


3-1-1999

## Cross-Border Legal Practice: The Role of Foreign Legal Consultants

John E. Rogers

Follow this and additional works at: <https://digitalrepository.unm.edu/usmexlj>

 Part of the [International Law Commons](#), [International Trade Law Commons](#), and the [Jurisprudence Commons](#)

### Recommended Citation

John E. Rogers, *Cross-Border Legal Practice: The Role of Foreign Legal Consultants*, 7 U.S.-Mex. L.J. 1 (1999).  
Available at: <https://digitalrepository.unm.edu/usmexlj/vol7/iss1/3>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in United States - Mexico Law Journal by an authorized editor of UNM Digital Repository. For more information, please contact [disc@unm.edu](mailto:disc@unm.edu).

# CROSS-BORDER LEGAL PRACTICE: THE ROLE OF FOREIGN LEGAL CONSULTANTS

JOHN E. ROGERS

## SUMMARY OF REMARKS PRESENTED AT THE SEVENTH ANNUAL U.S.-MEXICO LAW INSTITUTE CONFERENCE, OCTOBER 1-3, 1998

A year ago the outlook for international agreement on reciprocal cross-border legal practice involving Mexico, the U.S. and Canada was not promising. The negotiations that had been undertaken by professional bodies in the three countries pursuant to Annex 1210.5, Section B, of the North American Free Trade Agreement (NAFTA), with a view to agreeing on a Model Rule respecting Foreign Legal Consultants, had repeatedly stalled over a couple of divisive issues. However, the negotiations resumed on June 19, 1998 in Mexico City, and delegates from the Federation of Law Societies of Canada, the Mexican Committee on the International Practice of Law and the American Bar Association managed to reach agreement on the text of such Rule. (The text of the agreed Model Rule may be found in Annex 1.)

The key issues that were discussed during the final negotiation session were: (1) the extent to which Mexican lawyers would be able to become partners in law firms based in the United States or Canada, and (2) the structure of law offices in Mexico out of which Mexican and U.S. or Canadian lawyers would be permitted to practice. The Model Rule agreed to on June 19, 1998 would permit Mexican lawyers to become partners in firms based in the U.S. or Canada, but would require the Mexican partners to practice in Mexico through firms organized under Mexican law and with majority Mexican ownership. The foreign partners in such firms would have to be individual foreign legal consultants rather than foreign law firms.

The concern on the first issue had arisen because under Rule 14 a law firm headquartered in the U.S. or Canada "may enter into any form of economic arrangement, other than a partnership, with a lawyer admitted to practice law" in Mexico or with a law firm headquartered in Mexico. The negotiators agreed on a new Rule 18(b) providing that nothing in Rules 10 through 17 shall be construed as prohibiting "a lawyer, who is admitted to practice in Mexico, whether or not the lawyer is a resident in Mexico, from being a partner in a law firm headquartered in Canada or in the United States." This result may help to address a key concern of U.S. firms with a Mexican practice, who would find it difficult to operate without the ability to offer a partnership to the Mexican lawyers with whom they practice.

On the other issue which had been contentious, U.S. firms did not achieve their objective, which was to be able to operate in Mexico through branch offices with lawyers licensed in Mexico as well as in the U.S. The Mexican delegation had objected to this approach, taking the position that the practice of Mexican law in Mexico had to be carried out through Mexican law firms controlled by Mexican lawyers. As a fallback position, the U.S. delegation had suggested that if the Mexican law firm structure had to be utilized, the minority foreign interest therein could be held by a foreign law firm. The Mexican delegation would not accept this either, on the ground that a Mexican lawyer was not permitted under the Mexican Professions Law to be a partner with a legal entity such as a foreign-headquartered partnership. Although it was argued that a partnership is not a legal entity, this

point was not accepted by the Mexican delegation. Thus Rule 15 will continue to prohibit a Mexican lawyer from being employed by or being a partner in a law firm formed in Mexico, if (i) the firm has as its partners anyone other than Mexican-licensed lawyers or foreign legal consultants or (ii) the number of Mexican-licensed lawyers in such firm, and their ownership interest therein, is exceeded by that of the foreign legal consultants. Rule 15 is an exception, applicable only to Mexico, to the general rule of openness established in Rule 12.

U.S. firms are not likely to be happy with this result, because of what they will view as unnecessary structural requirements to be satisfied in order to maintain a presence in Mexico. On the other hand, Rule 18(b) is a step in the right direction because it does make clear that Mexican lawyers can become partners in firms headquartered in the U.S. and Canada, and for many firms the economics of the U.S.- or Canada-based firm will predominate, regardless of the structures established for the Mexican presence.

Most of the Model Rule consists of relatively non-controversial provisions that would regulate the issuance of permits by the regulatory body of a host country to lawyers wishing to act as foreign legal consultants in such country. The applicant for a permit would have to satisfy the requirements under Rule 4 as to (a) good standing in the applicant's home jurisdiction, (b) reciprocity of treatment by such home jurisdiction, (c) good character, (d) previous practice experience, (e) liability insurance, (f) defalcation coverage, (g) submission to the host country's jurisdiction, (h) address for notices and service of process in the host country, (i) an undertaking as to trust funds, and (j) notifications of changes in status. Rules 6-9 spell out some limitations on the scope of practice permitted to a foreign legal consultant.

Foreign legal consulting in Mexico has a long history, primarily through in-house lawyers in multinational companies. There have been several cases of foreign lawyers living in Mexico and advising on foreign law without being formally licensed to do so, because of the absence of any formal mechanism in Mexico for licensing foreign legal consultants. Most foreign lawyers now practicing in Mexico would have little difficulty satisfying the licensing requirements contained in Rule 4, at least according to the English text of the Model rule. However, the Spanish text of the Model Rule was to be prepared after agreement was reached on the English text, and there is a risk that there will be subtle differences between the ultimate Spanish and English (as well as French) texts of the Model Rule. There is also a risk that in implementing the Model Rule, the regulatory authorities will deviate from the meaning thereof as intended by the negotiators. To the best of our knowledge, there have been no official steps taken to effect agreement between the governments party to NAFTA regarding the Model Rule. Upon agreement by the governments, implementing legislation would presumably be introduced in the relevant jurisdictions. It is possible that some lawyers or law firms will challenge the implementation of the Model Rule in one or more of the affected jurisdictions. In Mexico an *amparo* proceeding might be brought by a previously established firm on the ground of unconstitutionally retroactive application.

Among the questions raised by the audience, one was as to whether the foreign lawyers working in Mexico have been doing so illegally. The speaker indicated that the Mexican delegation had suggested that this might be the case, pointing out that none of these foreign lawyers were registered with the professional licensing body

within the Ministry of Public Education. However, a representative of such body was present at the negotiating session and she stated that there was no mechanism in place for such licensing because the licensing body was awaiting the result of the negotiations on the Model Rule. It was also pointed out that the foreign firms with offices in Mexico had, in most, if not all cases, obtained permits from the Ministry of Commerce and Industrial Development (SECOFI) and the Foreign Investment Commission which authorized the establishment of offices of foreign legal consultancy. The speaker indicated that his firm had been advised by independent Mexican counsel that such permits were sufficient authorization for the practice of foreign legal consultancy until the new licensing mechanism is in place.

Another member of the audience asked whether it is likely that huge U.S.-headquartered law firms will come into Mexico and dominate the Mexican legal scene. While the Mexican delegation appeared to harbor some lingering concern over this issue, that worry was beginning to be replaced by a concern over the possibility that huge accounting firms might come to dominate legal practice in Mexico. Already a number of large accounting firms had begun to strengthen their in-house legal departments and become listed in Martindale-Hubbell.

Another concern expressed by members of the Mexican delegation was that, if U.S.-headquartered law firms were to control Mexican law offices, U.S. lawyers would control the practice of Mexican law by their Mexican-licensed colleagues, and that by being the minority in a U.S.-headquartered firm the Mexican lawyers would not give the same opinions that they would if they were independent. This risk was not materially different from the risk that in any law firm a senior partner trained in one area of specialization would try to unduly influence the views or conclusions of more junior lawyers trained in another area of specialization. The common constraint would be the risk of malpractice liability if wrong opinions were given. A member of the audience commented that, nevertheless, tension would probably exist in such a cross-border firm environment. While that might well be true, such tension was perhaps not very different from the tension in any firm with a variety of personalities and areas of expertise.

**ANNEX 1**

**MODEL RULE RESPECTING FOREIGN LEGAL CONSULTANTS**

**JOINT RECOMMENDATIONS OF THE RELEVANT CANADIAN,  
MEXICAN AND AMERICAN PROFESSIONAL BODIES UNDER ANNEX  
1210.5, SECTION B**

**PREPARED BY:**

**FEDERATION OF LAW SOCIETIES OF CANADA, NAFTA COMMITTEE**

**MEXICAN COMMITTEE ON THE INTERNATIONAL PRACTICE OF LAW**

**AMERICAN BAR ASSOCIATION, SECTIONS OF INTERNATIONAL LAW  
AND PRACTICE AND LEGAL EDUCATION AND ADMISSIONS TO THE  
BAR, AND ITS AFFILIATE, THE NATIONAL CONFERENCE OF BAR  
EXAMINERS**

**June 19, 1998  
Mexico City**

## Declaration of Purpose

1. This Model Rule is intended to provide a framework within which the regulatory bodies of the legal profession in each Party are encouraged to adopt regulatory schemes which are substantially the same as, or less restrictive than, this Model Rule.

### Definitions

2. In this Model Rule, unless otherwise specified: home Party means the Party in which a lawyer is admitted to practise law, host Party means a Party other than a lawyer's home Party, internal jurisdiction means:

a) in the case of Canada, a Province or Territory,

b) in the case of the United Mexican States, a State or the Federal District, and in the case of the United States of America, a State, the District of Columbia or Puerto Rico, law firm includes, where permitted by law, a professional law corporation and, in such case, "partner" means a voting shareholder of the corporation, lawyer means a person who is legally permitted to engage in the practice of law in a Party or in one of its internal jurisdictions as an attorney or counsellor at law or the equivalent and, in the case of the Province of Quebec, includes a notary member of the *Chambre des Notaires du Québec* and in the case of Mexico includes a Mexican Notary,

Party means Canada, the United Mexican States or the United States of America and, as and where the context requires, means the government or the territory of that country, regulatory body means, in the case of a Party in which the practice of law is regulated by its internal jurisdictions, the regulatory body of the legal profession of each internal jurisdiction.

### Application for permit

3. A lawyer who wishes to act as a foreign legal consultant in a Party may apply to the relevant regulatory body in that Party for a permit, by delivering to it:

- a) a completed permit application in a form approved by the regulatory body, and
- b) the permit fee fixed by the regulatory body.

### Requirements for permit

4. The regulatory body of the host Party may issue to an applicant a permit to act as a foreign legal consultant in that Party or in one of its internal jurisdictions, when satisfied that the applicant:

a) Good standing: is a member in good standing of a recognized legal profession, in the applicant's home Party or in one of its internal jurisdictions, the members of which:

- (i) are admitted to practise as lawyers, and
- (ii) are subject to effective regulation and discipline by a legally recognized body or public authority.

b) **Reciprocity:** where Mexico is the host Party, is a member in good standing of a recognized legal profession in a Canadian or American internal jurisdiction which permits lawyers from Mexico to act as foreign legal consultants in that jurisdiction according to rules, including rules respecting forms of association, substantially the same as or less restrictive than this Model Rule.

c) **Good character:** is of good character and reputation, including personal, professional and financial integrity and the mental and physical capacity to practise law, which is required of members of the legal profession in the host Party or internal jurisdiction.

d) **Previous practice experience:** if required by the regulatory body in the host Party, has for at least 5 of the 7 immediately preceding years, actively practised the law of the applicant's home Party.

e) **Liability insurance:** if required by the regulatory body in the host Party, has undertaken in writing to obtain, or possesses, professional liability insurance or a bond, indemnity or other security:

(i) in a form and amount reasonably comparable with that required of members of the regulatory body in the host Party, and

(ii) which specifically extends to services rendered by the foreign legal consultant while acting as such in the host Party.

f) **Defalcation coverage:** if required by the regulatory body in the host Party, participates in a program or carries a fidelity bond or other security in a form and amount satisfactory to the regulatory body in the host Party, for the purpose of reimbursing persons who suffer a pecuniary loss as a result of the misappropriation or wrongful conversion by the foreign legal consultant of money or other property entrusted to or received by the consultant in his or her capacity as a foreign legal consultant in the host Party.

g) **Submission to jurisdiction:** has undertaken in writing to:

(i) submit to the jurisdiction of the regulatory body in the host Party, including professional discipline in the same manner and to the same extent as lawyers of the host Party, and

(ii) comply with the laws, regulations, rules and professional ethical obligations imposed on foreign legal consultants and on lawyers in the host Party.

h) **Address:** has an address in the host Party, appropriate for the delivery of documents and for the service of legal process.

i) **Trust funds:** has, if required by the regulatory body in the host Party, undertaken in writing not to deal in any way with funds which would, if accepted, held, transferred or otherwise dealt with by a lawyer in the host Party, constitute trust funds.

j) **Change in status:** has undertaken in writing to notify the regulatory body in the host Party promptly if the applicant:

(i) ceases to comply with any of the requirements set out in subrules (a), (c), (e) or (f) of this Rule, or

(ii) fails to complete satisfactorily whatever continuing legal education program is required of lawyers of the applicant's home Party.

Legal staff

5. A foreign legal consultant may employ in the host Party a lawyer admitted to practise law in a Party other than the host Party who does not have the previous practice experience required by subrule 4(d), provided that he or she is not held out in the host Party as a foreign legal consultant and works under the supervision and control of the foreign legal consultant.

#### Scope of practice

6. A foreign legal consultant may practise and advise on the law of any country in which the foreign legal consultant is admitted to practise as a lawyer.

7. A foreign legal consultant may not represent a client in a court, in an administrative court, before a magistrate, before any other judicial officer or in a procedure before a public administrative body, except as may be permitted under the laws of the host Party.

8. A foreign legal consultant in the host Party is not precluded from:

- a) acting as an arbitrator or as counsel in an arbitration, or
- b) practising or advising on international law or third country law in the host Party if the foreign legal consultant is permitted to do so as a lawyer admitted to practise law in the home Party.

9. A foreign legal consultant may only practise or advise on the law of the host Party in the host Party, when and to the extent that he or she is permitted to do so by the host Party.

#### Forms of association

10. A foreign legal consultant in the host Party may be employed by:

- a) another foreign legal consultant who holds a permit issued by the host Party,
- b) a lawyer admitted to practise law in the host Party, or
- c) a law firm headquartered in the host Party.

11. A law firm headquartered in a home Party may establish itself in a host Party for the purpose of providing foreign legal consultancy services through one or more lawyers of that law firm, each of whom:

- a) holds a foreign legal consultant permit issued by the host Party, or
- b) is permitted to act as an employee under Rule 5.

12. A lawyer admitted to practise law in a home Party or a law firm headquartered in a home Party may, subject to the provisions applicable to the host Party as stated in Rules 15 or 16:

- a) employ in the host Party a lawyer admitted to practise law in the host Party, and



b) enter into a partnership or otherwise form a law firm with one or more lawyers admitted to practise law in the host Party or with a law firm headquartered in the host Party.

13. A law firm formed in conformity with Rule 12, as restricted by Rule 15, may employ a lawyer admitted to practise law in the host Party.

14. A law firm headquartered in a home Party may enter into any form of economic arrangement, other than a partnership, with a lawyer admitted to practise law in the host Party or with a law firm headquartered in the host Party.

15. When Mexico is the host Party:

a) subrule 12(a) shall not apply to permit employment of a lawyer admitted to practise law in Mexico by:

- (i) any lawyer who is not admitted to practise law in Mexico, or
- (ii) any law firm which does not comply with subrule (b) of this Rule.

b) subrule 12(b) shall not extend generally to lawyers who are not admitted to practise law in Mexico or to law firms headquartered in Canada or in the United States, but applies only if, in a law firm formed in conformity with subrule 12(b):

(i) all the partners or direct or indirect owners of the law firm either hold foreign legal consultant permits issued by Mexico or are admitted to practise law in Mexico,

(ii) the number of lawyers not admitted to practise law in Mexico who are partners or owners of, and their ownership interest in, the law firm does not exceed the number of lawyers admitted to practise law in Mexico who are partners or owners, and their ownership interest in that law firm, and

(iii) management of the law firm is at all times entrusted to partners admitted to practise law in Mexico.

16. A law firm headquartered in an American State or Mexico may, in a Canadian province or territory, do the things described in Rule 12 only if at least one partner is a member of the law society of, and is admitted to practise law in, that province or territory and does in fact practise law principally in that province or territory.

17. Where a law firm to which subrule 15(b)(ii) or Rule 16 applies, ceases to comply with the requirements of that provision the firm shall, within 3 months after the non-compliance occurs, comply with the requirements.

18. Nothing in Rules 10 to 17 shall be construed as prohibiting:

a) a lawyer, who is a partner in a law firm formed in conformity with Rule 12, from being at the same time a partner in a law firm headquartered in that lawyer's home Party,

b) a lawyer, who is admitted to practice in Mexico, whether or not the lawyer is a resident in Mexico, from being a partner in a law firm headquartered in Canada or in the United States, or

c) a foreign legal consultant, while in the host Party, from being an employee of, or an associate in the practice of law with, a lawyer or law firm in the

foreign legal consultant's home Party, according to the rules applicable in the home Party.

#### Marketing of foreign legal consultancy services

19. Except as permitted by the host Party, a foreign legal consultant, when engaging in any advertising or in any other form of marketing activity in the host Party:

a) must not state that he or she is authorized, by reason of status as a foreign legal consultant in the host Party, to practise or advise on international law or on third country law,

b) must not use any designation or make any representation from which a recipient might reasonably conclude that the foreign legal consultant is a lawyer qualified to practise the law of the host Party,

c) must use the term "foreign legal consultant",

d) must state the Party or internal jurisdiction in respect of which he or she holds professional legal qualifications, and the professional title used there, and

e) may use the name of the law firm and may make reference to any other economic arrangement referred to in Rules 10 to 18, with which the foreign legal consultant is affiliated.

#### Professional rights and duties

20. A foreign legal consultant enjoys the same professional rights, and has the same professional duties respecting client confidentiality, that apply to lawyers in the host Party.

#### Immigration

21. A permit issued under this Model Rule does not preclude the need for a foreign legal consultant to comply with applicable immigration requirements, and with visa requirements as set out in Chapter 16 of the NAFTA.

22. A foreign legal consultant is not required to be a citizen of a Party or a resident in the host Party.

23. A foreign legal consultant is not required to establish or maintain a representative office or any form of enterprise in the territory of the host Party.

#### Duration of permit

24. A permit issued under this Model Rule ceases to be valid if:

a) it expires,

b) it is revoked by the regulatory body of the host Party under the provisions of applicable law, or

c) the foreign legal consultant ceases to comply with any of the requirements set out in subrule 4(a), (b), (c), (e), (f) or (h) or deals in trust funds contrary to subrule 4(i).

#### Renewal of permit

25. A permit issued under this Model Rule is valid from the issue date shown on it until the last day of the same calendar month in the next year, or for such longer time as determined by the regulatory body in the host Party.

26. The regulatory body in the host Party may renew the permit of a foreign legal consultant, if satisfied that the consultant:

a) continues to comply with applicable host Party requirements consistent with this Model Rule, and

b) has paid the permit renewal fee fixed by the regulatory body in the host Party.

27. A foreign legal consultant practicing, or a law firm established, in a host Party shall, within 12 months after the competent authority of the Party implements these Model Rules, ensure that the consultant or the firm complies with these Model Rules.