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TASK FORCE ON

INTERNATIONAL LAW PRACTICE IN TEXAS

FINAL REPORT TO TEXAS SUPREME COURT

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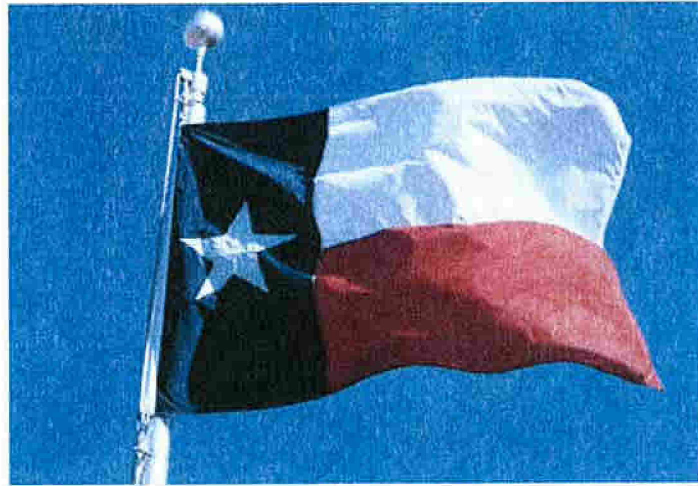

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I. Executive Summary

In August 2009, the Texas Supreme Court formed the Task Force on International Law Practice in Texas ("Task Force"). In its order appointing the Task Force, the Court recognized that the globalization of business and industry has led to an increasing need to review Texas' rules relating to the regulation of foreign-trained lawyers. The Court charged the Task Force with reviewing and recommending revisions to the rules for admission of foreign-trained lawyers as necessary to clarify the relevant issues, reflect recent developments in the law related to foreign-trained lawyers, and modernize existing criteria to meet the needs of international practice of law in Texas. The Court directed the Task Force to draft any proposed amendments to the rules governing admission to practice in Texas for consideration by the Court.

The Task Force members were drawn from a diverse cross section of the bar, and the Task Force was composed of lawyers from private law firms, in-house legal departments, academia, and representatives of the Texas Board of Law Examiners and Texas Unauthorized Practice of Law Committee.[1] The Task Force also had an English solicitor and a Brazilian lawyer (both of whom are dual licensed), offering additional cross-border insight and perspective. A member of the staff of the State Bar of Texas also participated.

[1] The members of the Task Force were Larry B. Pascal (Haynes and Boone, LLP, Dallas), Chair; Leland de la Garza (Shackelford, Melton and McKinley, LLP, Dallas), Vice-Chair; Julia Vaughan (Executive Director, Texas Board of Law Examiners, Austin), Eduardo R. Rodriguez (Rodriguez & Nicolas, L.L.P., and former President of the State Bar of Texas, Harlingen); Jill C.F. Atha (ExxonMobil Law Department, Houston); Joe A. Rudberg (Thompson & Knight, Dallas); Stephen D. Davis (Akin Gump, LLP, Houston); Albert C. Tan (Haynes and Boone, LLP, Dallas); Abel Martinez (HEB Corporation, San Antonio); Frederico P. Porto (BRFE, Sao Paulo); Ernesto Cisneros (Kemp Smith, El Paso); David Cibrian (Strasburger & Price, LLP San Antonio); and Professor Lawrence Sager (University of Texas School of Law, Austin). The Chairs would also like to acknowledge Josh Henslee (Director of Eligibility & Examination, Board of Law Examiners, Austin), Ray Cantu, (Director of Special Projects, State Bar of Texas Austin), Gabriel Salinas, Mayor Brown (Houston), and Jarom Yates of Haynes and Boone, LLP (Dallas) for their work for the Task Force.

1 The Task Force studied the issues in depth, including contacting licensing authorities in
2 other states and countries, holding discussions with the Texas Board of Law Examiners, the
3 Texas Unauthorized Practice of Law Committee, the State Bar of Texas, and a representative of
4 the United States Trade Representative, receiving presentations from legal scholars and
5 economists, and carrying out an in-depth study of the licensing schemes of other states and
6 countries and work by the American Bar Association ("ABA") on the subject.

7 The Task Force considered a variety of trends and developments affecting the practice of
8 law in Texas, such as globalization, changes in technology, the growing importance of foreign
9 investment and cross-border trade to the state, the convergence of legal systems, and
10 demographic changes.[2] The Task Force considered the large size of the Texas economy,[3] and its
11 dependence on cross-border trade, as well as the high level of competition for coveted cross-
12 border legal work, for which Texas firms compete with firms located in New York, Florida,
13 California, England, Australia, and elsewhere. The Task Force noted that the presence of cross-
14 border resources (and in particular foreign attorneys) is often an important consideration in
15 winning these coveted projects. In this context, the Task Force also noted that Texas' narrow
16 licensing regime currently impedes access to foreign-educated lawyers, sending them primarily
17 to New York for licensing. The Task Force also considered the educational impact of these
18 restrictive practice rules and the lost opportunity for law schools in this state to attract talented
19 foreign LL.M students. Such students currently do not consider the law schools in this state due

[2] In 2005, Texas became the fourth "majority-minority" state, with a minority population comprising 50.2% of its total population, according to U.S. Census Bureau population estimates. 2010 Census data also confirms that Hispanics are on pace to become the biggest ethnic group in Texas by 2015. See "Overview of the Texas Economy," dated August 2012, published by the Office of the Governor, Economic Development & Tourism found at www.TexasWideOpenForBusiness.com.
[3] According to the Texas Comptroller's 2011 estimates, if Texas were a nation, its economy would rank as the 14th largest in the world measured by gross domestic product (GDP).

1 to the restrictive bar application rules, impeding the state's ability to attract the best and the
2 brightest from around the world. Finally, the Task Force considered how foreign lawyers work,
3 their role in serving as legal, cultural, economic, and linguistic bridges to their home countries
4 and regions, and, the perhaps counter-intuitive effect, that the presence of these foreign attorneys
5 generates opportunities for the local bar, rather than depriving it of such.[4]

6 The Task Force unanimously recommends that Texas reform its international practice
7 rules in order to adjust to the changing market realities facing the state and thereby offer law
8 schools, law firms, and clients based in Texas greater access to international resources. The most
9 important areas to address are: (1) the ability of foreign lawyers to sit for the Texas Bar under
10 rules comparable to those used by New York and California (typically with an LL.M degree
11 from a U.S. law school), (2) greater curricular definition and requirements for LL.M graduates,
12 as generally contemplated in the draft ABA Model Rule, and as subsequently largely adopted by
13 the New York Bar in 2011, (3) the recognition of the ability to achieve admission to the Texas
14 Bar based on a Non-Resident F-1 student visa allowing for optional practical training ("Student
15 Visa"), as is common in New York, California, and other major states, (4) refinements to the
16 Texas foreign legal consultant rule to promote greater use of this rule, ensure appropriate access
17 to privileges and immunities, particularly by in-house counsel, and facilitate renewal for these
18 foreign attorneys, and (5) application of the Texas *pro hac vice* rule to foreign attorneys. This
19 report describes the study undertaken by the Task Force and contains its unanimous
20 recommendations for changes in Texas law along with explanations for those changes.

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[4] See for example the article entitled "Atlanta's International Arbitration Initiative" published in Global Atlanta, dated April 26, 2011, containing remarks by the former Chair of the International Law Section of the ABA, Glenn Hendrix, explaining how the Miami legal community benefits from international arbitration even for controversies with no connection to the state.

II. INTRODUCTION

1. Experience of Texas and Other States in Attracting Foreign-Educated Lawyers

Texas has historically fared very poorly in attracting foreign attorneys to take its bar exam, particularly when compared to New York, California, and even numerous smaller states. This is so notwithstanding Texas (i) is the largest exporting state in the country, (ii) has the second largest economy among U.S. states, (iii) has the greatest number of Fortune 500 company headquarters, (iv) shares a large border with Mexico, (v) has, in the Port of Houston, one of the most important ports in the country, and (vi) is a hub for the energy sector, one of the most global sectors of the economy. Moreover, despite Texas' position as a global leader in business and industry and the existence of numerous Texas law firms with strong international practices, in February 2012, only 9 foreign attorneys sat for the Texas bar exam. In contrast, 1,677 foreign-educated candidates, accounting for 42% of all candidates, sat for the February 2012 New York bar exam (as explained below, New York's summer bar exam draws an even greater number of foreign attorney applicants). From February 2003 to February 2012 (19 sittings), a total of 176 foreign attorneys sat for the Texas bar exam (average of 9 candidates per exam). Consequently, foreign attorneys working in Texas who obtain a U.S. law license are typically licensed in New York.

New York overwhelmingly is the market leader in both the cross-border legal market in the U.S. and in the number of foreign lawyers sitting for the bar exam. For example, the number of foreign lawyers sitting for a U.S. bar exam increased 43% from 2000 to 2007. New York received over 80% of these applicants, giving New York invaluable long-term personal relationships and commercial contacts. The New York Bar realized many years ago that the presence of foreign lawyers creates work opportunities for the local bar, rather than taking work

1 away. The New York Bar has a well-earned reputation for allowing foreign lawyers to sit for the
2 bar, inspiring trust and confidence in the foreign attorney community.

3 Nevertheless, New York has been reviewing the growth of foreign lawyers sitting for its
4 exam, and recently took some modest steps to reform its rule. In 2011, the New York Bar
5 increased the curricular requirements for the LL.M, but did not fundamentally change its
6 orientation in terms of foreign lawyer eligibility to sit for the New York bar exam. As a result,
7 we do not believe these changes will significantly weaken New York's position within the U.S.
8 as the most attractive market to become licensed as a foreign attorney.[5]

9 In July 2011, 4,427 foreign-educated candidates took the New York bar exam, a
10 significantly larger number than any other U.S. jurisdiction. California (which has a rule that is
11 even more open than New York, but was adopted after the New York rule) was second with 764
12 foreign candidates. The District of Columbia, Alabama and Virginia came next with 94, 65, and
13 38, respectively. Texas only had 22 foreign-educated candidates take its bar examination, which
14 was less than its much smaller neighbor, Louisiana (which had 29).

15 The Task Force believes that one of the main reasons these other states attract more
16 foreign applicants than Texas is their lack of a foreign practice requirement. In contrast, Texas
17 requires significant foreign legal experience before foreign-educated attorneys can even sit for
18 the bar exam, which is often difficult to meet or prove due to the need to request supporting

[5] We do not believe that if Texas were to adopt the proposed reforms that there would be a "tidal wave" of foreign lawyers applying immediately for the Texas Bar, given New York's well-earned reputation and "brand." However, we do believe the proposed reforms would be successful in attracting appropriate numbers of quality candidates. In the long-run, Texas may gradually approach California as the number two state in attracting foreign attorneys to sit for its bar and becoming licensed foreign legal consultants. We also believe these reforms would strengthen the international law programs for law schools in the state, attract more and a higher caliber of foreign attorneys to law schools in the state, enhance consumer choice and market competiveness and provide a more academically enriched environment for both these students and their U.S. counterparts. As discussed further below, the Task Force concurred with the curricular changes that are in the current New York rule and incorporated them into its recommendations.

1 documentation from past and present employers during the applicable period. Also, Texas
2 requires all foreign-educated attorneys to submit a certificate of good standing, issued by the
3 licensing body of their country of origin, as part of their application. Although this is a relatively
4 simple process in the U.S., in some countries, it is extremely difficult to obtain such a good
5 standing certificate, which can serve as a deterrent to even applying to take the Texas bar exam.[6]
6 In contrast, New York does not require a good standing certificate, but rather satisfactory proof
7 of the candidates' legal education.[7]

8 The New York Bar also does not require foreign-educated candidates to have any prior
9 experience, but rather only to have successfully completed twenty-four semester hours of law
10 school credit, including a basic introductory course in U.S. law at an approved law school in the
11 U.S. These educational requirements are usually completed while pursuing an LL.M degree.[8]
12 Finally, in contrast to Texas,[9] New York does not have a visa requirement for licensure.

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[6] In Mexico, for example, the licensing body for attorneys is the Ministry of Education, which is an agency of the executive branch. As a practical matter, any request made to this agency has to be processed in person (which is difficult when most candidates are studying in the U.S.). This process requires Mexican candidates to travel to Mexico to pay the fees, make the filing, and wait 20 business days for any response. The good standing certificate has to be personally picked up by candidates from the Ministry of Education. The filing fees and travel expenses are estimated to range between US$4,000 and US$5,000 between plane tickets (two round trip), hotel and meal expenses, official translations and apostilles, and bar application fees. While Texas has a discretionary "hardship" waiver mechanism for certain of its requirements, our view is that many foreign lawyers, facing this uncertainty and potential cost, elect the "safe" route instead and apply to take the New York bar exam.

[7] 22 NYCRR 520.6(b), entitled "Study of law in foreign country; required legal education."

[8] It is important to not overlook the amount of commitment required in applying for and attending an LL.M Program in the U.S. for a foreign attorney, ranging from compiling, translating, and certifying academic records, medical records, fulfilling immigration requirements to study on an F-1 visa (or otherwise to be authorized to enter and remain in the U.S.), and making the financial commitment in terms of tuition (often US$40,000 to US$50,000) and lost salary. These costs are even more relevant when considering that most foreign attorneys at the top local firms earn significantly less than their U.S. peers, although they tend to carry less student debt.

[9] Texas Rule II(a)(5) currently requires that an applicant be (a) a U.S. citizen, (b) a U.S. national, (c) an alien lawfully admitted for permanent residence (i.e. green card), or (d) an alien otherwise authorized to work lawfully in the United States. The Board of Law Examiners does not consider a Student Visa to qualify in this last category due to its optional practical training provision contemplating training rather than working independently as a professional and being limited to a one-year term.

1 Given the size of Texas' economy and the growing importance of the international sector, 2 it is clear that Texas is seriously underperforming in comparison with other states and not 3 drawing its fair share of foreign applicants, thereby resulting in an important loss of intellectual 4 capital. We believe this situation results in less cross-border economic opportunity for the state 5 and less choice for Texas consumers of cross-border legal services.

6 New York's licensing rules (referred to herein as the "New York Rule") represent best 7 current practice in this area, and we unanimously recommend that Texas adopt a substantially 8 similar[10] rule to improve its competitive position in an increasingly global economy. The New 9 York Rule is well known in the foreign lawyer community and enjoys a good reputation and 10 market acceptance.

11 The adoption of a rule similar to the New York Rule in Texas should also reduce the 12 Board of Law Examiners' workload by eliminating several burdensome tasks. Given Texas' 13 longstanding reputation as a "closed" jurisdiction for foreign candidates, we do not foresee an 14 immediate increase in applications in such a way that the existing resources of the Board of Law 15 Examiners would be strained.

16 **2. Existing Licensing Scheme for Foreign-Educated Lawyers**

17 **a. In General**

18 The National Conference of Bar Examiners ("NCBE") publishes a Comprehensive Guide 19 to Bar Admission Requirements ("Guide"), which contains a 50-state survey on licensing

[10] While broadly based on the New York Rule, the Task Force has recommended some enhancements which take into account New York's practical experience, best practices, and the proposed ABA Model Rule. That said, in general, the proposed Texas Rule XIII for admission of attorneys from other jurisdictions is slightly less open than the New York rule and in more instances requires that the foreign applicant be licensed in a foreign jurisdiction or another state than under the New York Rule. As to admission, the Task Force is only recommending changes as to the rules for eligibility to sit for the Texas Bar and not its waive-in or admission authorization rules. See further discussion as to competing policy considerations.

requirements and data regarding foreign lawyers. The 2012 Guide[11] reported the following information regarding the licensing requirements and bar examiners' experience:

1. Only four U.S. states (Arkansas, Connecticut, New Hampshire, and Rhode Island) impose a residency requirement. Only four states (Florida, Georgia, Ohio, and Utah) require proof of U.S. citizenship or immigration status.

2. 54% of U.S. states and the District of Columbia ("D.C.") permit graduates of foreign law schools to sit for the bar exam. States that do not accept a foreign law degree to establish eligibility to sit for the state's bar exam include Delaware, Georgia, and New Jersey.

3. 22% of U.S. states that permit a foreign law school graduate to sit for the bar exam require the applicant to have received an education in English common law.

4. 24% of U.S. states that permit a foreign law school graduate to sit for the bar exam require additional education at an ABA-approved law school.

5. 8% of U.S. states that permit a foreign law school graduate to sit for the bar exam permit the applicant to sit for the bar exam if the applicant obtains an LL.M or other graduate degree from an ABA-approved school. The states which permit applicants with LL.M degrees to sit for their bar exams are Alabama, California, New Hampshire, and New York.

6. 54% of U.S. states that permit a foreign law school graduate to sit for the bar exam require that the applicant have practiced law in the home jurisdiction before applying for licensure. As shown in the examples set forth below, the practice requirements vary:

State	Practiced law #	of last # years
Maine	3	3
Kentucky	3	5
Washington	3	5
New Mexico	4	6
Hawaii	5	6
Colorado	5	7
Connecticut	5	7

[11] See Chart 4 of the Guide, entitled "Eligibility to Take the Bar Examination: Foreign Law School Graduates," which has an excellent comparison of requirements for foreign attorneys to sit for the bar among US states and explanatory notes.

Illinois	5	7
Texas	5	7
Pennsylvania	5	8

7. 36% of U.S. states that permit a foreign law school graduate to sit for the bar exam require a determination that the foreign school's education is equivalent to a U.S. school's education. Only two states, Alabama and Massachusetts, recognize with regularity the sufficiency of a legal education received at a particular foreign law school.

8. The bar exam fees for attorneys in Texas are on the high side in comparison to other states, although recent increases in other states has made Texas relatively more competitive (*e.g.*, Texas - $1,040 / $1,140; California - $892.00; Florida - $1,600 - $3,000; New York $250.00 / $750.00).

9. 60% of states license or register foreign legal consultants.

The NCBE also publishes annual statistics on bar admissions in the U.S. The 2011 statistics reflect:

1. The average pass rate for bar applicants in the U.S. was 74%.

2. Texas' pass rate was 80%.

3. The pass rate of applicants who received an education outside of the U.S. is significantly lower than the pass rate of applicants who received an education at a U.S. ABA-approved law school:

(a) The average pass rate for graduates of ABA-approved schools was 74%.

(b) The average pass rate for graduates of foreign law schools was 30%.

4. 92% of all bar applicants who graduated from foreign law schools were concentrated in New York and California (New York – 4,427 applicants with a 33% pass rate; California – 764 applicants with 17% pass rate).

5. Texas had less than 1% of all bar applicants who graduated from foreign law schools (22 applicants with a 45% pass rate).

The NCBE also reported that in 2011, 91 Foreign Legal Consultants were newly registered in the U.S., with Florida having the highest number (47).[12]

[12] The 2011 Guide also lists California (3), D.C. (8), New York (23), and Texas (4).

b. Texas

i) Texas Rules Governing Admission of Attorneys

Texas' rule for foreign attorneys wishing to sit for the Texas Bar is captured primarily in Rule XIII, and is divided between applicants from civil law countries and common law countries. Rule XIII(b)(1) provides as follows:

> (1) a foreign nation attorney who has not completed the law study required under these Rules is eligible for an exemption from the law study requirement for admission to take the Texas Bar Examination without holding a J.D. degree from an approved law school if the attorney:
>
> (A) has been actively and substantially engaged in the lawful practice of law of said foreign nation in that nation or elsewhere as his/her principal business or occupation for at least five of the last seven years immediately preceding the filing of the most recent application or re-application, and such attorney;
>
> (B) has been licensed for at least five years to practice law in the highest court of the foreign nation;
>
> (C) holds the equivalent of a J.D. degree, not based on study by correspondence, from a law school accredited in the jurisdiction where it exists and which requires the equivalent of a three-year course of study that is the substantial equivalent of the legal education provided by an approved law school; and
>
> (D) meets one of the following criteria:
>
> (i) demonstrates to the Board that the law of such foreign nation is sufficiently comparable to the law of Texas that, in the judgment of the Board, it enables the foreign attorney to become a competent attorney in Texas without additional formal legal education; or
>
> (ii) holds an LL.M from an approved law school.

In addition, Rule XIII(b)(2), designed for applicants from common law jurisdictions, provides as follows:

> (2) a foreign nation attorney who has not completed the law study required under these Rules is eligible for an exemption from the law study requirement for admission to take the Texas Bar Examination, without holding a J.D. degree from an approved law school if the attorney:

1 (A) has been actively and substantially engaged in the lawful practice of law of said foreign nation in that nation or elsewhere as his/her principal business or occupation for at least three of the last five years immediately preceding the filing of the most recent application or re-application, and such attorney:

(B) has been licensed for at least three years to practice law in the highest court of the foreign nation;

(C) holds the equivalent of a J.D. degree, not based on study by correspondence, from a law school accredited in the jurisdiction where it exists and which requires the equivalent of a three-year course of study that is the substantial equivalent of the legal education provided by an approved law school;

(D) demonstrates to the Board that the law of such foreign nation is sufficiently comparable to the law of Texas that, in the judgment of the Board, it enables the foreign attorney to become a competent attorney in Texas without additional formal legal education; and

(E) holds an LL.M from an approved law school.[13]

ii) First Generation Reforms

In 2005, the Texas Supreme Court adopted important reforms pertaining to the licensing of foreign lawyers, primarily in the area of foreign legal consultants ("FLCs").[14] This first set of reforms (i) modernized the FLC Rule XIV so that it was based on the ABA Model Rule on Foreign Legal Consultants (albeit with some relatively minor changes), (ii) updated the foreign practice requirements under both the FLC Rule XIV and Rule XIII of the Rules Governing Admission to allow for such requirements to be fulfilled regardless of the locale where the

[13] Rule XIII(c)(2) defines "practice of law" to include: (A) private practice as a sole practitioner or for a law firm, legal services office, legal clinic, public agency, or similar entity; (B) practice as an attorney for an individual, a corporation, partnership, trust, or other entity, with the primary duties of furnishing legal counsel and advice, drafting and interpreting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, departments of government or administrative agencies; (C) practice as an attorney for local, state, or federal government, with the same primary duties described in the preceding subsection; (D) employment as a judge, magistrate, referee, or similar official for the local, state, or federal government, provided that such employment is open only to licensed attorneys; (E) employment as a full-time teacher of law at a law school approved by the American Bar Association; (F) any combination of the preceding categories.

[14] The Chair would like to acknowledge former State Bar of Texas President Kelly Frels for his hard work in connection with the First Generation Reforms.

1 services are being performed[15] (to better reflect changes in law practice prompted by changes in
2 technology and globalization), (iii) reduced the practice requirement for FLCs from five out of
3 the last seven years to three out of the last five years, (iv) clarified the ability of foreign lawyers
4 to associate with Texas lawyers, (v) gave greater certainty as to the eligibility of FLCs to have
5 their communications treated as subject to applicable privileges, (vi) subjected FLCs to the
6 MCLE regime and Texas professional rules and regulations, and (vii) advanced the public policy
7 goal of enhanced transparency and registration for foreign lawyers who previously had no
8 opportunity to participate in the Texas legal system from a registration perspective (collectively,
9 the "First Generation Reforms"). The First Generation Reforms succeeded in raising awareness
10 in the state of cross-border licensing issues, and the number of registered FLCs increased to
11 some degree.[16]

12 However, with the exception of the practice requirement, the First Generation Reforms
13 did not address the eligibility of foreign-educated lawyers to sit for the Texas Bar. Most foreign
14 lawyers who come to the U.S. to take an LL.M course of study and work in the United States
15 (typically for one year before returning home) prefer to sit for a bar exam, rather than register as
16 an FLC. This is due to the significantly greater recognition and prestige in their home markets
17 associated with being a U.S. licensed attorney. The need for modernization of Rule XIII remains
18 an important area of focus for Texas.

19 Texas currently has 21 registered FLCs, with the vast majority residing in Houston,
20 comprising attorneys licensed in seven countries - Mexico, Argentina, United Kingdom,

[15] See current Texas Rule XIV (1) (b) which stipulates that the practice requirement covers the "... lawful practice of law of the said foreign country in that country or elsewhere."

[16] See the discussion later in this report as to additional reforms proposed by this Task Force to enhance the use and application of the FLC Rule, in particular by increasing its availability to in-house counsel and otherwise facilitating application and renewal.

Colombia, Venezuela, Spain, and Greece. However, due to the burdensome nature of the current application and renewal process,[17] as well as the limited scope the current rule provides to address the needs of in-house counsel, there is potential to increase the use of the FLC Rule in Texas. This would promote transparency in the market and increase the access of these foreign attorney resources to Texas consumers of cross-border legal services.

c. New York

i) New York Rule 520.6

Section 520.6 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law (22 NYCRR 520.6) contains the eligibility requirements for applicants who wish to sit for the New York bar exam based on the study of law in a foreign country. The New York Rule is focused on the legal education of the foreign applicant and does not impose licensing or practice requirements on civil law applicants.[18] Rule 520.6(b)(1) (under which most applicants apply) has four major eligibility requirements:

(1) "Qualifying degree (520.6[b][1]). The foreign educated applicant must have fulfilled the educational requirements for admission to the practice of law in a foreign country other than the United States. The applicant must have a qualifying degree, which must be a law degree.

(2) Accreditation (520.6[b][1]). The qualifying degree must be from a law school or schools recognized by a competent accrediting agency of the government of the foreign country and must be deemed qualified and approved.

[17] Foreign attorneys working in the state also note that the application process to become a FLC in Texas is more burdensome than that required to sit for the NY Bar, judged by the size of the application package and the implicated hours of preparation required to submit the application, the ongoing challenges posed by the de novo renewal process, and the high application and renewal fees, which are among the highest in the country.

[18] See Section 520.6, entitled "Study of law in foreign country; required legal education. (a) General. An applicant who has studied in a foreign country may qualify to take the New York State bar examination by submitting to the New York State Board of Law Examiners satisfactory proof of the legal education required by this section." Note, however, Section 520.6 (b) (2) by which being admitted to practice law in a country other than the United States whose jurisprudence is based on principles of English Common Law, may be an element to cure a defect as to durational equivalency.

(3) Durational Equivalence (520.6[b][1][i][a]). The applicant's period of law study must be "substantially" equivalent in duration to a full-time or part-time program required at a law school in the United States approved by the American Bar Association (ABA) and in substantial compliance with the instructional and academic calendar requirements of Section 520.3 (c) (1) (i) and (ii) and 520.3 (d) (2).[19]

(4) Substantial Equivalence (520.3[b][1][i][b]). The foreign country's jurisprudence must be based upon the principles of the English Common Law, and the "program and course of law study" successfully completed by the applicant must be the "substantial" equivalent of the legal education provided by an ABA-approved law school in the United States."[20]

For applicants educated in a non-common law jurisdiction (*e.g.* civil law), substantial equivalence can be "cured" by completing an LL.M degree from an ABA approved law school. This mechanism may cure an education that is either durationally or substantively deficient, but not both.[21]

Rule 520.6 offers three different routes for common law applicants to become eligible to sit for the New York bar exam but only one route for civil law applicants as follows:

(1) Common Law candidates educated at recognized foreign law schools whose education has durational and substantive equivalence with U.S. approved law schools[22]

(2) Common Law candidates educated at recognized foreign law schools whose foreign education has substantive but not durational equivalence but who have obtained an approved LL.M

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[19] These sections entitled "Study of Law in Law School," address instructional requirements, including minimum credit hours and minutes of instruction and course of study and academic calendar (e.g. minimum class days in an academic year and minimum of instruction time). As a practical matter, this definition has not been exactly replicated by the Task Force in its recommendations for Texas as many foreign jurisdictions do not measure credit hours and class room minutes in the same way as U.S. law schools. Instead, the current Texas requirement for three years law study is preserved as the recommended duration.

[20] See New York Board of Law Examiners website under the "Foreign Legal Education" page.

[21] See New York Rule 520.6(b)(ii).

[22] The Task Force elected to propose a similar rule for this route, but added a practice requirement of three of the last five years. In general, the Task Force concluded that practice requirements inhibited the licensing of foreign attorneys, but in this instance felt it was an appropriate tool for the specific route.

(3) Common Law candidates educated at recognized foreign law schools whose education has durational but not substantive equivalence but who have obtained an approved LL.M

(4) Civil Law candidates educated at recognized foreign law schools whose education has durational equivalence but who have obtained an approved LL.M

These routes are shown in comparison to the Task Force's recommendations for Texas in Annex 22.

In April 2011, New York amended its rule for foreign lawyers seeking to sit for its bar exam, borrowing heavily from the LL.M requirements of the draft ABA Model Rule in this area.[23] Under amended rule 520.6, new requirements included completing: (a) a minimum of 24 semester hours of an LL.M program, (b) two hours of professional responsibility coursework, (c) two hours in legal research, writing, and analysis, (d) two hours in American legal studies, and (e) at least six hours in subjects tested on the New York bar exam. As part of this reform, New York also restricted hours for clinical courses and other courses related to legal training or courses offered in a dual degree program (maximum of four hours and six hours, respectively).

A chart summarizing the current New York Bar LL.M requirements is set forth on Annex 20.

The Task Force concluded that the New York Bar's new curriculum requirements were preferable (for the needs of Texas) to the ABA Model Rule for a variety of reasons, including the graduate nature of legal studies for foreign students, the need to give students the chance to specialize, and the need to be competitive with New York and attract more of world's "best and brightest" to Texas.

[23] See order dated April 27, 2011 of the New York Court of Appeals.

1 ii) **California and Other Jurisdictions**

2 Although New York is the dominant state for foreign lawyer licensing, the Task Force
3 examined several jurisdictions, foreign and domestic, for their approach to licensing foreign
4 lawyers. California permits licensed foreign lawyers to sit for the bar exam, with the completion
5 of an LL.M degree in the U.S. from an ABA-approved law school (or otherwise complete one
6 year of study at an ABA-approved or California-accredited law school, which includes certain
7 credits in bar examination courses). Every foreign law graduate must complete an entire year of
8 law study at an approved law school in the U.S., except those who are admitted to practice in
9 their home country, for whom no additional U.S. study is required.[24] There are eighteen ABA-
10 approved law schools in California that offer an LL.M program for foreign lawyers (out of 21
11 ABA-approved law schools in the state), significantly more than Texas, giving California a
12 distinct advantage in terms of fostering long-term cultural and commercial ties with foreign
13 countries in the legal marketplace.

14 Despite its strong ties to Latin America, Florida's licensing approach is more restrictive,
15 compared to New York and California. Florida requires foreign lawyers to have 10 years of
16 active practice in another U.S. jurisdiction in which the applicant has been duly admitted, in
17 which case the applicant may file a representative compilation of work product for evaluation by
18 the board.[25]

19 Other countries have also adopted some form of foreign attorney licensing. For example,
20 European Union countries, as part of their market integration efforts, have adopted rules

[24] See National Conference of Bar Examiners, 2012 Comparative Guide, chart 4 entitled "Eligibility to take the Bar Examination: Foreign Law School Graduates (supplemental remarks).
[25] See National Conference of Bar Examiners, 2012 Comparative Guide, Chart 4 entitled "Eligibility to take the Bar Examination: Foreign Law School Graduates (supplemental remarks).

facilitating the movement and practice of foreign lawyers from other EU Member States via a relatively easy registration process, which enhances FLC practice by such individuals.

England (and in particular London) remains the premier international legal market in Europe (and arguably the world) and has one of the most open licensing regimes for foreign lawyers. In September 2010, the Law Society of England and Wales adopted a fast-track route for foreign qualified lawyers to become admitted as solicitors of England and Wales. The Qualified Lawyers Transfer Scheme ("QLTS") covers lawyers from approximately 80 foreign countries[26] and 27 U.S. states.[27] The QLTS process is administered by the Solicitors Regulation Authority. Under the QLTS, lawyers are eligible to apply to become a solicitor if they:

(1) are a qualified lawyer in a recognized jurisdiction;[28]
(2) have followed the full route to qualification in the recognized jurisdiction;
(3) are entitled to practice as a qualified lawyer in a recognized jurisdiction;
(4) have satisfied any applicable English language requirement;
(5) are of the character and suitability to be admitted as a solicitor; and
(6) take and pass specially designed assessments of legal skills.

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[26] Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Bangladesh, Brazil, Bulgaria, Cameroon Republic, Canada (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Province of Ontario, Quebec, Saskatchewan, Yukon), Colombia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Gibraltar, Greece, Hong Kong, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Kenya, Korean Republic, Latvia, Lichtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mauritius, Mexico, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Northern Ireland, Norway, Oman, Pakistan, Panama, China, Philippines, Poland, Portugal, Puerto Rico, Romania, Russian Federation, Rwanda, Scotland, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Tanzania, Thailand, Turkey, Uganda, Uzbekistan, Venezuela, Zambia, and Zimbabwe.

[27] Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New York State, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wisconsin.

[28] A "recognized jurisdiction" is one where: (1) the professional qualification requires completion of specific education and training at a level that is at least equivalent to that of an English or Welsh bachelor's degree; (2) members of the profession are bound by an ethical code that requires them to act without conflicts of interest and to respect their clients' interests and confidentiality, and (3) members of the profession are subject to disciplinary sanctions for breach of their ethical code, including the removal of the right to practice.

3. ABA Response to Licensing Foreign-Educated Lawyers

a. ABA Model Rule

In July 2009, the Special Committee on International Issues of the ABA's Section of Legal Education and Admissions to the Bar (the "Section") issued a report recommending consideration of a model rule for admitting foreign law graduates. A standing committee on International Legal Education was created to draft a model rule that would address the admission of foreign lawyers to practice law or sit for bar examinations in U.S. jurisdictions.

In March 2011, the Section released a report and model rule (the "Model Rule") focusing on the criteria for an LL.M program designed to qualify foreign lawyers to take the bar exam and practice in the U.S. The Model Rule focuses on three main areas: (i) requirements for foreign-educated lawyers to take the bar examination; (ii) the meaning of "authorized" practice of law; and (iii) certification of LL.M programs (including new curricular requirements).

The Model Rule establishes a three part eligibility test for a foreign-educated lawyer to sit for the bar exam:

1. a law degree from a sanctioned or approved law school within the foreign jurisdiction;
2. authorization to practice law in a foreign jurisdiction; and
3. an approved LL.M degree with specific curricular requirements.

In general, these requirements are consistent with the requirements the Task Force is proposing. The only exception is the Task Force's recommended curricular requirements for LL.M graduates, which models the New York Rule.

As used in the Model Rule, the word "authorized" means that the "applicant has achieved the ability to engage in activities which would be recognized in the United States as the practice of law." The Model Rule states that foreign jurisdictions vary in the ways lawyers are authorized

to practice law and the labels associated with such authorization. The objective of this definition is to insure that the "applicant can, in his or her own country, engage in the activities which are generally considered the practice of law in the United States."

The Model Rule establishes an LL.M "certification" process that requires the particular law school offering the LL.M program to certify that the applicant:

1. was awarded an LL.M for the Practice of Law in the United States;

2. that the requirements of the LL.M were certified by the ABA Council as meeting the criteria to qualify the foreign-educated lawyer to sit for a bar examination; and

3. that the applicant received his or her foreign law degree at a foreign law school which is sanctioned or recognized in that foreign jurisdiction by the appropriate authorities.

Under the Model Rule, an LL.M Program for the Practice of Law in the United States must meet specific curricular requirements, which are mainly the following:

1. the LL.M degree is awarded by an approved law school;

2. the LL.M degree prepares students for admission to the bar and for responsible practice;

3. a total of 26 credit hours:

    a. 17 credit hours in U.S. law;
    b. 3 hours in Constitutional law;
    c. 3 hours in Federal/state civil procedure;
    d. 2 hours in Professional responsibility;
    e. 2 hours in Legal writing 1 analysis/research; and
    f. 18 of 26 credit hours must be taught by full-time or emeritus faculty;

4. the LL.M may be completed as a full or part-time program with the part time program being completed within 36 months, taught in English, and in the US or its territories; and

5. website disclosure of its LL.M first-time Bar passage rate by state.

These new requirements represent a significant departure from established LL.M programs and could pose some unforeseen obstacles for foreign candidates. The required number of credit hours was increased to 26 credit hours, yet LL.M students typically complete

only 22 to 24 credits. For some LL.M programs it is not possible to complete more than 24 credits. Furthermore, some LL.M programs give students the option to complete a long thesis paper for credit, which is not considered under the Model Rule for credit hour purposes.

Also, LL.M programs (like their J.D. counterparts) tend to have adjunct professors among their faculty, yet the Model Rule requires that 18 of 26 credit hours be taught by full-time or emeritus faculty. This could represent a significant obstacle subjecting LL.M candidates to the whims of sabbatical schedules and other factors outside of their control. Similarly, requiring very specific subjects such as Constitutional Law and Civil Procedure can be a limiting factor, as most LL.M candidates would prefer to focus on subjects closer to their typically commercially oriented practice. These above-mentioned subjects will, of course, be studied in the context of preparation for the Texas Bar examination in any event. Finally, it remains to be seen if the ABA law school certification process is accepted. New York's recent changes to Rule 520.6 did not adopt this aspect and the Task Force has not recommended it.

b. ABA Commission on Ethics 20/20 report on Inbound Foreign Lawyer Issues

The ABA Commission on Ethics 20/20 has released several proposals relating to inbound foreign lawyers. The proposals focus on three issues: (a) the ability of foreign lawyers to apply to appear in a state court *pro hac vice* (with the participation of a licensed local lawyer), (b) registration of foreign lawyers practicing in-house in the U.S.; and (c) temporary practice rules for foreign lawyers (FIFO). The Task Force agreed with the concept of granting foreign lawyers the right to appear *pro hac vice* in a Texas court, finding that there are adequate protections for the public. However, the Task Force did not adopt the other two concepts proposed by this Commission. Neither the registration of in-house lawyers nor the temporary practice rule has been adopted in Texas on a domestic level, and the Task Force chose not to make a

1 recommendation in an area where domestic practice had not been well established. However, the
2 Task Force did address in-house needs in the context of its recommendations for the FLC Rule.

3 **4. Graduate Legal Education in U.S. for Foreign-Educated Lawyers**

4 **a. Overview**

5 The number of foreign lawyers attending graduate legal education programs in the U.S.
6 has increased over the last fifteen years, as has the number of such programs offered by U.S. law
7 schools. The ABA reported that 5,531 graduate law degrees were awarded in 2010 (to both US
8 and foreign candidates), a significant increase from the 3,816 such degrees awarded in 2005.
9 Foreign lawyers are eligible to enroll in graduate legal programs at more than 105 U.S. law
10 schools -- approximately half of the schools that offer graduate legal education programs. The
11 number of schools with programs available to foreign lawyers increased by more than 50%
12 between 1998 and 2003, and has continued to increase since then. Most schools offer multiple
13 programs, with some programs open only to foreign students and others open to foreign and
14 U.S.-educated lawyers. Approximately one-third of the schools with programs available to
15 foreign lawyers are public institutions.

16 Law schools offering graduate programs for foreign lawyers range across the spectrum of
17 school rankings by *U.S. News and World Report*, which does not rank the graduate programs
18 themselves. Most of the schools with a large enrollment of foreign lawyers are located in major
19 metropolitan areas (*e.g.* New York, Washington D.C., Chicago, Los Angeles, etc.).

20 **b. Texas Law Schools**

21 Five Texas law schools presently offer LL.M degree programs in United States Legal
22 Studies to foreign lawyers: University of Houston, Southern Methodist University, St. Mary's

University, the University of Texas at Austin, and Texas Tech University.[29] The foreign law graduate enrollment in these programs currently is about 130 annually. The schools formally separate, but functionally integrate, foreign-educated and U.S.-educated students, with LL.M students attending most classes together with J.D. students.

Most of the Texas schools offer a general course of graduate legal study in which students sample a broad range of subjects, with some schools restricting enrollment in this general program to foreign-educated students. Most schools also offer certificate programs in specialized areas of the law, available to all students. All of the Texas programs require twenty-four (24) credit hours for the LL.M degree.

c. New York Law Schools

Thirteen law schools in New York offer the LL.M degree, with eight of the schools located in the New York City metropolitan area. Many of these programs are considerably larger than the programs offered in Texas – Columbia typically enrolls approximately 225 LL.M students and New York University enrolls approximately 425 LL.M students annually.

d. General Information

LL.M programs tend to be both rigorous (particularly in the top ABA approved schools) and expensive, particularly for foreign lawyers. Upper-level law school classes are often challenging, and foreign students without prior training in the U.S. legal system and for whom English is not their first language tend to find the work time-consuming and difficult. Tuition rates have steadily risen at law schools across the country over the last decade, and the cost of an LL.M degree is significant at both public and private institutions. For purposes of tuition, foreign students are generally "non-residents" and hence pay the highest tuition rates at public

[29] Texas Tech has recently inaugurated their LL.M program.

1 institutions. The combination of the challenging workload, the tuition levels, and the strong
2 enrollment by U.S.-educated lawyers make it unlikely that LL.M programs could be reasonably
3 considered as "foreign degree factories."

4 As a result of a delegation of authority from the U.S. Department of Education, the ABA
5 is responsible for accrediting law schools in the U.S. The ABA does not evaluate or accredit
6 LL.M programs, although it does require that non-J.D. degree programs not detract from a law
7 school's ability to maintain a J.D. degree program under the ABA Standards and Rules of
8 Procedures for Approval of Law Schools.

9 **e. Development of Specialized LL.M Programs**

10 In recent years, many law schools with LL.M programs have begun to offer students the
11 opportunity to pursue a specialized course of study and receive a certificate or degree in that
12 specialty. For example, in 2009 the University of Texas School of Law[30] created a specialized
13 program in energy, international arbitration and environmental law. Thirty-three students are
14 currently enrolled, and interest among students is steadily increasing. The students come from
15 all over the world: China, Europe, Australia, Africa, Mexico, and South America. Demand for
16 the program is particularly strong among students interested in energy law, because of Texas'
17 and UT's strong international reputation in the energy area. The law school offers a number of
18 energy-related courses, as well as interdisciplinary energy and environmental courses for law
19 students and graduate students in business, engineering, public policy, and science.[31]

[30] The University of Texas School of Law has also joined with the prestigious Mexican law school "Institute Tecnológico Autónomo de México" ("ITAM") to offer a dual degree program whereby, with four years of study, students will earn a U.S. JD degree and the Mexican law equivalent. See heading entitled "UT Law-ITAM Joint Degree Program" at www.utexas.edu/law/admissions.

[31] In March 2012, the University of Houston Law School announced a joint international energy law program with the University of Calgary whereby students will be allowed to obtain U.S. and Canadian law degrees in four years. The International Energy Lawyers Program will focus on preparing students to practice natural resources, energy

1 The Task Force unanimously recommends leaving U.S. law schools the curriculum flexibility necessary to allow students to pursue a specialized course of study. These new international programs conveys that the legal education sector accepts and even embraces the changes brought by globalization and highlight the need to modernize the Texas regulatory regime to keep pace.

5. Rationale for Revising Texas Regulatory Scheme

a. Globalization of Business

People around the world are more connected than ever before and information and money move from country to country very quickly. Technological advances have made it easier for people to travel, communicate, and do business internationally. As a result, the economies of many countries have become more interconnected and cross-border trade and investment has grown substantially in recent years.

Large corporations compete on a worldwide scale, and for many their main growth markets are outside their home countries. Moreover, American multinationals no longer enjoy the same competitive advantages they once had. Companies from emerging markets are increasingly able to compete effectively (as evidenced by, among other transactions, the

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and environmental law. Students will spend two years at each law school and will be eligible to receive American and Canadian JD degrees and will be eligible to sit for bar exams in both countries upon graduation. The program will commence in the fall of 2012. According to the Dean of the University of Houston, Raymond Nimmer, the curriculum will be flexible, with students taking certain core classes, but permitting numerous electives to enable students to pursue specialization of interest. Students will have to be admitted to both programs and enrollment is expected to be 5-10 students per year. See National Law Journal article entitled "U.S.-Canadian Joint Degree Program Will Focus on Energy Law," dated March 5, 2012. See also website of the University of Houston Law Center under the article entitled "University of Houston Law Center and University of Calgary launch joint program in International Energy Law." The National Law Journal article also cites a joint program between the University of Colorado Law School and the University of Alberta Faculty of Law. For more information on the University of Colorado program with Alberta, Faculty of Law, see www.colorado.edu/law/centers under the heading Dual Degree & Certificate Programs.

acquisition of the American icon Anheuser Busch, brewer of Budweiser, by the Brazilian/Belgian-controlled InBev Group).

Businesses big and small[32] are leading the charge towards a global business model. As large companies stake out new territories abroad (both for markets and human resources), smaller companies are taking advantage of the internet and enhanced communication media to open new markets previously unavailable to small business. Big brand-name companies, such as GE, have been developing customers and employees overseas. In 2000, 30% of GE's business was overseas; today, that number is 60%. In 2000, 46% of GE's employees were overseas; today, 54% are overseas. Oracle and Cisco Systems have both reported that at the end of 2010, they had more workers abroad than in the U.S.

b. Globalization of the Practice of Law

Globalization and other trends are profoundly impacting the practice of international law in the United States.

The practice of law, which at first glance seems to be highly localized and dependent on local expertise, has not been immune from this flattening trend. Robust technological information systems have made international legal systems, including that of Texas, location-neutral. The laws of most significant jurisdictions are now available online, facilitating international competition for legal services. Attorneys in India, for example, now compete with U.S. law firms for labor-intensive projects such as reviewing and cataloguing massive numbers

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[32] One should not assume that international commerce is the exclusive domain of large companies or that small and medium-sized enterprises (SMEs) are not taking advantage of these developments as well. According to the US Census Bureau, firms with fewer than 500 employees steadily increased their share of overall US goods exports from 27% in 2002 to 34% in 2010. In addition, in 2010, 293,000 companies were exporting, up from 276,000 in the prior year. See article dated May 17, 2012, entitled "Secretary Bryson Awards Presidential Export Honors to U.S. Exporters, including 35 Small or Medium Sized Enterprises," found on US Department of Commerce website at www.commerce.gov. Moreover, more than 90% of Texas exporters are small businesses. See www.Texaswideopenforbusiness.com/small-business/trade.php.

1 of documents produced in litigation. Given that emails and other electronic records now
2 constitute documents that must be produced and reviewed, client need for cost-effective service
3 delivery has increased significantly, as has the ease of remote review of documents. Travel
4 industry trends have also impacted, and will continue to impact, Texas' role in international
5 commerce as international travel to and from Texas continues to increase. For example, Texas
6 airports (primarily Houston George Bush and DFW) currently offer non-stop air service to
7 countries in Latin America, Europe, Asia Pacific, the Middle East, and Africa. Finally, for a
8 variety of reasons discussed below, legal systems are converging.

9 In July 2011, the United States International Trade Commission ("ITC") published a
10 report entitled "Recent Trends in U.S. Services Trade: 2011 Annual Report" (the "ITC Report"),
11 which focuses principally on exports and imports of professional and other related services,
12 including, but not limited to, legal services. The ITC Report generally notes that "professional
13 service industries" showed more resilience during the recent economic recession than the
14 "infrastructure industries" such as telecommunications, banking and logistics. As a result, the
15 ITC Report concludes, "the United States kept a surplus in cross-border trade in professional
16 services in 2009 and remained competitive in the sale of services through foreign affiliates."[33]

17 The ITC Report states that "legal services are a key input to international commerce:
18 they facilitate trade and investment by increasing predictability and decreasing risk in business
19 transactions." The Report also notes that the increase in global demand for U.S. legal services is
20 "largely attributed" to increased international trade and capital flows and that, although the
21 global legal services industry experienced a slowdown in 2009, the United States "sustained

[33] This statement acknowledges that services may be rendered by a U.S. law firm in the form of cross-border commerce, or via a subsidiary or affiliate based abroad.

1 growth in its cross-border trade surplus in legal services." According to the Report, in 2008
2 U.S.-related affiliate transactions showed a surplus (sales exceeded purchases) and in 2009
3 global legal services had revenues in the amount of $546.8 billion, about half of which is
4 attributed to U.S. law firms.

5 Foreign lawyers who obtain a U.S. law license often work collaboratively to bridge the
6 gap between the legal culture of the U.S. and that of their home country. Although these lawyers
7 may often hold a New York law license, as a practical matter, given the market reality of
8 increasing specialization, they typically do not practice U.S. law and hence they rarely act as the
9 sole source for definitive U.S. law advice (although they of course must be familiar with U.S.
10 legal concepts, and their frequent application in an extra-territorial capacity).[34] U.S. law firms
11 also rarely use foreign lawyers for definitive legal advice under their home country license (with
12 the exception of very ordinary course matters). Nevertheless, due to vast differences between
13 both legal and business cultures and the effects of growing cross-border trade and investment,
14 the importance of foreign lawyers has grown. U.S. clients need input for planning purposes, and
15 the immediacy of in-person meetings and real time access has proven to be a strong allure for
16 both US clients and US law firms serving those clients. Moreover, the presence of a foreign-
17 licensed attorney on the payroll of a U.S. law firm can prove to be a very critical component for
18 clients when deciding who to retain (along with other considerations, such as level of experience
19 for the type of work being contemplated, the specific team, the presence of a local office in the
20 foreign country, and foreign language ability, among others).

[34] The U.S., more than most countries, has been prepared to extend its law in an extra-territorial fashion, and this may partially explain (although not completely) the growth of foreign lawyers in the U.S. who are capable of applying and reconciling their home country law and U.S. law principles.

1 Another important factor is the trend to hire U.S. and international law firms for complex
2 projects (*e.g.* an infrastructure project in a foreign country). In these growing instances, both
3 U.S. and foreign clients will often hire U.S. or other international counsel for their market
4 knowledge, legal sophistication and industry expertise (*e.g.* familiarity with oil and gas
5 contracting using the AIPN form agreements). These complex projects often involve multi-
6 lingual transaction documents, governed by the laws of more than one jurisdiction. Use of dual-
7 qualified lawyers in support of these projects enhances a law firm's ability to meet their client's
8 needs, broadens the reach of the firm's established expertize and allows them to compete in the
9 global market place with other international law firms.

10 Other tasks that foreign or dual licensed lawyers handle include attending client
11 meetings, providing legal translations and interpretation services, often times in negotiation
12 settings, where non-lawyer translation services are inadequate or otherwise not available, and
13 coordination of work with foreign counsel abroad (often times building on their enhanced
14 knowledge of and relationship with law firms in their home country).

15

16 **c. Increasing Importance of English Law in International Commerce**

17 By some accounts, English law is supplanting New York law as the most important body
18 of commercial law for cross-border transactions. This gradual but steady trend is reflected in the
19 growth of London as an international center for capital markets activity, the opening of foreign
20 offices by English law firms (often ahead of their New York peers), the promotion of English
21 law abroad by these firms, the relative decline of New York as a destination for listing by foreign
22 companies on the NYSE (perhaps influenced by the more restrictive post-Enron reforms of the
23 Sarbanes-Oxley Act), the growth of international arbitration in London, and other factors. Texas
24 law firms that routinely compete for international work outside this hemisphere must

demonstrate sufficient English law capabilities to win projects, placing a greater importance on having English law resources both in their Texas offices and abroad.

d. International Arbitration and Cross-Border Litigation

It is not surprising that, with increased cross-border trade and investment, comes a greater need for capabilities in cross-border litigation and international arbitration. The Task Force identified increasing convergence among different legal systems.[35] Such convergence has made it easier for international arbitration to grow its appeal as a more neutral venue for resolving cross-border disputes. Over 140 countries have ratified the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), thereby facilitating the enforcement of international arbitration. In contrast, the U.S. has no international treaty on the enforcement of court judgments. Texas, with its large number of Fortune 500 corporate headquarters and concentration of energy companies, is well positioned to compete in the international arbitration market. In particular, Houston has earned a reputation as an international arbitration center for oil and gas matters, and the Houston International Arbitration Club has approximately 40 members in its organization.[36] The leading cities for international arbitration in the U.S. are New York, Miami, and Houston, although Atlanta has recently launched an international arbitration initiative.[37]

6. Role of International Commerce in the Texas Economy

By many measures, Texas is a leader in international commerce. Texas leads the country in export revenue, exceeding $251 billion in 2011, up 21.2% from the 2010 level. The state's

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[35] The factors contributing to these convergences are many and include the growth of treaty law, the growth of international arbitration, changes in technology that speed access to legal changes, and globalization of businesses, among others.

[36] See www.houstoninternationalarbitration.org.

[37] See article entitled "Atlanta's International Arbitration Initiative" published in Global Atlanta, dated April 26, 2011, interviewing former Chair of the International Law Section of the American Bar Association Glenn Hendrix.

1 leading value-added exports in 2011 were: Petroleum and coal products, chemicals, computer
2 and electronic products, machinery (except electrical), and transportation equipment. The states
3 five leading export markets in 2011 were Mexico ($87.39 billion), Canada ($22.12 billion),
4 China ($10.93 billion), Brazil ($10.05 billion), and Netherlands ($8.79 billion).[38]

5 Texas has also been an important destination for foreign direct investment (FDI).
6 According to the Texas Department of Economic Development and Tourism, Texas received 407
7 FDI projects for the period 2005-2010, with three Texas cities (Houston, Dallas and Austin)
8 ranking among the top 10 foreign investment markets in the U.S.[39] Moreover, Texas has more
9 than 2,000 foreign multinationals established in the state. The top five source countries for FDI
10 in the state are (in order of importance): the United Kingdom, Germany, France, Japan, and
11 Canada.[40]

12 A snapshot of 2011 international trade statistics published by the Texas Office of
13 Governor, Economic Development and Tourism is found on Annex 19.

14 **7. Increasing Use of Foreign-Educated Lawyers in U.S. and Texas**

15 U.S. law firms, including Texas firms, increasingly find it important to have the capacity
16 to provide multi-jurisdictional and cross-border legal services. In that regard, many firms
17 competing for international law work consider it important to employ foreign-educated lawyers.
18 Many firms have clients from foreign jurisdictions or U.S. clients engaged in business outside
19 the United States, and those firms find it helpful to have lawyers with relevant legal training,

[38] See "Overview of the Texas Economy," dated August 2012, published by the Office of the Governor, Economic Development and Tourism.
[39] Houston, Dallas, and Austin capture 26%, 14%, and 12%, respectively, of the state's FDI projects, according to the Texas Department of Economic Development and Tourism.
[40] See in general information provided by the Texas Office of the Governor, Economic Development and Tourism. www.texaswideopenforbusiness.com.

language, market, and cultural skills available to assist those clients. Texas-based firms are often in direct competition with New York, California, national, and London-based firms for these international clients. Each of these other jurisdictions actively facilitates the admission of foreign educated attorneys. To successfully compete in the global market, Texas will likewise need to facilitate the eligibility of foreign educated attorneys to sit for the Texas Bar.

Numerous Texas-based law firms also have one or more offices located outside the United States. Those firms may wish to bring foreign-educated lawyers to the United States, and in particular to a home office in Texas, for the purpose of training (typically for twelve months) or to assist on matters related to that lawyer's home jurisdiction. Such training and other assignments would be facilitated by the enhancement of Rules XIII and XIV.

English and New York law firms often have active on-campus recruiting programs in law schools in countries such as Australia, Canada, and India to enhance their international capabilities. This is not a realistic option for Texas law firms as a consequence of a more restrictive licensing regime, which, to some extent, places Texas-based firms at a competitive disadvantage relative to their New York, California, and English peers. Texas lawyers also compete with firms from Florida, Australia, China, Germany, Singapore, South Korea and Spain, among others, reflecting the truly global nature of the competition.

Foreign-educated lawyers based in Texas law firms are involved in the practice of law in a number of ways. In many instances, they may play an intermediary role in cross-border projects relating to their home jurisdiction, on matters such as mergers and acquisitions, project finance and development, international joint ventures and other foreign direct investment, international arbitration and so forth. Often, those lawyers are not substitutes for local counsel in the foreign jurisdiction, but rather provide an important role in assuring quality control and a

fluency of communication (not just language, but interpretation of legal concepts) with local counsel and the client.

Legal practice in support of international transactions or disputes can increasingly be found throughout the state of Texas. Not surprisingly, international practice is most robust in Houston (the largest market), the Dallas-Fort Worth area, Austin, San Antonio, El Paso, and South Texas. It is in those areas where the greatest current presence, the greatest future need and the greatest opportunities for using foreign lawyers exist.

Additional activities that foreign lawyers in the United States typically engage in include participation in client meetings, translation of documents, drafting in their native language and coordination of work with foreign counsel.

The most common way in which foreign lawyers come to the United States is to participate in a one-year U.S. LL.M course of study followed by a one-year training period permitted by the relevant U.S. visa (typically a an F1-Student Visa). Sometimes those lawyers come to the United States at their own expense, while in other cases they are sponsored or supported by a law firm or company in their home jurisdiction. Given the significant expense involved, and the commitment represented by that expense, most foreign law firms and companies send only their "best and brightest" to the United States. The lawyers who participate in these programs will develop strong, long term personal and commercial ties to the host state and the lawyers and law firms that they meet during their stays in the U.S. Moreover, a U.S. LL.M education and a U.S. bar license are important professional milestones for those foreign lawyers. Quite often, those lawyers will include on their business cards a reference to their U.S. bar licensure. For many U.S. law firms and companies looking to hire local counsel, the presence of lawyers within a local firm who have received training in the United States

(particularly those lawyers who also have become licensed in a U.S. jurisdiction) is viewed very favorably as a preliminary indicator of competence and training. It also helps assure that the foreign lawyer will have at least a basic understanding of the mindset of U.S. companies, as well as a basic grasp of U.S. legal concerns and command of the English language. As a further matter, the foreign lawyers who have received an LL.M and worked for a period in the United States also tend to refer work from their firms or companies to the lawyers they know, particularly lawyers in the states where they went to school or sat for a bar exam. Over the course of time, this trend has strengthened the New York Bar and contributed to its strong position in international law.

8. Increased Use of Foreign-Educated In-House Counsel in Texas

Texas is an important international business center and has many corporate in-house attorneys. The ALM 2013 Directory of Corporate Counsel lists nearly 2,300 in-house attorneys from more than 700 Texas companies and, according to the Association of Corporate Counsel, Texas membership in 2009 was higher than New York and second only to California.

As mentioned above, many Texas companies have international operations. International businesses leverage their global assets, including personnel, in order to optimize their business performance. In this context, legal department members with international experience better match international business needs. But, licensing issues have created barriers to achieving the optimum mix of local and international talent.

Texas does not have a specific rule addressing the licensing of in-house counsel. The Texas Unauthorized Practice of Law Committee has historically viewed the purely "in house" practice of law by staff counsel as not constituting the practice of law for purposes of the regulation of the unauthorized practice of law. The Committee has taken this approach because in-house services are solely for the attorney's employer and not a third party. However, in the

1 absence of a bright line rule, becoming licensed in Texas may be preferable given the uncertainty
2 surrounding whether an in-house counsel's work will be viewed as the practice of law for which
3 a Texas license is required. A Texas license also ensures that the corporate client has the benefit
4 of legal privilege, in appropriate circumstances, a factor driving many in-house counsel to seek a
5 Texas license.

6 Unlike their law firm counterparts, foreign in-house counsel can spend extended periods
7 in the U.S. Such lawyers are usually here on an employer-sponsored L1 or H1 visa and will
8 often be senior level personnel. Such visas are only granted if the U.S. Citizenship and
9 Immigration Services are satisfied as to the individual's suitability and special skills.

10 The differences between common law and civil code regimes are even less pronounced in
11 the context of in-house practice. For example, the terms of commercial transactions are broadly
12 similar regardless of governing law, antitrust and other compliance requirements are often
13 similar, and major corporations often develop standard contracts and procedures for global use.
14 As a result, senior level lawyers with relevant industry experience are key resources to their
15 employers regardless of their jurisdictional or educational background. Additionally, career
16 development programs for future general counsel of foreign subsidiaries often build in some U.S.
17 based experience to ensure well-rounded personnel.

18 Foreign in-house counsel joining a U.S. based legal department will typically be expected
19 to operate as a fully functioning member of the in-house team and to that effect will be
20 responsible for supporting substantially all of the legal needs for their allocated in-house client
21 groups. Alternatively, they may fulfill the role of a subject matter expert responsible for giving
22 guidance to other in-house lawyers on their established area of expertise, or advising on the law
23 of the foreign jurisdictions they have been assigned. These foreign counsels will typically

handle a range of issues, including negotiation and drafting of contracts, structuring of business transactions, advice on legal developments, interpretation of relevant law, compliance training and initiatives, management of disputes, and the development of global precedents and procedures. Not surprisingly, a foreign in-house lawyer based in Texas is more likely to work in support of transactions impacting the company's foreign interests. However, the prospect of a foreign in-house lawyer giving advice to one's employer on U.S. or Texas related issues or disputes cannot always be excluded.

The proposed in-house FLC reforms are designed to help companies in Texas by adding more certainty as to the availability of privilege and facilitating the internal transfer of highly-skilled professionals with international and cross-border skills. In addition, these reforms are expected to facilitate oversight of foreign in-house counsel by making registration and renewal more viable. The FLC rule provides an efficient and cost effective means to meet these goals and enhance the international competiveness of Texas companies.

9. Asia-Pacific/China Considerations

One of the challenges for the Task Force was to draft a rule that properly addresses the circumstances of foreign lawyers educated, licensed, and trained around the world with varying practices relating to law study, law school accreditation, attorney licensing, and young attorney training. This is particularly true for Texas, given its diversified set of trading partners from Europe, Latin America, Asia Pacific, and the Middle East. Different countries have very different legal traditions and any Texas rule must work in multiple legal settings. China provides a good example of the reason for enhancing the current rule and the benefits that could flow to Texas by doing so.

Several Texas law firms have opened offices in China (Beijing, Shanghai, and Hong Kong), and need to provide U.S. based training to their new personnel. Regrettably, Texas'

1 existing restrictive licensing requirements push these Texas firms to train their Chinese staff in
2 New York, where they have usually obtained their U.S. license, and the Task Force heard
3 testimony to this effect from members whose firms have offices in China.

4 Initially, Texas firms concentrated on advising their U.S. and multinational clients on
5 out-bound investments into China. However, in recent years, the additional opportunity to
6 advise Chinese companies making acquisitions and investments in the U.S. and elsewhere
7 around the world has developed. Chinese lawyers are increasingly sitting for the New York Bar
8 exam. For example, 426 Chinese lawyers took the New York bar exam in 2009.[41]

9 Texas' goods exports in 2010 totaled $207 billion, the largest figure of the 50 states. Of
10 Texas' total exports, $137 billion, or 66 percent, went to markets in the Asia-Pacific region.

11 Since the turn of the century, China has encouraged its companies to "Go Global" and
12 invest overseas, particularly to develop mineral resources and food stuffs for rapidly growing
13 domestic markets. Texas, as an important energy hub, has attracted investment from Chinese
14 energy companies. For example, China National Offshore Oil Corporation signed a joint venture
15 with Chesapeake Energy Corporation, one of the most important companies in the shale oil and
16 gas segment in this country, committing more than $2.2 billion to shale oil and gas development.
17 Similarly, Tianjin Pipe (Group) Corporation has invested $1 billion to build a manufacturing
18 facility in Texas close to its key oil and gas customers. ZTE, China's second largest

[41] See presentation entitled "New York's Foreign Legal Education Program," dated April 16, 2010, given by Bryan R. Williams, Board Member of New York State Board of Law Examiners at the NCBE Annual Bar Admissions Conference in Austin, Texas. In 2009, Chinese applicants represented the largest pool of applicants, with the United Kingdom a close second with 417. In that year, foreign-educated candidates came from every continent and from over 100 different countries to take the New York Bar. New York received more than 100 applicants from 10 countries: China (426), UK (417), Japan (266), Korea (212), Canada (207), France (204), Taiwan (181), India (139), Ireland (135), and Nigeria (116).

1 telecommunications equipment producer, has opened its U.S. headquarters in Texas.[42] In 2010,
2 China invested $5 billion in the U.S. If China follows the financial path taken by other emerging
3 nations, more than $1 trillion in Chinese investments could flow worldwide by 2020 with a
4 sizeable amount going to advanced markets such as the U.S. Between 2003 to 2010, according
5 to a study by the Rhodium Group, the value of investments made by Chinese companies in Texas
6 was $2.7 billion, which equals the approximate combined value of investments made in
7 California and New York, highlighting the importance of the Chinese market to Texas.[43]

8 Other Asian countries also invest in Texas. For example, Japan was the 4th largest source
9 of foreign direct investment in Texas between 2005 and 2010, having invested in 35 different
10 projects in Texas during that period.[44]

11 Moreover, due to Texas' role in the global energy market, Texas is also viewed by
12 countries in Asia Pacific as the gateway to the natural resources markets of Latin America,
13 particularly Brazil. This represents a significant source of business opportunity for Texas. In
14 2009, China became Brazil's largest trade partner, accounting for 12.5% of Brazil's exports. By
15 2010, China became Brazil's largest foreign direct investor, accounting for $17 billion out of $48
16 billion – with much of China's investment concentrated in Brazil's commodities and energy
17 sector.

18 Texas law firms have directly benefited from the importance of the Asia Pacific region.
19 Many top Texas law firms have opened branch offices in the region or have established strategic
20 alliances with local law firms. Because of Texas law firms' expertise, particularly in the energy

[42] See the U.S. Chamber of Commerce "Faces of Chinese Investment in the United States" http://www.uschamber.com/sites/default/files/international/asia/files/16983_INTL_FacesChineseInvest_copyright_1r.pdf.
[43] California received 55 deals with a value of $824 million. New York received 24 deals with a value of $1.9 billion. Texas received 23 deals with a value of $2.7 billion.
[44] See http://www.governor.state.tx.us/files/ecodev/Foreign_Investment.pdf.

sector, top Texas law firms have regularly represented state-owned Chinese energy companies in their overseas investments – including Sinopec's acquisition of Repsol YPF's Brazil assets for $7.1 billion in 2010. Because of the significant current and projected growth in trade and investments by Asia Pacific companies in Texas, it is increasingly important for Texas that Asia Pacific lawyers have the opportunity to hold a Texas bar license. Such dual qualified lawyers will be able to attract and assist Asia Pacific companies doing business in Texas and assist and advise Texas-based global companies on doing business in Asia Pacific. As a result, Texas law schools have seen a significant increase in lawyers and law students from Asia Pacific – particularly from China – coming to Texas for law school training in both LL.M and J.D. programs.

10. Other Miscellaneous Considerations

a. Historic Reputation

Current Texas rules on eligibility to sit for the Texas bar exam prevent or dissuade many foreign-educated bar applicants from sitting for the Texas bar exam. Moreover, New York has a tremendous advantage over Texas, as it has been admitting foreign lawyers on a widespread basis for over 40 years and offers a high level of certainty for potential applicants. Texas, on the other hand, is viewed as a closed jurisdiction. If the Task Force recommendations are adopted, a communications program will be necessary to counteract these historic impressions.

b. Economic Benefits

Various sources, including recent ABA reports on international law, have identified a variety of important factors that are forcing states to consider modernizing their regime for foreign lawyers.

The ITC, in its most recent report covering 2009, valued the U.S. share of the global legal market at $260.3 billion.[45] Although the ITC does not keep statistics for the cross-border legal market by state, the testimony provided by SMU economist Richard Alm to the Task Force supported the conclusion that given Texas' economic makeup, particularly the presence of a variety of economic sectors that are strong exporters, Texas lawyers are in an excellent position to benefit from reforms to Texas licensing rules.[46]

c. No Evidence of Material Risk to Public - UPL and Professional Ethics Considerations

There is no evidence to support the proposition that dual licensed foreign lawyers or FLCs represent a material risk to the public. In fact, the Task Force investigated whether foreign lawyers working in the U.S. represented a disproportionate number of ethical problems, including a consultation carried out on the ABA List Share. This investigation overwhelmingly found that no systemic problems existed within the community for foreign attorneys.

The Task Force searched for empirical data related to foreign lawyers sitting for bar exams in the United States and foreign lawyers practicing law in the United States, and anecdotal data related to any UPL, licensing and disciplinary concerns by authorities in other states with foreign lawyers. The search for empirical data was done primarily using the internet and through contact with UPL, licensing and disciplinary authorities in other states. The search for anecdotal data was done through the use of the American Bar Association's CPR-UPL@mail.abanet, or list serve, and by phone calls to UPL, licensing, and disciplinary authorities in other states.

[45] See page 7-3 of ITC Report.

[46] Mr. Alm noted that governments have typically kept better statistics for trade in goods than for trade in services and that cross-border figures as to the legal sector on a state level are scarce or non-existent.

The Task Force made inquiry through the ABA list serve and directly with UPL, licensing and disciplinary authorities in other states regarding their experience with foreign lawyers. Twenty-five state authorities were contacted. This research disclosed no significant problems with foreign lawyers in those states. There were isolated instances of complaints of UPL or discipline problems with foreign lawyers, but no pattern or trend was demonstrated.

Inquiry was also made with New York licensing authorities to ascertain the experience of New York with foreign-educated attorneys who have passed the bar and returned to their home country. New York advised that this information was not maintained. New York advised that of the 253,810 registered New York attorneys, 16,701 reported their primary address as being outside the U.S (approximately 6.6%).[47]

d. Opinion Poll Supported International Reforms

In December 2011, the Texas Supreme Court distributed a questionnaire to managing partners of Texas law firms and general counsels at Texas companies to assist the Task Force in assessing the use of and need for foreign-educated lawyers in Texas. Some of the highlights are set forth below.

1. The Supreme Court mailed the questionnaires (with a short cover letter and a copy of the current Texas rules) in early December 2011. The letters were addressed to managing partners (100) and general counsels or associate general counsels[48] (collectively 75) appearing on recent lists published by the Texas Lawyer (Note that the recipients did not necessarily have responsibility for international law matters and their actual in-depth familiarity with all of these issues cannot be assured).

2. We received 23 responses from law firms and 12 responses from corporate counsel, for a total of 35 responses.

[47] Email dated 3/3/2010 from Sam Younger, Deputy Director, Office of Court Administration.

[48] Given that the list for corporate counsel was structured by compensation, some companies had more than one representative on the list.

3. Law firms overwhelming answered "yes" to the first question of whether they currently provide cross-border services of some nature. 50% of the corporate counsel who responded, also answered "yes."

4. The second question asked whether they currently or recently (*i.e.* during the last 3 years) have employed foreign lawyers. The majority of law firms answered affirmatively (While 10 law firms responded that they currently had a foreign lawyer on their staff, 13 indicated that they had hired a foreign lawyer over the last 3 years). Most corporate counsel who answered said they did not presently have foreign educated lawyers on their staff (2 said "yes" and 10 said "no").

5. Law firms strongly agreed that they would benefit from greater access to foreign lawyers registered and based in Texas (16 out of 23). A majority of corporate counsel responded "yes" to this third question as well (7 out of 12).

6. When asked if having more foreign-educated lawyers in Texas would be beneficial to the state and its economy, the majority of law firm respondents said "yes" (16 out of 23). Corporate counsel also agreed overwhelmingly (9 out of 12). This question indicated the highest level of support for the modernization of the international practice rules (perhaps because it required less pre-existing knowledge of the Texas or New York rule).

7. When asked if adapting the New York Rule would be beneficial to one's institution, a majority of law firms said "yes" (13 out of 23). Corporate counsel were equally divided (6 "yes" and 6 "no").

8. When asked if adopting a less restrictive rule for admission of foreign-educated lawyers in Texas would be beneficial to the state and its economy, a majority of law firms said "yes" (13 out of 23). A majority of corporate counsel also agreed (7 out of 11).

9. There were a variety of written comments to the questionnaire. Many (but not all) were very supportive of modernizing these rules. Six of these individual comments are quoted below:

> "There is a similar problem with foreign students who are educated in Texas but want to practice outside the State. They currently cannot sit for the bar in Texas. This rule should be changed."

> "Foreign law versus Texas law advice is very difficult to distinguish in the context of a deal while we could keep foreign lawyers from practicing purely Texas law, like trial work or real estate; most transaction are multi-law and don't fit neatly in any one basket."

> "Texas is benefitting from increased foreign investment and an increasing number of non-U.S. companies establishing a presence in the State. This creates jobs and tax revenues. The Texas Bar needs to be able to assist

1 these companies and having foreign educated lawyers meeting our high
2 ethical standards available will promote foreign investment."
3
4 'Our Firm represents a number of clients in the energy industry that have
5 operations throughout the world that would benefit greatly from having
6 counsel that is familiar with the laws of these various jurisdictions (and
7 their legal systems) close at hand."
8
9 "These needs will substantially increase in the future!"
10
11 "I taught law at the University of Houston Law Center for 10 years as an
12 adjunct and time and again saw the best foreign [students] go and take the
13 New York Bar and move to another state. We have lost great
14 opportunities to expand the economy in Houston due to our restrictive
15 rule. We need to adopt the N.Y. style rule."
16
17 A complete summary of the survey results is set forth in Annex 14. The summary also
18 addresses in more detail those instances in which a "strongly" agree/disagree was registered.
19 Although the questionnaire has certain limitations, the level of response is positive and indicates
20 a high level of interest in the matter. Moreover, the answers to questions #3 and #4 suggest an
21 awareness of the importance of modernizing these rules, both for the benefit of law firms and
22 companies, and for the interests of the state as a whole.

23 **III. RECOMMENDATIONS OF THE TASK FORCE**

24 **1. Overview**

25 The Task Force has identified three general areas for reform: (a) eligibility of foreign
26 attorneys to sit for the Texas bar exam, (b) foreign legal consultant certification, and (c) *pro hac*
27 *vice* admission for foreign attorneys.

28 While many of the Task Force's proposals for Rule XIII are based on the core eligibility
29 criteria in the New York Rule, the Task Force maintained the existing terms as used in the Texas
30 rules, where practical. The Task Force also wanted to learn from the practical experience of the

1 Texas Board of Law Examiners ("TBLE"), the New York Board of Law Examiners ("NYBLE"),

2 and the Law Society of England and Wales in applying their current rules.

3 With this in mind, the Task Force recommends the following with respect to foreign

4 attorney eligibility to sit for the Bar:

5 (a) elimination of the practice requirement as a pre-condition for all candidates sitting
6 for the Texas Bar exam (with the exception of the first route for common law
7 applicants, where the applicant must have durational equivalency as to legal
8 education, the applicant is authorized to practice law in a foreign jurisdiction or
9 another state, and has been actively and substantially practicing law for three of
10 the last five years). Furthermore, this current requirement is unnecessarily
11 onerous for many foreign attorneys who pursue LL.M studies early in their career
12 and, consequently places Texas at a competitive disadvantage to New York. This
13 proposal is consistent with the recommendation by the ABA Model Rule
14 Committee for 2011;
15
16 (b) acceptance of the F-1 student visa for foreign attorneys seeking admission to the
17 Texas Bar. In addition, this requirement is a practical "deal breaker" for most
18 LL.M students who wish to rely on Student Visas rather than longer term
19 professional H1 or L1 work visas. New York does not require the NYBLE to
20 review the immigration status of its applicants. This requirement adds
21 administrative burden for the TBLE; and
22
23 (c) recognition that an LL.M from an approved law school is sufficient educational
24 preparation for most foreign attorneys to sit for the Texas Bar if based on LL.M.
25 curriculum standards substantially similar to those adopted in New York.
26
27 The practice requirement, failure to accept a Student Visa, and requirement for J.D. curricular

28 equivalence are three key impediments under the current Texas rule.

29 Perhaps the most controversial issue that the Task Force faced was the eligibility of U.S.

30 lawyers (typically New York licensed) to become admitted without examination in Texas.

31 Currently, Texas allows other U.S. lawyers who have actively and substantially practiced at least

32 5 of the last 7 years to be admitted without examination under certain circumstances with a J.D.

33 degree from an ABA approved law school. Certain members of the Task Force recommended

34 relaxation of this rule to allow waive-in by dual qualified attorneys (if they have an approved

1 LL.M, a U.S. license, a foreign law license and proven practical experience). These members
2 felt the current rule was unfair to accomplished U.S. lawyers who had two sets of legal training
3 and who had developed sophisticated practices in law firms and companies. In contrast, others
4 felt that to extend waive-in privileges to LL.M graduates was unfair to graduates of non-ABA
5 accredited law schools in the U.S., who also are not eligible to waive-in to Texas. Another
6 alternative that was suggested included offering a waive-in right for a limited period of time to
7 address the specific needs of these experienced dual-qualified foreign lawyers. The Task Force
8 ultimately concluded that, while it was beneficial for the Supreme Court to have a deep
9 understanding of these dynamics, the Task Force was not in a position to make a unanimous
10 recommendation on this point.

11 The Task Force also re-considered Rule XIV relating to FLCs, and in particular assessed
12 its policy objectives. The Task Force identified refinements necessary to reflect practical
13 experience under the existing Rule and addressed the unique challenges posed by the
14 international transfer of foreign in-house counsel.

15 Recognizing that not all foreign attorneys operating in Texas will seek admission in
16 accordance with Rule XIII, Rule XIV provides an additional mechanism to ensure that foreign
17 attorneys are effectively monitored and professional standards are controlled by the Texas
18 Supreme Court and the TBLE.

19 Currently, the application fee for a Texas FLC is $990.00, and the annual renewal fee is
20 alternatively $150 or $300, levels that are higher than most other U.S. states. There was some
21 concern that the FLC registration fees were higher than hoped, given other processing costs and
22 the relatively reduced market prestige of an FLC registration, compared to a bar license.
23 Mindful that the Board of Law Examiners is 100% self-funding and does not rely on financial

support from the Legislature, the Task Force did not recommend specific new filing and renewal fees, but rather informs the Supreme Court of these market realities.[49]

The current Rule XIV on FLCs, although a marked improvement over its predecessor, has not resulted in FLC registration to the extent originally hoped. The current rule also limits certification to those foreign attorneys admitted in foreign jurisdictions, which excludes experienced in-house law practitioners who are not so admitted.[50] Rule XIV could be a cost effective and efficient vehicle for corporations wishing to use foreign employees within their in-house law departments if modified to more clearly permit in-house practice.

2. Proposed Revisions to Rule XIII (Admission)

a. Introduction

The Task Force recommends revising Rule XIII to bring the rule closer to the New York Rule, although with some significant differences. The proposed rule maintains the bifurcated approach between common law and civil law jurisdictions and provides routes to admission for each based on those differences. As explained above, the proposed rule improves on the current rule by removing or reducing practice requirements, eliminating work visa requirements, recognizing an LL.M from an approved law school as sufficient education for a foreign attorney wishing to sit for the Texas Bar, and establishing curriculum requirements for such LL.M programs.

[49] It is possible that the effect of reduced processing times and a steady and sustained (albeit gradual) increase in foreign applicants would generate more revenue for the Board to carry out its work.

[50] Some jurisdictions require in-house counsel to surrender their license upon moving in-house, while others treat admission as discretionary for in-house practice. As a consequence, experienced and able in-house counsel may not hold a license from their home country.

1 **b. Summary of Revisions**

2 The principal proposed changes to Rule XIII are reflected on the chart set forth on Annex
3 21. The chart addresses six principal areas: (1) visa requirements, (2) license requirements, (3)
4 practice requirements, (4) law degree durational equivalency, (5) law degree substantive
5 equivalence, and (6) required LL.M degree, and LL.M curricular requirements. The chart set
6 forth on Annex 22 compares the proposed Rule XIII to the existing New York Rule.

7 **c. Immigration Considerations**

8 As mentioned above, Texas currently imposes a requirement that an applicant be able to
9 work in the United States under federal immigration laws. Rule II provides that the applicant
10 should, *inter alia*, "be an alien otherwise authorized to work lawfully in the United States." This
11 imposes a requirement on the TBLE to interpret and enforce federal immigration laws and results
12 in a diversion of effort and resources away from the TBLE's core competencies. This
13 requirement has been historically interpreted by the TBLE as requiring a right to work as a
14 professional (H1 or L1 visa) rather than a Student Visa. The Task Force proposes to eliminate
15 the requirement. From a national market perspective, both New York and California permit
16 foreign law graduates to sit for their bar exams under a Student Visa, which allows the applicant
17 to work in the US for one year of optional practical training but not as independent professionals.
18 In addition, reliance on a Student Visa removes the need for an applicant (or their sponsoring law
19 firm/employer) to incur the additional effort and expense of a longer term professional visa.[51]
20 Texas, in contrast, requires applicants to show, prior to licensure, that they have a resident visa,
21 such as an H-1B or green card, or that they will have such visa by the time of admission, and few

[51] The costs to obtain an H-1B visa can represent an additional $5,000 in filing and legal fees. H-1B visas are also subject to annual quotas, and in certain years, the quota has been filled very early in the calendar (sometimes in the first few weeks or so), representing an additional risk and burden to the applicants and the employing law firms.

LLM law students are able to make this showing or have been willing to bear this additional risk or expense. Moreover, H-1 and L1 visas require an employer to sponsor their application, and most candidates do not have a job offer at the time of bar application. This is a critical area to reform, without which Texas will not be competitive with New York and California.

3. Proposed Revision to Rule XIV (Foreign Legal Consultants)

a. Introduction

In order to address the needs of Texas businesses and facilitate state oversight of all foreign-educated counsel operating in Texas, the Task Force believes that Texas should also consider reforms to the FLC rule. Consistent with its approach to Rule XIII reforms, the Task Force maintained terms used in the current Texas rules, where practical. The Task Force recommendations focus on three key enhancements to the current rule:

i. Simplification of application process by removal of foreign practice requirement and modification of proof required in support of the application for certification;

ii. Simplification of renewal process by removal of need for de novo application and review, instead, renewal is based on sworn compliance statements more akin to the process for renewal of a Law license; and

iii. Clarification of scope and applicability to in-house counsel.

b. Summary of Revisions

The principal proposed changes to Rule XIV are reflected on the summary chart found on Annex 21.

c. Foreign Practice Considerations for FLCs

Texas currently requires that applicants for the FLC certification have actively and substantially practiced the law of their country for a certain number of years immediately preceding their application. This requirement can be very difficult for the applicant to prove and

necessitates significant effort in time and resources for the TBLE to investigate. Many FLC applicants have significant practice experience, but not all of it relates to the law of their home country. For example, corporate counsel often does not exclusively practice the law of their home countries and may not be able to satisfy this requirement either upon initial application or upon renewal. The Task Force suggests that the other existing eligibility requirements of Rule XIV are sufficient to ensure suitability for certification as a FLC. These requirements include that the applicant has been a member in good standing of their home foreign jurisdiction for three out of the last five years and that they are of good moral character and fitness. Removal of the practice requirement would increase the availability of the FLC rule to foreign attorneys and reduce the administrative burden on the TBLE without undermining the TBLE's ability to approve and monitor applicants. Interestingly, the District of Columbia, the European Union, and Australia grant foreign legal consultant licenses without requiring any previous experience, recognizing the importance of the participation of these lawyers in the local regulatory structure.

d. Policy Objectives

The Task Force considers it desirable for the state authorities to have oversight of the vast majority of foreign attorneys working in Texas and believes that this goal can be achieved through the effective operation of Rules XIII and XIV. While the current FLC eligibility and renewal requirements operate as barriers to the attainment of that goal, these barriers can be easily removed without undermining the core objectives of Rule XIV or the TBLE's ability to verify suitability of a FLC for certification.

With this in mind, the Task Force recommends reducing the requirements for supporting evidence upon initial application to remove unnecessary hurdles and significant expense. The Task Force believes that an applicant's suitability can be verified if his/her application is supported by a member in good standing of the Texas Bar and accompanied by a certificate of

1 good standing from the applicant's home jurisdiction. It is therefore recommended that the other
2 current requirements be removed (*i.e.* recommendation letter from foreign high court and
3 evidence of right of visa status). In addition, the Task Force recommends a significant
4 simplification of the renewal process to make it more akin to renewal of a law license. The
5 documentation required for renewal extends to tax returns and other evidence of remuneration,
6 which in contrast are not required to renew a Texas law license, and the Task Force recommends
7 removal of these requirements. This will ease the burden for the TBLE in administering the
8 system and make the FLC certification a more attractive option for those candidates who do not
9 need to obtain a law license to fulfill their career objectives. Inevitably, a law license will be
10 more attractive to some candidates who desire to return to their home countries with a
11 prestigious U.S. law qualification.

12 **e. In-house Counsel**

13 The scope of practice permitted under the current Rule is uncertain in the context of in-
14 house counsel. This has raised doubts over the availability of privilege protection, which is a key
15 consideration for any corporate client organization. In-house counsel, who would otherwise
16 wish to rely on an FLC certification, have been obliged to sit for the Texas Bar in order to
17 guarantee privilege protection for their employers. Study for bar admission diverts valuable
18 legal resource away from the employer's day to day needs. The cost and time investment
19 involved in such study (and potentially study for an LL.M) creates unnecessary barriers to
20 relocation of corporate counsel, particularly those from civil code jurisdictions. By contrast,
21 FLC certification is a cost effective and efficient solution if Rule XIV is modified to specifically
22 address in-house needs (both scope of practice and eligibility criteria). As in-house counsel only
23 advise their employers and do not provide services to the general public, there is no public

interest driver to require all in-house counsel to sit for the Texas Bar or to require their employers to incur the cost associated with admission in the U.S.

The Task Force therefore unanimously recommends supplementing the existing scope and eligibility requirements of Rule XIV to facilitate the international transfer of foreign in-house counsel by their employers. It would also be consistent with the approach taken in some other U.S. states to recognize the different governance needs of corporate in-house counsel.[52] This addition would not only benefit Texas based employers but would also extend the oversight available to the TBLE by encouraging certification of all foreign in-house attorneys. The proposed modifications would not prevent such counsel from seeking admission under Rule XIII in circumstances where they or their employers consider it appropriate to do so.

4. Proposed Revision to Rule XIX (*Pro Hac Vice*)

The Task Force unanimously recommends modifications to the existing Rule XIX to allow *pro hac vice* admission for foreign attorneys. This will be accomplished by extending *pro hac vice* admission to an attorney licensed in a "foreign jurisdiction" as well as in another state. We used the defined term "foreign jurisdiction" based on the ABA Model Rule. We also included the new requirement that the attorney provide an email address and the name and contact information for the client to be represented.

5. Proposed Harmonization of Other Rules

If the Texas Supreme Court were to adopt the rule changes proposed by the Task Force, they may also wish to consider harmonizing other existing rules either now or at a later date. For

[52] Arizona, Connecticut, Delaware, Virginia, Washington, and Wisconsin allow in-house counsel from other states or foreign countries to practice without the need for further examination provided their advice is restricted to advice given to employer and associated companies

1 example, Texas has a rule granting admission without examination to attorneys who are
2 members in good standing of the Bar of another U.S. jurisdiction after a sustained period (*i.e.*
3 five of the last seven years) of actively and substantially practicing in a U.S. jurisdiction.
4 However, as explained below, this rule excludes foreign attorneys who may be licensed in New
5 York (or other states), but who lack a J.D. degree from an ABA accredited law school. The
6 Supreme Court may wish to consider whether such waive-in should be based on an approved
7 U.S. LL.M when the applicant is also a foreign attorney in good standing.[53] This limited
8 modification would simplify the admission process for foreign attorneys who have already been
9 admitted in another state and have so practiced in an active and substantial manner for an
10 extended period, thereby attracting qualified foreign attorneys who are admitted in other U.S.
11 jurisdictions (primarily New York) to Texas. However, as this issue also raises questions of
12 consistency of treatment between foreign attorneys and those U.S. attorneys from non-approved
13 law schools, the Task Force was not able to make a unanimous recommendation in this area.

14 The Supreme Court may also wish to delay character and fitness reviews until after a
15 candidate has passed the bar examination. Unlike New York, Texas is currently required by rule
16 and statute to perform this review at the time of application for the bar exam.[54]

[53] LL.M candidates usually have several years of legal experience before coming to the U.S.

[54] At first glance, a move in the direction of New York on this issue appears attractive. First, it could encourage more foreign-trained lawyers to apply to take the Bar as the character and fitness approval process represents a burdensome endeavor for them and would only be required if he/she were to pass. Second, such a change could reduce the TBLE's work load by eliminating the need for evaluating the character and fitness of every candidate in the short time available between the submission of an application and the date of the exam. As only a minority of foreign applicants pass the Texas bar, such delay could reduce the TBLE's overall work load in this area. However, pre-exam review for character and fitness has been beneficial for some Texas applicants in instances where the review process has revealed a potential problem, providing the applicant a chance to clarify or cure the situation beforehand.

1 Prior review for character and fitness is mandated by statute under Texas Govt. Code
2 Section 82.023(c)[55] and 82.030(b).[56] Because a statutory change is required, this change is
3 outside the scope of the current suggested reforms.

4 **IV. CONCLUSION**

5 The Task Force unanimously finds that its proposed reforms will have a variety of
6 positive effects for the state, the public, consumers of legal services, Texas law schools, Texas
7 companies, Texas lawyers, and law firms. These benefits include: (a) improvement of Texas'
8 position in the globalized economy; (b) improved access by Texas businesses to international
9 legal resources, international markets and foreign lawyers; (c) extension of TBLE oversight to a
10 broader population of foreign attorneys who are working in Texas; (d) creation of a more
11 transparent regulatory system whereby foreign lawyers are registered and licensed in Texas, pay
12 regular bar dues, take CLE courses, and are subject to Texas ethics rules; (e) facilitation of
13 transactions by allowing foreign attorneys to work in Texas as required to meet client needs;
14 (f) provision of mechanism for foreign attorneys to develop ties and loyalties to the State of
15 Texas and SBOT; and (g) improvement of consumer choice and fostering of competition in the
16 cross-border legal services market.

17 Texas has numerous attractions for foreign lawyers. It has a strong and vibrant economy
18 with an export focus. It has fine LL.M programs in major metropolitan areas. It has an

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[55] This provision provides: "§ 82.023. Declaration of Intention to Study Law. [...](c) The board shall notify each first-year law student who files the declaration on or before January 1 of the year in which the student begins law school, not later than August 1 of the following year, of the board's decision as to the student's acceptable character and fitness. The board shall notify all other declarants not later than the 270th day after the date the declaration was filed whether or not it has determined that the declarant has acceptable character and fitness."

[56] This provision provides: "§ 82.030. Board Assessment of Moral Character and Fitness. If the board determines that the applicant does not have the requisite good moral character and fitness, the board, not later than the 150th day after the day on which the application is filed, shall furnish the applicant an analysis of the character investigation that specifies in detail the results of the investigation. The analysis must include an objective list of actions the applicant may take to become qualified for a license to practice law."

1 affordable cost of living (an attractive consideration for younger students in comparison to New
2 York). It has strong law firms competing in market for cross-border legal services, many with
3 offices abroad, which can enhance synergies for educational and professional opportunities.
4 The Task Force believes that these reforms will be an important milestone for Texas and
5 the international law community and unanimously recommends the adoption of these proposals.
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