Transnational Legal Practice 2009

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I. Introduction

The economic downturn exerted enormous influence on lawyers and law firms from late 2008 throughout 2009, both in their domestic and transnational activities. Among the global firms based in the United States, unprecedented layoffs became the norm. According to the National Law Journal:

> Attorneys in the international offices of the nation's top law firms weren't spared a pummeling by a recession that hit global proportions in 2009. A big piece of the four percent decline in the total number of attorneys at large law firms came from losses in international offices . . . Law firms with significant foreign practices saw their numbers in those offices decline—often sharply—as they struggled to adjust to plummeting demand from clients.[1]

The economy also severely affected firms based outside the United States.[2] Despite these challenges, cross-border legal services remain important.[3] Indeed, according to

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1. Leigh Jones, *Big Firms Slashed Headcount at International Offices, NLJ 250 Shows*, NAT'L L.J., Nov. 12, 2009.

2. *See, e.g.*, Law Shucks, *Layoff Tracker: Top Ten by Total Layoffs*, http://lawshucks.com/layoff-tracker/ (last visited Feb. 8, 2010) (showing Allen & Overy, Clifford Chance, and Linklaters among the ten firms having laid off the highest number of lawyers and staff); Julia Berris, *Clifford Chance Rents Out Space to U.S. Rival Kilpatrick*, THE LAW., Mar. 19, 2009, http://www.thelawyer.com/clifford-chance-rents-out-space-to-us-rival-kilpatrick/1000029.article (reporting on Clifford Chance having renting out excess space in several offices); Husnara Begum, *Slaughters Closes Applications From Non-law Grads*, THE LAW., Mar. 19, 2009, http://www.thelawyer.com/slaughters-closes-applications-from-non-law-grads/1000034.article (reporting on fewer spots for training contracts at Slaughter & May and other Magic Circle firms).

3. *See* Recent Trends in U.S. Services Trade, USITC Pub. 4084, at 6-1 (July 2009), *available at* http://www.usitc.gov/publications/332/pub4084.pdf [hereinafter 2009 Recent Trends]. The *2009 Recent Trends* report noted that legal services are among the professional service sectors that have experienced strong growth and that have helped the U.S. trade balance. It described U.S. legal services as "very competitive in the global market," noting that they "accounted for fifty-four percent of global revenue in 2007 and comprised seventy-five of the top 100 global firms ranked by revenue."

some, they provide a buffer against the financial constraints of the downturn.[4]

Our report for 2009 addresses a number of important transnational legal practice developments. Perhaps the most closely followed changes in 2009–both inside and outside of the United States–were the developments related to the 2007 U.K. Legal Services Act. The Legal Services Act promises to affect not only U.K. lawyers and law firms but also U.S.-based global firms that often are their primary competitors. In particular, U.S.-based firms with offices in the U.K. (often staffed with U.K.-licensed solicitors, among others) must consider how the new U.K. regulations will impact their work. France, Canada, Australia, Scotland, and other jurisdictions also have initiated the process of reconsidering lawyer regulation. As the rules of the game are rewritten for U.S. competitors, the ability of U.S.-based firms and U.S.-licensed lawyers to compete effectively is implicated. Moreover, U.S. regulators are considering how best to respond to these changes and to those posed by globalization and advances in technology. We begin our discussion in Section II by focusing on transnational legal practice developments outside of the United States. Section III addresses transnational legal practice developments within the United States. In Section IV, we turn to trade activities regarding legal services, including the General Agreement on Trade in Services (GATS), bilateral agreements, and regional trade blocs. We conclude with a "watch list" for the coming year. Although our review here is brief and there are topics we have not addressed, we reference additional source material throughout the article.[5]

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4. John Bringardner, *Lawyers Wanted: Abroad, That Is*, N.Y. TIMES, Nov. 21, 2008, *available at* http://www.nytimes.com/2008/11/23/business/23law.html ("But with Wall Street in tatters and London struggling as the credit crisis plays out, lawyers and analysts say that the most promising places for legal careers are such far-flung locales as Dubai, Abu Dhabi and Hong Kong.").

5. This footnote highlights several transnational legal practice developments not addressed in the text. In April 2009, forty-six Bologna Process members held their seventh Ministerial Meeting. *See* Bologna Process Secretariat [Benelux], *Ministerial Conference Hosted by the Benelux Countries at the Universities of Leuven and Louvain-la-Neuve in 2009*, http://www.ond.vlaanderen.be/hogeronderwijs/Bologna/conference/index.htm (last visited Feb. 8, 2010) (includes links to Ministerial documents). The Bologna Process is an ambitious undertaking by forty-six European countries that seeks to create the European Higher Education Area in order to make European education more competitive. Its ten "action lines" and its "global dimension" are potentially relevant to transnational legal practice because they include recognition principles, quality assurance initiatives, and lifelong learning initiatives. *See* Laurel S. Terry, *The Bologna Process and Its Impact in Europe: Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107 (2008).

During 2009, several international bar associations worked to develop various kinds of lawyer codes of conduct or commentary to existing codes. The International Bar Association has been drafting a "commentary" to accompany its IBA General Principles of the Legal Profession (Sept. 2006).

The Union Internationale des Avocats is planning an April 2010 conference to work towards development of a global code of lawyer conduct. An International Law Association committee is drafting a code of conduct for lawyers practicing before international tribunals that it hopes to adopt in 2010. *See* Laurel S. Terry, Handout of Codes of Conduct for International Tribunals and Arbitration for Panel Session on Challenges of Transnational Legal Practice: Advocacy and Ethics at the American Society of International Law 103rd Annual Meeting (Mar. 27, 2009), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/ASIL_Terry_Codes_International_Tribunals.pdf.

The Council of the Bar and Law Societies of Europe's (CCBE) 2009 electronic newsletters explain a number of additional important developments, including a study on cross-border legal aid; an EU proposal that would require European lawyers who lobby to register; a proposed EU study on the impact of the EU money laundering directives on the legal profession; FATF developments; CCBE guidance about lawyers' obligations with respect to electronic communication, metadata, and the Internet; and the EU's massive E-Justice project, which is developing information and communication technologies (ICT) in the field of justice, including a European portal that should help simplify judicial procedures. *See, e.g.*, *CCBE-INFO No. 22* (Council of the

II. Transnational Legal Practice Developments Outside of the United States

A. THE U.K. LEGAL SERVICES ACT 2007

The U.K. Legal Services Act (LSA) has been the subject of efforts towards implementation as well as further study and discussion of its mandate. It remains a topic of interest not only in the United Kingdom, but also in the United States and elsewhere.[6] For example, in May 2009, the LSA was a primary focus of a conference organized for the Conference of Chief Justices by the ABA Standing Committee on Professional Discipline, the ABA Center for Professional Responsibility, and the Georgetown Law Center for the Study of the Legal Profession.[7] The overall purpose of the conference was to extend to the Chief Justices conversations about globalization's influence on the profession, including how the LSA affects activities and actors outside of the United Kingdom.[8] The conference also sought to recognize the reality that, given widespread cross-national practice and the presence of U.S.-based law firms abroad, regulatory changes in other countries—particularly in England (home of the largest overseas offices of U.S. firms, in terms of headcount)—are likely to influence U.S. firms and lawyers.[9]

The LSA has three main components:

- it dramatically reshapes the regulation of legal practice in England and Wales, including creating a new Legal Services Board comprised of a majority of non-lawyers and chaired by a non-lawyer;
- it revamps the complaints system for lawyers; and
- it creates a framework that will enable England and Wales to follow in the wake of Australia by authorizing alternative business structures (ABS) that include multidisciplinary practices and publicly-traded law firms.[10]

Bar and Law Societies of Europe, Brussels, Belg.), Feb. 2009, *available at* http://www.ccbe.eu/index.php?id=27&L=0; *CCBE-INFO, No. 23* (Council of the Bar and Law Societies of Europe, Brussels, Belg.), Oct. 2009, *available at* http://www.ccbe.eu/index.php?id=27&L=0.

The Council of Bars and Law Societies of Europe (CCBE) is the representative organization of more than 700,000 European lawyers through its member bars and law societies from thirty-one full member countries, and ten further observer countries. *Id.*

6. Laurel S. Terry et al., *Transnational Legal Practice: 2006-07 Year-in-Review*, 42 INT'L LAW. 833, 856 (2008) [hereinafter 2006-2007 Transnational Legal Practice].

7. *See* Center for the Study of the Legal Profession at Georgetown Law, http://www.law.georgetown.edu/LegalProfession/ (last visited Feb. 8, 2010).

8. *Cf.* Summary of Action of the Oct. 31-Nov. 1, 2008, ABA BOARD OF GOVERNORS MEETING, at 9, *available at* http://www.abanet.org/leadership/docs/October2008SummaryofAction.pdf (last visited Feb. 8, 2010).

9. *See, e.g.*, Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Glocal*, 23 GEO. J. LEGAL ETHICS ___ (forthcoming 2010). For example, an ongoing study of approximately sixty large U.S. law firms by Carole Silver found that these firms support 376 offices overseas, where approximately 8,000 lawyers are working, and three-quarters of these lawyers are working in offices located in Europe. A 2007 study by International Financial Services, London indicates that there are over 100 U.S. law firms with London offices, and that there are a similarly large number of U.K. solicitors and firms in the United States. *Legal Services*, CITY BUS. SERIES 3 (Int'l Fin. Serv., London, Eng.), Feb. 2007, *available at* http://www.ifsl.org.uk/upload/CBS_Legal_Services_2007.pdf.

10. Laurel S. Terry et al., *Transnational Legal Practice: 2008 Year-in-Review*, 43 INT'L LAW. 943, 960-961 (2009) [hereinafter 2008 Year in Review]. In 2007, Australian personal injury law firm Slater and Gordon became the first publicly-traded law firm in the world. *See, e.g.*, *Underwritten Offer of 35 Million Shares,*

The LSA puts in place a new regulatory regime headed by the Legal Services Board (LSB). The LSA separates the regulatory and representative functions for solicitors and barristers.[11] Representation here refers to the role typically assumed by a professional association working on behalf of the interests of its members. The Solicitors Regulatory Authority (SRA) and Bar Standards Board (BSB) are the "regulatory" arms for solicitors and barristers, and are supervised as "front line regulators" by the LSB,[12] while the Law Society of England and Wales and the Bar Council are the "representational" arms. The LSB began operations in 2009.[13] Its front-line regulators have addressed several issues raised by the LSA,[14] including, for example, developing regulations to authorize non-lawyer managers and employees to own up to one-quarter of the equity ownership interests in a law firm.[15] According to the Chief Executive Offices of the LSB, establishing a framework for implementing the authorization of outside equity ownership by non-lawyers is a high priority.[16] In addition, sole practitioners are now regulated as entities, an important development because it adds a new layer of regulation.[17]

In 2009, the Law Society commissioned two reports that are significantly influencing the discussion surrounding regulation of lawyers in the United Kingdom. The "Smedley Report" recommends that the SRA separately regulate law firms representing sophisticated corporate clients.[18] Smedley also recommends that certain principles might be applied differently to these firms. The "Hunt Report," issued after Smedley, takes a broader approach and responds to certain of Smedley's propositions.[19] Where Smedley recommended that a separate division of the SRA should regulate firms providing certain kinds of corporate legal work, Hunt recommended a unified approach as a long-term target. In

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PROSPECTUS (Slater & Gordon Limited, Australia), Apr. 13, 2007, *available at* http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf.

11. Legal Services Act, 2007, c. 29, § 30(1)(a) (U.K.). *See also* LEGAL SERVICES BOARD, REGULATORY INDEPENDENCE (2009), *available at* http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/regulatory_independence.pdf.

12. U.K. Legal Services Board, Approved Regulators, http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm (last visited Feb. 8, 2010).

13. U.K. Legal Services Board, Latest News, http://www.legalservicesboard.org.uk/news_publications/latest_news/index.htm (last visited Feb. 8, 2010).

14. *See* Solicitors Regulatory Authority Consultations, http://www.sra.org.uk/sra/consultations.page (last visited Feb. 8, 2010); Bar Standards Board Consultations, http://www.barstandardsboard.org.uk/consultations/ (last visited Feb. 8, 2010); Legal Services Board, Consultations, http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm (last visited Feb. 8, 2010).

15. *See* Press Release, Solicitors Regulation Authority, Start Date for Legal Disciplinary Practices (Feb. 12, 2009), *available at* http://www.sra.org.uk/sra/news/press/start-date-legal-disciplinary-practices.page (noting Mar. 31, 2009 start date for lawyer disciplinary partnerships).

16. *See, e.g.*, Chris Kenny, Speech to Oxford/Harvard Legal Symposium: The Paradoxes of Regulatory Reform (Sept. 11, 2009), http://www.legalservicesboard.org.uk/news_publications/speeches_presentations/2009/pdf/speech110909.pdf ("[W]e have made development of momentum in this area [referring to Alternative Business Structures and non-lawyer ownership] an early priority for the Board.").

17. *See* Solicitors Regulation Authority, Change Tracker-SRA Practising Regulations 2009, Regulation 4, *available at* http://www.sra.org.uk/solicitors/change-tracker/practising-regulations/practising-regulation.page (last visited Feb. 8, 2010) ("Application to be recognized as a sole practitioner").

18. Nick Smedley, Review of the Regulation of Corporate Legal Work, at v (2009), *available at* http://www.legalregulationreview.org.uk/files/report_smedleyfinal.pdf.

19. David Hunt, The Hunt Review of the Regulation of Legal Services 9 (2009), *available at* http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf.

addition to the Hunt and Smedley reports, the SRA and the LSB issued several important consultations on a wide range of issues related to the LSA.[20]

The U.K. regulatory changes have elicited a direct response from the Council of Bars and Law Societies of Europe (CCBE), among others in Europe. The CCBE opposes outside equity ownership of law firms, a form of ABS referred to above in the description of the LSA's main components, and criticizes aspects of the proposed conflict of interest and confidentiality rules.[21] Thus, the negotiation of the U.K. changes with regard to interaction with other EU member countries remains to be worked out, and we anticipate this to be an area of importance in the future.

B. Other Legal Profession Reform Initiatives

Although the U.K. changes have garnered the most attention, several other countries enacted and considered lawyer regulatory reform initiatives during 2009. In France, for example, President Sarkozy appointed the Darrois Commission to do an in-depth study of France's legal profession.[22] The Commission's much anticipated March 2009 report recommends that: 1) French *avocats* be allowed to work in-house, which would allow them to benefit from the 98/5/EC Establishment Directive; 2) *avocats* be able to share fees with notaries under certain circumstances; 3) partnerships between various legal professions in France, including with French notaries, be permitted; and 4) a legal aid fund financed by taxes of lawyers' practices be established.[23]

Scotland also considered changes to its lawyer regulatory regime, and in 2008, the government issued a consultation paper addressing structural regulation of the profession, the lawyer discipline-complaints system, and the issue of alternative business structures.[24] The Law Society of Scotland responded in 2009 by embracing the "modernisation of legal services by allowing for alternative business structures."[25] The report urged the Scottish Government to quickly take the necessary steps to amend or repeal legislation that cur-

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20. *See* Solicitors Regulatory Authority Consultations, *supra* note 14; Bar Standards Board Consultations, *supra* note 14; Legal Services Board, Consultations, *supra* note 14.

21. *See* CCBE, Response to the Solicitors Regulation Authority Consultation Concerning the Amendment of Rules 3 (Conflicts of Interest) and 4 (Duty of Confidentiality) of the Solicitors' Code of Conduct 2007 (2009), *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_CCBE_response_to_1_1253696293.pdf; CCBE, Response to the Solicitors Regulation Authority's Consultation on New Forms of Practice and Regulation for Alternative Business Structures (2009), *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_CCBE_Response_to_1_1253696350.pdf.

22. *See* Darrois Commission, Rapport sur les professions du droit (2009), *available at* http://www.justice.gouv.fr/art_pix/rap_com_darrois_20090408.pdf (in French only).

23. *See Darrois Report Calls for Overhaul of Legal Services Market in France*, Law Soc'y of Eng. & Wales (Apr. 29, 2009), http://international.lawsociety.org.uk/node/5991.

24. *See* Scottish Government, Wider Choice and Better Protection: A Consultation Paper on the Regulation of Legal Services in Scotland (2008), http://www.scotland.gov.uk/Publications/2008/12/29155017/0.

25. *See* Law Society of Scotland, Alternative Business Structures, http://www.lawscot.org.uk/Members_Information/abs/ (last visited Feb. 8, 2010); *see also* The Law Society of Scotland, Wider Choice and Better Protection: A Consultation Paper on the Regulation of Legal Services in Scotland: The Law Society of Scotland's Response (2009), *available at* http://www.lawscot.org.uk/uploads/ABS/Widerchoiceandbetterprotection.pdf.

rently impedes or prevents ABSs; the Legal Services (Scotland) Bill was introduced in September 2009 and was under discussion at the time this article was written.[26]

Changes in lawyer regulation have been implemented outside of Europe, too. Korea, for example, adopted a foreign legal consultant regulation in anticipation of its market liberalization.[27] In addition, a Korean think tank recently suggested allowing non-lawyers to own interests in law firms.[28] The discussion of this proposal in Korea is just beginning, and we anticipate it will be taken up in the context of liberalization as foreign and Korean law firms engage more directly.[29]

C. Foreign Lawyer Admission Developments Outside of the United States

Several important international initiatives in 2009 relate to U.S. lawyers seeking admission in other countries. The Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree issued its final report, which was the culmination of a two-year consultation process.[30] The Task Force recommended that common law Canadian jurisdictions adopt a uniform national requirement for bar admissions and that the National Committee on Accreditation apply this national requirement in assessing the credentials of applicants educated outside Canada. Part of the impetus for the report was the fact that "the number of internationally trained applicants for entry to bar admission programs has greatly increased and the requirement for equivalency has created a need to articulate what law societies regard as the essential features of a lawyer's academic preparation."[31]

Australia, too, has been active on this issue. In July 2009, the Australian Law Admissions Consultative Committee (LACC) issued its "Uniform Principles for Assessing Overseas Qualifications," which allow foreign-educated applicants to qualify as Australian lawyers provided that certain course and skill requirements are met.[32] The exact nature of

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26. *See* Alternative Business Structures, *supra* note 25; The Law Society of Scotland, ABS Frequently Asked Questions, http://www.lawscot.org.uk/Members_Information/abs/faqs.aspx.

27. *Korea Liberalizes Legal Services Market, Will Recognize 'Foreign Legal Consultants*, 25 LAW. MANUAL OF PROF. CONDUCT 227 (2009).

28. Anthony Lin, *South Korea Moves to Loosen Regulations on Legal Trade*, AM. LAW., Nov. 5, 2009.

29. Korea Adopts Clementi?, http://johnflood.blogspot.com/2009_11_01_archive.html (Nov. 4, 2009, 21:15 EST) (stating "The Seoul Bar Association released a statement, saying 'a non-lawyer's ownership of a law firm will make law firms subordinate to market capital which undermines the fundamental legitimacy of the current lawyer licensing system.'").

30. *See* FEDERATION OF THE LAW SOCIETIES OF CANADA, TASK FORCE ON THE CANADIAN COMMON LAW DEGREE FINAL REPORT 4 (2009), *available at* http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf.

31. *Id.* at 3.

32. *See* LAW ADMISSIONS CONSULTATIVE COMMITTEE, UNIFORM PRINCIPLES FOR ASSESSING QUALIFICATIONS OF OVERSEAS APPLICANTS FOR ADMISSION TO THE AUSTRALIAN LEGAL PROFESSION (2009), *available at* http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=30440EFC-1C23-CACD-22AD-FF00728F08CE&siteName=lca. The LACC Uniform Principles, for example, would require that Canadian and U.S. lawyers take the "usual subjects," which includes Administrative Law, Federal and State Constitutional Law, and Property, whereas applicants from South Africa take the "usual subjects" plus Equity. *Id.* at 17-18, 21.

The LACC website links to a number of related documents. *See* Law Admissions Consultative Committee, Documents: Significant LACC Documents, http://www.lawcouncil.asn.au/lacc/information_home.cfm (last visited Feb. 8, 2010).

the courses depends on the foreign applicant's original training. Graduates from certain foreign countries must also take more "make-up" courses.

In England and Wales, the current system for foreign lawyer admission is known as the Qualified Lawyers' Transfer Test (QLTT).[33] The SRA has decided, in principle, to create a new structure, to be called the Qualified Lawyer Transfer Scheme (QLTS).[34] The QLTS will: 1) ensure competence by assessing all candidates against the same set of standards; 2) allow lawyers to apply from a larger number and wider range of jurisdictions than at present; 3) substitute new practical exercises to objectively assess applicants' practice experience in the law of England and Wales in place of the current experience requirement; and 4) introduce a separate English language test for international applicants, which must be passed before an applicant is eligible to take the QLTS assessments. The SRA will likely submit QLTS regulations implementing these changes to the LSB in 2010.[35]

These three initiatives are significant to any U.S. lawyers seeking to qualify in these jurisdictions. Additionally, they provide a basis for comparison as U.S. regulators consider similar foreign lawyer admission issues.

III. U.S. Transnational Legal Practice Developments

A. State Implementation of Limited Admission Multijurisdictional Practice Rules

Several developments last year relate to limited licensing for foreign-educated law graduates and foreign-licensed lawyers, including state implementation of the ABA's foreign lawyer multijurisdictional practice (MJP) recommendations. The ABA has urged all states to adopt rules permitting foreign lawyers to practice as foreign legal consultants (FLCs) without taking a U.S. qualification examination (ABA MJP Recommendation #8).[36] It also has urged adoption of a Model Rule for Temporary Practice by Foreign Lawyers that would allow a foreign lawyer to engage in temporary practice on terms similar to the MJP rules for domestic lawyers (ABA MJP Recommendation #9).[37] Virginia and Iowa adopted new FLC rules in 2009, which brings the total to thirty-one U.S. jurisdictions with FLC rules.[38] Also in 2009, Virginia authorized temporary practice by foreign lawyers through

33. *See* Solicitors Regulation Authority, Qualified Lawyers Transfer Test, http://www.sra.org.uk/solicitors/qltt.page (last visited Feb. 8, 2010).

34. *See* Press Release, Solicitors Regulation Authority, SRA Board Approves New Qualified Lawyers Transfer Scheme (Sept. 10, 2009), http://www.sra.org.uk/sra/news/press/3584.article.

35. *See generally* SRA Education & Training Committee, http://www.lawsociety.org.uk/aboutlawsociety/how/committees/view=viewmeeting.law?MEETINGID=3378&COMMITTEEID=7 (last visited Feb. 8, 2010).

36. ABA Comm'n on Multijurisdictional Prac., Report 201H: Licensing of Legal Consultant 1 (2002), *available at* http://www.abanet.org/cpr/mjp/201h.pdf. The Model Rule for Licensing of Foreign Legal Consultants was later amended in ABA Recommendation 301A. Amended Model Rule Adopted by the House of Delegates Aug. 7-8, 2006, http://www.abanet.org/leadership/2006/annual/dailyjournal/threehundredonea.doc (last visited Feb. 8, 2010).

37. ABA Comm'n on Multijurisdictional Prac., Report 201J: Temporary Practice by Foreign Lawyers 1 (2003), *available at* http://www.abanet.org/cpr/mjp/201j.pdf.

38. *See* Iowa Court Rule 31.18 (allowing the licensing of foreign legal consultants), *available at* http://www.legis.state.ia.us/DOCS/ACO/CR/LINC/08-17-2009.CourtOrder.File91.pdf (last visited Feb. 8, 2010);

its new version of ABA Model Rule of Professional Conduct 5.5.[39] Although the ABA does not currently have a policy regarding foreign in-house counsel, Connecticut and Virginia both adopted rules (effective in 2009) permitting foreign corporate counsel registration, bringing the total number of states with such a provision to six.[40]

As cross-border legal practice increases, regulators worry about foreign lawyer accountability and the need for lawyer discipline cooperation.[41] Responding to this concern, during 2009, the Conference of Chief Justices (CCJ) adopted resolutions setting forth lawyer discipline cooperation protocols with both the Law Council of Australia and the Council of Bars and Law Societies of Europe (CCBE).[42]

B. Full Admission for Foreign Educated Applicants

In addition to the limited licenses described above, foreign law graduates and foreign lawyers often seek full admission in the United States. At the ABA Section of International Law Spring Meeting in April 2009, representatives of regulatory bodies and the bar in California, the District of Columbia, and New York discussed their jurisdictions' regulatory and administrative approaches to foreign lawyer and law graduate admission.[43] The topic of full admission also was a principal focus of a Special Committee on International Issues of the Section of Legal Education and Admissions to the Bar that met over the

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Rules of the Supreme Court of Virginia Part 1A, Rule 1A:7, Certification of Foreign Legal Consultants, *available at* http://www.abanet.org/cpr/mjp/flc_va.pdf; *see generally* Laurel S. Terry, Summary of State Action on ABA MJP Recommendations 8 & 9 (Sept. 26, 2009), http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf.

39. Virginia is the seventh state to adopt a rule allowing such practice. Virginia Rule of Prof'l Conduct 5.5, *available at* http://www.vsb.org/site/regulation/rules-55-and-85-of-rules-of-professional-conduct (last visited Feb. 8, 2010).

40. *See* Connecticut Practice Book Section 2-15A–Authorized House Counsel, http://www.jud.ct.gov/CBEC/housecounsel.htm#Amendment_to_Sec._2-15A (last visited Feb. 8, 2010); Va. Sup. Ct. Rule 1A:5, pt. II, http://www.vsb.org/site/members/cc-rule1a-5 (last visited Feb. 8, 2010). *See* Terry, *supra* note 38.

41. *See* 2008 Year in Review, *supra* note 10, at 954-56.

42. *See* Conference of Chief Justices, Resolution 13: In Support of Cooperation Among United States and Australian Bar Admission and Lawyer Disciplinary Bodies (Aug. 2009), http://ccj.ncsc.dni.us/InternationalResolutions/resol13.html; Conference of Chief Justices, Protocol for The Exchange of Information Between [State Admitting Authority] And The Law Council Of Australia, http://ccj.ncsc.dni.us/InternationalResolutions/ProtocolAustralia.pdf (last visited Feb. 8, 2010); Conference of Chief Justices, Resolution 2: In Support of Cooperation Among United States and European Disciplinary Bodies (Jan. 2009), http://ccj.ncsc.dni.us/2-ProposedCCBEResolution1-6-09.pdf; CCBE, Resolution In Support Of Cooperation Among American And European Disciplinary Bodies (2009), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Resolution_in_Suppor1_1241602552.pdf; Letter from Anne Birgitte Gammeljord, President of the CCBE, to the Hon. Margaret H. Marshall, the President of the Conference of Chief Justices (May 6, 2009) (creating an exception for Spain because of data protection rules), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/090506_letter_CCJpd1_1241602466.pdf.

43. ABA Section of International Law, Multiple Bar Admissions: Getting Qualified Outside the USA (Washington, D.C., Spring Meeting 2009) (includes materials from California, Washington D.C., and New York bar examination representatives) (on file with author). *See also* National Conference of Bar Examiners, Plenary Meeting (Baltimore, Md., April 2009) (panelists include speakers from Australia and Ireland and the Peking University School of Transnational Law and a session on Trends in International Practice) (on file with author).

course of 2009.[44] The Committee issued a report regarding this and other issues in July 2009. In response, the Section Council created an international committee, which is considering development of a model rule on bar eligibility for foreign law graduates, among other things. The issue of recognition of foreign educational credentials and licensing is a fundamental issue underlying international agreements.[45] At the same time, in the United States, certain state regulators and members of the Section of Legal Education and Admissions to the Bar have expressed concern about the effect of such recognition on domestic admission requirements.

Several 2009 developments raise interesting issues for lawyer admission rules that traditionally have required graduation from a U.S.-based ABA-accredited law schools. First, Massachusetts authorized a graduate of the online Concord Law School (which is not accredited by the ABA Section of Legal Education and Admissions to the Bar) to sit for its bar examination.[46] Second, the ABA Section of Legal Education and Admissions to the Bar is anticipating in the near future an application for accreditation by the Peking University School of Transnational Law.[47]

C. ABA Commission on Ethics 20/20

In August 2009, incoming ABA President Carolyn B. Lamm appointed a new commission to study the impact of globalization and technology on legal practice and regulation.[48] The Commission's work is guided by three principles: "protecting the public, preserving core professional values of the American legal profession, and maintaining a strong, independent, and self-regulated profession."[49]

President Lamm asked the Commission to review the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation. In November 2009, the Commission issued for comment its Preliminary Issues Outline, setting forth initial subjects for its consideration. The Commission sought and continues to welcome comments regarding that document and its work generally. The Ethics 20/20 Commission held its first public hearing in February 2010 and will be meeting regularly during 2010.[50]

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44. *Report of the Special Committee on International Issues*, 2009 A.B.A. Sec. of Legal Educ. & Admissions to the Bar 42, *available at* http://www.abanet.org/legaled/committees/International%20Issues%20Report%20(final).DOC [hereinafter International Committee Report] (summarizing the number of foreign-educated applicants who sat for U.S. bar examinations from 1992-2007); *see also* Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 Nw. J. Int'l L. & Bus. 487 (2003).

45. International Committee Report, *supra* note 44, at 12-14.

46. *See* Thomas Grillo, *Web Degree No Bar for this Lawyer*, Boston Herald, June 24, 2009.

47. *See, e.g.*, Stephen T. Yandle, Peking University, School of Transnational Law, Remarks at the Inaugural Symposium of the Joseph G. Miller and William C. Becker Institute for Professional Responsibility, University of Akron School of Law (Oct. 9, 2009); *see also* Bill Henderson, *Coming Soon . . . to China: A New ABA-Accredited Law School*, Peking University School of Transnational Law STL Media Kit (Nov. 28, 2008), http://stl.szpku.edu.cn/en/article.asp?articleid=107.

48. Letter from Jamie S. Gorelick & Michael Traynor, Co-Chairs ABA Comm'n on Ethics 20/20 (Nov. 19, 2009), *available at* http://www.abanet.org/ethics2020/outline.pdf.

49. *Id.*

50. *See* ABA Commission on Ethics 20/20, Calendar, http://www.abanet.org/ethics2020/ (last visited Feb. 8, 2010).

IV. Trade Negotiations Affecting Legal Services

During 2009, most of the U.S. activity regarding trade in legal services occurred along regional and bilateral lines. But there were some developments worth noting with respect to the multilateral General Agreement on Trade in Services (GATS).

A. GATS Negotiations

The GATS is an annex to the Agreement that created the World Trade Organization (WTO) and applies to cross-border services, including legal services.[51] All 153 WTO Members are bound by certain provisions of the GATS, but other GATS provisions apply only if a country lists a particular service sector, such as legal services, on a document called its Schedule of Specific Commitments (Schedule).[52] A country's legal services commitments are listed on its GATS Schedule according to four different "modes of supply" or methods of delivering legal services.[53]

The GATS includes two articles requiring future action by WTO Members. Article XIX of the GATS requires WTO Members, within five years of the GATS' 1995 effective date, to negotiate to further liberalize trade in services.[54] In the legal services context, this is generally referred to as GATS Track #1.[55] GATS Article VI(4) requires WTO Members to develop "any necessary disciplines" to ensure that domestic regulation measures do not create unnecessary barriers to trade.[56] In the legal services context, this second obligation is generally referred to as GATS Track #2.[57]

1. *GATS Track #1*

Despite deadlines with regard to GATS Track #1,[58] little progress has been made due in part, no doubt, to the problems in global financial markets and the credit and liquidity crises.[59] WTO Members held their Seventh Ministerial Conference in Geneva the week of November 30, 2009.[60] Prior to its commencement, the Chair announced that the upcoming Ministerial was "not intended as a negotiating meeting."[61] The Ministerial theme

51. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994) [hereinafter GATS].

52. *See* Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. __ (forthcoming 2010) [hereinafter *GATS to APEC*].

53. *See id.* at 52; GATS, *supra* note 51, art. I(2).

54. GATS, *supra* note 51, art. XIX.

55. *See GATS to APEC*, *supra* note 52.

56. *Id.*

57. GATS, *supra* note 51, art. VI(4).

58. The revised deadlines "called for revised offers by October 15, 2008, with final commitments due December 1, 2008." 2008 Year in Review, *supra* note 10, at 949.

59. *See, e.g.*, Pascal Lamy, Director-General, WTO, Remarks to the General Council: Lamy Creates WTO Task Force on Financial Crisis (Oct. 14, 2008), *available at* http://www.wto.org/english/news_e/news08_e/tnc_chair_report_oct08_e.htm.

60. *See* WTO General Council, *Seventh Session Of The Ministerial Conference, Draft Decision, Revision*, WT/GC/W/601/Rev.1 (May 25, 2009).

61. *See* WTO, *News, Chair says Geneva Ministerial "Not Intended as a Negotiating Meeting"* (July 22, 2009), *available at* http://www.wto.org/english/news_e/news09_e/mn09a_22jul09_e.htm.

was "The WTO, the Multilateral Trading System, and the Current Global Economic Environment."[62]

As we write, the outcome of the GATS Track #1 negotiations remains uncertain. Even if the Doha "progressive liberalization" negotiations collapse, however, the United States and other WTO Members remain bound by their prior commitments and obligations.

2. *GATS Track #2*

The WTO's Working Party on Domestic Regulation (WPDR) currently is responsible for developing any disciplines (*i.e.*, regulations) required by GATS Article VI(4). The most significant 2009 Track #2 development was the WPDR Chair's April 2009 circulation of a second revised set of draft disciplines,[63] although in substance this document was substantially similar to the January 2008 draft disciplines.[64] Despite WTO Members' repeated statements about their commitment to developing disciplines,[65] the WPDR's 2009 Annual Report reveals difficulty in reaching consensus. The Report explains that "large gaps in ambition for the disciplines remained, and progress of work was linked to progress on the market access negotiations. Several delegations were open to the idea of a reality check on the disciplines as a complementary element to technical work."[66] A June 2008 document that identifies disagreements concerning the January 2008 draft disciplines also demonstrates the challenges faced by those negotiating these disciplines.[67] Thus, although WTO Members remain committed to the concept of horizontal disciplines on domestic regulation, the shape of such disciplines is unclear.

The current U.S. position on the GATS disciplines issue appears to be the same as it was previously.[68] The United States has indicated that it remains cautiously supportive of these endeavors.[69]

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62. *See* WTO, *Seventh Ministerial Conference*, *available at* http://www.wto.org/english/thewto_e/minist_e/min09_e/min09_e.htm (last visited Feb. 8, 2010).

63. WTO, *Annual Report of the Working Party on Domestic Regulation [WPDR] to the Council for Trade in Services (2009)*, S/WPDR/12 (Oct. 2, 2009) ¶ 4 [hereinafter WTO WPDR 2009 Annual Report]; *see* WTO, Working Party on Domestic Regulation, Room Document, *Disciplines On Domestic Regulation Pursuant To Gats Article VI:4, Second Revision, Informal Note by the Chairman* (Mar. 20, 2009) (draft), *available at* http://www.tradeobservatory.org/library.cfm?refID=106851.

64. *Compare* WTO WPDR 2009 Annual Report, *supra* note 63, ¶ 4 ([The April 2009 draft] "contained only changes to a handful of paragraphs of the text on which discussions had indicated wide support for new language, and which left the overall balance of the text intact.") *with* WTO, Working Party on Domestic Regulation, Room Document, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman*, Room Document (Jan. 23, 2008) (revised draft), *available at* http://www.tradeobservatory.org/library.cfm?refID=101417.

65. *See* 2008 Year in Review, *supra* note 10, at 950.

66. *See* WTO WPDR 2009 Annual Report, *supra* note 63, ¶ 4-5.

67. *See* WTO, Working Party on Domestic Regulation, *Issues Received from Delegations for Discussion at the Informal Meeting of the WPDR on 8 July 2008* (June 25, 2008), *available at* http://www.tradeobservatory.org/library.cfm?refID=103141.

68. *See* OUTLINE OF THE U.S. POSITION ON A DRAFT CONSOLIDATED TEXT IN THE GATS WORKING PARTY ON DOMESTIC REGULATION (WPDR), at 1-2, *available at* http://www.ustr.gov/webfm_send/1084 (last visited Feb. 8, 2010).

69. *Id.* at 2.

B. OTHER U.S. FREE TRADE AGREEMENTS

Although U.S. and global interest shifted from the GATS to bilateral and regional agreements during 2007 and 2008, there was little U.S. bilateral trade activity during 2009. U.S. free trade agreements with Oman took effect in January 2009, and with Peru in February 2009,[70] but three other U.S. free trade agreements (with Colombia, Panama, and Korea), while signed, still await Congressional approval.[71] The little U.S. movement with respect to bilateral trade agreements differs from what occurred in other countries. While the U.S.-Korea FTA was awaiting approval, Korea signed an FTA with the EU and with India, and India signed an additional FTA with the ASEAN countries.[72]

There is much interest within the U.S. legal community in opening the Indian legal services market.[73] This was addressed during the ABA briefing trip to India in January 2009, organized by the ABA Section of International Law's International Legal Exchange (ILEX).[74] Although ABA representatives expected there would be follow-up discussions regarding transnational legal practice issues,[75] little has occurred in the intervening months. A recent article on the Indian legal market offers insight into the absence of progress.[76]

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70. Office of the United States Trade Representative, Oman Free Trade Agreement, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta (last visited Feb. 8, 2010); Office of the United States Trade Representative, Peru Trade Promotion Agreement, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa (last visited Feb. 8, 2010); *see generally* Office of the United States Trade Representative, U.S.-Oman Free Trade Agreement, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text (last visited Feb. 8, 2010); *see generally* Office of the United States Trade Representative, U.S.-Peru Trade Promotion Agreement, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (last visited Feb. 8, 2010).

71. Office of the United States Trade Representative, U.S.-Columbia Free Trade Agreement (Pending Congressional Approval), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta (last visited Jan. 15, 2010); Office of the United States Trade Representative, U.S.-Panama Trade Promotion Agreement (Pending Congressional Approval), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa (last visited Jan. 15, 2010); Office of the United States Trade Representative, Korea-U.S. Free Trade Agreement (Pending Congressional Approval), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (last visited Jan. 15, 2010).

72. *See EU, South Korea Sign Free Trade Accord*, 13 BRIDGES WKLY TRADE NEWS DIGEST 36 (Oct. 21, 2009); *India Signs Trade Deals with South Korea, ASEAN*, 13 BRIDGES WKLY TRADE NEWS DIGEST 30 (Sept. 9, 2009).

73. *See, e.g.*, Douglas S. Malan, *Banking on Boom Times in India: Conn. Firm Wants a Piece of World's Fastest Growing Economy*, CONN. L. TRIB., July 20, 2009; Douglas Wong, *India's 'Not for Sale' Legal Market Draws Law Firms from U.S., U.K.*, BLOOMBERG.COM, June 16, 2009, http://www.bloomberg.com/apps/news?pid=20601127&sid=aHz8zYy8.Vdg ("For the past five years, Asia's third-largest economy grew at the fastest pace since independence in 1947. Lawyers are betting India will be a growth market for them once they're allowed in.").

74. *See* ABA Section of International Law, ILEX Briefing Trip to India, (Jan. 4-10, 2009), http://www.abanet.org/intlaw/intlproj/trips/india.html.

75. *Id.*

76. *See* Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS (forthcoming 2010), *available at* http://ssrn.com/abstract=1371098 (last visited Feb. 8, 2010). After this article was written, the Bombay High Court issued its long-awaited "Lawyers Collective" decision (Judgment-W.P. 1526/1995, http://www.legallyindia.com/images/stories/pdf/Lawyers%20Collective%20v%20Ashurst%20&%20Ors%20Judgement%2016%20Dec%202009.pdf) regarding the law firms of White & Case, Chadbourne & Parke, and Ashurst Morris Crisp. That decision has been the subject of much interest and discussion in the U.S. transnational legal practice community and will be addressed in the 2010 "Year-in-Review."

There were, however, some process developments in 2009 that potentially are quite important. For example, in July 2009, the Obama Administration solicited comments on whether, in the future, there should be a standardized template for bilateral investment treaties (BITs).[77] The Administration also announced its plans to re-charter the statutorily-required private sector advisory groups known as ITAC to prohibit participation by registered lobbyists.[78] This proposal has been controversial.[79]

C. The APEC Legal Services Initiative

Contrary to the paucity of trade activity in 2009 regarding the GATS or U.S. bilateral trade agreements, important regional initiatives occurred. The Asia-Pacific Economic Cooperation (APEC) is one example. APEC is comprised of twenty-one country members, including the United States, that represent approximately forty percent of the world's population, fifty-four percent of world GDP, and forty-three percent of world trade.[80] In 2008, APEC agreed to fund a legal services initiative,[81] designed to "facilitate the provision of services in foreign and international law," including the "rights for foreign lawyers to work in association with host economy lawyers."[82] Although APEC is not a treaty organization and operates by consensus,[83] developments made pursuant to the Legal Services Initiative may be influential because of the identity of its members.

In furtherance of its legal services initiative, APEC circulated a questionnaire to its members to learn about regulation of foreign lawyers.[84] Responses were summarized[85] and discussed, among other issues, at a July 2009 "capacity building workshop" in Singapore.[86] The questionnaire has been used to develop a report on domestic regulatory approaches, including contact information for the appropriate regulatory authorities in each jurisdiction and information about whether a jurisdiction: 1) has a rule permitting tempo-

77. *See* Public Notice 6693, Notice of Public Meeting and Opportunity to Submit Written Comments Concerning the Administration's Review of the U.S. Model Bilateral Investment, 74 Fed. Reg. 34071 (July 14, 2009).

78. *See* Posting of Norm Eisen, Special Counsel To The President For Ethics And Government Reform, to White House Blogs, http://www.whitehouse.gov/blog/Lobbyists-on-Agency-Boards-and-Commissions/ (Sept. 23, 2009, 14:23 EST).

79. Keith Koffler, *Lobbyists Stew After Being Bounced From Boards*, CQ Today Online News (Oct. 5, 2009), http://www.cqpolitics.com/wmspage.cfm?docID=news-000003216413#.

80. APEC, About APEC, http://www.apec.org/apec/about_apec.html (last visited Jan 15, 2009); *see also* Kevin Voigt, *Does APEC matter anymore?*, CNN (Nov. 6, 2009), *available at* http://edition.cnn.com/2009/BUSINESS/11/06/apec.does.it.matter/index.html (stressing the importance of APEC for smaller economies, and likening it to "an international dating service for leaders" (quoting Charles E. Morrison, director of the East-West Center in Hawaii)).

81. *See* 2008 Year in Review, *supra* note 10, at 962. For additional information on the APEC Legal Services initiative, *see GATS to APEC*, *supra* note 52.

82. *See* APEC Group on Services, APEC Legal Services Initiative: Inventory of Requirements Affecting Practice of Foreign Law in APEC Jurisdictions (Iain Sandford ed., Aug. 2009) [hereinafter APEC Final Inventory].

83. *See* About APEC, *supra* note 80.

84. *See* Legal Services Initiative Workshop, *Legal Services Initiative–Questionnaire*, Asia Pac. Econ. Cooperation (2009), http://aimp.apec.org/Documents/2009/GOS/GOS2/09_gos2_009.DOC.

85. APEC Final Inventory, *supra* note 82, at 5.

86. The Singapore Workshop materials are available online. *See, e.g.*, Legal Services Initiative Workshop, *Document List*, Asia Pac. Econ. Cooperation (2009), 2009/SOM2/GOS/WKSP/000, http://aimp.apec.org/Documents/2009/GOS/WKSP1/09_gos_wksp_000.doc.

rary practice;[87] 2) provides for limited licensing of foreign lawyers; 3) allows foreign lawyers to seek full licenses to practice the law of the jurisdiction; and 4) allows foreign lawyers to enter into commercial associations with local lawyers or local firms.[88] While the survey generated responses from many APEC jurisdictions, not all responses were complete, and fewer than half of U.S. jurisdictions responded at all. In light of the potential usefulness of this sort of aggregation of information, the ABA Task Force on International Trade in Legal Services is continuing its efforts to encourage U.S. states to respond. The United States will be the APEC "Host Economy" in 2011; this may lead to APEC becoming the subject of increased focus by the U.S. government in the coming years.[89]

V. Conclusion

Regulation of transnational legal practice continues to evolve nationally, regionally, and through trade agreements. We anticipate that increased attention will be focused on the relationship of regulation and transnational legal practice, and that as regulators in one jurisdiction revisit national approaches to regulation, those in other jurisdictions will respond directly or indirectly through their own considerations. We look forward to the resulting dialogue in the coming years.

87. The terms "fly-in, fly-out" and "FIFO" are sometimes used to refer to temporary practice by a lawyer in a foreign jurisdiction in which the lawyer is not admitted. *See Legal Services Initiative–Questionnaire*, *supra* note 84.

88. *See* APEC Final Inventory, *supra* note 82, at 5, 9-13.

89. *See, e.g.*, APEC, *The APEC Host Economy*, http://www.apec2009.sg/index.php?option=com_content&view=article&id=24&Itemid=34 (last visited Feb. 8, 2010); Public Notice 6428, *APEC 2011 Leaders' Meeting*, 73 Fed. Reg. 69715 (Nov. 19, 2008); *GATS to APEC*, *supra* note 52.