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Transnational Legal Practice 2008

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Transnational Legal Practice

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I. Introduction

The current financial turmoil shaking the world illustrates the connectedness of national markets and economies. Legal practice is no exception: lawyers and their firms are experiencing the upheaval along with their clients.¹ This has resulted in new opportunities for lawyers and firms—in bankruptcy and restructuring and, likely in the future, in regulatory advising as well—and, at the same time, in substantial challenges. The promise of benefits from a diversified practice—in terms of both substance and geography—is being tested as lawyers and law firms follow their clients through the uncertainties of the current economic conditions.

As law firms cut the size of their legal and non-legal staffs and decrease compensation expectations, they also are capitalizing on the benefits of a geographically diverse footprint of practice by looking to overseas activities as opportunities for growth. The number of firms announcing new offices in the Middle East, for example, has not slowed during the economic crisis.² Over the last twenty years or so, the growth of overseas activities of the largest U.S.-based law firms has far outpaced their growth within the United States, by a rate of ten-to-one.³ In 2007, more than 15,000 lawyers worked for the *National Law Jour-*

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1. See, e.g., Posting of Marisa McQuilken to The BLT: The Blog of LegalTimes, <http://legal-times.typepad.com/blt/2008/12/latham-freezes-associate-pay.html> (Dec. 16, 2008, 12:45 EST); Nate Raymond, *Bonus Memos Hint at Firm Finances*, AM. LAW., Dec. 12, 2008, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202427591826>; Karen Sloan, *As Firms Cut Marketing, Others See Opportunity*, NAT'L L. J., Dec. 8, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426427122>.

2. *Office Openings and Closings*, HILDEBRANDT HEADLINES (Hildebrandt Int'l, Somerset, N.J.), Oct. 31, 2008, available at http://www.hildebrandt.com/HHSigUp.aspx?WP_ID=305 (In the last four months of 2008, eight U.S. law firms announced plans to open offices in the Middle East.).

3. *The NLJ 250*, NAT'L L. J., Nov. 18, 2008, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425874104> (tables include information on number of lawyers working in each office of

nal 250 firms in more than 550 offices located outside the United States.⁴ Indeed, two U.S.-based law firms with substantial investments in overseas offices joined the ranks of four of the London “Magic Circle” firms in a new category dubbed the “global elite.”⁵ But the description so far relates only to the most visible part of the story of the importance of overseas-related work for U.S. lawyers. Overseas-related work also supports lawyers working for firms that do not have formal international footprints. These may be firms with foreign clients or U.S.-based clients involved in offshore activities or partnerships. They may be firms that are members of international networks or associations of lawyers that serve as a source of referral relationships, among other things. Each of these arrangements points to the continuing importance of keeping watch over the regulatory and business environment for lawyers outside the United States. The U.S. Department of Commerce Bureau of Economic Analysis estimates that the export of U.S. legal services generated \$6.4 billion in receipts in 2007, while imports of legal services were valued at nearly \$1.6 billion, yielding a four-to-one surplus for balance-of-payment accounts.⁶ If globalization continues, as appears likely, lawyers may be able to rely on overseas activities as a sort of hedge against instability at home. Access to overseas legal markets, then, remains an issue of high priority.

The state-based U.S. regulatory scheme is increasingly discussed in the growing global legal market.⁷ The state regulation of U.S. lawyers is viewed by many as a complicating barrier for foreign lawyers (and thus law firms) who wish to establish a presence in the United States.⁸ For U.S.-based lawyers and firms, the state regulatory structure presents a challenge for lawyer mobility, both for purposes of representing clients directly and for

NLJ 250 firms); *The 1987 NLJ 250*, NAT'L L. J., Sept. 28, 1987; *The 1997 NLJ 250*, NAT'L L. J., Nov. 10, 1997; *The 2007 NLJ 250*, NAT'L L. J., Nov. 12, 2007.

4. See *The 2007 NLJ 250*, *supra* note 3.

5. Matt Byrne, *Introducing the Sweet Sixteen*, THE LAWYER, May 10, 2008, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=132761> (“Then come the firms that have gone, or are going, truly global (the UK magic circle, Skadden Arps Slate Meagher & Flom, Latham & Watkins.”); Kian Ganz, *Magic Circle Keeps U.S. Rivals at Bay with Record Year*, THE LAWYER, July 7, 2008, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=133709> (“A&O [Allen & Overy] senior partner David Morley said: “We can see the development and emergence of a global elite. It’s a convenient phrase for describing the four international magic circle firms plus Skadden and Latham. Those firms are all over £1bn in revenue and there’s a gap opening up in terms of scale. They all have wide geographic spreads—more so with London firms than with U.S. firms—and all are focused on premium work.”).

6. Bureau of Econ. Analysis, *U.S. International Services: Cross-Border Trade 1986-2007, and Services Supplied Through Affiliates, 1986-2006, Table 7: Business, Professional, and Technical Services: 2006-2007*, SURVEY OF CURRENT BUSINESS, Oct. 2008, available at <http://www.bea.gov/international/intlserv.htm> (Table 7c) (\$6,424,000 - receipts; \$1,561,000 payments).

7. See, e.g., Stephen Gillers, *Bar None*, THE AM. LAW., Oct. 1, 2008, available at <http://www.law.com/jsp/PubArticle.jsp?id=1202424951437> (calling for a model ABA rule on admission of foreign lawyers); Georgetown University Law Center, Center For The Study Of The Legal Professional Symposium: The Future of the Global Law Firm, Apr. 17-18, 2008, available at <http://www.law.georgetown.edu/LegalProfession/>(many speakers and commentators referred to the difficulties that the U.S. state-based regulatory system creates for global law firms).

8. For information on U.S. admission rules for foreign lawyers, see Chart X in NAT'L CONFERENCE OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 30-34 (Erica Moeser & Margaret Fuller Corneille eds. 2008) available at <http://www.ncbex.org/comprehensive-guide-to-bar-admissions/>

planning and strategic management objectives of multi-office law firms.⁹ As the impact of the financial crisis deepens in the market for lawyers, licensing barriers may assume a more significant position, privileging some and challenging others. Firms have situated most of their international work in liberal jurisdictions such as New York and Washington, D.C., over the last couple of decades.¹⁰ One can only wonder whether other practice areas that also require relatively flexible mobility opportunities will follow this pattern.

Legal education is another area affected by global forces, with an impact on both inbound and outbound movement. On the inbound side,¹¹ applications to U.S. graduate programs for foreign law graduates have become more streamlined as a result of the Law School Admission Council's (LSAC) new LL.M. Credential Assembly Service.¹² Indeed, during 2008, LSAC expanded its membership to include Australian schools.¹³ The three-year basic JD program, too, attracts a small but steady stream of applicants from overseas. These developments are evidence of the growing competitiveness of the market for law students. On the outbound side, new models for sending U.S. students overseas are emerging, and these promise to help broaden the experiences and knowledge of U.S. law students, many of whom inevitably will be working with non-U.S. law graduates in their careers.¹⁴ Related to this is the emergence of U.S.-style law schools outside of the United States. Some countries, including Korea, simply adopt the U.S.-structure of legal education as a graduate degree program.¹⁵ Others have gone further, instructing students in English and using U.S. law school methods, some even planning to seek ABA accreditation.¹⁶ As the 2006-2007 Year-in-Review article noted, the Conference of Chief Justices has adopted a resolution calling on the ABA to consider developing and implementing a

9. See generally, AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE: INTRODUCTION AND OVERVIEW (2002), available at <http://www.abanet.org/cpr/mjp/intro-cover.pdf>.

10. See Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 J. L. & POL'Y INT'L BUS. 1093-1150 (2000).

11. See Am. Bar Ass'n, Post J.D. Programs by Category, <http://www.abanet.org/legaled/postjdprograms/postjdc.html#2foreign%20> (last visited Mar. 7, 2009) (provides a listing of LL.M. programs for graduates of non-U.S. law schools); see generally Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM J. INT'L L.J. 1039 (2002); Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143 (2006).

12. See Law Sch. Admission Council, LL.M. Credential Assembly Service, <https://llm.lscac.org/llm/logon/splash.aspx> (last visited Mar. 7, 2009).

13. See Law Sch. Admission Council, <http://www.lscac.org/> (last visited Mar. 7, 2009).

14. See, e.g., Press Release, Georgetown Univ. Law Ctr., Georgetown Law Spearheads Center for Transnational Legal Studies in London (Oct. 8, 2008), available at <http://www.law.georgetown.edu/news/releases/October.7.2008.html> (The new Center for Transnational Legal Studies organized by Georgetown University Law Center "brings together faculty and students from 10 nations and five continents to study international, transnational and comparative law."); Am. Bar Ass'n, Foreign Study, <http://www.abanet.org/legaled/study-abroad/foreignstudyhome.html> (last visited Mar. 31, 2009) (Provides information on the ABA's regulation on U.S. law schools awarding credit for studying abroad.).

15. See, Kim Kwang-rok, *Korea Needs Real US-Style Law School System*, KOREA TIMES, Aug. 6, 2007, available at http://www.koreatimes.co.kr/www/news/special/2007/08/180_7836.html.

16. See, e.g., Bill Henderson, *Coming Soon . . . to China: A New ABA-Accredited Law School*, LEGAL PROF. BLOG, June 3, 2008, available at http://lawprofessors.typepad.com/legal_profession/2008/06/new-aba-accredi.html.

program to certify the quality of the legal education offered by universities in other common law countries.¹⁷

In sum, 2008 has shown no sign of diminishing global legal practice activity, and this article highlights some of the most important developments during the last year. The first section of this article documents developments with respect to items discussed in the 2006-2007 Year-in-Review prepared by the Transnational Legal Practice Committee.¹⁸ The second section addresses new developments, including a number of ABA initiatives, a new legal services initiative by the Asian Pacific Economic Cooperation, a new resolution from the Conference of Chief Justices, action by the American Society of International Law, and recent topics such as offshore legal outsourcing and litigation financing.

II. Ongoing Activities Relevant to Transnational Legal Practice

The 2006-2007 Year-in-Review discussed a number of developments in transnational legal practice.¹⁹ This section describes new developments since December 2007 with respect to a number of initiatives discussed in that article.²⁰

A. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) NEGOTIATIONS

Whenever the topic of transnational legal practice arises, one usually does not have to wait long before there is mention of the General Agreement on Trade in Services (GATS).²¹ Before providing an update on GATS developments, it is helpful to provide a brief overview for those who may not be familiar with the structure of GATS or its application to legal services.

GATS is an annex to the agreement that created the World Trade Organization (WTO) and applies to cross-border services, including legal services.²² All 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 its Schedule of Specific Commitments (hereinafter "Schedule").²³ A country that places legal services on its Schedule may treat foreign lawyers differently than domestic lawyers but must disclose any market access or national treatment limitations directed at foreign lawyers. A country's legal services commitments, market access, and national treatment limitations are

17. Laurel S. Terry, et al., *Transnational Legal Practice Developments 2007*, 42 INT'L LAW. 833, 850 (2008) (citing Conference of Chief Justices, Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar).

18. Terry, *supra* note 17, at 850.

19. *Id.*

20. *Id.*

21. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B, Apr. 15, 1994, 33 I.L.M. 1125, 1167 (1994), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter GATS]. For a lighthearted but comprehensive introduction to the GATS, see Laurel S. Terry, *The GATS and Legal Services in Limerick*, 15 MICH. ST. J. INT'L L. 635 (2007).

22. For additional information about the GATS' application to legal services, see GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (Int'l Bar Ass'n, May 2002), available at <http://www.ibanet.org/images/downloads/gats.pdf> [hereinafter IBA GATS HANDBOOK]; Terry, *supra* note 17 (summarizing twelve years of GATS developments).

23. See IBA GATS HANDBOOK, *supra* note 22.

listed on its Schedule according to four different “modes of supply,” or methods of delivering legal services.²⁴

The GATS included two articles that required future action. Article XIX of the GATS required WTO members, within five years of the effective date of the GATS in 1995, to begin negotiations to further liberalize trade in services. Article VI (4) required WTO members to develop “any necessary disciplines” to ensure that domestic regulation measures do not create unnecessary barriers to trade.²⁵ This first ongoing obligation is now handled under the auspices of the Doha Round trade negotiations; these developments are sometimes referred to as “GATS Track #1” activities.²⁶ GATS Track #1 activities refers to the efforts undertaken pursuant to GATS Article XIX to secure commitments from additional countries to add legal services to their Schedules or, for countries that had already listed legal services, to reduce or eliminate existing limitations on market access or na-

24. All services are “delivered” across national borders by the provider to the user in one of four “modes” so named in the GATS. Mode 1 contemplates the delivery by the provider from his home office directly to a user in another country by such means as a letter or telephone call. An e-mail from a lawyer’s office in the providing country (U.S., for example) to a client in a using country (Germany, for example) is a Mode 1 delivery. In the absence of censorship and wiretapping, the delivery of services in Mode 1 is virtually impossible to control (and revenues received for such services are difficult to trace). It is likely that a majority of the legal services provided internationally are delivered this way—and are largely “below the radar screens” of regulators or statisticians. Mode 2 contemplates the receipt of services by the user at the location of the provider. In the above paradigm, the client from Germany, consulting a lawyer in the lawyer’s New York office, would be obtaining cross-border legal advice under Mode 2. Such transactions are even more difficult to monitor or control than those performed under Mode 1. Mode 3 deliveries are made by a service provider in the country of the recipient through the provider’s “permanent establishment” in the country of the recipient. This has been interpreted informally in the GATS to refer solely to the ownership of the establishment and not the identity of the personnel working there. Thus, the delivery of the New York lawyer’s work product through his firm’s office in Germany is made under Mode 3, even if no U.S. lawyers were physically present or employed in the Germany office. Finally, Mode 4 contemplates the personal presence of a service provider in the country of the user. Under the above paradigm, Mode 4 is used by the New York lawyer who personally enters Germany to consult with his client (whether or not the lawyer has an office in Germany and whether or not the consultation related to German, U.S., or any other law.) This “fly-in fly-out” (FIFO) practice is probably the most common form of international trade in legal services. But as personal entry of a national of one country into the territory of another requires the incoming individual to hold a visa allowing the entry (or a visa is waived, as it often is for such persons as a U.S. citizen lawyer going to Germany or a German lawyer visiting the United States), Mode 4 deliveries of services are enmeshed in the contentious debates in many countries, including the United States, about “immigration” policies and “border protections” aimed at terrorists. See GATS, *supra* note 21, at art. I(2); IBA GATS HANDBOOK, *supra* note 22.

25. GATS, *supra* note 21, art. VI(4). The complete text of this subsection states:

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

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

26. *Id.* (The General Agreement on Tariffs and Trade (GATT), predecessor of the WTO, and now the WTO, have conducted trade liberalization efforts in periodic rounds where trade liberalization commitments were successively enlarged. The current round is known as the Doha Round after the city in which it commenced.)

tional treatment. The second obligation is primarily handled within the WTO Working Party on Domestic Regulation and sometimes is referred to as GATS Track #2 activities. The 2008 GATS legal services developments are discussed below.

1. *Track #1 Activities*

The most obvious 2008 development (or lack thereof) with respect to GATS Track #1 is that there was no conclusion to the Doha Round of negotiations. Despite the lack of an agreement, there were notable developments during 2008. In May 2008, the Chair of the Services Council issued a report that summarized elements required for the completion of the services negotiations.²⁷ This document summarized the key developments, reaffirmed the commitments in the Hong Kong Ministerial, acknowledged differences among members, and attempted to cover new ground.²⁸ The Chair called for further discussion on proposed language that was bracketed in the draft.²⁹ The Chair's May 2008 report provided the basis for later consultations with WTO members. In July 2008, a revised version was circulated that was substantially different from the May draft.³⁰ At the time this article was written, the July 2008 draft was the most recent version that is publicly available and thus presumably provides the clearest picture of where members are with respect to the services negotiations, including legal services. According to that July 2008 report:

1. The consultations have resulted in progress on outstanding issues.
2. [The July 2008 document] is a revised draft capturing the results of these consultations.
3. The discussion of the elements contained in [the] draft revealed certain issues which, while not specifically addressed in the draft, will require further consideration at a later stage in the [Council for Trade in Services'] Special Session.³¹

27. WTO Council for Trade in Services, *Report by the Chairman: Elements Required for the Completion of the Services Negotiations*, TN/S/33 (May 26, 2008) [hereinafter *May 2008 Chair's Report*].

28. The May 2008 Report was preceded by a February 2008 informal report. See WTO Council for Trade in Servs., *Report by the Chairman: Elements Required For the Completion of the Services Negotiations*, JOB(08)/5 (Feb. 12, 2008), available at <http://www.tradeobservatory.org/library.cfm?refID=101604>.

29. See *May 2008 Chair's Report*, *supra* note 27, para. 4. The bracketed language stated:

Negotiations must be driven by the same level of ambition and political will as reflected in the agriculture and NAMA modalities. While respecting the existing structure and principles of the GATS, Members shall respond to bilateral and plurilateral requests by offering commitments that substantially reflect current levels of market access and national treatment and provide new market access and national treatment in cases where significant trade impediments exist. . . . Members reiterate that the next offers shall provide market access in sectors and modes of supply of export interest to developing countries, such as Modes 1 and 4, as indicated in bilateral and plurilateral requests, in accordance with Article IV of the GATS.

30. See WTO Council for Trade in Servs., *Report by the Chairman: Elements Required For the Completion of the Services Negotiations*, JOB(08)/79 (July 17, 2008), available at <http://www.tradeobservatory.org/library.cfm?refID=103205> (last visited Dec. 10, 2008) [hereinafter *July 2008 Chair's Report*].

31. *Id.* Paragraph 4 in the revised version stated:

Members reaffirm that the services negotiations are an essential part of the DDA. They recognize that an ambitious and balanced outcome in services would be integral to the overall balance in the results of the DDA single undertaking. Negotiations must therefore be driven by a high level of ambition and political will as reflected in the other areas of the DDA. Accordingly, the negotiations shall aim at a progressively higher level of liberalization of trade in services with a

After the issuance of this report, many WTO members participated in a “Services Signaling Conference” in Geneva.³² In his summary of this signaling conference, WTO Director-General Pascal Lamy noted that members remained committed to the Hong Kong Ministerial statements and deadlines, that he had been pleased about expressions of willingness to close the gap between applied regimes and existing commitments in several sectors, that he was encouraged by signals that involved new market openings beyond status quo conditions, that he was pleased about expressions of satisfaction with the implementation of modalities for least-developed countries, and that the exercise did not represent the final outcome of the services negotiations.³³ The July 2008 report called for revised offers by October 15, 2008, with final drafts of commitments due December 1, 2008.³⁴ Regardless of whether these deadlines were realistic, they were not met, undoubtedly due in part to global problems in global financial markets and the credit and liquidity crises.³⁵ In December 2008, Director-General Pascal Lamy recommended against holding a Ministerial meeting in 2009.³⁶

The final GATS Track #1 development worth mentioning is that the Australian law firm of Minter Ellison has continued to update its chart that summarizes WTO members’ legal services offers.³⁷ This chart is regularly posted on the ABA GATS-Legal Services Track #1 webpage.³⁸

2. Track #2 Activities

Similar to GATS Track #1, there have been several Track #2 developments since December 2007. On January 23, 2008, the Chair of the WTO Working Party on Domestic

view to promoting the economic growth of all trading partners, and the development of developing and least-developed countries. There shall be no a priori exclusion of any service sector or mode of supply. Respecting the existing structure and principles of the GATS, Members shall, to the maximum extent possible, respond to the bilateral and plurilateral requests by offering deeper and/or wider commitments. Such responses shall, where possible, substantially reflect current levels of market access and national treatment and provide new market access and national treatment in areas where significant impediments exist, in particular in sectors and modes of supply of export interest to developing countries, such as modes 1 and 4, in accordance with Article IV of the GATS. Commitments shall be commensurate with the levels of development, regulatory capacity and national policy objectives of individual developing countries. In making such commitments, Members shall be guided by paragraphs 1, 2 and 7 of Annex C of the Hong Kong Ministerial Declaration.

32. WTO Council for Trade in Servs., *Report by the Chairman of the TNC: Services Signaling Conference*, JOB(08)/93 (July 20, 2008), available at <http://www.tradeobservatory.org/library.cfm?refID=103471> [hereinafter *Signaling Conference Report*].

33. *Id.* para. 48.

34. See *July 2008 Chair’s Report*, *supra* note 30, paras. 7-8.

35. 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.

36. See, e.g., Pascal Lamy, Director-General, WTO, Speaking Notes for the Director-General: Lamy Recommends No Ministerial Meeting by the End of this Year (Dec. 12, 2008), available at http://www.wto.org/english/news_e/news08_e/tnc_dg_12dec08_e.htm.

37. See Minter Ellison, WTO Services Negotiations—Derestricted Offers Relating to Legal Services (June 30, 2008), <http://www.abanet.org/cpr/gats/derestricted.pdf>.

38. Am. Bar Ass’n Ctr. for Prof’l Responsibility, Track 1 of the GATS—The Ongoing GATS (Doha) Negotiations, http://www.abanet.org/cpr/gats/track_one.html (last visited Dec. 10, 2008).

Regulation circulated a new set of draft disciplines on domestic regulation.³⁹ This is the last draft publicly available, but a leaked June 2008 document identifies issues on which WTO members disagree.⁴⁰ Director General Lamy's July 2008 report on the Services Signaling Conference noted that effective disciplines on domestic regulation played an important role with respect to the aspirations expressed by participants.⁴¹ The May 2008 and July 2008 Services Elements documents also reiterated the commitment to disciplines and called for intensified efforts.⁴² Thus, it appears that despite the problems in the Doha Round, WTO members remain committed to the concept of horizontal disciplines on domestic regulation.

3. *Other GATS-Related Developments: The IBA's October 2008 Resolution*

In addition to the ongoing GATS developments within the WTO, there were a number of other GATS legal services developments during 2008. One prominent development is the International Bar Association's (IBA) adoption of its market access-skills transfer resolution.⁴³ In October at its 2008 annual meeting in Buenos Aires, the IBA Council adopted a revised version of this resolution.⁴⁴ In addition to a number of "whereas" clauses, this resolution consisted of three substantive paragraphs; it encouraged countries that have not yet done so to place legal services on their Schedule and accurately observed that such countries are permitted to place conditions on these commitments, including a requirement that foreign lawyers coming into the jurisdiction provide skills and knowledge to the local legal profession. The resolution specifies that any such conditions must be transparent, not unreasonably burdensome, non-discriminatory as among foreign lawyers, not designed to obstruct foreign lawyers in the host jurisdiction, and not require the disclosure of confidential information.⁴⁵ Because lawyers in developed and developing countries

39. See Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, Informal Note by the Chairman, Room Document (revised draft Jan. 23, 2008), available at <http://www.tradeobservatory.org/library.cfm?refID=101417>.

40. See 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>.

41. See *Signaling Conference Report*, *supra* note 32, para. 48. See also *id.* para. 47 (citing the need for disciplines to implement Mode 4 and noting the mandate in Annex C of the Hong Kong Ministerial Declaration to develop disciplines on domestic regulation before the end of current negotiations).

42. See *July 2008 Chair's Report*, *supra* note 30, para. 5; *May 2008 Chair's Report*, *supra* note 27, para. 5.

43. For background on this, see Terry, *supra* note 17, at nn. 53-55. For additional information on this resolution, see Laurel S. Terry, Remarks at the Third Annual IBA Bar Leaders' Conference: Skills Transfer in Developing Jurisdictions (May 14, 2008), available at http://www.ibanet.org/images/downloads/BLC_Amsterdam2008/Laurel_Terry_PPT_Overview_Skills_Transfer.pdf.

44. See IBA, Resolution of the IBA Council on transfer of skills and liberalization of trade in legal services (Oct. 16, 2008), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=72BD1D90-A251-4FCE-AD4A-331A51667142>.

45. The operative language in this resolution states:

NOW THEREFORE BE IT RESOLVED, by way of supplement to (and without modification or limitation of) the Resolutions by IBA Council referred to in the first preambular paragraph above:

- (1) Countries that so far have not been willing to open their legal services market to Foreign Lawyers, or that have done so to a limited extent only as regards the scope of practice rights or rights of association with Local Lawyers, may wish to grant Foreign Lawyers access to their

agree that one of the best mechanisms for transferring skills is the employment of local lawyers by host law firms, the IBA currently is working on an association resolution that will address the issue of employment and partnership relationships among foreign and local lawyers.

4. *U.S. Implementation of Foreign Lawyer Multi-Jurisdictional Practice Rules*

The last Year-in-Review reported on U.S. state implementation of the ABA's recommended multi-jurisdictional practice rules.⁴⁶ In 2002, the ABA adopted nine recommendations regarding multi-jurisdictional practice (MJP); two of these recommendations addressed the rights of foreign lawyers to practice in the United States.⁴⁷ MJP Recommendation 8 urged all states to adopt rules permitting foreign lawyers to practice as foreign legal consultants (FLCs) without taking a U.S. qualification examination.⁴⁸ MJP Recommendation 9 suggested adoption of a Model Rule for Temporary Practice by For-

legal services market, or to reduce or remove any existing restrictions on such access, subject to the following:

(A) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction may be required by the Host Authority to participate, directly or indirectly, in the provision of formal continuing legal education and training programs sponsored or approved by the Host Authority or other bodies responsible for the development of the legal profession of the Host Jurisdiction and open to Local Lawyers generally.

(B) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the course of his/her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.

(2) In order to be consistent with the general principles of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skills Transfer as contemplated by Paragraphs (1)(A) and (1)(B) of this resolution would need to be: (i) transparent; (ii) not unreasonably burdensome; (iii) non-discriminatory as between Foreign Lawyers and (iv) not adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.

Any measures taken pursuant to Paragraph (1)(A) of this resolution should not require a Foreign Lawyer to disclose information that is proprietary or confidential to the Foreign Lawyer, his/her firm or any client.

Int'l Bar Ass'n, Resolution of the IBA Council on Transfer of Skills and Liberalization of trade in legal services (adopted Oct. 16, 2008), *available at* www.ibanet.org/Document/Default.aspx?DocumentUid=72BD1D90-A251-4FCE-AD4A-331A51667142.

46. See Terry, *supra* note 17, at 843-45.

47. ABA COMM'N ON MULTI-JURISDICTIONAL PRACTICE, FINAL REPORTS (adopted Aug. 12, 2002), <http://www.abanet.org/cpr/mjp/home.html> (MJP Recommendation 8 is Report 201H; Recommendation 9 is Report 201J; and the domestic counterpart rule is Recommendation 2, which is Report 201B). In a number of U.S. jurisdictions, foreign lawyers have an additional path to practice in the United States because they are eligible to sit for the bar exam and become a fully-licensed U.S. lawyer. See NAT'L CONFERENCE OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2008 COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 30-34, chart X (Erica Moeser & Margaret Fuller Corneille eds., 2007), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide.pdf (last visited Dec. 18, 2008).

48. ABA COMM'N ON MULTI-JURISDICTIONAL PRACTICE, REPORT 201H: LICENSING OF LEGAL CONSULTANT (2002), *available at* <http://www.abanet.org/cpr/mjp/201h.doc>. This rule was later amended in ABA Recommendation 301A (adopted by the House of Delegates Aug 7-8, 2006), *available at* <http://www.abanet.org/leadership/2006/annual/dailyjournal/threehundredonea.doc>.

eight Lawyers that would allow a foreign lawyer to engage in temporary practice (sometimes called “fly-in fly-out” or FIFO) on terms similar to the MJP rules for domestic lawyers.⁴⁹ Although there are a variety of reasons why many U.S. jurisdictions have not yet adopted MJP rules for foreign lawyers, the incomplete adoption of MJP Recommendations 8 and 9 by all states has been discussed during the GATS legal services negotiations and has been cited as a request of our trading partners in the Doha Round negotiations.⁵⁰

As of October 2008, twenty-nine U.S. jurisdictions had adopted a foreign legal consultant rule, including a number of states that recently adopted or revised an FLC rule.⁵¹ Seven jurisdictions in the United States permit temporary practice by lawyers not licensed in the United States. The states which have adopted rules explicitly authorizing temporary practice are Delaware, Florida, Georgia, New Hampshire, and Pennsylvania.⁵² Rule language is in effect in a sixth state, North Carolina, and appears to authorize temporary practice.⁵³ In addition, the Unauthorized Practice of Law (UPL) Committee in the District of Columbia has issued an opinion authorizing FIFO practice.⁵⁴ As the prior report noted, only one jurisdiction has issued a report urging rejection of Recommendation 9.⁵⁵ Other states continue to study the issue.⁵⁶ According to statistics collected by the ABA, approximately 80 percent of the actively-licensed U.S. lawyers are licensed in jurisdictions that have a foreign legal consultant rule.⁵⁷

Although the ABA’s MJP recommendations did not include foreign lawyers within Rule 5.5(d)’s safe harbor for “in-house” or corporate counsel, several states (Delaware, Virginia, and Washington) included foreign lawyers within the ambit of their in-house counsel

49. ABA COMM’N ON MULTI-JURISDICTIONAL PRACTICE, REPORT 201J: TEMPORARY PRACTICE BY FOREIGN LAWYERS (1993), available at <http://www.abanet.org/cpr/mjp/201j.doc>.

50. See, e.g., Pub. Citizen’s Posting, GATS Requests by State, http://www.citizen.org/documents/leaked_WTO_Service_requests.pdf (last visited Dec. 16, 2008) (general requests begin on page 1; requests regarding business services, including legal services, are found on pages 3-9; state-specific requests are listed alphabetically and begin on page 35); see also Collective Request —Legal Services, <http://www.tradeobservatory.org/library.cfm?refID=78740> (last visited Dec. 16, 2008).

51. See Laurel S. Terry, Summary of State Action on ABA MJP Recommendations 8 & 9 (Oct. 13, 2008), http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf (last visited Mar. 26, 2008) [hereinafter Terry Chart]. For additional information on the details of these rules, see Carol A. Needham, *Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-Border Legal Practice*, 15 MICH. ST. J. INT’L L. 605 (2007).

52. Terry Chart, *supra* note 51, at 2.

53. North Carolina’s regulation governing MJP omits the phrase “U.S. jurisdiction” and has been read to give implied authorization for temporary practice by lawyers licensed in other countries. See N.C. State Bar, Revised Rules, Preamble and Scope, <http://www.ncbar.com/rules/rules.asp> (last visited Dec. 15, 2008).

54. The Committee on the Unauthorized Practice of Law of the District of Columbia Court of Appeals issued opinion 14-04 on October 15, 2004. It is available on the court’s website at http://www.dcappeals.gov/dccourts/docs/rule49_opinion14-04.pdf.

55. Terry Chart, *supra* note 51, at 2 (the state rejecting it was Arizona).

56. See, e.g., Comments of the Virginia Bar’s Task Force on Multijurisdictional Practice and the language of the rule change proposed to the Virginia Supreme Court are available at <http://www.vsb.org/site/regulation/proposed-amendments-to-rules-55-and-85-of-rules-of-professional-conduct> (last visited Dec. 16, 2008).

57. See ABA CTR. FOR PROF’L RESPONSIBILITY, *Chart 1: Lawyer Population and Agency Caseload Volume, SURVEY ON LAWYER DISCIPLINE SYSTEMS* (2006), <http://www.abanet.org/cpr/discipline/sold/06-ch1.pdf>. Compare the total population of 1,363,537 active lawyers in the United States with the 1,097,233 active lawyers in the twenty-nine jurisdictions with an FLC rule. These statistics do not include North Carolina, which has an FLC rule, or New Hampshire, which does not.

rules.⁵⁸ During 2008, three additional states (Arizona, Connecticut, and Wisconsin) amended their in-house counsel rules in order to include foreign in-house counsel within their ambit. Arizona's Supreme Court Rule 38(i)(2) took effect in January 2009 and allows in-house counsel licensed outside the United States to register in Arizona on the same basis as those attorneys licensed in a jurisdiction within the United States. Connecticut amended its rule effective January 1, 2009, so that its definition of authorized in-house counsel includes any person who "is a member in good standing of the entity governing the practice of law of each state (other than Connecticut) or territory of the United States, or the District of Columbia or any foreign jurisdiction in which the member is licensed."⁵⁹ Wisconsin's new rule follows the increasingly popular model, used by Delaware in 2007,⁶⁰ in which the words "or foreign lawyer" are added to the ABA Model Rule; thus, the new Wisconsin Rule 5.5(d) states:

A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, who is not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or medical incapacity, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates. . .⁶¹

Several other admission and MJP implementation-related developments are worth noting. In 2008, the Florida Supreme Court approved language amending Florida Rule of Professional Conduct 4-5.5 to provide in section (b)(3) that lawyers who are not admitted in Florida may not "appear in court, before an administrative agency, or before any other tribunal" unless authorized to do so by the applicable rules of those panels.⁶² The comments to the amendment indicate that this might include complying with the Florida Rules of Judicial Administration governing appearance by non-U.S. lawyers.⁶³ Also in 2008, the Supreme Court of Louisiana amended its admission rule, effective January 1, 2009, to allow aliens "lawfully admitted for permanent residence" or "otherwise authorized to work lawfully" in the United States to qualify for admission to the bar of Louisiana.⁶⁴ This is a significant development because the Louisiana rule had been the subject of one of the unsuccessful certiorari petitions described in the 2006-2007 Year-in-Re-

58. DEL. SUP. CT. R. 55.1 (2005), available at <http://courts.delaware.gov/Rules/?supremerule55-1.pdf>; WASH. SUP. CT. R. 8 (2007), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr08; VA. SUP. CT. RULE 1A:5 (2006), available at <http://www.vsb.org/site/members/cc-rule1a-5>.

59. See CONN. SUP. CT. R. 2-15A; Rules of the Superior Court Regulating Admission to the Bar, Amendment to Sec. 2-15A—Foreign Law Degree or Law License—Effective January 1, 2009, available at http://www.jud.ct.gov/CBEC/housecounsel.htm#Amendment_to_Sec._2-15A (last visited Dec. 15, 2008).

60. DEL. R. PROF'L CONDUCT 5.5 (as revised in 2007), available at http://courts.delaware.gov/Rules/?DLRPP_Oct2007.pdf.

61. WIS. SUP. CT. R. 10.03(4)(f) (adopted July 30, 2008), available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=33576>.

62. See FLA. R. PROF'L CONDUCT 4-5.5 (2008).

63. *Id.*

64. LA. SUP. CT., BAR ADMISSION RULES, *Rule XVII: Admission to the Bar of The State Of Louisiana*, § 3(B) (2008).

view.⁶⁵ Finally, as noted earlier, there have been increased calls for the ABA to develop a model admission rule for foreign lawyers.⁶⁶

In sum, U.S. courts continue to actively consider foreign lawyer MJP issues.⁶⁷ In addition, the Domestic Summit, described below, may contribute to further developments in this area.

B. OTHER FREE TRADE AGREEMENT NEGOTIATIONS

At the time of the 2006-2007 Year-in-Review, the United States had signed free trade agreements (FTAs) with Columbia, Peru, Panama, and Korea that were still awaiting congressional approval and had one agreement—with Oman—that had been approved and was awaiting implementation.⁶⁸ One year later (in December 2008), three of these four FTAs were still awaiting Congressional approval and two (Peru and Oman) had been approved and were awaiting implementation.⁶⁹ In light of the November 2008 U.S. Presidential and Congressional elections, it is unclear whether the pending FTAs will be adopted in the form in which they were negotiated, if at all.

Although there was little movement on these FTAs within the past year, the Office of the U.S. Trade Representative (USTR) continued to show interest free trade agreements. In September 2008, for example, the USTR announced that the United States would join the Trans-Pacific Strategic Economic Partnership.⁷⁰ Also, as is set forth in greater detail in Section III of this article, the United States agreed to be a sponsor of the Asia-Pacific Economic Cooperation (APEC) Legal Services initiative.

C. LAWYER DISCIPLINE COOPERATION INITIATIVES

The 2006-2007 Year-in-Review discussed ongoing initiatives that focused on lawyer discipline cooperation and was triggered in part by the increasing amount of transnational legal practice.⁷¹ As the 2006-2007 article discussed, the number of U.S. jurisdictions with rules that permit foreign lawyers to practice in the United States and the number of non-

65. Terry, *supra* note 17, at 850-52.

66. See Gillers, *supra* note 7. A number of other countries are also interested in these kinds of education and admissions issues. See, e.g., Fed'n of Law Soc'ys of Can., Task Force On The Canadian Common Law Degree Consultation Paper (Sept. 2008), available at http://www.flsc.ca/en/pdf/2008Consultation_paper.pdf; Arrangements for Qualified Lawyers Transferring to Become Solicitors in England and Wales, U.K. SOLICITORS REGULATION AUTH., Nov. 11, 2008, available at <http://www.sra.org.uk/sra/consultations/1454.article> (last visited Dec. 16, 2008).

67. See DEL. R. PROF'L CONDUCT 5.5.

68. See Terry, *supra* note 17, at nn. 80-85. The 2007 Year-in-Review included details about these proposed FTAs, including that they applied to legal services, included a Professional Services Appendix, and included domestic regulation provisions, investment provisions, and "standstill" provisions. The Peru and Colombia FTAs also included side letters that required a review of selected state measures, including legal services measures.

69. See *id.*; see also PTPA Press Releases, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Press_Releases/Section_Index.html (last visited Dec. 10, 2008) (includes links to information about Congressional adoption and presidential signing of the Peru Trade Promotion Agreement).

70. See Office of U.S. Trade Representatives [USTR], United States to Negotiate Participation in Trans-Pacific Strategic Economic Partnership (Sept. 2008), available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file660_15116.pdf.

71. See Terry, *supra* note 17, at 850.

U.S. lawyers representing their clients in this country continues to increase.⁷² That article also noted that U.S. regulators have been increasingly interested in developing an accountability system for foreign lawyers practicing in the United States, including but not limited to ensuring that there exists a system to exchange information relating to misconduct and discipline.⁷³ The 2006-2007 Year-in-Review referred to ongoing discussions among the ABA Standing Committee on Professional Discipline, the ABA ITILS Task Force on International Trade in Legal Services, and the Council of Bars and Law Societies of Europe (CCBE) to facilitate discipline cooperation.⁷⁴ At a May 2008 meeting among ABA and CCBE representatives in Amsterdam, it became clear that adoption of a full international reciprocal discipline protocol based upon Rule 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement would present difficulties for the CCBE. Although both organizations remain committed to fostering communication and developing further cooperation, work on the “protocol” moved to a different forum.

In August 2008, the CCBE submitted to the Conference of Chief Justices a draft Memorandum of Understanding (MOU). This document proposed a framework for situations where a foreign lawyer is charged with professional misconduct or has been disciplined by a host jurisdiction for violating a rule of professional conduct. In these situations, the regulatory authority of the host jurisdiction may notify the regulatory authority of the lawyer’s home jurisdiction.⁷⁵ The draft MOU further provides that upon receipt of such information, the home jurisdiction’s regulatory authority may take whatever action it deems appropriate and shall inform the host jurisdiction of its decision. To facilitate the exchange of this information, the draft MOU states that the CCBE and the Conference of Chief Justices agree to exchange contact information for their jurisdictions’ respective regulatory authorities.

Under ABA Model Rule 22, a lawyer must provide such notice to the home disciplinary agency of any discipline imposed by another jurisdiction.⁷⁶ Rule 17 of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that upon the imposition of a public disciplinary sanction, disciplinary counsel shall provide notice to the disciplinary agency of every other jurisdiction where the disciplined lawyer is admitted.⁷⁷ Every U.S. jurisdiction has adopted a reciprocal discipline rule similar to ABA Model Rule 22.⁷⁸ In January 2009, the Conference of Chief Justices adopted a resolution endorsing discipline coopera-

72. See E-mail from Ellyn Rosen, Associate Regulation Counsel, ABA Ctr. for Prof'l Responsibility, to Laurel Terry (Dec. 16, 2008) (on file with author) (summarizing research she conducted when preparing the first draft ABA-CCBE protocol).

73. *Id.*

74. *Id.*

75. “Home” jurisdiction for lawyers generally means that jurisdiction in which an individual is “admitted” or licensed to practice law. For law firms, the concept of “home” jurisdiction is tied to the geographic and historic foundation of the firm, typically also where a firm maintains its principal office. See, e.g., Terry, *supra* note 17.

76. See ABA MODEL RULES FOR LAWYER DISCIPLINE R. 22 (2002), available at <http://www.abanet.org/cpr/disenf/rule22.html>.

77. See ABA MODEL RULES FOR LAWYER DISCIPLINE R. 17 (2002), available at <http://www.abanet.org/cpr/disenf/rule17.html>.

78. E-mail from Ellyn Rosen, Associate Regulation Counsel, ABA Center for Professional Responsibility, to author (Dec. 16, 2008).

tion with the CCBE, which was followed by the CCBE's later adoption of similar principles.⁷⁹

D. ATTORNEY CLIENT PRIVILEGE AND AKZO NOBEL

The 2006-2007 Year-in-Review also reported on a European case known as *Akzo Nobel*.⁸⁰ In September 2007, the European Court of First Instance (CFI) addressed the issue of attorney-client privilege in EU antitrust (competition) proceedings.⁸¹ The *Akzo Nobel* court found that certain documents were protected by attorney-client privilege and that some of the procedures used by the European Commission were improper because the Commission examined the documents without giving the affected parties an opportunity to assert the attorney-client privilege issue before the CFI.⁸² The court agreed that the privilege covered internal company documents drawn up exclusively to seek legal advice from an independent lawyer.⁸³ But it rejected the argument that communications with the company's in-house counsel were protected.⁸⁴ The court held that the attorney-client privilege applied only to independent lawyers and that the privilege did not apply to internal communications involving in-house lawyers.⁸⁵ The decision of the CFI was similar to the decision by the European Court of Justice (ECJ) in *AM&S* in which the Court denied the attorney-client privilege extended to European in-house counsel.⁸⁶

When the 2006-2007 Year-in-Review was written, the period for an appeal of *Akzo Nobel* was still pending.⁸⁷ The case has now been appealed to the ECJ, and a number of parties—including the ABA—have filed a petition to intervene.⁸⁸ In February 2009, the ECJ

79. Conference of Chief Justices, Resolution 2, In Support of Cooperation Among United States and European Disciplinary Bodies (Jan. 2009), available at <http://ccj.ncsc.dni.us/2-ProposedCCBEResolution1-6-09.pdf>; Email from Jonathan Goldsmith, CCBE Secretary General to Laurel Terry (March 5, 2009) (on file with author) (noting that the CCBE Standing Committee adopted its resolution on February 19, 2009).

80. Terry, *supra* note 17, at 857.

81. *Akzo Nobel* refers to two joined cases: Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chems. Ltd., Akcros Chems. Ltd. v. Comm'n*, 2007 E.C.R. II-3523, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-125/03>.

82. *Id.* para. 101.

83. *Id.* paras. 122-23.

84. *Id.* paras. 166-69.

85. *Id.*

86. Case 155/79, *AM & S v. Comm'n*, 1982 E.C.R. 1575, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61979J0155.

87. Terry, *supra* note 17, at 857.

88. See ABA, Application for Leave to Intervene in Case C-550/07 P (on file with author) [hereinafter ABA Intervention Petition]; Molly McDonough, *Flying Under the Radar*, ABA JOURNAL, Jan. 2005, available at http://www.abajournal.com/magazine/flying_under_the_radar/ (stating that "[t]he ABA took steps to allow for the filing of a 'written statement of intervention'—the equivalent of an amicus brief—in support of extending the privilege, in the combined cases of Akzo Nobel Chemicals Ltd., No. T 125/03 R, and Akcros Chemicals Ltd., No. T 253/03 R, but no brief has been submitted.").

The ABA intervention petition explained as follows the basis for the ABA's interest in the case :

Many ABA members, whether they practice in the United States or in other countries, represent clients with international business operations. In the course of those representations, it is necessary for ABA members to interact with other lawyers around the world who also provide legal services to the same clients, including lawyers in the EU in which, under the *AM&S* decision as confirmed by the CFI, client-lawyer communications with in-house attorneys are not protected.

...

rejected the ABA's intervention petition.⁸⁹ Because of the importance of the attorney-client privilege issue, this case will be closely followed by many interested in transnational legal practice, even though the ABA's petition for intervention was rejected.

E. FATF

The 2006-2007 Year-in-Review provided background information about the Financial Action Task Force (FATF) and its ongoing, hotly-contested negotiations.⁹⁰ In 2008, those negotiations came to fruition with the October 28 adoption of an FATF document entitled "Risk Based Guidance for Legal Professionals" ("Lawyer Guidance").⁹¹ The Lawyer Guidance, which contains 125 separately numbered paragraphs and is a complex document, was the product of interventions by the ABA, the CCBE, and the IBA, among others.⁹² Although it is beyond the scope of this article to address that document in detail, it is a significant development about which it is worth knowing. Fortunately, Kevin Shepherd, who was one of the ABA's FATF negotiators, has written an excellent article that sets forth

However, such US-privileged materials are at risk of seizure by the Commission in an on-the-spot investigation; indeed, so are client-lawyer communications occurring wholly *inside* the United States that are prepared solely for the purposes of giving confidential legal advice to the client or for the purposes of litigation in the US. Both types of communications, which have a high degree of protection (absolute in the case of the attorney-client privilege) in the United States, are liable to examination and copying by the Commission during investigations under Article 20 of Regulation No 1/2003 or to compelled production under requests for information under Article 18 of that Regulation. The problem has become acute since the *Akzo* judgment. Increasingly, Commission investigations extend to undertakings whose primary place of business is located outside the European Economic Area ("EEA"), including several prominent companies incorporated in the US. Based on the *Akzo* judgment, the Commission asserts the right to seize or require production of confidential client-lawyer communications that were made or received in the United States (both in-house and external) and are privileged under U.S. law if these are held in, or can be electronically accessed from, the EU/EEA. The lack of protection under the LLP in Commission investigations for (1) communications between EU lawyers and lawyers and clients located in the US, and (2) communications that are produced in the US, both of which are created for the purposes of giving confidential legal advice in the U.S. and are fully privileged in U.S. litigation, has a significant chilling effect on the ability of those multinational clients to have the benefit of effective, coordinated legal services.

As stated, many ABA members are employed in Europe as corporate counsel and are directly affected by the ruling in *Akzo* refusing the protection of LLP to confidential communications giving legal advice to their employer. As it stands, the CFI's judgment in Case T-253/03 will therefore gravely impair the ability of many ABA members to participate effectively in the administration of justice in EU Member States and before the EU jurisdictions.

If the Court upholds the judgment of the CFI on the basis of the rule as stated in *AM&S* confining the protection of LLP to independent lawyers entitled to practice their profession in the EU/EEA, it will also directly affect a far wider category of members of the ABA (both in the EU/EEA and in the US) since their confidential advice given under the full protection of privilege in the U.S. will be open to scrutiny and potential use as evidence by the Commission in the circumstance described above.

ABA Intervention Petition, *supra* note 88, paras. 7, 9-13.

89. See Order of the President of the Court, Case C 550/07 P (Feb. 5, 2009) (on file with author).

90. Terry, *supra* note 17, at 846.

91. FATF, RISK-BASED APPROACH GUIDANCE FOR LEGAL PROFESSIONALS (Oct. 28, 2008), *available at* <http://www.fatf-gafi.org/dataoecd/5/58/41584211> [hereinafter *LAWYER GUIDANCE*].

92. *Id.*

the history of the FATF and the background that led to the Lawyer Guidance; his article provides the equivalent of a legislative history that explains how the various provisions in the Lawyer Guidance came to exist.⁹³

Although an in-depth review is beyond the scope of this article, a brief review of this important document is in order. As noted in last year's report, FATF is an inter-governmental body established to develop and promote anti-money laundering and terrorism financing policies at the national and international levels.⁹⁴ In 1990, FATF adopted a set of forty recommendations;⁹⁵ in 2001, it initiated a review of those forty recommendations, resulting in its May 30, 2002, Consultation Paper known as the Gatekeeper Initiative.⁹⁶ This FATF consultation paper proposed that "certain professionals, such as lawyers, should. . .serve as 'gatekeepers' to the international financial and business markets" by, *inter alia*, disclosing client breaches of the rules, even if such information was obtained in confidence, though not revealing the disclosure to the affected clients.⁹⁷ The FATF Recommendations encouraged countries to develop a risk-based approach to efforts to combat money laundering and terrorism financing. The theoretical and practical underpinning of the risk-based approach is to ensure that limited resources to combat money laundering and terrorist financing are used so that the greatest risks receive the highest attention.⁹⁸ As Mr. Shepherd points out, this risk-based approach differs fundamentally from a rules-based approach under which a lawyer would be required to comply with particular laws, rules, or regulations irrespective of the underlying quantum or degree of risk.⁹⁹ The Lawyer Guidance adopts a risk-based approach and does so in a "stand alone" document that focuses exclusively on the legal professions.¹⁰⁰

One of the most contentious issues in the FATF was whether lawyers would be subject to the "suspicious transaction reporting" (STR) obligation with respect to their clients.

93. See Kevin L. Shepherd, *Guardians At The Gate: The Gatekeeper Initiative And The Risk Based Approach For Transactional Lawyers*, 43 REAL PROP. TR. & EST. L. J. 903 (2009).

94. Fatf-gafi.org, About the FATF, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html (last visited Mar. 26, 2008).

95. See ABA TASK FORCE ON GATEKEEPER REGULATION & THE PROFESSION, RECOMMENDATION (2003), available at <http://www.abanet.org/leadership/recommendations03/104.pdf> [hereinafter ABA GATEKEEPER RESOLUTION]; see also ABAnet.org, Criminal Justice Task Force on Gatekeeper Regulation & the Profession, <http://www.abanet.org/crimjust/taskforce/home.html> (last visited Mar. 26, 2008).

96. ABA GATEKEEPER RESOLUTION, *supra* note 95.

97. *Id.* The ABA report summarized the FATF Gatekeeper recommendations as follows:

The Consultation Paper proposes that certain anti-money laundering measures be extended to lawyers, such as (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance training and record-keeping requirements for lawyers and law firms, and, (4) under certain circumstances, "suspicious transaction reporting" ("STR") requirements that would require lawyers to report to a government enforcement agency or a self-regulatory organization ("SRO") information that triggers a "suspicion" of money laundering relating to a client activity.

Id. A proposed "noisy withdrawal" rule would require lawyers to breach confidentiality and inform appropriate officials of their clients' conduct. The Gatekeeper Initiative would also prohibit lawyers from notifying their clients of the lawyers' disclosures.

98. See LAWYER GUIDANCE, *supra* note 91, para. 18.

99. Shepherd, *supra* note 93, § IV.

100. See LAWYER GUIDANCE, *supra* note 91 (stating the legal professions addressed in the Guidance include lawyers and notaries).

Mr. Shepherd's forthcoming article provides background on this issue and explains the handling of this issue in the Lawyer Guidance:

The lawyer groups steadfastly refused to agree to the inclusion of any provision in the Lawyer Guidance that would impose an STR requirement on lawyers. The lawyers explained that the imposition of an STR obligation on lawyers would run afoul of the attorney-client privilege and the duty of client confidentiality and would prove injurious to the attorney-client privilege. After considerable debate, FATF and the lawyers resolved the issue by acknowledging that STRs are not part of risk assessment; rather, STRs represent a response mechanism once a suspicion of money laundering has been identified. Because of the risk-based approach orientation of the Lawyer Guidance, FATF agreed to language that would not impose a mandatory STR obligation on legal professionals. However, in those jurisdictions where a law or regulation mandates the filing of an STR report, the risk-based approach does not apply and the legal professional must comply with the rule (the so-called "rules-based approach"). FATF thus leaves it to individual countries to adopt either a risk-based or rules-based approach on STRs for legal professionals.¹⁰¹

The Lawyer Guidance identifies country risk, client risk, and service risk as factors a lawyer should take into account. According to Mr. Shepherd, the Lawyer Guidance is consistent with the ABA policy that emphasizes the need for the legal profession to develop "good practice in the design and implementation of an effective risk-based approach."¹⁰² One contentious issue during the negotiations was how to weigh risks associated with beneficial ownership. After meeting in September 2008 to address this issue, the FATF and the private sector resolved this issue before the October 2008 FATF plenary meeting.¹⁰³

Although U.S. lawyers may not yet have heard much about the FATF Recommendations or the Lawyer Guidance, this may change in the future. A number of bar associations around the world have recently adopted anti-money laundering policies that seem to be driven, at least in part, by the FATF developments and in anticipation of possible government action.¹⁰⁴

101. Shepherd, *supra* note 92, § V(A)(3)(a); *see also* LAWYER GUIDANCE, *supra* note 91, ¶ 120.

102. Shepherd, *supra* note 93, § VII; *see also* ABA GATEKEEPER RESOLUTION, *supra* note 95, and the 2008 ABA Resolution discussed *infra*.

103. Shepherd, *supra* note 93, § V(A)(5).

104. *See, e.g.*, Law Council of Austl., Anti-Money Laundering and Counter Terrorism Financing Reforms, *available at* <http://www.lawcouncil.asn.au/initiatives/aml-counter-terrorism-reforms.cfm> (last visited Dec. 15, 2008) (includes links to several 2008 documents); FED. OF LAW. SOC'YS OF CAN., MODEL RULE ON CLIENT IDENTIFICATION AND VERIFICATION REQUIREMENTS (adopted Mar. 31, 2008), *available at* http://www.flsc.ca/en/pdf/Federation_Model_Rule_080327.pdf; UK Money Laundering and "Know Your Client" Rules, <http://www.aprl.net/2008-Amsterdam/12/12bAML.pdf>; Sample KYC Form, <http://www.aprl.net/2008-Amsterdam/06/6eKYC.pdf> (last visited Dec. 16, 2008). *See also* Ass'n of Prof'l Responsibility Lawyers, May 2008 Amsterdam Conference Materials, http://www.aprl.net/Programs/program2008_05.htm (last visited Dec. 10, 2008) [hereinafter APRL Conference]. Selected papers from the APRL Conference were published in a 2008 Global Legal Practice Symposium of the Penn State International Law Review. *See* Laurel S. Terry, *Foreword, 2008 Global Legal Practice Symposium*, 27 PENN ST. INT'L L. REV. 269 (2008).

F. INTERNATIONAL LEGAL PROFESSION REFORM EFFORTS, INCLUDING IN THE U.K.

There have been several new developments in antitrust and reform initiatives directed towards the legal profession.¹⁰⁵ In February 2008, the Organisation for Economic Co-operation and Development (OECD) issued a report on competitive restrictions in the legal profession.¹⁰⁶ The OECD Report addressed the issues of independent regulatory authority for legal services, entry restrictions, exclusive rights, and advertising and price restrictions. It also discussed regulation of the legal professions (market failures and rent-seeking), removing unnecessary restrictions, and informed versus uninformed buyers. In July 2008, the Federation of Law Societies of Canada publicized the results of a study that had been commissioned regarding Ontario's legal services market.¹⁰⁷ This report was prepared in response to the Canadian Competition Bureau report on self-regulated professions, which had called for a response within two years.¹⁰⁸ In July 2008, France commenced its own investigation into the legal profession—the Darrois Commission.¹⁰⁹ The Commission, led by Jean Michel Darrois, has been assigned by President Sarkozy to study the legal profession in France and examine the multi-disciplinary practices and non-lawyer investment in law firms; on April 8, 2009, the Commission issued its report which concluded, *inter alia*, that the professions of notary and avocat should not be merged, but should be permitted to work together and that for certain types of law structures, there may be up to 25 percent outside investment under certain conditions.¹¹⁰

One significant development in 2008 concerns the ongoing implementation of the October 2007 U.K. Legal Services Act.¹¹¹ The Legal Services Act has three main components: it dramatically reshaped the regulation of the legal profession in England and Wales; it revamped the complaints system for lawyers; and it created a framework that will permit England and Wales to follow in the wake of Australia and allow multidisciplinary practices and publicly traded law firms.¹¹²

There have been a number of new developments with respect to the first and third components of this U.K. legislation. With respect to the restructuring of the regulatory

105. For developments in 2007, see Terry, *supra* note 17, at 854-56.

106. See OECD, COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS, DAF/COMP 39 (2007), available at <http://www.oecd.org/dataoecd/12/38/40080343.pdf>.

107. EDWARD IACOBUCCI & MICHAEL TREBILCOCK, SELF-REGULATION AND COMPETITION IN ONTARIO'S LEGAL SERVICES SECTOR: AN EVALUATION OF THE COMPETITION BUREAU'S REPORT ON COMPETITION AND SELF-REGULATION IN CANADIAN PROFESSIONS (2008), available at <http://www.flsc.ca/en/pdf/TrebilcockPaper.pdf>.

108. See Terry, *supra* note 17.

109. See Darrois Commission, Accueil, <http://www.commission-darrois.justice.gouv.fr/> (last visited Dec. 10, 2008) (in French only).

110. Mission confiée par le Président de la République, Rapport sur les professions du droit (March 2009), http://www.justice.gouv.fr/art_pix/rap_com_darrois_20090408.pdf. See also Am. Chamber of Commerce in Fr., Events Roundtable Discussion with Commission Darrois—Presented by the Legal Affairs Task Force, Nov. 13, 2008, <http://www.amchamfrance.org/chapters.php?idcontenu=52&idpage=127&idmenu=98>; Neil Rose, *France unveils Clementi-style review*, LAW GAZETTE, July 17, 2008, available at <http://www.lawgazette.co.uk/news/france-unveils-clementi-style-review>.

111. See Terry, *supra* note 17, at 856.

112. *Id.* In 2007, Australian personal injury law firm Slater and Gordon became the first publicly-traded law firm in the world. See, e.g., Slater & Gordon Ltd., Prospectus (Apr. 13, 2007), available at <http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf>; Alexia Garamfalvi, *In a First, Law Firm Goes Public*, LEGAL TIMES, May 22, 2007, available at <http://www.law.com/jsp/article.jsp?id=1179751700602>.

system, the new Legal Services Board has now been appointed; as required by the legislation, this Board has a non-lawyer chair and a non-lawyer majority.¹¹³ The U.K. Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB), both of which are “approved regulators” under the new Act, have issued a number of consultations in connection with the October 2007 Legal Services Act.¹¹⁴ With respect to the third component of the legislation, which concerns alternative business structures, the SRA issued regulations that took effect in March 2009 and will permit non-lawyers to hold up to 10 percent of the equity interest in a law firm; these non-lawyer owners, however, are not permitted to be passive investors.¹¹⁵ The regulations that would allow passive equity investment (and possibly publicly traded law firms) are not expected until 2011 or 2012. This third component of the U.K. Legal Services Act has been the subject of intense interest in the United States as well as the United Kingdom since its adoption.¹¹⁶

III. New Developments

This section describes several ABA and U.S.-related developments and several transnational legal practice “hot topics.”

A. ABA ACTIVITIES

In August 2008, the ABA House of Delegates adopted a resolution supporting the contribution that negotiated liberalization of international trade makes to the rule of law.¹¹⁷ The ABA House of Delegates also adopted a resolution relevant to the FATF negotiations.¹¹⁸ During the 2008 ABA Annual Meeting, the ABA also sponsored several “summits.” In prior years, the ABA’s Task Force on International Trade in Legal Services (ITILS), which is tasked with assisting the coordination of the ABA’s involvement with issues relating to the international multijurisdictional practice of law,¹¹⁹ successfully or-

113. See UK Ministry of Justice, Jack Straw appoints new Legal Services Board (July 17, 2008), <http://www.justice.gov.uk/news/newsrelease170708a.htm> (last visited Dec. 15, 2008).

114. See SRA.org, Solicitors Regulatory Auth., Consultations, <http://www.sra.org.uk/sra/consultations.page> (last visited Dec. 15, 2008); Bar Standards Bd., Consultations, <http://www.barstandardsboard.org.uk/consultations/> (last visited Dec. 15, 2008).

115. See Solicitors Regulation Auth., Solicitors’ Code of Conduct (LDPs and Firm Based Regulation) Amendment Rules (entered into force Mar. 31, 2009), <http://www.sra.org.uk/sra/legal-services-act/lsa-new-rules.page>.

116. The U.K. Act has been featured at a number of conferences in the past year. See, e.g., Symposium, *The Future of the Global Law Firm*, *supra* note 7; Symposium, *Facing a Transformed Global Legal Landscape: An Introduction to the UK Legal Services Act*, Am. Law. Media Law Firm Leaders’ Forum, New York (Oct. 22, 2008); Symposium, *Legal Services Reform in the United Kingdom: What Does It Mean for Firms with a Foot on Both Sides of the Pond?—Other ABS Initiatives*, Ass’n of ProFl Responsibility Lawyers, Amsterdam (May 5, 2008).

117. ABA Res. 108B (Aug. 2008) (“RESOLVED, That the American Bar Association supports the contribution that the negotiated liberalization of international trade in goods and services, through government-to-government trade agreements, makes to the spread of the Rule of Law, both at the state-to-state level and within participants’ domestic legal systems.”).

118. ABA Res. 300 (Aug. 2008), *available at* http://www.abavideo.org/ABA531/pdf/hod_resolutions/300.pdf (last visited Dec. 10, 2008).

119. See Terry, *supra* note 17, at 841 n. 47-48.

ganized European and Asian “summits” of legal services leaders.¹²⁰ Encouraged by these prior events, in 2008, ITILS organized separate meetings with Korean and Indian bar leaders. Summit participants discussed the issues and concerns related to transnational practice. ITILS also convened a meeting of representatives of U.S. law firms with multiple foreign offices to explore the issues facing these law firms. Leaders in the ABA and its Section of International Law have also had ongoing discussions with the leaders of the CCBE.¹²¹

Other ABA sections have been active in areas related to transnational legal practice. In 2008, the Section of Legal Education and Admissions to the Bar formed an “International Committee” that will make recommendations to the Council.¹²² In August 2008, the ABA House of Delegates adopted a Model Rule for Registration of In-House Counsel. In a compromise before the vote, a number of individuals and entities agreed not to oppose the proposed Model Rule if the ABA Section of Legal Education and Admissions to the Bar would consider developing a model registration rule for foreign in-house counsel. Additionally, several commentators, including Professor Steve Gillers, have called on the ABA to develop a Model Rule on Admission of Foreign Lawyers.¹²³

B. NON-ABA U.S. DEVELOPMENTS

In November 2008, members of the Asia-Pacific Economic Cooperation (APEC) agreed to fund a legal services initiative.¹²⁴ In August 2008, APEC’s Trade and Investment Committee approved a legal services initiative designed: to “facilitate the provision of services in foreign and international law” by conducting an inventory of APEC members’ existing requirements for the licensing of foreign lawyers to supply services in foreign law and international law; to work in associations with local professionals; to identify best practices; and to establish an APEC Legal Services Framework to reduce impediments to the provision of services in foreign and international law among APEC economies.¹²⁵

Another important set of developments came from the Conference of Chief Justices (CCJ). In January 2008, the CCJ adopted a resolution endorsing the ABA’s Model Rule for Temporary Practice by Foreign Lawyers.¹²⁶ This resolution is worth reading in full because it shows the CCJ’s understanding of many of the issues related to global legal practice:

120. *Id.* at 841-42.

121. *See id.* at 842.

122. *See* Memorandum from Randy Hertz, Section Chair, ABA Section of Legal Educ. and Admissions to the Bar, & Hulet H. Askew, ABA Legal Educ. Consultant, to Council Members of the ABA Section of Legal Educ. and Admissions to the Bar (Sept. 18, 2008) (on file with author) (announcing the creation of a special committee on international issues).

123. Gillers, *supra* note 7.

124. *See* E-mail from Todd Nissen, Dir. of Servs. Trade Negotiations, Office of the U.S. Trade Representative, to author (Dec. 5, 2008) (announcing the funding decision) (on file with author).

125. *See* APEC, PROJECT PROPOSAL: PROFESSIONAL SERVICE INITIATIVE: LEGAL SERVICES FACESHEET, CONSOLIDATED TEXT FINAL (on file with author).

126. Conf. of Chief Justices Res. 6 (Jan. 30, 2008), *available at* <http://ccj.nsc.dni.us/resol6AdoptionRulesTemporaryPractice.html> (regarding adoption of rules on temporary practice by foreign lawyers).

WHEREAS, United States lawyers and law firms from nearly every state and territory are increasingly called upon to provide legal advice on questions of American law in other countries; and

WHEREAS, some countries are reluctant to allow United States lawyers to provide this service unless comparable recognition is provided to their lawyers throughout the United States; and

WHEREAS, most American jurisdictions have already promulgated rules regarding “temporary practice” by qualified lawyers admitted in another state and territory of the United States; and

WHEREAS, the American Bar Association has promulgated a stand-alone Model Rule for Temporary Practice by Foreign Lawyers; and

WHEREAS, several American jurisdictions have promulgated rules permitting temporary practice by qualified lawyers from other countries or have included foreign lawyer temporary practice provisions in Rule 5.5 of their Rules of Professional Conduct; and

WHEREAS, the experience of these American jurisdictions has not led to significant problems regarding the conduct of these foreign lawyers or to disciplinary proceedings; and

WHEREAS, the provision of such legal advice is increasingly important to American businesses and citizens throughout the nation; and

WHEREAS, the decision to promulgate a rule regarding temporary practice by foreign lawyers is separate and distinct from the decision whether to agree to having the rule listed as a commitment of the United States under the General Agreement on Trade in Services;

NOW, THEREFORE, BE IT RESOLVED that the Conference urges the highest court of each state or territory, that has not already done so, to consider adopting a rule permitting temporary practice by foreign lawyers.¹²⁷

This 2008 resolution followed an earlier CCJ resolution endorsing the ABA’s Model Foreign Legal Consultant Rule and its resolutions about legal education and lawyer admission.¹²⁸

Another 2008 U.S.-related development was the new interest shown in transnational legal practice by the American Society of International Law (ASIL). The ASIL issued its *Report of the Task Force on Global Professional Responsibility*,¹²⁹ a document that confirms that the ASIL interest group in transnational litigation and arbitration will increase its focus on

127. *Id.*

128. See Terry, *supra* note 17, at 848 (discussing the CCJ’s Resolution 7 Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations and Resolution 8 Regarding Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar, both of which are available at <http://ccj.ncsc.dni.us/LegalEducationResols.html>).

129. Mary C. Daly, et al., ASIL TASKFORCE REPORT (Dec. 2007), available at <http://www.asil.org/pdfs/taskforcereport.pdf>.

international legal ethics issues. In November 2008, ASIL also cosponsored a conference with Harvard Law School on globalization and the legal profession.¹³⁰

C. TRANSNATIONAL LEGAL PRACTICE 2008 “HOT TOPICS”

A number of transnational legal practice “hot topics” generated significant discussion in 2008.¹³¹ In addition to the U.K. Legal Services Act and FATF developments described earlier, the topics of litigation financing and offshore legal outsourcing were frequent topics of discussion. Although the litigation financing phenomenon may be much less significant in 2009 as a result of the global credit crisis and the collapse of many hedge funds, in 2008, there was significant interest in these litigation financing companies, many of whom are international.¹³² One expert has estimated that about \$3.0 billion has been committed for patent litigation investments and another \$750 million to \$1.0 billion for general litigation.¹³³

During 2008, offshore legal outsourcing was another “hot topic” and a recurring theme in analyses of globalization’s impact on multinational businesses.¹³⁴ Corporations divide their activities into segments and relocate them where the combination of labor costs, infrastructure, and other costs of doing business allow the activities to be performed most efficiently. For lawyers, the relationship of jurisdiction to a lawyer’s work often trumps other forces, but the use of offshore workers to perform certain, often routine tasks in the providing of legal services has been in the news often.¹³⁵ General Counsels are interested in saving on legal fees whenever possible. Outsourcing particular legal services to India and other jurisdictions has offered a cost-saving option to general counsels. For law firms, outsourcing can expand the capacity of the firm without taking on additional permanent

130. See Symposium, *Globalization of the Legal Profession*, Harvard Law School Program on the Legal Profession and the American Society of International Law (Nov. 21, 2008), available at http://www.law.harvard.edu/programs/plp/pages/globalization_conference.php.

131. In addition to these topics and the conferences cited elsewhere in this article, several important symposia were published in 2008. These include: Symposium, *Globalization of the Legal Profession*, 28 NW. J. INT’L L. & BUS. 399 (2008); Symposium, *Globalization of the Legal Profession*, 14 IND. J. GLOBAL LEGAL STUD. 1 (2007); Symposium, *From Canons to Codes to Rules: 1908-2008 and Beyond: A Centennial Celebration of the ABA Legacy: Lawyer Ethics*, 2008 J. PROF. L. 1 (includes a number of articles that address international developments); Symposium, *Global Legal Practice Developments*, 27 PENN ST. INT’L L. REV. (forthcoming 2009).

132. See, e.g., *Law Firm Leaders Forum*, the AM. LAW., New York, NY (Oct 22-23, 2008), available at http://www.almevents.com/conf_page.cfm?pt=/CustomerFiles_sri/agenda/detailed_agenda.cfm&web_page_id=9534&web_id=1110&instance_id=24&pid=720&iteration_id=816; ABA Section of Int’l Law and IBA, *The Next Big Wave of Cross-Border Litigation*, <http://www.abanet.org/intlaw/miami/agenda.html> (last visited Dec. 16, 2008). See also Douglas Richmond, *Other People’s Money: The Ethics Of Litigation Funding*, 56 MERCER L. REV. 649 (2005); Julia H. McLaughlin, *Litigation Funding: Charting A Legal And Ethical Course*, 31 VT. L. REV. 615 (2007). Additional resources may be found at the web pages of litigation financing providers: Juridica, <http://www.juridicainvestments.com/investmentob.html>; OmniBridgeway, <http://www.omnibridgeway.com/>; and Claims Funding International, <http://www.claimsfundings.com/> (last visited Dec. 16, 2008).

133. E-mail from Richard W. Fields, Mgmt., Juridica, to author (Nov. 25, 2008) (estimating based primarily on published reports of activities of litigating funding entities) (on file with author).

134. See, e.g., Symposium, *International Outsourcing of the Legal Profession*, UC Berkeley (Apr. 2008), available at <http://www.law.berkeley.edu/centers/gcl/outsource/resources.html>.

135. On offshore outsourcing of legal services generally, see Mary Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal Services*, 38 GEORGETOWN J. INT’L L. 401 (2007).

staff. There are some indications that offshore outsourcing of legal services is an increasing trend.¹³⁶

Although offshore outsourcing provides flexibility to clients and law firms, it also raises concerns about the delegating lawyer's ethical obligations to her client. It presents especially interesting issues with regard to transnational practice because it may involve the use of non-U.S. law graduates to perform work that is governed by U.S. law. During the last two years, at least six bar association ethics committees have issued opinions on the ethical challenges posed by offshore outsourcing, including an opinion by the American Bar Association's Standing Committee on Ethics and Professional Responsibility.¹³⁷ Each opinion concluded that a lawyer could satisfy her ethical obligations and outsource work offshore.

At least four general issues are addressed by the offshore outsourcing opinions: (1) duty of care in selection and supervision (which relates to the issue of unauthorized practice); (2) duty to maintain confidentiality; (3) duty to avoid conflicts of interest; and (4) duty to inform the client that the delegating lawyer is outsourcing the work.

The opinions address the issue of whether outsourcing to individuals who are not admitted in a U.S. jurisdiction violates the rules against the unauthorized practice of law.¹³⁸ They conclude that outsourcing offshore to non-U.S. lawyers does not constitute unauthorized practice, or aiding the unauthorized practice of the non-U.S. law graduates, so long as the delegating attorney adequately supervises the workers performing the outsourced work.¹³⁹ The duty to supervise outsourcing workers involves the related duty of the delegating lawyer to exercise "independent judgment in deciding how and whether to use [the services performed by the outsourced worker] on the client's behalf."¹⁴⁰ This duty is analogous to the duty a lawyer owes when delegating work to a paralegal and

136. See, e.g., Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527 (2008) (citing GlobalSourcingNow's prediction that there will be 79,000 legal process outsourcing jobs in India by 2015 and other predictions that the revenues from legal services offshoring will grow from \$146 million in 2006 to \$640 million by the end of 2010).

137. Bar opinions on outsourcing include the following: ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, FORMAL OPINION 08-451 (2008), available at www.abanet.org/cpr; FLA. BAR, OPINION 07-2 (2008), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+07-2?opendocument>; LOS ANGELES COUNTY BAR ASS'N, OPINION NO. 518: ETHICAL CONSIDERATIONS IN OUTSOURCING OF LEGAL SERVICES (2006), available at <http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf>; N.C. STATE BAR, FORMAL ETHICS OPINION 12 (2007), available at <http://www.ncbar.com/ethics/ethics.asp?page=2&keywords=outsourcing>; THE ASS'N OF THE BAR OF THE CITY OF NEW YORK COMM. ON PROF'L & JUDICIAL ETHICS [ABCNY], FORMAL OPINION 2006-3 (2006), available at http://www.nycbar.org/Publications/reports/print_report.php?rid=503; SAN DIEGO COUNTY BAR ASS'N, LEGAL ETHICS OPINION 2007-1 (2007), available at <https://www.sdcb.org/index.cfm?Pg=ethicsopinion07-1>.

138. See ABCNY, *supra* note 137, at 2 ("Some jurisdictions have concluded that any work performed by a non-lawyer under the supervision of an attorney is by definition not the 'unauthorized practice of law' violative of prohibitory provisions This committee does not go so far. However, . . . [s]upervision within the law firm thus is a key consideration.").

139. ABA, *supra* note 138, at 3 ("The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately."); L.A. COUNTY BAR, *supra* note 137 ("[A]ttorneys who contract for services which assist the attorneys in representation of their clients do not assist in a violation of [the rule against unauthorized practice] so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client." (internal citation omitted)).

140. SAN DIEGO COUNTY BAR ASS'N, *supra* note 137, at 5.

involves a related duty of care in selecting, supervising, and monitoring the outsourcing worker. The delegating lawyer must take reasonable steps to ensure that the outsourcing worker is competent to perform the services.¹⁴¹ The San Diego opinion makes the point that if the delegating attorney is completely unfamiliar with the expertise required to perform the outsourced work, she may not be able to fulfill her duty of care in delegation.¹⁴² Finally, the delegating attorney must take reasonable steps to provide adequate supervision and instruction with regard to the services outsourced. The distance involved in offshore outsourcing may make adequate supervision and instruction difficult.¹⁴³

A second challenge to structuring an outsourcing relationship with offshore workers performing legal services involves the duty to maintain client confidences. Offshore outsourcing itself does not limit this duty. Instead, the delegating attorney must assess the risk of disclosure of client confidences by the outsourcing worker and take steps to minimize such risks. The ABA recommends using “[w]ritten confidentiality agreements” to minimize the risk of inappropriate disclosure;¹⁴⁴ this also may help compensate for differences in the standard of conduct regarding the confidentiality required of outsourcing workers according to their own regulatory framework.¹⁴⁵ Others urge the delegating attorney to investigate the protectiveness inherent in the organizational structures of the outsourcing firms.¹⁴⁶

A third concern about offshore outsourcing is that outsourced workers may simultaneously work for opposing parties who have also delegated work to the outsourced worker. At least one law firm has solved this concern by creating a dedicated team of outsourcing workers to work exclusively with their firm.¹⁴⁷ The duty of the outsourcing lawyer to investigate for conflicts, both with the outsourcing worker and with any intermediary outsourcing firm that contracts with the delegating lawyer and the outsourcing worker, is clearly articulated in the opinions.¹⁴⁸ If concerns about confidentiality require the delegating attorney to use fictitious names in the documents it shares with the outsourcing worker and intermediary firm, such as in a planned takeover merger, this may impinge upon the ability to thoroughly investigate conflicts of interest. Finally, the delegating

141. See N.C. BAR, *supra* note 137, at 2 (“When contemplating the use of foreign assistants, the lawyer’s initial ethical duty is to exercise due diligence in the selection of the foreign assistant.”).

142. SAN DIEGO COUNTY BAR ASS’N, *supra* note 137, at 10.

143. FLA. BAR, *supra* note 137, at 4 (“Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country.”).

144. ABA, *supra* note 137, at 5.

145. The delegating lawyer should investigate the extent to which the law of the outsourcing worker’s jurisdiction supports the duty of confidentiality as it exists in the US. See SAN DIEGO COUNTY BAR ASS’N, *supra* note 137, at 11.

146. See ABA, *supra* note 137, at 3 (urging investigation of outsourcing “premises, computer network, and perhaps even its recycling and refuse disposal procedures); FLA. BAR, *supra* note 137, at 4 (suggesting limiting computer access to only those files necessary to perform the outsourced work); ABCNY, *supra* note 137, at 4 (“Measures. . .to help preserve client confidences. . .include restricting access to confidences and secrets, contractual provisions. . .and periodic reminders regarding confidentiality.”); L.A. COUNTY BAR, *supra* note 137, at 14 (urging consideration of the outsourcing worker’s “contract relationship with the” outsourcing intermediary firm).

147. See Haynes and Boone, <http://www.haynesboone.com/affiliations/> (see “Outsourcing”).

148. See ABCNY, *supra* note 137, at 4; LA COUNTY BAR, *supra* note 137, at 14.

lawyer should remind the outsourcing worker that the duty to avoid conflicts is ongoing and relates to new work accepted at any time.

Finally, the delegating lawyer faces an initial decision of whether to inform the client that she intends to outsource the work. This decision is informed by two issues. First, if any confidential information is disclosed, the delegating lawyer must inform the client before outsourcing the work.¹⁴⁹ Second, the delegating lawyer must consider the client's expectations regarding who will perform its work (and if the expectations are unclear, at least one opinion directs that disclosure must be made on the grounds that reasonable client expectations are for its work to be performed by persons within the delegating lawyer's law firm).¹⁵⁰ A related issue is how the delegating lawyer may charge for the outsourced work.¹⁵¹ It is clear from the opinions that passing along the cost of the services, with a reasonable allocable overhead charge, is permissible. Less clear are the circumstances in which the delegating lawyer may charge for the outsourcing workers' services just as it does for services of its associate lawyers and paralegals—that is, apart from cost plus overhead.¹⁵² The relationship of fees to disclosure is one that would benefit from further discussion.

IV. Conclusion

In sum, 2008 has been another active year in the area of transnational legal practice. In light of the ever increasing volume of transnational legal practice and the global initiatives discussed in this article, it appears that this pace of development is likely to continue in the future.

149. See ABA, *supra* note 137, at 5 (“Thus, where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The implied authorization of Rule 1.6(a) and its Comment [5] thereto to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.”).

150. SAN DIEGO COUNTY BAR ASS'N, *supra* note 137, at 8.

151. See ABCNY, *supra* note 137, at 5. Note also that a reasonable overhead charge may be added to the charges of the outsourcing worker's services without implicating the duty to disclose. See *id.*

152. See ABA, *supra* note 137, at 5-6.

