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Electronic Interview with Professor Laurel S. Terry, Penn State Dickinson School of Law

Laurel S. Terry is a member of the faculty of Penn State Dickinson School of Law in Carlisle, Pennsylvania. In addition to teaching the required Professional Responsibility course since 1986, Terry has periodically taught since 1987 a Comparative Legal Ethics and Cross Border Legal Practice course. Terry has offered this course in Dickinson's summer abroad programs, at the University of Vienna and the University of Bremen and regularly offers the course in Carlisle. Terry and her co-author Mary Daly have written a casebook for this course which they hope to publish and Terry has prepared a statutory supplement entitled *Global Regulation of Lawyers: Statutes and Standards* which she hopes soon will be published. Laurel currently is a member of the ABA Section of International Law Transnational Legal Practice Committee, the International Bar Association Committee on Cross Border Practice issues, and the Pennsylvania Bar Association Task Force on Multijurisdictional Practice. In the past, Laurel has served as an ABA observer at the 1998 Paris Forum on Transnational Practice for the Legal Profession and as a consultant to the ABA committee that drafted the cross border legal practice agreement between the ABA-Brussels Bars. Laurel has received two Fulbright grants, one in 1992 to study comparative legal ethics in Vienna and one in 1998-99 to study MDPs in Germany. Laurel submitted extensive materials to the ABA Commission on Multidisciplinary Practice, which cited these materials and Laurel's MDP articles favorably.

Laurel graduated from the University of California, San Diego (Phi Beta Kappa) and the UCLA School of Law, where she earned membership in the Order of the Coif. Laurel clerked for the Honorable Alfred T. Goodwin of the U.S. Court of Appeals for the Ninth Circuit before joining a large law firm in Portland, Oregon where she had a litigation practice. She is a past member of the Executive Committee of the Association of American Law School's Section on Professional Responsibility, a former vice-chair of the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility, and an editor of the *Pennsylvania Ethics Handbook*.

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Question No. 1. There appears to be a fair amount of misinformation circulating about what lawyers in Europe are able to do by way of multijurisdictional practice. Could you explain the general scheme of things there for the benefit of U.S. lawyers unfamiliar with the licensing of lawyers there?

Response. I will respond to your question first and thereafter explain why I have put the terms "European Community" and "EC" in quotation marks in my answer.

The "European Community" or "EC" has adopted three laws or "directives" that are relevant to your question asking "what lawyers in Europe are able to do by way of multi-jurisdictional

practice." The first directive is over twenty years old and governs the temporary provision of legal services in an EC Member State by EC lawyers from a different Member State. The name of this directive is "COUNCIL DIRECTIVE of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC), O.J. L. 78/17 (1977)[hereafter Lawyers' Services Directive 77/249].

The Lawyers' Services Directive 77/249 authorizes lawyers from one EC country to offer temporary legal services in another EC country. In effect, a law license from one EC country is given "full faith and credit" in the second country. Or, to state it differently, the EC has adopted a system of "mutual recognition", in which each EC country agrees to recognize the qualifications of lawyers from another EC country. ("Mutual recognition" requirements often are viewed as the opposite of "harmonization" requirements, in which each country must adopt identical or "harmonized" provisions.)

One of the key points of the Lawyers' Services Directive 77/249 is that there is no automatic registration requirement, although the Host State may ask the "transient" lawyer to establish his or her qualifications as a lawyer. The directive requires the transient lawyer to use the professional title used in the Home State [original] jurisdiction when the lawyer temporarily practices in the Host State. The directive also specifies the rules of conduct that apply to the transient lawyer. The directive permits the Member State to place limitations on the transient lawyer's scope of practice. For example, an EC Member State may exclude the transient lawyer from preparing formal documents to administer estates of deceased persons or documents creating or transferring interests in land. The Member State may also require the transient lawyer to be introduced to the presiding judge or bar president and require a lawyer involved in litigation to work in conjunction with a lawyer who practices before the judicial authority in question. For a more detailed discussion of this directive, see Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 Fordham International Law Journal 556, 576-585 (1991-92).

The second major law that regulates multijurisdictional practice by European lawyers is entitled "COUNCIL DIRECTIVE of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (89/48/EEC), O.J.L. 19/16 (1989)" [hereafter "Diplomas Directive"]. Unlike the Lawyers Services Directive 77/249, which applies to the temporary provision of legal services in another Member State, the Diplomas Directive was intended to cover permanent establishment. Furthermore, the Diplomas Directive is not limited to the legal profession. The Diplomas Directive requires mutual recognition by EC Member States of higher education diplomas and regulated professional licenses for those professions which are not subject to a separate directive.

Under the Diplomas Directive, the Host State can require that the transient professional either take an aptitude test or complete an adaptation period of not more than three years. For the legal profession, it is the Host State, not the individual, who has the right to determine whether to require an adaptation period or aptitude test. All EC jurisdictions except Denmark have opted to require an aptitude test rather than an adaptation period. Information about these requirements and the contents of the aptitude tests are available from an excellent website maintained by

Professor Julian Lonbay of the University of Birmingham. See <http://www.iel.bham.ac.uk/> (and select "Lawyers" from the left-hand menu.)

The third important EC law governing lawyers addresses the topic of permanent establishment of lawyers. This law is relatively new and has not yet been implemented in all EC Member States. The law is entitled "Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J.L. 77/36 (1998)" [hereafter "Lawyers' Establishment Directive 98/5."]

Because the Lawyers' Establishment Directive specifically addresses the topic of establishment of lawyers, one might expect that the Diplomas Directive would no longer be relevant to the issue of multijurisdictional practice by European lawyers. The Diplomas Directive remains relevant, however, because the Lawyers' Establishment Directive incorporates by reference some of the provisions of the Diplomas Directive and allows lawyers to become established using the methods specified in the Diplomas Directive.

It is beyond the scope of this interview to completely describe the Lawyers' Establishment Directive, which has been discussed in several law review articles. See, e.g., Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 Int'l L. 307 (2000); see also Laurel S. Terry, *A Case Study of the Hybrid Model For Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 Fordham Int'l L. J. 1382 (1998) (comparing the EC scheme of multijurisdictional practice with the other major global MJP schemes). In a nutshell, however, the Lawyers' Establishment Directive permits a lawyer from one EC Member State to practice law on a permanent basis in another EC Member State. In other words, each EC Member State will "recognize" the qualifications obtained in another EC Member State and give "full faith and credit" to those qualifications.

The Lawyers' Establishment Directive requires the transient lawyer to register with the Host State. The directive specifies the rules of conduct that apply in different situations and makes the transient lawyer subject to discipline in the Host State. Initially, the transient lawyer practices under the lawyer's Home State title.

Similar to the Lawyers' Services Directive, the Lawyers' Establishment Directive places some limits on the transient lawyer's scope of practice. For example, the Host State may elect to exclude the transient lawyer from preparing formal documents to administer estates of deceased persons or documents creating or transferring interests in land. The Member State may also require a lawyer involved in litigation to work in conjunction with a lawyer who practices before the judicial authority in question. These "scope of practice" limitations are relatively narrow, however. Except for the specified limitations, the transient lawyer may practice Home State law, EC law, international law, and Host State law.

Interestingly, the Lawyers' Establishment Directive provides two different methods by which the transient lawyer may become "integrated" into the Host State profession, with the ability to thereafter use the Host State's title of lawyer. First, the transient lawyer may become integrated

under the methods specified in the Diplomas Directive. Alternatively, the transient lawyer may become integrated into the Host State's profession if the transient lawyer has "effectively and regularly pursued for a period of at least three years an activity in the host Member State in the law of that State including Community law..." In my view, this directive permits a French lawyer to move to Germany, practice EC law for three years, and thereafter become a full-fledged German Rechtsanwalt, with the right to use the title of Rechtsanwalt. The French lawyer can do this without an examination or special requirements, other than registration with the proper German authorities.

In sum, the multijurisdictional practice laws that apply to European lawyers are significantly more liberal than the multijurisdictional provisions found in many U.S. states. The EC temporary practice MJP rules have been in place for over twenty years, with very little history of problems. The permanent practice rules have been in place a much shorter time and do not yet have a significant track record.

The EC's multijurisdictional practice scheme is constitutionally required because of treaty provisions guaranteeing freedom of mobility. Despite this constitutional mandate, I would note that in my view, it should have been much more difficult to develop a European multijurisdictional practice system than a U.S. multijurisdictional practice system. Although it is true that there are only fifteen EC Member States, in many of these states, lawyers are licensed on a local basis, rather than a national basis. Therefore, the EC, like the US, had to cope with a large number of different regulators. In addition, there are significant language barriers involved in developing a European multijurisdictional practice system. An added difficulty is the fact that some EC Member States have a civil law system and other Member States have a common law system. Moreover, there are some significant differences even among Member States that have a civil law system. In short, the EC overcame significant practical barriers when it developed its multijurisdictional practice rules for European lawyers.

At this point, I would like to explain why I initially put the terms "European Community" and "EC" in quotation marks. It is somewhat difficult to speak about the "European Community" because there are, in fact, three "European Communities," not one. Three separate initiating treaties established the European Coal and Steel Community (ECSC); the European Atomic Energy Community (Euratom); and the European Economic Community (EEC). The 1957 Treaty of Rome, which created the EEC, together with the subsequent law relating to the EEC, is currently what is meant when the shorthand term "European Community" or "EC" is used.

At its initiation in 1957, the EC had six Member States. Currently there are fifteen Member States, but additional countries have petitioned to join the EC. In 1985, a conference was held in Luxembourg to amend the Treaty of Rome that created the EEC. The resulting amendments are contained in a document called the Single European Act (SEA). Numerous changes occurred, including an agreement to complete a single internal market by 1992. A second set of major amendments was adopted on February 7, 1992 at Maastricht, the Netherlands, in the Treaty on European Union (TEU). The TEU contained significant new agreements on economic and political integration and also created a new entity called the "European Union." The core of the "European Union" consists of the European Community, rather than the European Economic Community. The TEU was followed by the 1997 Amsterdam Treaty which adopted further

provisions concerning economic and political integration. For ease of use, the official EU website includes a document entitled "Consolidated Version of the Treaty Establishing the European Community." This document has not been officially adopted, but consolidates in a useful fashion the original European Community treaty and subsequent amendments. It is found at http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf.

Question No. 2. Similar to question 1, there appears to be a fair amount of misinformation circulating about the impact of NAFTA and GATS on efforts within the United States to liberalize the admission rules for out-of-state lawyers in various U.S. jurisdictions. Could you explain, in general, what impact NAFTA and GATS have on these discussions?

Response. Because these are fairly complicated topics and because I can only begin to scratch the surface in my answer, let me begin by telling you how to find the GATS and NAFTA. The GATS, which is the acronym for the General Agreement on Trade in Services, is Annex 1b to the Agreement Establishing the World Trade Organization. In other words, the GATS was one of the agreements that was executed when the World Trade Organization was created. (Other agreements include the GATT, which applies to goods not services, the agreement on agriculture, and TRIPS, which governs intellectual property.) The GATS is found at 33 *International Legal Materials* 1125, 1168 (1994) and on the Internet at <http://www.wto.org/> (select "documents" from the top menu, and then "legal texts of the WTO Agreements") or at http://www.wto.org/english/docs_e/legal_e/final_e.htm. The U.S. Congress enacted legislation to implement the WTO and annexed agreements including the GATS, but did not ratify them as a treaty. See Uruguay Round Agreements Act, Pub. L. No 103-465, 108 Stat. 4809 (1994).

NAFTA, which is the acronym for the North American Free Trade Agreement, is found at 32 *International Legal Materials* 605 (1993) and on the Internet at <http://www.nafta-sec-alena.org/english/index.htm> (select "NAFTA" from the top menu).

For a fuller discussion of these agreements, see Laurel S. Terry, *GATS' Regulation of Transnational Legal Practice*, 34 *Vanderbilt J. of Transnational Law* 989 (2001) and Laurel S. Terry, *A Case Study of the Hybrid Model For Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 *Fordham Int'l L. J.* 1382, 1393-1400 (1998)(and the authorities cited therein).

In my view, neither GATS nor NAFTA currently has any impact on "efforts within the United States to liberalize the admissions rules for out-of-state lawyers in various U.S. jurisdictions." GATS and NAFTA are trade agreements which the U.S. has signed. Both of these agreements apply, at least in part, to legal services. These agreements are fairly general; GATS has no provisions that are specifically directed towards legal services and NAFTA has an appendix that requires a working group to jointly develop foreign legal consultant (FLC) rules. (Although there is a draft version of the NAFTA Model FLC rule, some U.S. lawyers and bar associations have objected to the draft, which has not yet been approved.)

Both of these agreements establish procedures for developing more specific understandings of how the general requirements should apply to legal services. In both agreements, however, the enforcement mechanism consists of the ability to use retaliatory trade sanctions. Thus, even for

foreign lawyers (as contrasted with the out-of-state lawyers you inquired about), these agreements do not provide a private cause of action for enforcement. *See, e.g., In re Application of Gail Elizabeth Collins for Admission to the Nebraska State Bar*, 252 Neb. 222, 561 N.W.2d 209 (1997)(court denied applicant's request for admission to the Nebraska bar without examination on the basis of her qualification as a lawyer in Newfoundland and Saskatchewan, finding that NAFTA did not grant her a private cause of action.)

On the other hand, in my view, both NAFTA and GATS have the potential, in the future, to affect the conditions under which U.S. state regulators may exclude lawyers licensed in another country. I also believe that ultimately, the admissions rules for out-of-state [U.S.] lawyers might be affected by the admissions rules that apply to lawyers from another country. In the European Community, for example, a number of countries changed their lawyer regulations after court decisions by the European Court of Justice. For example, in Case 107/83, *Ordre des Avocats du Barreau de Paris v. Klopp*, [1984] E.C.R. 2971, [1985] 1 C.M.L.R. 99, France argued that in order to ensure compliance with the professional rules of conduct, the Paris Bar should be permitted to require that an *avocat* practice exclusively in Paris and not also practice from his Dusseldorf, Germany office. The European Court of Justice found the Paris Bar's concerns legitimate, but found that the existence of a second office didn't prevent the Paris Bar from enforcing its rules. Accordingly, the European Court of Justice ruled that a country could not prohibit a foreign lawyer from operating two offices [a branch office]. After these decisions, some European countries changed their rules to permit their domestic lawyers, as well as foreign lawyers, to be able to open branch offices.

In my view, a likely motivation for these European rule changes was to address the perceived "reverse discrimination" in which foreign lawyers had more rights than domestic lawyers. Similarly, I would expect that ultimately, if GATS or NAFTA is used to reduce the restrictions on admission by foreign lawyers, then similar treatment may be afforded to out-of-state U.S. lawyers.

In sum, neither GATS nor NAFTA directly governs admission of out-of-state U.S. lawyers. Indirectly, GATS and NAFTA have the potential to influence "efforts within the United States to liberalize the admissions rules for out-of-state lawyers in various U.S. jurisdictions". The reason why GATS and NAFTA might have this indirect effect is because they could affect state regulation of foreign lawyers and because regulators may want to treat out-of-state lawyers no less favorably than out-of-country lawyers. At the moment, however, I think it will be several years at the earliest before GATS or NAFTA might be used as the basis for changes to state admission rules that regulate foreign lawyers. Accordingly, I expect it to be even longer before the ripple effect, if any, of GATS and NAFTA affects state regulation of domestic out-of-state lawyers.

Question No. 3. From your extensive study of various topics surrounding the practice of law between sovereign states, do you have any thoughts about U.S. efforts to streamline and simplify the lawyer admission rules in the various states? Any preferred directions you think the process should take?

Response. My first observation is that the multijurisdictional practice rules in the U.S. need to be changed to reflect the reality that lawyers do in fact practice across jurisdictional lines, clients want lawyers who can practice across jurisdictional lines, and competent representation may require lawyers to practice across jurisdictional lines.

My second observation is that the world experience shows us that multijurisdictional practice can work. I have seen no evidence to suggest that the twenty-year old legislation in the European Community has led to problems. Nor have I heard about significant problems in Canada or Australia, which also have multijurisdictional practice schemes. Many lawyers and regulators in the U.S. are unaccustomed to the idea of having a "full faith and credit" approach towards law licenses. The experience elsewhere in the world should prompt us to recognize that such an approach can work and deserves serious consideration.

My third observation is that I do not want to make any specific recommendations about how regulators should streamline and simplify the lawyer admission rules in the various states. There may be reasons why, from a practical perspective in a specific jurisdiction, one approach is more appropriate at this time than the competing approaches.

Ultimately, however, for temporary legal services, I favor a "recognition" or "full faith and credit" approach over the "safe harbor" approach discussed in the context of proposed amendments to ABA Model Rule of Professional Conduct 5.5. Under our current framework, when a U.S. lawyer receives a law license, that lawyer receives a general license that permits the lawyer to practice any type of law. (In many jurisdictions in the world, there is not a comparable general law license.)

Notwithstanding the general law license currently granted to U.S. lawyers, I believe that most U.S. lawyers would concede that they are not competent to practice every type of law. As a general rule, the ethical obligation to provide competent representation and the liability system act together as a system of "checks and balances" to limit the services that a lawyer provides under the general law license. I believe that a similar "checks and balances" system would operate if a state permits an out-of-state lawyer to practice law in its jurisdiction. Similar to the in-state lawyer with a general law license, the out-of-state lawyer also would have an ethical duty to provide competent representation and would be subject to liability for failing to live up to those obligations. Therefore, I think a "recognition" or "full faith and credit" approach is appropriate and workable for temporary multijurisdictional practice.

For permanent establishment, I also favor a recognition system, although I realize there are difficult details that need to be worked through, especially with regards to accreditation of law schools. In the European context, in which training, culture and language differences are more significant than in the U.S., I disagree with some of the provisions in the Lawyers' Establishment Directive 98/5, such as the full integration provision without accompanying disclosure, in which a client may not realize that the lawyer was not trained or examined by the Host State.

Question No. 4. Any final thoughts or observations about the multijurisdictional practice of law from the vantage point of a law professor? Do most law professors even have this issue

on their radar screens? Do you think liberalized admission standards for out-of-state lawyers in a majority of U.S. states are on the horizon?

Response. I would speculate that most U.S. law professors who teach the law of lawyering do have the issue of multijurisdictional practice on their "radar screens." I think the issue has been on the periphery of the screen for a number of years. *See, e.g., Symposium: Ethics and Multijurisdictional Practice of Law*, 36 South Texas Law Review (1995). I am sure, however, that the multijurisdictional practice of law issue has moved towards the center of the "radar screen" in the wake of the California *Birbrower* case, the creation of the ABA Multijurisdictional Practice of Law Commission (<http://www.abanet.org/cpr/mjp-home.html>), the increased interest in MJP by state courts, regulators and bar associations, *see* CrossingtheBar.Com's [News](#) page, and the programs sponsored by the ABA Center for Professional Responsibility. For more information, go to <http://www.abanet.org/cpr/> and select "National Conference on Professional Responsibility" from the left-hand menu.

Because I do not think that I am especially tuned into political realities, I have no opinion about whether, in the short term, liberalized admission standards for out-of-state lawyers in a majority of U.S. states is on the horizon. On the other hand, I believe that ultimately, liberalized admission standards are inevitable. Furthermore, just as I urged in the MDP debate, I think regulators would be better served to enact these regulations sooner rather than later. In my view, the sooner regulators act, the better chance they have of deciding what is important and setting the terms of regulation, rather than having to codify a fait accompli.

CrossingtheBar.Com greatly appreciates Professor Terry's willingness to participate in this electronic interview.