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Foreign Lawyer Admission Issues



Testimony to the Minnesota State
Board of Law Examiners (Dec. 3, 2009)

by

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Introduction and Caveats

- This testimony reflects my personal views and not those of any institution or organization with which I am affiliated.
 - The Court has received a petition asking it to add language to Rule 4(3) that would permit graduates from non-ABA-accredited law schools who are licensed in other U.S. states to sit for the Minnesota bar examination
 - The Court’s order directs the Board to “study the issues raised by the petition”
 - Although my testimony does not focus on the four petitioners in question or the specific amendment they have requested, my testimony is relevant to the issues before the Board
 - The Board should consider whether and how it should respond to globalization and the ability of foreign applicants to practice in Minnesota in order to assist Minnesota clients and the public
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Overview of My Testimony: 5 Points

I will address 5 points:

1. Foreign contacts (and possible legal needs) of Minnesota clients
2. Methods of Allowing **Limited Admission** of Foreign Applicants
 - A Temporary Practice By Foreign Lawyers rule
 - A Foreign Legal Consultant (FLC) limited license
 - Foreign In-House Counsel Registration
 - Allowing Foreign *Pro Hac Vice*
3. **Full Admission** allows foreign applicants to take a bar exam
4. My recommendations *re* the process to use in your deliberations
5. Other reasons why you might want to allow foreign applicants

3

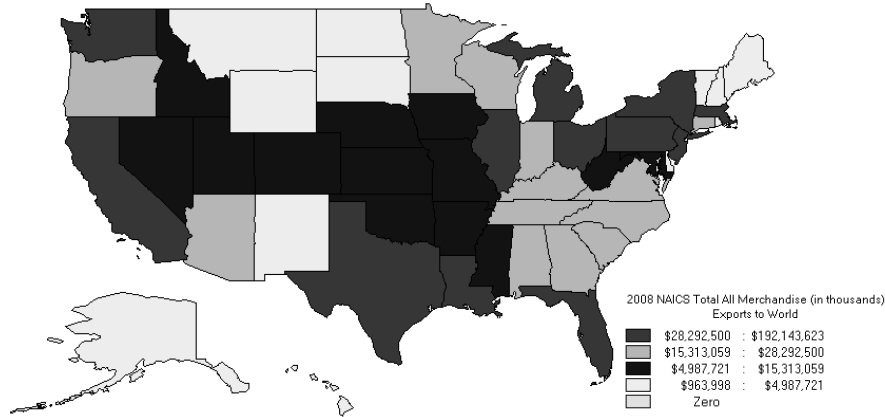
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Point #1: MN Clients Have Global Needs

- Globalization affects Minnesota clients (both individual and corporate clients)
- Thus, Minnesota citizens are likely to need the services of foreign as well as U.S. lawyers.
- The slides that follow slides have data illustrating this point.

4

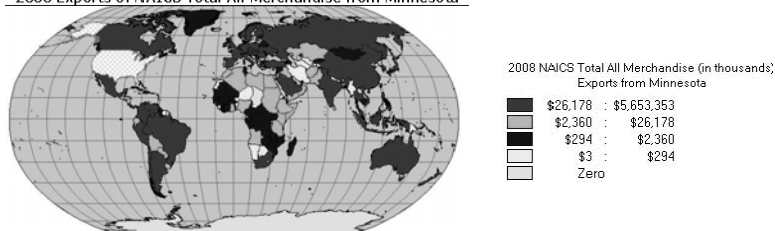
Minnesota's 2008 Foreign Exports



Minnesota is in the 2nd highest group of exporting states

2008 Minnesota Exports: \$19.19 Billion

2008 Exports of NAICS Total All Merchandise from Minnesota



numbers are in thousands (\$ USD)

Partner	2004	2005	2006	2007	2008
World Total	12,667,818	14,736,124	16,349,477	18,061,826	19,186,171
Canada	3,238,065	3,609,568	4,129,662	5,099,751	5,653,353
China	400,840	742,080	886,093	1,042,954	1,022,253
Japan	880,785	884,724	1,014,373	936,044	936,302
Ireland	1,312,268	1,368,208	1,016,715	1,107,870	884,740
Mexico	509,326	550,307	595,977	664,853	663,132
United Kingdom	698,427	662,113	714,744	739,821	778,025
Germany	551,710	617,228	687,296	788,376	764,286
Philippines	144,640	267,895	363,821	494,986	746,535

Provided by the Office of Trade and Industry Information (OTII), Manufacturing and Services, International Trade Administration, U.S. Department of Commerce.

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MN Headquarters of Fortune 1000 Co's

- Minnesota ranks 19th in the country for Fortune 500 companies
- Minnesota is the headquarters for 32 companies listed in the Fortune 1000
- Minnesota has a high concentration (545) of ACC [Association of Corporate Counsel] members
- Only 5% of ACC members define their practice as "local to the US"
- All of this suggests that many Minnesota companies have global legal needs

7

Individual MN Clients May Also Have Global Legal Needs

2000 U.S. Census - Foreign Born Residents

Number of MN Foreign born residents	% of MN population	Numeric Rank in % population	1990-2000 % increase	State Rank in % increase 1990-2000	State Rank in numeric increase 1990-2000
260,463 (Rank: 21 st)	5.3%	25 th	130.4%	12 th	18 th

2008 Estimate - Foreign Born Residents

Number of MN Foreign born residents	% of MN population	Numeric Rank in % population	2000-2008 % increase	State Rank in % increase 2000-08	State Rank in numeric increase 2000-08
340, 657 (Rank: 21 st)	6.5%	24 th	30.8%	23 rd	20 th

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Point #2: Consider Limited License Rules

- If the legal services import-export figures mean that foreign lawyers are or will be coming to MN, would you rather have them regulated or unregulated? (See p.11)
- There are 4 kinds of “limited licenses” for foreign lawyers:
 - A Foreign Legal Consultant (FLC) limited license
 - A Temporary Practice By Foreign Lawyers rule
 - Foreign In-House Counsel Registration
 - Permit Foreign *Pro Hac Vice* Applications

9

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Minnesota and Limited Law Licenses

- MN has a Foreign Legal Consultant (FLC) rule
- MN does NOT have a rule that allows temporary practice by foreign lawyers (*Are both of these under consideration? See ABA chart*)
- MN does NOT allow foreign in-house counsel registration
- MN may not allow foreign *Pro Hac Vice*
 - [*Cf.* Mn. Statutes § 481.02, Subd. 6 (UPL safe-harbor for *pro hac vice* by lawyers of “any other state or territory”); Mn. R. App. Proc., Rule 143.05, Subd. 1.(*pro hac vice* for “an attorney admitted to practice law in another state or territory”); Mn. General R. Practice District Courts, Rule 5 (“Lawyers duly admitted to practice in the trial courts of any other jurisdiction may appear in any of the courts of this state...)
- Although it was not asked to do so, the State Board could recommend that the Minnesota Supreme Court consider limited license rules for foreign lawyers. The Court has jurisdiction.

Data Regarding Legal Services Imports

U.S. Trade in Goods & Services

2008	
Exports	\$1,835,785,000,000 [\$1.8 trillion]
Imports	\$2,516,915,000,000 [\$2.5 trillion]

U.S. Cross Border Trade in Legal Services [Modes 1,2, 4]

2007 (the latest data)	
Exports	\$6,424,000,000 [\$6.4 billion]
Imports	\$1,561,000,000 [\$1.6 billion]

2007: Foreign-owned assets in the U.S.	2007: US-owned assets abroad
\$20 trillion	\$17.6 trillion

Legal Services Trade by Affiliates [Mode 3]

To Foreign Persons by U.S. Firms' Foreign Offices (2006)	To US persons by Foreign Firms' U.S. offices (2004)
\$2.7 billion	\$28 million

Point #3: Foreign Full Admission Issues

- Some foreign-educated applicants may want full admission rather than a limited license
- A majority of states allow foreign applicants to take a bar exam under certain circumstances (*See* slide 13)
- The ABA does not currently have a model rule on full admission (but is working on it)
- The 7-09 ABA Section of Legal Ed Int'l C'ee Report sets forth state approaches and issues (*See* slides 14-15)
- I don't have a particular rule to recommend but Point #4 identifies the process I recommend

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March-09 NCBE Member Survey Results

- **25 (of 45)** U.S. jurisdictions allow some foreign lawyers to sit for their bar exam
- **8 (of 45)** allow some kind of admission by motion for foreign lawyers
- **65%** of responders said admission applications from foreign lawyers are on the rise
- **38 states** are willing to consider foreign lawyer admission (& said what info would be helpful)
- *See* 1992-2007 NCBE state-by-state statistics showing the number of foreign applicants ₁₃

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Some Variables in Full Admission Rules

- Should you have different requirements for common-law and non common-law graduates?
- Should you require an LL.M.? When? (Some states use the LL.M. to “make up” for a non-common law or non-US education)
- Should you require the foreign applicant to have completed certain courses (DC)?
- Should you have a waiver rule (either in addition to your existing rule (NY) or as your only rule (GA))?

See pp. 15-18 of the ABA Int'l C'ee report, available at:
[http://www.abanet.org/legaled/committees/International%20Issues%20Report%20\(final\).DOC](http://www.abanet.org/legaled/committees/International%20Issues%20Report%20(final).DOC) ₁₄

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More Variables in Full Admission Rules

- Do you require substantial educational equivalency and if so, how do you measure this?
- Should you require the foreign applicant to be a lawyer, to be eligible to take the bar, or to have completed his or her legal education?
 - Some countries have single digit pass rates [w/ narrow UPL]
 - Some foreign graduates get their LL.M. after taking 1 bar exam, but not all exams or before finishing an apprenticeship
 - If you require the applicant to be a lawyer, is there a “years-in-practice” requirement?
- Will you admit an applicant licensed in another state?

See Figure 1 in Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 *Journal of International Law & Business* 487 (2003)(chart of state rules)¹⁵

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Point #4: *Process Recommendations*

- The trend in international lawyer regulation is to expressly acknowledge regulatory objectives
- Before drafting a particular rule (*e.g.* full admission), a regulator should consider what it wants to achieve
- Explicitly articulating both the regulatory objectives and the goals of an admission rule:
 - will help you draft the rule; and
 - will help others understand your decisions
- See slides 17-19 for a suggested approach:

16

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General Regulatory Principles

- There is a growing international consensus that regulation:
 - should be designed to achieve legitimate objectives
 - should directly and materially advance those objectives; and
 - should be narrowly tailored to achieve those objectives
- These principles have been articulated in different ways, but the concepts are similar
- The U.S. regularly uses these principles. *See, e.g.*, 1st Amendment lawyer commercial speech USSC cases

17

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Possible Objectives of Lawyer Regulation

Regulation of the legal profession should be designed in order to achieve one or more of these regulatory objectives:

- (a) protecting the interests of clients;
- (b) protecting and promoting the public interest;
- (c) supporting the constitutional principle of the rule of law;
- (d) improving access to justice;
- (e) promoting competition in order to provide clients with more and better choices regarding legal services; and
- (f) encouraging an independent, strong, diverse and effective legal profession

18

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Possible Goals of a Full Admission Rule:

1. Ease of use by the court and admissions authorities;
2. Reliability;
3. Avoid unnecessary complications for other stakeholders;
4. Avoid actions that would undermine the current U.S. lawyer regulatory system insofar as it has been effective;
5. English fluency;
6. Cultural sensitivity regarding rule of law issues; and
7. Appropriate Legal Training: Because the U.S. system has determined that is important to regulate both “input” [e.g. legal education] and “outcome” requirements, any policy should ensure that foreign applicants for a bar examination have appropriate legal training. In evaluating what is “appropriate,” the policy may consider educational duration, rigor, style, and content, including substance, skills, and values.

Note: Petitioners arguably have challenged some of these assumptions ¹⁹

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Point #5: Other Reasons to Adopt a Rule

- Having a foreign lawyer full admission rule is good for Minnesota clients and the public
- Global initiatives provide additional support for a full admission rule because of “recognition” provisions:
 - Resolutions of the Conference of Chief Justices
 - Global “recognition” agreements such as the Lisbon Convention, the GATS, other U.S. Free Trade Agreements, the APEC Legal Services Initiative
 - *See also* the Bologna Process (influential, but not U.S.)
 - *See also* global antitrust and regulatory reform initiatives

20

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2007 Conference of Chief Justices Resolutions

Resolution 8: NOW, THEREFORE, BE IT RESOLVED that the [CCJ] *urges the American Bar Association Section on Legal Education and Admission to the Bar to consider* developing and implementing *a program to certify the quality of the legal education* offered by universities in other common-law countries.

Resolution 7: NOW, THEREFORE, BE IT RESOLVED that the [CCJ] *urges each state supreme court* to consider permitting individuals *who have graduated from an Australian University and have been admitted to practice in Australia*, and who meet the state requirements regarding experience, character, and fitness, *to sit for the bar examination* and if they pass that examination, to be admitted to the practice of law in the state.

21

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Global “Recognition” Agreements

- The Lisbon Convention
- U.S.-Australia Free Trade Agreement (FTA)
- Other FTAs
- The APEC Legal Services Initiative
- The GATS
- Also...the Bologna Process, which now has a “global dimension”
- *See also* global antitrust and regulatory reform initiatives

22

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The Lisbon Convention



- The U.S. is a signatory
- It governs recognition in higher education
- The US Department of Education administers the U.S.' Lisbon Convention obligations
- This is one reason why the DOE has a webpage on professional qualification recognition

23

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Lisbon Convention provisions include:

- Holders of qualifications issued in one country shall have adequate access to an *assessment of these qualifications in another country.*

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- The responsibility to demonstrate that an application does not fulfil the relevant requirements lies with the body undertaking the assessment.

24

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U.S.-Australia Free Trade Agreement



1. The Parties shall encourage *the relevant bodies* in their respective territories *to develop mutually acceptable standards and criteria for licensing and certification of professional services suppliers* and to provide recommendations on mutual recognition to the Joint Committee.

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U.S.-Australia Free Trade Agreement

- **Requires** the establishment of a working group;
- **Requires** that this group consider:
 - (a) procedures for fostering the development of mutual recognition arrangements among their relevant professional bodies;
 - (b) the feasibility of developing model procedures for the licensing and certification of professional services suppliers; and
 - (c) other issues of mutual interest relating to the provision of professional services

26

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Other Trade Agreements

Office of the United States Trade Representative

The U.S. has signed a number of Free Trade Agreements (FTAs) that include “recognition” provisions; most include a professional services annex

Trade Agreements

Regional	Bilateral
<ul style="list-style-type: none">• FTAA• ASEAN Initiative• NAFTA• MEFTA• APEC• CAFTA-DR	<ul style="list-style-type: none">• Australia FTA• Bahrain FTA• Chile FTA• Colombia FTA• Israel FTA• Jordan FTA• KORUS FTA• Malaysia FTA• Morocco FTA• Oman FTA• Panama TPA• Peru TPA• Malaysia FTA• Singapore FTA• SACU FTA• Bilateral Investment Treaties (BITs)• Trade and Investment Framework Agreements (TIFAs)

 NAFTA Secretariat
Secrétariat de l'ALÉNA
Secretariado del TLCAN

27

The APEC Legal Services Initiative

- In Nov. 2008, APEC voted to fund this Initiative
- This Initiative proposed:
 - the development of an electronic repository of foreign lawyer rules and regulators
 - the development of a Legal Services Framework of best practices for reducing impediments to the provision of services in foreign and international law


Asia-Pacific
Economic Cooperation

28

The GATS



With a view to ensuring that measures relating to **qualification requirements and procedures**, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

29

Recognition & the Bologna Process

- In 10 years (98-07), the Bologna Process grew from 4 EU countries to 46 European countries
- Its ten “action lines” include promoting mobility, recognition, and quality assurance
- It has dramatically changed higher education (and legal education) in Europe
- As of 2005, it has a “global dimension”
- CHEA, the U.S. DOE and others in the U.S. are paying attention to it



30

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Conclusion

- Developing foreign lawyer admission rules is hard work
 - It may seem like the applicant numbers don't justify the institutional investment of time. So why bother?
 - Minnesota citizens have global legal needs
 - Ask yourself... who is handling the legal work for all of this foreign investment and trade? If foreign lawyers are in your state, would you rather have them regulated or unregulated?
 - If global business can't function, they may protest the system
 - Even if it's outside your "jurisdiction," consider recommending limited license options to the Court
 - For full admission, consider your regulatory objectives and rule goals; others have more expertise on rule details ³¹
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Additional Resources

- My "Presentations" Webpage has a number of additional resources (including information on international initiatives)
<http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm>
 - My April 2009 Nat'l Conference of Bar Examiners presentation on "Foreign Lawyer Recognition" includes urls and links to the items mentioned in this talk
http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/Terry_NCBE_Baltimore.pdf
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