Post brought proceedings against Total News for linking to its material and framing it with its own advertisements and the Total News branding. The case settled on the basis that Total News could continue to link to the site, but that it would desist from the practice of framing.

V. Banner and Search Results Advertising

Advertising is a vital source of revenue for search engines. Some search engines will display banners advertising a product or services for one business when the trademark of another business is entered as a search word. The banner ad may be just an advertisement or may also serve as a link through to the advertisers' Web site. The sale of key words by search engine companies may on its face not seem objectionable, but what if the key word is another's trademark?

Such a situation arose in the German case of *Estee Lauder Cosmetics Ltd v. Fragrance Counter, Inc.*,[14] where the court found that such practices amounted to trademark infringement and unfair competition. The District Court of the Hague also took a tough line on this issue in *VNU Business Publication BV v. The Monster Board BV*.[15] The parties were competitors and the court prevented the defendant from instructing a search engine to use the claimant's trademark to generate banner advertising for it.

VI. Conclusions

Metatag use, linking, framing and banner advertising are practices used to get noticed on the Web, but may bring parties into conflict. While there are many areas that still need to be adjudicated upon, as a general rule those activities which take unfair advantage of another's Web site or branding are likely to give a claimant one or more possible causes of action. With this in mind, there are a number of practical tips for Web site operators to avoid unwanted litigation:

- Use the letter "R" after all trademarks on your Web site to show others that they are registered.
- Include copyright notices on your Web site.
- Avoid using the trademarks of others as metatags unless they are descriptive of your services.
- Be wary of others using your trademarks as metatags and carry out regular searches using search engines and typing in your trademarks.
- Check the metatags on your competitors' Web sites by visiting them and clicking "view," then "source."
- Avoid linking to other sites without the site owner's consent.
- If linking to another party's site, ensure that the screen is cleared of your material so as to avoid framing.
- Include terms and conditions on your site governing the other party's linking to and/or framing your site.
- Consider placing advertising throughout your site-—not just on the homepage—in order to minimize the effect of deep linking.
- Consider what technical measures can be employed to prevent deep linking if required.

- Before making threats of trademark infringement, be sure you have sufficient grounds to do so. (See, for example, the U.K. case *Brain v. Ingledew*,[16] where Justice Laddie decided that a groundless pre-action letter can result in a potential claimant itself being sued and becoming a defendant in a threats action.)

Endnotes

1. 147 F.3d 1036 (9th Cir. 1999).
2. 985 F. Supp. 1220 (N.D. Cal. 1997).
3. 279 F.3d 796 (9th Cir. 2002).
4. [2000] ETMR 970 (Ch. 2000).
5. TLR 13 June 2002.
6. (2002) ECDR 1.
7. No. 99CV7654, 2000 WL 1887522 (C.D. Cal. 10 Aug. 2000).
8. [1997] F.S.R. 604 (Sess. 1996).
9. 96/9/EC of 11 March 1986 on the Legal Protection of Databases, 1996 O.J. (L. 77) 20.
10. [2001] R.P.C. 31 (Ch. 2001).
11. AZ 28 O 692/00 (Feb. 2001).
12. *Keljob v. Cadremploi*, Court of Appeal, Civ. Ct. Paris, 25 May 2001.
13. *Roche-Lefikon de*, 3 U 247/00, Hamburg Ct. App., 22 Feb. 2001.
14. [2000] ETMR 843.
15. Pres. Rb., 's-Gravenhage, 29 June 1999, IER 1999/42
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Foreign Direct Investment Law in Romania—An Overview

By Dan Hulea

I. Investment Law From 1990 to the Present

Since the 1989 Revolution, a succession of Romanian governments have encouraged foreign investment in Romania in order to help establish an open market economy. Thus, the debate within the government has never centered around whether to promote legislation aimed at attracting such investment, but rather on which means to employ in order to achieve this goal.

Over the last ten years, consistent with the shifts in political preferences of the Romanian electorate, the people have empowered various governments to address the issue, and these governments, up to 1997 at least, followed similar paths in addressing the problem. A series of laws and governmental emergency ordinances have significantly muddied the waters with respect to not only the precise laws applicable to foreign investors, but, most significantly, to the future outlook of investment legislation and its direct impact on foreign investors. Currently, the government of Prime Minister Adrian Nastase is faced with the daunting task of clarifying the situation in order to increase foreign investment, and has therefore made the passing of a new, comprehensive, and ideally stable law on the subject one of its highest priorities.

In order to provide a succinct overview, this article will first discuss the previous investment legislation, then address the provisions of the recently issued investment law, and finally try to draw some conclusions regarding the outlook for the future.

II. The Previous Investment Legislation

Over the last decade the anticipated influx of foreign capital into Romania has consistently come in below the estimates of even the most cautious economists. By comparison, other Eastern European countries, such as Hungary and the Czech Republic, have attracted more than twice as many foreign investment dollars as Romania has. The impact of these investments on the economies of the countries mentioned above has of course been very significant, and one need only look at the most general economic statistics in order to realize that the situation of foreign investment in Romania is critical.[1] Some of the reluctance of foreign investors with respect to entering the Romanian market may have been caused by the country's past legislation on the subject, a brief synopsis of which is provided below.

First, between 1991 and 1997 the foreign investment law remained unchanged, at least with respect to the tax benefits and customs exemptions from which such investments benefited. The first comprehensive law addressing the situation of foreign investment in Romania was Law 35/1991, which provided extensive facilities to investors entering Romania either directly or by mergers with Romanian companies.[2] For example, all machinery, equipment, means of transportation, etc., supplied by the foreign investor were declared exempt from customs duties. Furthermore, all raw materials supplied by the investor were exempt from customs duties for a period of two years from the time of commencement of the business activity. Extensive profit tax exemptions were also provided to foreign investors for periods ranging from two to five years depending on the type of activity. This law was only modified and supplemented twice prior to 1997, as described below.

The changes that did take place were all designed to grant further incentives to investors. Law 57/1993 extended the paragraph regarding imported machinery and equipment to afford customs duty exemptions to "all other foreign goods necessary to the investment."[3] Furthermore, the periods during which foreign investments were deemed exempt from the profit tax were extended for various activities. Then, in 1994, Law 71/1994 granted further tax incentives and customs exemptions for companies in which the contribution of the foreign investor exceeded fifty million U.S. dollars.[4] Therefore, it can be fairly said that, prior to 1997, the legal framework remained substantially the same, and as a result it was at least well understood, if not entirely liked, by foreign investors and their attorneys.

In 1997, however, two significant pieces of legislation were issued. During the first half of 1997 foreign investment was at an all-time high. But Emergency Ordinance 31 was issued by the Romanian government in June 1997 in response to political pressures aimed at securing incentives for both domestic and foreign investors.[5]

A word of clarification may be in order. The emergency ordinance procedure is a vehicle by which the government is allowed to legislate directly when immediate action must be taken, and the ordinance takes effect immediately. However, the ordinance is subject to review, amendment, and either approval or rejection by the legislature. The government that elects to utilize this procedure is required to submit the ordinance to the Parliament for review within the parliamentary session during which it was enacted, or if the ordinance is enacted while Parliament is out of session, during the

following session. But the Parliament is not required to review the ordinance immediately, and it can choose to delay review for as long as it sees fit. Sometimes, depending on its provisions, an emergency ordinance cannot be implemented without accompanying methodological norms, which constitute the "ministerial rules which are promulgated under the provisions of a law or ordinance and furnish it with form and substance."[6]

In the case of Ordinance 31, these norms did not appear until late December 1997, but the issuance of the ordinance itself signaled a significant shift in the approach of the government to the foreign investment issue.[7] Furthermore, once the norms were finally enacted, they were rendered moot one day later by the enactment of Emergency Ordinance 92, which outlined other incentives for foreign investors while invalidating most of Ordinance 31.[8]

Ordinance 92 brought yet another change in the strategy previously followed by the government with respect to foreign investments. In broad terms, the differences in incentives between Romanian and foreign investors were erased, and all fiscal incentives in the form of tax reductions disappeared along with the customs incentives for raw materials. The methodological norms for Ordinance 92 were issued on 25 February 1998.

While some foreign investors would have perhaps preferred to remain under the previous regime established under Ordinance 31/1997, the new ordinance brought with it several additional incentives for investors.[9] Among these, foreign investors were granted full customs and VAT exemptions for in-kind contributions to Romanian entities, full deductibility of advertising expenses from the taxable profit, customs incentives for the importation of various technological equipment which qualified as a depreciable asset, and others. Furthermore, foreign investors were guaranteed the full deductibility of depreciation expenses, or a twenty-percent deduction on the purchase price of certain technological equipment from taxable profit, and a carryforward of losses for a period of five years. In addition, this ordinance contained guarantees that incentives awarded under previous legislation would continue to be awarded for the full length of the period for which they had been granted. With respect to the present incentives, the ordinance guaranteed that they would not be altered for a period of at least five years.

By December 1998, Parliament had approved this ordinance through Law 241, but with several changes to the investors' advantage.[10] Among other incentives, the law allowed the tax-free re-investment of profits, and in-kind contributions and some technological equipment were exempt from customs duties and VAT.

What followed less than two weeks later was an act to which many observers attribute the subsequent dramatic drop in foreign investments in Romania, and the consistent low level of subsequent investments. In order to level the playing field and establish uniform investment regulation for both domestic and foreign investors, the government of then premier Mugur Isarescu proposed the retroactive suspension of most facilities awarded to foreign investors in order to accommodate a lowering of the profits tax for both foreign and domestic investors. By January 1998, the two chambers of Parliament had agreed to the proposal, and the *ex post facto* suspension and then abrogation of incentives previously granted to foreign investors became a part of the 1999 Budget Law.

III. The New Investment Law

A. Background

The need for reform in the area of foreign investment laws soon became evident when investments dwindled and investors showed great reluctance to enter the Romanian marketplace. Soon after being charged with forming the current Romanian government, premier Adrian Nastase recognized the need for change. The result was the recently adopted Law 332/2001, entitled "Law on Promoting Direct Investment with a Significant Impact in the Economy."[11] While the law marks a significant return to a pre-1999 legal framework, aimed at attracting foreign investment, some problems are still apparent and remain to be addressed by the government of Mr. Nastase.

This law seeks to implement changes aimed at stabilizing and clarifying the legal framework, but also at promoting efficiency in the investment process. These intentions are materialized in the first four chapters of the new law. Here are some of the more significant provisions.

- New direct investments with a significant impact in the economy can be made in all economic fields of activity, with the exception of the finance, banking, and insurance-reinsurance fields, as well as certain fields regulated by special laws. These investments are subject to only three restrictions: they cannot violate norms of environmental protection; they cannot prejudice the security and national defense interests of Romania; and they cannot impair public order, health, or morals.
- Foreign investors are guaranteed the ability to transfer abroad their entire profits, under the applicable Romanian laws regarding foreign currency, after the payment of taxes, duties and other obligations provided under Romanian law. They are also guaranteed the right to transfer abroad, in the foreign currency in which the investment

was made, any sums obtained by selling stock or share capital, as well as sums resulting from the liquidation of investments, under the applicable Romanian laws regarding foreign currency. Investments in Romania cannot be expropriated except for public utility reasons, the taking of such measures is guaranteed to be non-discriminatory, and will be effected only in accordance with the law. If expropriations do occur, foreign investors are guaranteed the right to be compensated for the value of their investment at current market value, and the right to transfer abroad in the foreign currency in which the investment was made any amounts obtained as damages or compensation pursuant to the expropriation. Finally, a foreign investor is guaranteed the right to enjoy all the rights provided in bilateral agreements guaranteeing and promoting foreign investment which Romania concluded with the country of origin of the investor.

- Imported technological equipment, installations, machines, measurement and control appliances and software that were produced less than one year prior to entering the country and were never utilized are exempt from payment of customs duties. Goods, whether imported or purchased from Romania, which were produced less than one year before and were never utilized will benefit, for the period when the investment is being achieved, from a postponement of the VAT payment until the twenty-fifth day of the month following the date when the investment is commissioned.
- New investments achieved under this law benefit from the deduction of up to twenty percent of their value. The deduction is calculated in the month when the investment is achieved, and must be entered together with other deductible sums provided in the tax statement. In case a fiscal loss results, the loss will be recouped from the taxable profit over the next five years. Finally, investments achieved under this law have the opportunity to utilize accelerated amortization.

B. Discussion

In spite of the many positive and stimulating provisions contained in the new law, several negative aspects of the law are readily apparent.

First of all, the law only applies to foreign investments "worth more than one million US dollars." Therefore, an investment which falls below this level will not be the recipient of any additional incentives, but rather will remain under the auspices of the now infamous 1999 Budget Law.

Secondly, the law applies only to new investments, "achieved after the coming into force of this law," namely after 30 June 2001, which runs contrary to the hopes and expectations of foreign investors already present in Romania, who will be denied the benefits of the new regulations.[12]

Finally, the law makes a commendable attempt at implementing an atmosphere of security among foreign investors, by guaranteeing in Article 9 that new direct investments effectuated pursuant to the provisions of the new law will benefit from the "legal conditions" created by it throughout the duration of their existence.[13] However, a slightly more skeptical observer might note that similar guarantees had been provided by Romanian governments prior to 1997, and yet the 1999 Budget Law retroactively abrogated previously granted incentives. This latter aspect is perhaps the most damaging to the attempt of the government to stimulate foreign investment, due to the atmosphere of distrust and general dissatisfaction caused by the actions of the previous government.

IV. Conclusion

Only time will tell whether the new law contains sufficient assurances and facilities to stimulate foreign direct investments in Romania in the near future. Nevertheless, the law signals a clear step of the Romanian government in the right direction, and a recognition of some major causes for past reluctance of foreign investors to enter the Romanian marketplace. It will be interesting to see whether this new law will be followed by a similarly minded law regarding small and medium-sized investments, which would complete the legal framework in the area of foreign direct investment.

Endnotes

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3. Monitorul Oficial al Romaniei, nr. 160 (14 July 1993).
4. Monitorul Oficial al Romaniei, nr. 189 (22 July 1994).
5. Monitorul Oficial al Romaniei, nr. 125 (19 June 1997).
6. Herzfeld & Rubin, *The Romanian Digest*, vol. 6, no. 6, June 2001.
7. Meyer, *Investment Incentives Established, later Clarified, only to be Modified, then Suspended—and now (Perhaps) Reinstated (but only Partially)*, Survey of East European Law, vol. 10, No. 1, March, 1999.
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9. Meyer, note 7 *supra*.
10. Monitorul Oficial al Romaniei, nr. 483 (16 December 1998).
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12. *Id.*
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