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## Transnational Legal Practice 2006-2007

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# Transnational Legal Practice 2006-2007

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## I. Introduction

Law practice continues to expand across borders, and lawyers and law firms from the United States and other countries are substantially invested in representations that take them outside of their home jurisdictions.<sup>1</sup> Unfortunately, reliable information relating to the extent of internationalization of the legal market is scarce. Neither the number of lawyers and law firms working in the international legal services market nor the receipts generated from internationally-related work are readily and reliably available. Nevertheless, statistics from both the United States and United Kingdom provide a sense of the numbers from the largest present sources of international legal practice.

In the category of outbound services, for example, we can consider how U.S. lawyers and law firms serve foreign clients and U.S.-based clients in their offshore activities. One measure of these services could include the offshore activity of U.S. law firms. The American Lawyer Global 100 includes nine U.S.-based law firms with more than a quarter of their lawyers stationed outside of the United States, three of which support more than 50 percent of their lawyers working from overseas offices.<sup>2</sup> Another study of approximately sixty large U.S. law firms reported that those firms support approximately 375 offices overseas, where approximately 8,000 lawyers are working;<sup>3</sup> three-quarters of these lawyers

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\* This Transnational Legal Practice Year-in-Review was prepared jointly by Laurel S. Terry, Vice-Chair of the ABA Section of International Law's 2006-07 Transnational Legal Practice Committee [TLPC] and Professor of Law, Penn State Dickinson School of Law; Carole Silver, Vice-Chair of the TLPC and Senior Lecturer, Northwestern University School of Law; Ellyn Rosen, Associate Regulation Counsel, ABA Center for Professional Responsibility; Carol A. Needham, Professor, Saint Louis University School of Law; Robert E. Lutz, Chair of the ABA Task Force on International Trade in Legal Services and Professor of Law, Southwestern University School of Law; and Peter Ehrenhaft, Chair of the TLPC and Of Counsel, Harkins Cunningham, LLP.

1. "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 as well as where a firm maintains its principal office.

2. *The Global 100: Most Lawyers*, 29 AM. LAW. 145 (007); see also Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 494 (2005).

3. Based on an ongoing study of Carole Silver and Nicole DeBruin regarding the overseas activities of U.S. law firms. See also Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. OF GLOBAL LEGAL STUD. 67 (2007).

are working in offices located in Europe. The U.S. Department of Commerce Bureau of Economic Analysis estimates that the export of legal services from the United States generated \$4.3 billion in receipts in 2005, while imports of legal services were valued at \$914 million, yielding a 4:1 surplus for balance-of-payment accounts.<sup>4</sup> According to the U.K. Department of Constitutional Affairs, British law firms generated £1.9 billion in exports in 2003, compared to £1.5 billion in imports.<sup>5</sup>

The sources and subjects of available information relevant to inbound legal services differ from that for outbound services. There is no single source of information regarding foreign lawyers and law firms with offices in the United States, for example, although recent articles in the legal press have reported on renewed efforts by U.K. law firms to establish successful practices in the United States.<sup>6</sup>

Another measure of interest in international practice is provided by statistics about foreign law graduates in the United States. Increasing numbers of persons whose initial legal training was outside the U.S. now complete one-year post-J.D. programs leading to the LL.M. degree. For the 2004-2005 academic year (the most recent year for which data is available from the American Bar Association Section of Legal Education and Admission to the Bar), approximately 2,270 foreign law graduates earned LL.M. or similar one-year master's degree from the eighty-two U.S. accredited law schools, and in 2006, 4,505 foreign law graduates sat for a bar exam in the U.S.<sup>7</sup> The bar exam data is supplemented by information about foreign lawyers who seek the status of licensed foreign legal consultants in the United States, which authorizes them to advise on their home country law and, in certain jurisdictions, on international law and the law of third countries. Under the legal consultant licensing regime, practice related to the law of the host jurisdiction is either outside the scope of permitted practice or is limited to advice given in consultation with a host-country lawyer. In fact, only sixty individuals became licensed as legal consultants in the entire United States in 2006 (the same number as in 2005), down from the three prior years.<sup>8</sup> The number of U.S. states that have a Foreign Legal Consultant (FLC) rule has increased, however, as have the number of states that have adopted a rule that allows temporary practice by foreign lawyers.<sup>9</sup>

4. Bureau of Economic Analysis (BEA), 2005 Business, Professional and Technical Services, <http://www.bea.gov/international/xls/tab7b.xls> (last visited Mar. 26, 2008). The BEA figures probably understate the "real" values of transnational services as they are compiled from international cash remittances. Thus, they do not capture the significant sums paid and used within a country without remittance to or from the United States, e.g., a U.S. lawyer paid in Euros while in Germany who then uses the payment to cover local office or travel expenses.

5. U.K. DEP'T FOR CONSTITUTIONAL AFFAIRS, EXPORTING EXCELLENCE: A GUIDE TO LEGAL SERVICES 13 (2005). The original figures, reported in British pounds, were £1.9 billion in exports and £1.5 billion in imports. Using current exchange rates, the dollar value is approximately \$3.9 billion in exports and approximately \$3.1 billion in imports.

6. See, e.g., Georgina Stanley, *The British Are (Still) Coming*, 10 LAW FIRM INC. 14 (2007), available at Westlaw, Legal News, ALM New.

7. This number is reported by individual state bar examiners to the National Council of Bar Examiners. National Council of Bar Examiners, *2006 Statistics: Persons Taking and Passing the 2006 Bar Examination by Source of Education*, BAR EXAMINER 8, 9 (2007), available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar\\_Admissions/2006stats.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2006stats.pdf).

8. National Council of Bar Examiners, *2006 Statistics: Admission to the Bar by Jurisdiction 2002-2006*, BAR EXAMINER 19, 21 (2007), available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar\\_Admissions/2006stats.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2006stats.pdf).

9. See *infra* notes 60-61.

The sections that follow summarize some of the most important developments that have taken place since the last Year-in-Review report of the American Bar Association (ABA) Section of International Law's Transnational Legal Practice Committee.<sup>10</sup> This report begins with a review of international developments, followed by U.S. developments. It concludes by outlining several regional and national developments elsewhere in the world that have the potential to affect U.S. and other international lawyers.

## II. International Developments

### A. GENERAL AGREEMENT ON TRADE IN SERVICES

The General Agreement on Trade in Services (GATS)<sup>11</sup> is an annex to the agreement that created the World Trade Organization (WTO) and applies to cross-border services, including legal services.<sup>12</sup> 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 ("Schedule").<sup>13</sup> In 1994, when the GATS was finalized, approximately forty-five countries, including the United States, listed legal services on their Schedules.<sup>14</sup> 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 in its treatment of foreign lawyers. A country's legal services commitments and market access and national treatment limitations are listed on its GATS Schedule according to four different "modes of supply" or methods of delivering legal services.<sup>15</sup>

10. Robert E. Lutz, Philip T. Von Mehren, Laurel S. Terry, Peter Ehrenhaft, Carole Silver, Clifford J. Hendel, Jonathan Goldsmith & Masahiro Shimojo, *Transnational Legal Practice Developments: 2004 Year-in-Review*, 39 INT'L LAW. 619 (2005) [hereinafter Lutz et al., *2004 Developments*]; see also Robert E. Lutz, Philip T. von Mehren, Laurel S. Terry, Peter Ehrenhaft and Carole Silver, *Transnational Legal Practice: Cross-Border Legal Services: 2002 Year-in-Review*, 37 INT'L LAW. 987 (2003).

11. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](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).

12. For additional information about the GATS' application to legal services, see INTERNATIONAL BAR ASSOCIATION, GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (2002), available at <http://www.ibanet.org/images/downloads/gats.pdf> [hereinafter IBA GATS HANDBOOK]; Terry, *supra* note 11 (summarizing twelve years of GATS developments).

13. See IBA GATS HANDBOOK, *supra* note 12.

14. See WTO Council for Trade in Services, *Background Note by the Secretariat: Legal Services, S/C/W/43* (July 6, 1998), available at [http://www.abanet.org/cpr/gats/bkgground\\_note.pdf](http://www.abanet.org/cpr/gats/bkgground_note.pdf). For information about countries' commitments, see American Bar Association (ABA), *Legal Services Commitments of Other Countries During the 1994 GATS Uruguay Round*, <http://www.abanet.org/cpr/gats/uruguay.html> (last visited Mar. 26, 2008).

15. 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 (New York, 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

Article XIX of the GATS required WTO Members, within five years of the signing of the GATS in 1994, to begin negotiations to further liberalize trade in services. Current liberalization of cross-border legal services is, therefore, focused on securing 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 national treatment. These ongoing negotiations are referred to as the Doha Round market access negotiations or Track 1 of the GATS.<sup>16</sup>

### 1. *Track 1 Activities*

The Doha Round of GATS negotiations began in November 2001.<sup>17</sup> Traditionally, trade negotiations have taken place using a bilateral offer-request procedure.<sup>18</sup> At the time this article was written (in November 2007), the most recent U.S. offer, filed on May 31, 2005, proposed several new commitments affecting legal services, including the elimination of a citizenship requirement for practice before the U.S. Patent and Trademark Office (PTO) (while retaining residence preconditions) and the addition of eight new FLC rules (in Arizona, Indiana, Louisiana, Massachusetts, Missouri, New Mexico, North Carolina, and Utah).<sup>19</sup> Although requests typically are confidential, the Office of the United States Trade Representative (USTR) has made public a redacted copy of the United States' May 2002 legal services requests to other countries, and at least one organi-

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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 11, at art. I(2); IBA GATS HANDBOOK, *supra* note 12.

16. The General Agreement on Tariffs and Trade (GATT), predecessor of the WTO, and now the WTO, have conducted trade liberalization efforts in a series of a periodic rounds in which trade liberalization commitments were successively enlarged, exchanged, and then bound for signatories. The current round is known as the Doha Round after the city in which it commenced.

17. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/W/L/41 I.L.M. 746 (2002), available at <http://www.abanet.org/cpr/gats/doha.pdf>.

18. See Massimo Geluso Grusso, Working Party of the Trade Committee, *OECD Trade Policy Working Paper No. 2, Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services*, TD/TC/WP(2003)40/FINAL (June 14, 2004), available at [http://www.ois.oecd.org/olis/2003doc.nsf/43bb6130e5e86e5fc12569fa005d004c/39cd178d21ec94eec1256eb3003931c7/\\$FILE/JT00166062.pdf](http://www.ois.oecd.org/olis/2003doc.nsf/43bb6130e5e86e5fc12569fa005d004c/39cd178d21ec94eec1256eb3003931c7/$FILE/JT00166062.pdf).

19. WTO Council for Trade in Services, *United States, Revised Services Offer*, TN/S/O/USA/Rev.1 (May 31, 2005), available at [http://www.abanet.org/cpr/gats/legal\\_svcs\\_offer.pdf](http://www.abanet.org/cpr/gats/legal_svcs_offer.pdf).

zation has posted on its website a copy of requests directed toward the United States.<sup>20</sup> The ABA GATS-Legal Services webpage includes information about the current “state of play” regarding GATS Track 1 and legal services requests and offers.<sup>21</sup>

Since 2006, WTO Members, including the United States, have negotiated using both bilateral and collective approaches.<sup>22</sup> In February 2006, a group of WTO Members, including the United States, submitted a “collective” or “plurilateral” request regarding legal services,<sup>23</sup> as agreed upon in the December 2005 Hong Kong Ministerial Declaration.<sup>24</sup> The United States is both a proponent and a recipient of this collective request, which asks selected countries to make new or improved legal services GATS commitments, identifies a number of limitations proposed for removal, and includes two model schedules for making commitments.<sup>25</sup>

The Doha negotiations were suspended in July 2006 but resumed in December 2006–January 2007 and since then have proceeded at a varying pace.<sup>26</sup> As of November 2007, the prognosis for the Doha Round was unclear.<sup>27</sup>

20. See, e.g., OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (USTR), AN UNCLASSIFIED SUMMARY OF THE LEGAL SERVICES “REQUESTS” FILED BY THE U.S.: SUMMARY OF [U.S.] PROPOSED REFERENCE PAPER ON LEGAL SERVICES (June 30, 2002), available at [http://www.abanet.org/cpr/gats/us\\_request.doc](http://www.abanet.org/cpr/gats/us_request.doc); Public Citizen’s Posting, GATS Requests by State, [http://www.citizen.org/documents/leaked\\_WTO\\_Service\\_requests.pdf](http://www.citizen.org/documents/leaked_WTO_Service_requests.pdf) (last visited Mar. 26, 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 Mar. 26, 2008) [hereinafter Collective Request—Legal Services] (updating the United States’ 2002 requests).

21. See ABA, Track 1 of the GATS: The Ongoing GATS (Doha) Negotiations, [http://www.abanet.org/cpr/gats/track\\_one.html](http://www.abanet.org/cpr/gats/track_one.html) (last visited Mar. 26, 2008) (includes, *inter alia*, a July 2007 Minter Ellison chart of derestricted legal services offers.).

22. See, e.g., Special Session of the WTO Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 27 April 2007*, paras. 5 & 11, TN/S/M/24 (May 30, 2007) (noting that negotiations had occurred “bilaterally” and “plurilaterally”).

23. See Collective Request—Legal Services, *supra* note 20.

24. The Hong Kong Sixth Ministerial Declaration urged countries to consider the plurilateral approach. World Trade Organization, DOHA Work Programme, Ministerial Declaration of 18 December 2005, annex C, para. 7, WT/MIN(05)/DEC (Dec. 22, 2005), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_text\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm) [hereinafter Hong Kong Ministerial Declaration] (“In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis.”)

25. See Collective Request—Legal Services, *supra* note 20.

26. Compare WTO: 2006 News Items, Talks Suspended. “Today There are Only Losers” (July 24, 2006), [http://www.wto.org/english/news\\_e/news06\\_e/mod06\\_summary\\_24july\\_e.htm](http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm) (last visited Mar. 26, 2008), with WTO: 2006 News Items, Lamy: “We Can Stay on Track to Successfully Conclude the Round Next Year” (Dec. 14–15, 2006), [http://www.wto.org/english/news\\_e/news06\\_e/tnc\\_chair\\_report\\_14dec06\\_e.htm](http://www.wto.org/english/news_e/news06_e/tnc_chair_report_14dec06_e.htm) (last visited Mar. 26, 2008) and Int’l Ctr. for Trade & Sustainable Dev., *Some Members Call for Greater Focus on Services, as Talks Resume in Geneva*, 11 BRIDGES WKLY. (Jan. 24, 2007), available at <http://www.ictsd.org/weekly/07-01-24/story2.htm>.

27. See, e.g., WTO News: Speeches, Doha Success Will Need Positive Outcome in Services—Lamy (Oct. 15, 2007), [http://www.wto.org/english/news\\_e/spl\\_e/spl177\\_e.htm](http://www.wto.org/english/news_e/spl_e/spl177_e.htm) (last visited Mar. 26, 2008); WTO: 2007 News Items, Lamy Urges Further Acceleration of Negotiations (Oct. 9, 2007), [http://www.wto.org/english/news\\_e/news07\\_e/tnc\\_chair\\_report\\_oct07\\_e.htm](http://www.wto.org/english/news_e/news07_e/tnc_chair_report_oct07_e.htm) (last visited Mar. 26, 2008).

2. *Track 2—The Disciplines Issue*

Track 2 of the GATS is based on GATS Article VI (4) and requires WTO Members to develop “any necessary disciplines” to ensure that domestic regulation measures do not create unnecessary barriers to trade.<sup>28</sup> In 1998, WTO Members agreed on Disciplines for Domestic Regulation in the Accountancy Sector.<sup>29</sup> During the Sixth Ministerial Conference in Hong Kong in December 2005, WTO Members endorsed the adoption of additional disciplines.<sup>30</sup> Since then, WTO Members have continued their discussions about whether and how to adopt horizontal disciplines that would apply to other service sectors, including legal services. Although Australia proposed a set of disciplines specifically for legal services in 2005,<sup>31</sup> the majority of the WTO Working Party on Domestic Regulation appears to have settled on horizontal disciplines.<sup>32</sup> A number of WTO Member States, including the United States, have circulated draft horizontal disciplines, many of which take conflicting positions.<sup>33</sup> In April 2007, the Chair of the WTO Working Party on Domestic Regulation circulated a disciplines discussion draft, which was intended to be a compromise document.<sup>34</sup> At the time this Year-in-Review report was prepared, WTO

28. GATS, *supra* note 11, 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.

*Id.*

29. WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (Dec. 17, 1998), available at <http://www.abanet.org/cpr/gats/accounting.doc>.

30. See Hong Kong Ministerial Declaration, *supra* note 24, para. 5 (“Members shall develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations. We call upon Members to develop text for adoption.”)

31. WTO Working Party on Domestic Regulation, *Communication from Australia: Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34 (Sept. 5, 2005), available at [http://www.abanet.org/cpr/gats/aus\\_disp.pdf](http://www.abanet.org/cpr/gats/aus_disp.pdf).

32. See, e.g., WTO Working Party on Domestic Regulation, *Informal Note by the [WPDR] Chairman: Disciplines on Domestic Regulation Pursuant to GATS Article VI:4* (Apr. 18, 2007) (draft), available at <http://www.tradeobservatory.org/library.cfm?refID=98264> [hereinafter Chair’s April 2007 Draft].

33. See ABA, Horizontal Discipline Proposals from WTO Member States, [http://www.abanet.org/cpr/gats/disp\\_proposals.html](http://www.abanet.org/cpr/gats/disp_proposals.html) (last visited Mar. 26, 2008). Many discipline proposals are not public documents but are often available on the Trade Observatory webpage and as links on the ABA GATS Track 2 webpage. Trade Observatory, Library, <http://www.tradeobservatory.org/library.cfm> (last visited Mar. 26, 2008) (select “GATS” from the left-hand drop-down menu); ABA, GATS Track 2, [http://www.abanet.org/cpr/gats/track\\_two.html](http://www.abanet.org/cpr/gats/track_two.html) (last visited Mar. 26, 2008).

34. See Chair’s April 2007 Draft, *supra* note 32. The United States has commented on this draft. See WTO Working Party on Domestic Regulation, *Communication from the United States: Outline of US Position on a Draft Consolidated Text in the WPDR*, Job (06)/223 (July 11, 2006), available at <http://www.tradeobservatory.org/library.cfm?refID=88410>.



Members were awaiting a new discussion draft prepared by the Chair of the WTO Working Party on Domestic Regulation.

The USTR has consulted with several organizations, including the ABA and the Conference of Chief Justices, about the Chair's draft disciplines. In August 2006, the ABA House of Delegates adopted a resolution about the GATS disciplines issue:

RESOLVED, That with respect to the legal services portion of the General Agreement on Trade in Services (GATS), the American Bar Association:

1. Supports the efforts of the U.S. Trade Representative to encourage the development of transparency disciplines on domestic regulation in response to Article VI (4) of the GATS requiring the development of "any necessary disciplines" to be applicable to service providers; and
2. Supports the U.S. Trade Representative's participation in the development of additional disciplines on domestic regulation that are: (a) "necessary" within the meaning of Article VI (4) of the GATS; and (b) do not unreasonably impinge on the regulatory authority of the states' highest courts of appellate jurisdiction over the legal profession in the United States.

### 3. *Other WTO Issues—TPA and Compensation*

In 2007, President Bush's trade promotion authority (TPA) expired.<sup>35</sup> That authority, granted in various forms to successive presidents since 1934, was denied to President Clinton but renewed for five years to President Bush under the Bipartisan Trade Promotion Authority Act of 2002. TPA is intended to prevent selective amendment to an internationally-agreed document when submitted for congressional approval.<sup>36</sup> Under TPA, the President is required to consult with Congress during the negotiation of a trade agreement, and Congress may hold hearings and debates, propose changes or exclusions, and "mark up" any proposal. But after an agreement is actually accepted and signed by the United States, Congress' authority is limited to an "up-or-down" vote on implementation of the agreement as U.S. law.<sup>37</sup> The general consensus is that without the TPA procedure, it is very difficult to obtain congressional approval of a trade agreement.<sup>38</sup> There-

34. See ABA STANDING COMM. ON PROF'L DISCIPLINE, RECOMMENDATION 105 (2006), available at <http://www.abanet.org/leadership/2006/annual/onehundredfive.doc> [hereinafter RECOMMENDATION 105].

35. See CAROLYN C. SMITH, TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES, CRS REPORT RS21004 (Sept. 29, 2006), available at <http://fpc.state.gov/documents/organization/73937.pdf>.

36. Trade Act of 2002, 19 U.S.C. § 2902 (2002). The most recent version was Pub. Law No. 107-210 enacted Aug. 6, 2002.

37. Trade Agreements are generally not submitted as treaties requiring the advice and consent of two-thirds of the Senate (without House participation in the process). They are negotiated as Executive Agreements pursuant to advance legislative authorization and are then submitted to the entire Congress for implementation through an implementing statute such as the Uruguay Round Agreement Act of 1994 that implements the creation of the WTO. See, e.g., Message of the President Transmitting the Uruguay Round Trade Agreements, Texts of Amendments, Implementing Bill, and Required Supporting Statements, H. R. Doc. No. 103-316 (1994); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 19 USC § 3501 (1994).

38. See, e.g., Press Release, USTR, Statement by U.S. Trade Representative Susan C. Schwab on President Bush's Call for TPA Renewal (Jan. 31, 2007), available at [http://www.ustr.gov/Document\\_Library/Press\\_Re-](http://www.ustr.gov/Document_Library/Press_Re-)

fore, it is possible that Congress might approve limited TPA applicable solely to any agreement emerging from the Doha Round.<sup>39</sup>

Another important GATS development is the report that some WTO Members may seek compensation from the United States—possibly in the legal services sector—in the WTO gambling dispute.<sup>40</sup> In 2003, Antigua and Barbados claimed that U.S. state and federal restrictions on gambling violated the United States' GATS commitments and sought a remedy through the WTO's dispute settlement procedures. In April 2005, the WTO Dispute Settlement Body issued its opinion, and one month later, the United States announced its intention to implement the ruling.<sup>41</sup> Antigua and Barbuda subsequently complained that the United States had not implemented the decision.<sup>42</sup> After unsuccessful efforts to resolve the issue, Antigua and a number of countries announced that they would seek "compensation"<sup>43</sup> pursuant to GATS Article XXI.<sup>44</sup> The USTR has sought

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leases/2007/January/Statement\_by\_US\_Trade\_Representative\_Susan\_C\_Schwab\_on\_President\_Bushs\_Call\_for\_TPA\_Renewal.html ("An extension of TPA will be needed to successfully complete the Doha Development Round, which is crucial to economic growth at home, opening markets abroad, and alleviating poverty around the world.").

39. See, e.g., Press Release, USTR, Statement by U.S. Trade Representative Susan C. Schwab Regarding the Expiration and Renewal of Trade Promotion Authority (June 29, 2007), available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/June/Statement\\_by\\_US\\_Trade\\_Representative\\_Susan\\_C\\_Schwab\\_regarding\\_the\\_expiration\\_renewal\\_of\\_Trade\\_Promotion\\_Authority.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/June/Statement_by_US_Trade_Representative_Susan_C_Schwab_regarding_the_expiration_renewal_of_Trade_Promotion_Authority.html)? ("The Bush Administration and congressional leaders have found a bipartisan path forward for congressional approval of FTAs with Peru, Colombia, Panama, and Korea. I am hopeful this spirit of cooperation will guide our efforts to renew TPA, as President Bush requested in January, to keep the United States at the table negotiating for the continued benefit of the American people."); 2007 TRADE POLICY AGENDA AND 2006 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 8, available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Trade\\_Policy\\_Agenda/asset\\_upload\\_file278\\_10622.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf) ("The Administration will work closely with leaders of both parties in both Houses of Congress to secure an extension of Trade Promotion Authority so that the United States can continue to open new markets across the globe for American farmers, ranchers, workers, and service providers."); Press Release, USTR, Statement from Ambassador Susan C. Schwab on U.S. Trade Agenda (May 10, 2007), available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/May/Statement\\_from\\_Ambassador\\_Susan\\_C\\_Schwab\\_on\\_US\\_trade\\_agenda.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_from_Ambassador_Susan_C_Schwab_on_US_trade_agenda.html) (announcing the new trade policy template (stating [t]he new trade policy template also opens the way for bipartisan work on Trade Promotion Authority").

40. For information about this dispute, see USTR, Dispute Settlement Update (Sept. 21, 2007), [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/asset\\_upload\\_file243\\_5697.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file243_5697.pdf) (summarizing the developments in this case) [hereinafter USTR Dispute Settlement Summary]; WTO Dispute Settlement: DS285, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm) (last visited Mar. 26, 2008) [hereinafter WTO Case Description].

41. See, e.g., USTR Dispute Settlement Summary, *supra* note 41, at 20 ("The United States stated its intention to implement the DSB recommendations and rulings on May 19, 2005").

42. See, e.g., WTO Dispute Settlement Proceeding Regarding United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 71 Fed. Reg. 61808 (Oct. 19, 2006); WTO Case Description, *supra* note 41.

43. See, e.g., Int'l Ctr. for Trade & Sustainable Dev., *Antigua Gambling Dispute: Major Economies Demand Compensation from US*, 11 BRIDGES WKLY. (July 4, 2007), available at <http://www.ictsd.org/weekly/07-07-04/story3.htm> (citing reports that eight countries, including Antigua, the EU, Costa Rica, India, Canada, Macau, Australia, and Japan, had served notice that they would seek compensation for lost revenues potentially worth billions of dollars if the United States uses GATS Article XXI to explicitly exclude internet gambling from its commitments).

44. The GATS states:

public comment on this issue.<sup>45</sup> This development is relevant to legal services because some published reports stated that the E.U. planned to seek compensation in the legal services sector.<sup>46</sup> At the time this Year-in-Review report was written, it was not clear which WTO countries will seek compensation and in which service sectors.

#### 4. *Bar Association Initiatives*

##### a. ABA Initiatives

The ABA Task Force on International Trade in Legal Services (the “ITILS Task Force”) coordinates the ABA’s initiatives related to the GATS.<sup>47</sup> The ITILS Task Force is engaged in dialogue with the U.S. Government, interested law firms, and significant participants in the U.S. law practice regulatory system as well as with foreign bar associations and bar leaders. It is composed of representatives of a diverse group of ABA entities, liaison members who represent major U.S. stakeholders having interests in the regulation of the U.S. legal profession, and a number of special advisors who are experts in legal ethics, international trade law, and lawyer regulation.<sup>48</sup>

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1. (a) A Member (referred to in this Article as the “modifying Member”) may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an “affected Member”) by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

GATS, *supra* note 11, art. XXI.

45. See Request for Public Comment on the Negotiations for Compensatory Adjustments to U.S. Schedule of Services Commitments Under WTO General Agreement on Trade in Services (GATS) in Response to Notice of the United States of Intent To Modify Its Schedule Under Article XXI of the GATS, 72 Fed. Reg. 38846 (July 16, 2007).

46. See, e.g., John W. Miller, *EU Service Firms Could Gain U.S. Access Thanks to Internet Gambling Case*, WALL ST. J., Aug. 23, 2007, at A2.

47. This Task Force was established in 2003 by the ABA Board of Governors to monitor GATS developments and coordinate the ABA’s activities with respect to international legal services regulation. Its mission is to advise the USTR on the ABA’s position regarding the U.S. admissions policy for foreign lawyers and report to the Board of Governors. In addition, the ABA has appointed a representative to serve on the USTR/Secretary of Commerce’s Industry Trade Advisory Committee for Trade in Services (ITAC), a committee of nearly forty advisors from diverse service sectors. ITAC is one of a number created pursuant to the Trade Agreements Act of 1974. The USTR is required to consult with the group (and does so on a monthly basis), and the ITAC is obliged to report to Congress on its views on any trade agreement submitted for congressional approval.

48. ITILS is composed of eight Task Force members (who come from ABA entities having interests in transnational law practice regulation): the Section of International Law, Section of Administrative Law and Regulatory Practice, Section of the Business Law, Section of Litigation, and Section of Legal Education and Admissions to the Bar. Liaisons from inside the ABA represent the Center for Professional Responsibility and the Government Affairs Office, and liaisons from outside the ABA are the Conference of Chief Justices,

Since the last Year-in-Review, the ITILS Task Force, in cooperation with the ABA Section of International Law's Transnational Legal Practice Committee, convened several Summit Meetings with foreign bar leaders from various regions to discuss differences in legal services regulation and to identify areas of agreement and disagreement about goals and approaches. At the 2006 and 2007 ABA Annual Meetings, the E.U.-U.S. Legal Services Summits were co-hosted by the Council of the Bars and Law Societies of Europe (CCBE), and the Asia-U.S. Legal Services Summits included lawyers and bar leaders from Australia, China, India, Indonesia, Japan, Korea, Singapore, and Vietnam.<sup>49</sup> The ITILS Task Force also convened discussions with Latin American bar leaders at the Fall Meetings of the Section of International Law in Houston in 2005 and in Miami in 2006. The ITILS Task Force also communicates regularly with the International Bar Association (IBA), the Union Internationale des Avocats (UIA), the Law Society of England and Wales, and the Law Council of Australia to exchange information, coordinate initiatives, and discuss strategies.

During its 2006 Annual Meeting, the ABA adopted a policy regarding GATS Track 2 "disciplines" issues<sup>50</sup> and revised its Model Rule for Foreign Legal Consultants in the United States, discussed in greater detail below. In August 2007, the House of Delegates rejected a resolution proposed by the Section of International Law to encourage the PTO to eliminate its reliance on citizenship, residence, or immigration status in its licensing regulations (in the hope that these changes would be reflected in any revised U.S. GATS "offer").<sup>51</sup> The Council of the Section thereafter voted to pursue discussions with other Sections with a view to the possible reintroduction of some of the policies expressed in the defeated resolution.

#### b. IBA Initiatives

During its September 2005 Annual Meeting in Prague, the IBA began a discussion about two related issues: whether the IBA should encourage all GATS member countries to make specific commitments regarding access to their markets for legal services and the related concept of whether all countries should permit foreign lawyers some rights of practice in that country, without requiring the foreign lawyers to obtain a local Host State law license. As a result of these discussions, the IBA WTO Working Group drafted a

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the National Conference of Bar Examiners, the National Association of Bar Executives, and the National Organization of Bar Counsel.

49. See ABA Section of Int'l Law, 2007 Annual Meeting Agenda (specifically, "Asian Summit: Bar Leaders on Regulation of Transnational Legal Services" and "European Union Legal Services Summit"), [http://www.abanet.org/intlaw/annual07/agenda\\_meeting.html](http://www.abanet.org/intlaw/annual07/agenda_meeting.html) (last visited Mar. 26, 2008).

50. See RECOMMENDATION 105, *supra* note 35.

51. ABA SECTION OF INT'L LAW, RECOMMENDATION 118A (2007), *available at* <http://www.abanet.org/leadership/2007/annual/docs/hundreichteena.DOC>. The defeated resolution stated:

**RESOLVED**, That the American Bar Association urges the U.S. Patent and Trademark Office (USPTO) to amend 37 CFR §§ 11.6 and 11.7 to permit the registration and continued qualification to practice before the USPTO of any attorney who:

- (1) demonstrates the necessary scientific, technical, character and language qualifications; and
- (2) passes the USPTO examination for registration without regard to the citizenship, country of residence, or immigration status of such person.

*Id.*

resolution, sometimes referred to as the “skills transfer” resolution.<sup>52</sup> The resolution was originally scheduled to be presented to the IBA Council in October 2007 in Singapore, but it was removed from the agenda at the request of the WTO Working Group in order to address issues that it had raised; a revised version may be introduced after further study.<sup>53</sup> During this period, the IBA WTO Working Group also drafted an Association Resolution that addresses the rights of foreign firms to employ and partner with local lawyers, and that is currently working its way through the IBA process.<sup>54</sup>

### 5. *U.S. Implementation of Foreign Lawyer Multi-Jurisdictional Rules*

In 2002, the ABA adopted nine recommendations regarding multi-jurisdictional practice (MJP), two of which addressed the rights of foreign lawyers to practice in the United States.<sup>55</sup> MJP Recommendation 8 urged all states to adopt rules permitting foreign law-

52. The core of the October 2007 Skills-Transfer Resolution states:

NOW THEREFORE BE IT RESOLVED, that the IBA Council hereby reaffirms the principles set out in the Establishment Resolution and adopts, by way of supplement thereto, the following additional principles:

- (1) As contemplated by the Establishment Resolution, Foreign Lawyers who are established in a Host Jurisdiction may be required to register with, and be regulated by, the Host Authority.
- (2) A Foreign Lawyer registered with, and regulated by, the Host Authority should be entitled, at a minimum, to render advice on matters governed by the law of the Home Jurisdiction, as authorized by the Home Authority.
- (3) A Foreign Lawyer permitted to practice 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.
- (4) A Foreign Lawyer who is permitted to practice in a Host Jurisdiction in association with Local Lawyers may be required, in the context 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 he or she practices in such association.
- (5) Consistent with the general requirements of the GATS, any regime adopted by a Host Authority for the purpose of implementing Skill Transfer as contemplated by Paragraphs 3 and 4 of this resolution: (i) should be transparent; (ii) should not be unreasonably burdensome; (iii) should not discriminate as between Foreign Lawyers and/or (iv) should not be adopted or designed for the purpose of constituting an obstacle to the establishment of Foreign Lawyers in the Host Jurisdiction.

International Bar Association (IBA), WTO Working Group, Proposed “Skills Transfer” Resolution (Aug. 15, 2007) (for consideration by the IBA Council at its Meeting of October 18, 2007), [http://www.ibanet.org/images/downloads/Executive%20office/August\\_2007\\_Council\\_Agenda\\_Part\\_03.pdf](http://www.ibanet.org/images/downloads/Executive%20office/August_2007_Council_Agenda_Part_03.pdf).

53. *See Id.*; Telephone Interview by Laurel S. Terry with Bernard L. Greer, Jr., Chair, IBA WTO Working Group (Oct. 23, 2007).

54. Interview with Laurel S. Terry, Member, IBA WTO Working Group (Oct. 31, 2007). At the time this article was written, the Association Resolution had not yet been presented to the IBA Council or the Policy Committee of the Bar Issues Committee. *Id.*

55. ABA Comm’n on Multi-Jurisdictional Practice, Final Reports, as adopted August 12, 2002, <http://www.abanet.org/cpr/mjp/home.html> (last visited Mar. 26, 2008) (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*

yers to practice as FLCs without taking a U.S. qualification examination.<sup>56</sup> MJP Recommendation 9 recommended adoption of a Model Rule for Temporary Practice by Foreign 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.<sup>57</sup> Although there are independent reasons why U.S. jurisdictions adopt 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 cited as a request of our trading partners in the Doha Round negotiations.<sup>58</sup>

As of November 10, 2007, twenty-nine U.S. jurisdictions have adopted a foreign legal consultant rule, including a number of states that recently adopted or revised an FLC rule.<sup>59</sup> Six states have adopted a temporary practice rule for foreign lawyers, the District of Columbia has issued an ethics opinion stating that such practice is permitted, and two states have temporary practice rules pending.<sup>60</sup> Only one jurisdiction has issued a report urging rejection of Recommendation 9.<sup>61</sup> 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.<sup>62</sup>

The ABA MJP Commission included in its proposed Rule 5.5(d)(1) an exemption from local registration for “house counsel” in good standing in another U.S. jurisdiction, but it did not address the issue of such practice rights of foreign in-house counsel. But several states, such as Delaware and Washington, include foreign lawyers in their in-house coun-

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CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2007 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/2007CompGuide.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2007CompGuide.pdf).

56. ABA COMM’N ON MULTI-JURISDICTIONAL PRACTICE, REPORT 201H: LICENSING OF LEGAL CONSULTANT (2002), available at <http://www.abanet.org/cpr/mjp/201h.doc>.

57. 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>.

58. See *supra*, note 20 (for the requests directed toward the United States).

59. See Laurel S. Terry, Summary of State Action on ABA MJP Recommendations 8 & 9 (Oct. 17, 2007), [http://www.abanet.org/cpr/mjp/8\\_and\\_9\\_status\\_chart.pdf](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). The twenty-nine jurisdictions with foreign legal consultant rules are: 1) Alaska, 2) Arizona, 3) California, 4) Connecticut, 5) Delaware, 6) the District of Columbia, 7) Florida, 8) Georgia, 9) Hawaii, 10) Idaho, 11) Illinois, 12) Indiana, 13) Louisiana, 14) Massachusetts, 15) Michigan, 16) Minnesota, 17) Missouri, 18) New Jersey, 19) New Mexico, 20) New York, 21) North Carolina, 22) North Dakota, 23) Ohio, 24) Oregon, 25) Pennsylvania, 26) South Carolina, 27) Texas, 28) Utah, and 29) Washington. *Id.* The seven states that recently adopted or revised their rules include Delaware, Georgia, Indiana, North Dakota, Pennsylvania, South Carolina, and Texas. *Id.*

60. See Terry Chart, *supra* note 60 (indicating that Delaware, Florida, Georgia, New Hampshire, North Carolina, and Pennsylvania have temporary practice rules for foreign lawyers, although the ABA did not include North Carolina on its list, and the District of Columbia had a UPL Committee opinion authorizing temporary practice by foreign lawyers); Needham, *supra* note 60.

61. Terry Chart, *supra* note 60, at 2 (the state rejecting it was Arizona).

62. See ABA Ctr. for Prof’l Responsibility, Survey on Lawyer Discipline Systems, Chart 1: Lawyer Population and Agency Caseload Volume (2006), <http://www.abanet.org/cpr/discipline/sold/06-ch1.pdf> (last visited Mar. 26, 2008). 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.

sel registration rules.<sup>63</sup> Pennsylvania originally included foreign lawyers within its in-house counsel MJP rule but later amended its rule to exclude them.<sup>64</sup>

In August 2006, the House of Delegates amended the ABA's Model Rule for FLCs in a number of ways. Most importantly, it deleted the optional reciprocity requirement, eliminated minimum age requirements, and reduced the periods of prior practice in the original jurisdiction of admission.<sup>65</sup>

In sum, U.S. courts continue to actively consider these foreign lawyer MJP issues, as Delaware's October 2007 adoption of foreign lawyer MJP rules demonstrates.<sup>66</sup> Nevertheless, the pace of change by the states on Recommendations 8 and 9 is slow, perhaps because the MJP recommendations followed on the heels of the more universal changes recommended in the ABA's Ethics 2000 initiative, which had proposed amendments to the ABA Model Rules of Professional Conduct. Many state supreme courts considered the recommended changes to the ethics rules before turning to the MJP recommendations.<sup>67</sup>

## B. OTHER INTERNATIONAL DEVELOPMENTS

In addition to the GATS activities discussed above, there have been several other important international developments ranging from international ethics codes to the rules of conduct for practice before the International Criminal Court (ICC) and money laundering rules for lawyers involved in transnational transactions. Although the United States is not a party to the agreement creating the ICC (President Bush having withdrawn the United States' signature in 2002),<sup>68</sup> U.S. lawyers from the ABA participated in the drafting of the ICC's Code of Professional Conduct for Counsel practicing before the Court, which was adopted in 2005.<sup>69</sup>

63. 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](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr08).

64. Compare Amendments to the Pennsylvania Rules of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement; No. 28 Disciplinary Doc. No. 1, 204 PA. CODE §§ 82-83 (Apr. 30, 2004), *available at* <http://www.pabulletin.com/secure/data/vol34/34-20/840.html> (in-house counsel provision in Rule 5.5(d)(1) includes foreign lawyers), *with* PA. RULES OF PROF'L CONDUCT R. 5.5 (2006), *available at* <http://www.padisiplinaryboard.org/documents/RulesOfProfessionalConduct.pdf> (Rule 5.5(d) is limited to U.S. lawyers).

65. See ABA, RECOMMENDATION 301A (2006), *available at* <http://www.abanet.org/leadership/2006/annual/dailyjournal/threehundredonea.doc>.

66. See DEL. SUP. CT. R. 55.2 (2007), *available at* <http://courts.delaware.gov/Rules/?SC-Rule55-2ForeignLegalConsultants.pdf>; DEL. RULES OF PROF'L CONDUCT R. 5.5 (as revised in 2007), *available at* [http://courts.delaware.gov/Rules/?DLRPP\\_Oct2007.pdf](http://courts.delaware.gov/Rules/?DLRPP_Oct2007.pdf).

67. Compare with ABA Ctr. for Prof'l Responsibility, Status of State Review of Professional Conduct Rules (Jan. 24, 2008), [http://www.abanet.org/cpr/jclr/ethics\\_2000\\_status\\_chart.pdf](http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf).

68. See, e.g., Press Release, U.S. Dept. of Defense, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=3337>.

69. See Int'l Criminal Court (ICC), Code of Prof'l Conduct for Counsel, Resolution ICC-ASP/4/Res.1 (2005), *available at* [http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.1\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.1_English.pdf). This Code was adopted December 2, 2005, at the third plenary meeting of the ICC Assembly of State Parties. The ABA provided comments to the ICC. See, e.g., ABA Section of Int'l Law, Comments on the Draft Code of Conduct for Counsel Before the International Criminal Court (Nov. 10, 2005), [http://www.iccnw.org/documents/ABA\\_DraftCodeComments.pdf](http://www.iccnw.org/documents/ABA_DraftCodeComments.pdf).

ABA representatives also participated in ongoing consultations about the “gatekeeper” initiative of the Financial Action Task Force (FATF). FATF is an inter-governmental body established to develop and promote anti-money laundering policies at the national and international levels.<sup>70</sup> In 1990, FATF adopted a set of forty recommendations;<sup>71</sup> in 2001, it initiated a review of those forty recommendations, which resulted in its May 30, 2002, Consultation Paper known as the Gatekeeper Initiative.<sup>72</sup> This 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, although such information was obtained in confidence, and not revealing the disclosure to the affected clients.<sup>73</sup> In 2003, the ABA adopted a resolution that objected to these ideas,<sup>74</sup> and a number of bars from around the world adopted a joint statement on the FATF “Forty Recommendations.”<sup>75</sup> In 2006 and 2007, the FATF held consultations with the legal profession, including ABA representatives; the September 2007 meeting was convened to discuss the work done with the financial services sector and to try to agree on how further work might be undertaken with respect to obligations of the legal profession.<sup>76</sup>

70. Fin. Task Force on Money Laundering (FATF), About the FATF, [http://www.fatf-gafi.org/pages/0,3417,en\\_32250379\\_32236836\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html) (last visited Mar. 26, 2008).

71. 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 ABA TASK FORCE ON GATEKEEPER REGULATION & THE PROFESSION, <http://www.abanet.org/crimjust/taskforce/home.html> (last visited Mar. 26, 2008).

72. ABA GATEKEEPER RESOLUTION, *supra* note 72.

73. *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.

74. ABA GATEKEEPER RESOLUTION, *supra* note 72.

75. For information on the FATF recommendations, see Joint Statement by the International Legal Profession to the FATF on the Fight Against Money-Laundering (Apr. 3, 2003), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/signed\\_statement\\_0301\\_1183723072.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/signed_statement_0301_1183723072.pdf).

76. *Money Laundering: FATF Consultation*, 17 CCBE -INFO (CCBE, Brussels, Belg.), Jan. 2007, at 6, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/n\\_17\\_enpdf1\\_1179229661.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_17_enpdf1_1179229661.pdf); *Money Laundering: FATF*, 19 CCBE -INFO (CCBE, Brussels, Belg.), Oct. 2007, at 3-4, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_enpdf1\\_1193300073.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf) [hereinafter CCBE: *FATF*]. The document states:

[In September 2007], [t]he representatives from the legal profession communicated the fact that the function and role of lawyers differ significantly from that of financial institutions, and the international legal profession does not consider that the principles contained in the recently concluded FATF guidance for the financial services sector can simply be applied to lawyers. Furthermore, the international legal profession conveyed to the meeting that many Bars have already drafted extensive guidance for their members which is specifically tailored to address any risks that might arise, and in cases where Bars have not yet drawn up guidelines, it is the view of the



Another international development is the November 2005 Statement of Core Principles of the Legal Profession, which was signed by almost 100 bar presidents.<sup>77</sup> The ABA endorsed this document in February 2006.<sup>78</sup> This Statement of Core Principles demonstrates the bars' increased interest in developing a harmonized set of principles and values that can be shared with others, such as those participating in the FATF initiative.

### III. U.S. Developments

In addition to these international developments, there have been a number of U.S.-based transnational legal practice developments since the last Year-in-Review.

#### A. U.S. BILATERAL INITIATIVES

During 2006 and 2007, the Executive Branch concluded negotiations on five new bilateral Free Trade Agreements (FTAs).<sup>79</sup> At the time this report was written, four FTAs—with Colombia, Peru, Panama, and Korea—were still awaiting congressional approval and one agreement—with Oman—had been approved and was awaiting implementation. All of them apply to legal services, and all of them include a Professional Services Appendix.<sup>80</sup> Each of them also includes, *inter alia*, domestic regulation provisions,<sup>81</sup> investment provisions,<sup>82</sup> and “standstill” provisions.<sup>83</sup> The Peru and Colombia FTAs also included side

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legal profession that any such guidelines should be drafted by the legal profession itself and not by any other body.

*Id.*

77. See ABA, RECOMMENDATION 111 (2006), available at <http://www.abanet.org/intlaw/policy/ruleoflaw/coreprinciples.pdf>.

78. *Id.*

79. See generally USTR, Bilateral Trade Agreements, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Mar. 26, 2008).

80. See United States-Peru Trade Promotion Agreement, U.S.-Peru, ch. 11, annex 11-B, Apr. 12, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/section.index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/section.index.html) [hereinafter U.S.-Peru FTA]; United States-Colombia Trade Promotion Agreement, U.S.-Colom., ch. 11, annex 11-B, Nov. 22, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Final\\_Text/section.index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/section.index.html) [hereinafter U.S.-Colombia FTA]; United States-Panama Trade Promotion Agreement, U.S.-Pan., ch. 11, annex 11.9, June 28, 2007, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Panama\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html) [hereinafter U.S.-Panama FTA]; United States-Republic of Korea Free Trade Agreement, U.S.-Korea, ch. 12, annex 12-A, June 30, 2007, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Republic\\_of\\_Korea\\_FTA/Final\\_Text/section\\_index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/section_index.html) [hereinafter U.S.-Korea FTA]; United States-Oman Free Trade Agreement, U.S.-Oman, ch. 11, annex 11.9, Jan. 19, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Oman\\_FTA/Final\\_Text/section\\_index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/section_index.html) [hereinafter U.S.-Oman FTA].

81. U.S.-Korea FTA, *supra* note 81, ch. 12.7; U.S.-Panama FTA, *supra* note 81, ch. 11.8; U.S.-Colombia FTA, *supra* note 81, ch. 11.7; U.S.-Peru FTA, *supra* note 81, ch. 11.7; U.S.-Oman FTA, *supra* note 81, ch. 11.7.

82. U.S.-Korea FTA, *supra* note 81, ch. 11; U.S.-Panama FTA, *supra* note 81, ch. 10; U.S.-Colombia FTA, *supra* note 81, ch. 10; U.S.-Peru FTA, *supra* note 81, ch. 10; U.S.-Oman FTA, *supra* note 81, ch. 10.

83. See, e.g., U.S.-Korea FTA, *supra* note 81, U.S. annex I, at 12 (“All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico”); U.S.-Panama FTA, *supra* note 81, U.S. annex I, at 13 (“All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico”); U.S.-Colombia FTA, *supra* note 81, U.S. annex I, at 13 (“All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico”); U.S.-Peru FTA, *supra* note 81, U.S. annex I, at 13 (“All existing non-conforming measures of all states of the

letters that required a review of selected state measures, including legal services measures.<sup>84</sup> The U.S.-Republic of Korea FTA, which is often referred to as KORUS, generated the most interest in the U.S. legal community because Korea included its new foreign legal consultant rule within its commitments.<sup>85</sup> At the Asian Summit meetings, Korean bar representatives claimed that Korea would follow the path taken by Japan in liberalizing access to the local market (including full rights of partnership with and employment of or by local lawyers) within a fraction of the nearly twenty-five years these reforms took in Japan.

In addition, significant efforts have been made to implement the 2004 U.S.-Australia FTA provisions applicable to legal services.<sup>86</sup> This FTA includes an Annex on Professional Services requiring the Parties to establish a Working Group to facilitate the FTA activities.<sup>87</sup> In May 2006 in Washington D.C., representatives from the U.S. and Australian governments, bar associations, and lawyer regulatory organizations met to discuss lawyer regulatory issues.<sup>88</sup> In addition, the Australian government and the Law Council of Australia demonstrated a strong interest in making U.S. jurisdictions more accessible to Australian lawyers through visits by delegates to meet with the Conference of Chief Justices (CCJ) and representatives from the highest courts in Georgia, Delaware, New York, and California.<sup>89</sup>

The cooperative efforts of U.S. and Australian participants have yielded a number of significant developments.<sup>90</sup> For example, the FTA, promising “temporary entry” rights to

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United States, the District of Columbia, and Puerto Rico”); U.S.-Oman FTA, *supra* note 81, U.S. annex I, at 14 (“All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico”).

84. See U.S.-Peru FTA, *supra* note 81, Side Letter on State Measures; U.S.-Colombia FTA, *supra* note 81, Side Letter on State Measures. The side letters indicate, *inter alia*, that within one year of the agreement entering into force, the United States would initiate a review of state measures in New York, New Jersey, Florida, California, Texas, and the District of Columbia; that the United States would review measures requiring citizenship or permanent residency; and that the United States would report the results of the review to the Government of Peru and the Government of Colombia, respectively.

85. See U.S.-Korea FTA, *supra* note 81, annex II, at 44.

86. United States-Australia Free Trade Agreement, U.S.-Austl., ch. 10, annex 10-A, Mar. 3, 2004, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final\\_Text/Section\\_Index.htm](http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.htm) [hereinafter U.S.-Australia FTA]. For information about the dates of House and Senate passage and presidential approval of this FTA, see generally USTR, Australia FTA Press Releases, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Australia\\_FTA/press\\_releases/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/press_releases/Section_Index.html) (last visited Mar. 26, 2008). The commitment is modeled on a similar provision in NAFTA that resulted in an aborted effort to reach a detailed agreement between the ABA and the Mexican and Canadian bar associations.

87. U.S.-Australia FTA, *supra* note 87, annex 10-A, para. 5.

88. Laurel S. Terry, *Current Developments Regarding the Gats And Legal Services: The Suspension of the Doha Round, “Disciplines” Developments, and Other Issues*, 76 B. EXAMINER 27, 29 (2007). The ABA Section of International Law’s Committee on Transnational Legal Practice, in cooperation with the ABA Task Force on International Trade in Legal Service, coordinated the efforts to notify and encourage the appropriate U.S. representatives to attend. Each side prepared briefing papers for the other regarding lawyer qualification rules and rules governing foreign lawyers. This event was the first and only FTA-related legal services meeting involving representatives of the relevant legal profession bodies from each country.

89. The Conference of Chief Justices (CCJ) consists of the highest judicial officer in each U.S. state and territory—typically the Chief Justice of the state supreme court. Conference of Chief Justices, About CCJ, <http://ccj.ncsc.dni.us/about.html> (last visited Mar. 26, 2008).

90. See Conference of Chief Justices, Resolution 7 Regarding Authorization for Australian Lawyers to Sit for State Bar Examinations (Feb. 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html> [hereinafter Resolution 7]; Conference of Chief Justices, Resolution 8 Regard-

professionals, has been uniquely implemented for Australian applicants with an annual quota of 10,000 visas (probably a number greatly exceeding current demand).<sup>91</sup> Following their visit to the CCJ's Annual Meeting in February 2006,<sup>92</sup> the CCJ adopted two resolutions supportive of Australian lawyers interested in gaining practice rights in the United States through easier access to local bar examinations and recognition of home country qualification.<sup>93</sup> In October 2007, following visits by a Delaware Supreme Court justice to the Australian Law Council's Annual Meeting and visits by Australian Law Council representatives and government officials to Delaware, the Delaware Supreme Court adopted a FLC rule and included foreign lawyers in its amended Rule of Professional Conduct 5.5 to allow temporary practice by foreign lawyers and by foreign in-house counsel.<sup>94</sup> Australian representatives also met with Georgia representatives to discuss the possibility of a lawyer discipline cooperation protocol and initiatives that might provide Australian lawyers with a greater opportunity to sit for the Georgia bar examination.<sup>95</sup> Although California and New York have not been as responsive to the Australian efforts, discussions continue with both those states.

U.S. representatives have also begun discussions with representatives from India. In response to a request from the Office of U.S. Trade Representative, the ITILS Task Force assisted the creation of an India-U.S. Joint Working Group on Legal Services established under the auspices of the U.S.-India Trade Policy Forum. While it is still in its formative stage, the goal is that the Working Group will engage in direct dialogue with representatives of the Indian legal profession to discuss mutual issues of interest relate to the delivery of legal services within and between the two countries.

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ing Accreditation of Legal Education in Common Law Countries by the ABA Section on Legal Education and Admission to the Bar (Feb. 2007), <http://ccj.ncsc.dni.us/LegalEducationResolutions/resol8AccredLegalEducCommonLawCountries.html> [hereinafter Resolution 8]; Conference of Chief Justices, Resolution 4 Regarding Adoption of Rules on the Licensing and Practice of Foreign Legal Consultants (Aug. 2006), <http://ccj.ncsc.dni.us/InternationalResolutions/resol4ForeignLegalConsultants.html> [hereinafter Resolution 4].

91. See, e.g., Labor Condition Application Requirements for Employers Seeking to Use Nonimmigrants on E-3 Visas in Specialty Occupations, 72 Fed. Reg. 1650 (proposed Jan. 12, 2007) (to be codified at 20 C.F.R. pt. 655) (explaining the history of the E3 visas that can be used by Australian lawyers under the U.S.-Australia FTA); see also 8 U.S.C. § 1101(a)(15)(E)(iii) (2006); 22 C.F.R. § 41.51(c) (2006); Memoranda from Michael Aytes, Acting Associate Dir., Domestic Operations, U.S. Citizenship & Immigration Serv., Dep't of Homeland Sec. to Reg'l Serv. Ctr. Dir. (Dec. 15, 2005), available at [http://www.uscis.gov/files/pressrelease/E3PolGdnc\\_121505.pdf](http://www.uscis.gov/files/pressrelease/E3PolGdnc_121505.pdf).

92. Terry, *supra* note 89. The Australians are not the only foreign lawyer representatives to be invited to a CCJ meeting. CCBE representatives attended 2006 and 2007 CCJ meetings. See *Relations with the United States: Conference of Chief Justices*, 19 CCBE-INFO (CCBE, Brussels, Belg.), Oct. 2007, at 6, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_enpdf1\\_1193300073.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf); *GATS: Meeting with Representatives of the Chief Justices of US State Supreme Courts*, 14 CCBE-INFO (CCBE, Brussels, Belg.), Jan. 2006, at 10, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/n\\_14\\_enpdf1\\_1180964697.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_14_enpdf1_1180964697.pdf).

93. See Resolution 7, *supra* note 91; see Resolution 8, *supra* note 91. One resolution encouraged state bar regulators to consider allowing Australian lawyers to sit for state bar examinations, and the other urged the ABA Section on Legal Education and Admissions to the Bar to consider developing and implementing a program to certify the quality of the legal education offered by universities in other common-law countries. See also Resolution 4, *supra* note 91.

94. Email from Robert E. Lutz to Laurel S. Terry (Oct. 29, 2007).

95. Telephone Interview by Robert E. Lutz with William Smith, General Counsel, Georgia State Bar (Oct. 26, 2007).

## B. LAWYER DISCIPLINE COOPERATION INITIATIVES

Increasing numbers of U.S. states now permit foreign lawyers to practice in the United States, and the growing number of non-U.S. lawyers performing services in this country—both from permanent offices or through FIFO visits—mirrors the growth of the trade and “globalization” in the world economy.<sup>96</sup> The increased number of foreign lawyers has not been accompanied by increased reports of improper conduct on the part of these lawyers, but it would be prudent—before a crisis occurs—to consider the issue of developing a protocol or other procedure for international cooperation on lawyer discipline and perhaps even reciprocal discipline. Moreover, as more state supreme courts have adopted rules permitting non-U.S. lawyers to practice in the United States, there has been increased interest in developing an accountability system for those foreign lawyers based on the exchange of information relating to misconduct and discipline. The absence of such procedures to help ensure appropriate public protection may make state supreme courts reluctant to adopt liberalized rules relating to non-U.S. lawyer access to the U.S. legal services market.

The ABA Standing Committee on Professional Discipline and the ABA ITILS Task Force have been engaged in efforts to facilitate discipline cooperation and perhaps develop a model protocol with the CCBE and with professional regulators in Australia. The ABA groups have offered proposed models that are consistent with Rule 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement, and discussions are proceeding on these issues.<sup>97</sup>

These discipline cooperation efforts may be aided by the CCBE’s recent adoption of a new electronic ID card and its framework proposal for establishing a European system for electronic lawyer ID cards.<sup>98</sup> This CCBE lawyer ID card could also serve a role similar to the national identification number used by the ABA for all U.S. lawyers for the purposes of the national regulatory data bank.<sup>99</sup>

## C. SIGNIFICANT LITIGATION

In its 2006 term, the U.S. Supreme Court was presented with two opportunities to consider the rights of foreign lawyers to access the U.S. market for legal services: *LeClerc v. Webb* challenged the rules of the State of Louisiana pertaining to non-U.S. citizens under which membership in the bar and even the right to take the bar exam is limited to resident aliens,<sup>100</sup> and *Lacavera v. Dudas* sought review of a PTO rule that similarly barred

96. See *supra* notes 1-16 and accompanying text.

97. See ABA STANDING COMM. ON PROF’L DISCIPLINE, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 22, available at <http://www.abanet.org/cpr/disenf/rule22.html>.

98. Press Release, CCBE, CCBE Issues Guidelines for Electronic ID Cards for European Lawyers (Oct. 15, 2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/pr\\_1007\\_enpdf1\\_1192451701.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/pr_1007_enpdf1_1192451701.pdf).

99. For information about the purposes of this initiative, see *IT Law*, 19 CCBE-Info (CCBE, Brussels, Belg.), Oct. 2007, at 8, available at [http://www.ccbe.org.eu/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_en.pdf](http://www.ccbe.org.eu/fileadmin/user_upload/NTCdocument/newsletter_19_en.pdf). For information about the U.S. National Lawyer Data Regulatory Bank, see ABA Ctr. for Prof’l Responsibility, National Lawyer Regulatory Data Bank, <http://www.abanet.org/cpr/regulation/databank.html> (last visited Mar. 26, 2008).

100. *LeClerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003), *aff’d*, 419 F.3d 405 (5th Cir. 2005), *cert. denied*, 127 S.Ct. 3000 (2007).

admission to practice to an otherwise qualified applicant based on her non-immigrant (non-resident) visa.<sup>101</sup> In both cases, the petitioners held valid visas allowing them to reside and work in the United States, but they had not obtained “immigrant” status and were not U.S. citizens.

The Louisiana Supreme Court rule at issue in *LeClerc v. Webb* and its companion case, *Wallace v. Calogero*,<sup>102</sup> requires that “[e]very applicant for admission to the Bar of this state shall . . . [b]e a citizen of the United States or a resident alien thereof.”<sup>103</sup> In an earlier case, the Louisiana Supreme Court interpreted the term “resident alien” to include “only . . . those aliens who have attained permanent resident status in the United States.”<sup>104</sup> The petitioners in *LeClerc* were a Canadian and three French lawyers who held either J-1 student visas or H-1B temporary worker visas. The petitioners in *Wallace* were citizens of the U.K.; Wallace was licensed as an attorney in England and Wales, while Maw graduated from Tulane University Law School. Wallace and Maw each held H-1B visas.<sup>105</sup> Both J-1 and H-1B visas are temporary in that they do not allow the holder to remain in the United States on a permanent basis.

The principal arguments urged by the petitioners focused on Equal Protection and federal preemption of immigration issues. The district court hearing the *Wallace* case upheld the equal protection challenge, finding that the state rule did not satisfy the strict scrutiny standard of review;<sup>106</sup> the district court hearing *LeClerc* held that the rule satisfied the rational basis standard of review. Both district courts rejected the preemption argument.

On appeal, the Fifth Circuit held that nonimmigrant aliens are not a “suspect class” requiring strict scrutiny of laws claimed to discriminate against their interests. It explained,

The Court has never applied strict scrutiny review to a state law affecting any . . . alienage classifications, *e.g.*, illegal aliens, the children of illegal aliens, or nonimmigrant aliens. In such cases, the Court has either foregone Equal Protection analysis . . . or has applied a modified rational basis review.<sup>107</sup>

The Fifth Circuit rejected the preemption argument as well, holding the Louisiana rule was a “permissible exercise of . . . broad police powers to regulate employment.”<sup>108</sup>

The U.S. Supreme Court requested the views of the Solicitor General before ruling on the petitions. The Solicitor General’s brief argued that the Fifth Circuit’s views on pre-

101. *Lacavera v. Dudas*, 441 F.3d 1380 (Fed. Cir. 2006), *cert. denied*, 127 S.Ct. 1246 (2007).

102. *Wallace v. Calogero*, 286 F. Supp. 2d 748 (E.D. La. 2003), *rev’d*, 419 F.3d 405 (5th Cir. 2005), *cert. denied*, 127 S.Ct. 3000 (2007).

103. *LaClerc*, 419 F.3d at 410 (quoting LA. SUP. CT. R. XVII, § 3(B)).

104. *In re Bourke*, 819 So.2d 1020, 1022 (La. 2002).

105. *LaClerc*, 419 F.3d at 412.

106. *Wallace*, 286 F. Supp. 2d at 762.

107. *LaClerc*, 419 F.3d at 416. The opinion also states:

The Court has uniformly focused on two conditions particular to resident alien status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of resident aliens to exert political power in their own interest given their status as virtual citizens; and (2) the similarity of resident aliens and citizens.

*Id.* at 417.

108. *LaClerc*, 419 F.3d at 423.

emption were correct and that only permanent resident status triggers strict scrutiny for purposes of Equal Protection analysis. After receiving the Solicitor General's brief, the Supreme Court denied certiorari.

*Lacavera v. Dudas* challenged PTO rule §10.9(b), which restricts registration as an attorney licensed to practice before the PTO to those applicants who are U.S. citizens or resident aliens. For nonimmigrant aliens, the PTO grants a "limited recognition" that "allows them to practice before the PTO, but confines their activities to those authorized by the Immigration and Naturalization Service."<sup>109</sup>

Catherine Lacavera, a Canadian citizen who held a three-year H-1B visa at the time her case was appealed to the Federal Circuit, successfully passed the PTO qualification examination but was granted only limited practice rights solely because of her visa status.<sup>110</sup> She challenged the limited recognition determination as a denial of equal protection and inconsistent with the permitted scope of the regulations in light of the underlying statutory authority. The trial court granted summary judgment for the PTO, and the Federal Circuit affirmed, essentially deferring to the PTO's judgments on its needs and policies. The court considered the visa parameters an appropriate factor for consideration in interpreting the "necessary qualifications" language of the PTO's authorizing statute.<sup>111</sup> The court rejected the equal protection claims using the rational basis test and found the regulation is "rationally related to a legitimate government interest, *e.g.*, minimizing the unauthorized practice of law before the PTO and its attendant public harm."<sup>112</sup> On petitioner's application for a writ of certiorari before the Supreme Court, the Solicitor General pointed out to the Court that, in the period between the Federal Circuit's decision and the date of his brief the petitioner had converted her visa to that of an immigrant, rendering the case moot. The Supreme Court denied certiorari.

These two cases provided the U.S. Supreme Court with a rare opportunity to consider issues related to transnational legal practice. The Coalition of Service Industries, Tulane Law School, the Innocence Project, and the National Asian Pacific American Par Association filed amicus briefs urging the Supreme Court to grant certiorari.

#### IV. Regional Developments

The United States was far from alone in efforts to deal with the growth in transnational legal practice. The following survey represents some (but far from all) of these developments over the past two years.

##### A. AUSTRALIA

Australia has been extremely active in its efforts to implement the U.S.-Australia FTA and to convince U.S. jurisdictions to allow Australian lawyers to practice in the United States.<sup>113</sup> In addition to these activities, one of the most significant developments of this past year is the emergence in Australia of the first law firm in which profit shares were

109. *Lacavera*, 441 F.3d at 1382 (citing 37 C.F.R. § 10.9(b)).

110. *Id.* at 1382.

111. *Id.* at 1383.

112. *Id.* at 1384.

113. *See supra* notes 87-96 and accompanying text.

offered to the public and traded publicly—a development directly at odds with the ABA’s rejection of related concepts in 2000.<sup>114</sup>

Since 2001, legal service providers in New South Wales have been permitted to form Incorporated Legal Practices (ILPs).<sup>115</sup> Pursuant to the 2004 Legal Profession Act, an ILP may include service providers who are not lawyers, provided that there is compliance with the requirements of the Act and other applicable laws and rules.<sup>116</sup> One such requirement is that the ILP include at least one lawyer serving as a “legal practitioner director.” That director must comply with his or her obligations under the Act, other applicable regulations governing lawyers, and obligations as a company director under the Corporations Act of 2001.<sup>117</sup>

Approximately 500 Australian law firms have incorporated since 2001, and in May 2007, the firm of Slater & Gordon made history by becoming the first law firm to offer publicly-traded stock.<sup>118</sup> Slater & Gordon’s prospectus addresses issues regarding conflicts between its duties to shareholders, clients, and the court. That document also describes the firm’s obligations pursuant to the Act and other related laws as well as how those requirements could impact the firm’s relationship with its stockholders. Specifically, the prospectus warns potential investors that, in terms of priority, they are third in line after the court and clients.<sup>119</sup>

Slater & Gordon’s initial public offering, coupled with the legal services legislation in England and Wales discussed in the next section, has contributed to revitalized discussion in the United States and the E.U. about the “inevitability” of and ethical and business ramifications associated with multidisciplinary practices (MDPs).<sup>120</sup>

114. For information about the ABA initiative, see ABA Ctr. for Prof'l Responsibility, Multidisciplinary Practice, <http://www.abanet.org/cpr/mdp/home.html> (last visited Mar. 26, 2008).

115. See Steven A. Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671 (2004).

116. Legal Profession Act 2004, §§ 132-182. To view the portions of the Act relating to Incorporated Legal Practices (ILPs) and Multidisciplinary Partnerships, see New South Wales Consolidated Acts, [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/lpa2004179/s134.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s134.html) (last visited Mar. 26, 2008).

117. For more information regarding ILPs and applicable rules and regulations, see Office of the Legal Services Commissioner, Incorporated Legal Practices, [http://www.lawlink.nsw.gov.au/lawlink/olsc/olsc.nsf/pages/OLSC\\_ilp](http://www.lawlink.nsw.gov.au/lawlink/olsc/olsc.nsf/pages/OLSC_ilp) (last visited Mar. 26, 2008).

118. See, e.g., 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>; see also, Bernard Ascher, *Overhaul of British Legal System Can Sharpen Competition* (The Am. Antitrust Inst., Working Paper No. 07-09, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103616](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103616). For specific current information about Slater & Gordon, see Australian Securities Exchange, Slater & Gordon Limited, <http://www.asx.com.au/asx/research/CompanyInfoSearchResults.jsp?searchBy=asxCode&allinfo=&asxCode=sgl> (last visited Mar. 26, 2008).

119. SLATER & GORDON, PROSPECTUS (April 13, 2007), available at <http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf>.

120. See, e.g., Ascher, *supra* note 119; Mark L. Tuft, *Law Firms, Ethics, & Equity Capital: A Conversation*, 21 GEO. J. LEGAL ETHICS (2007). In light of the Australian developments and proposals elsewhere in the world, there has been increasing interest in the alternative business structures for law firms, including outside investment. See, e.g., Panel Discussion at the 2007 ABA Annual Meeting: Brave New World: The Changing Face of Law Firms and the Practice of Law (Aug. 10, 2007), schedule available at <http://www.abanet.org/annual/2007/docs/ABAAnnualSanFrancisco2007.pdf> (materials on file with journal); Symposium at the Georgetown University Center for the Study of the Legal Profession: Future of the Global Law Firm (April 17-18, 2008); Panel Discussion at the ABA Section of International Law 2008 Spring Meeting: Third-Party Equity Holdings in Law Firms: An Inevitable Response to Globalization or an Infeasible Ethical Morass? (April 3, 2008), schedule available at [http://www.abanet.org/intlaw/spring08/agenda/agenda\\_practice.html](http://www.abanet.org/intlaw/spring08/agenda/agenda_practice.html).

Historically, many organized bars throughout the world have either opposed or been very cautious about the concept of multidisciplinary partnerships and outside investment in law firms. In July 2000, the ABA's House of Delegates rejected the recommendations of its Commission on Multidisciplinary Practice to permit joint ownership and fee sharing in a single firm of lawyers and non-lawyers.<sup>121</sup> The House reiterated support for the preservation of the "core values of the legal profession" and recommended that in jurisdictions where lawyers and law firms are permitted to own and operate non-legal businesses, non-lawyers should not own or exert control over the practice of law by a lawyer or law firm or "otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person."<sup>122</sup> The IBA, the Union Internationale des Avocats (UIA), and the CCBE expressed similar concerns to the ABA MDP Commission regarding non-lawyer ownership of law firms and multidisciplinary partnerships.<sup>123</sup> Australia's first publicly-traded law firm is likely to lead to renewed discussions in the United States and elsewhere about MDPs, alternative business structures, and publicly traded law firms.

## B. EUROPE

### 1. *European Competition (Antitrust) Issues*

European developments will also contribute to renewed discussions in the United States and elsewhere about MDP and alternative business structures. In 2003, the Competition Directorate of the European Commission launched an investigation of professional services in order to consider the justification for, and effects of, the regulatory provisions for five types of professional services, including legal services.<sup>124</sup> The resulting reports identified a number of possible problems: lawyer qualification rules, lawyer monopoly rules, restrictive rules regarding lawyer advertising and lawyer fees, and rules limiting MDPs and alternative business structures.<sup>125</sup> Since then, various factions have addressed this issue, including the CCBE and the European Parliament.<sup>126</sup>

121. ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, RECOMMENDATION (July 2000), *available at* <http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html>. Even the Commission, however, would not have permitted public ownership or trading in law firm shares.

122. BARRY EPSTEIN, PAUL MICHAEL HASSETT, & CHERYL I. NIRO, REPORT ACCOMPANYING RECOMMENDATION 10F (June 2000), *available at* <http://www.abanet.org/cpr/mdp/mdprecom10f.html>.

123. *See, e.g.*, Laurel S. Terry, Appendix B1: Summary of CMDP Public Hearing Testimony (March 20, 1999), <http://www.abanet.org/cpr/mdp/terryb1.html> (summarizing testimony before the ABA MDP Commission; this testimony is located in various places on the Commission's website).

124. *See* European Commission (EC), Professional Services Overview, [http://ec.europa.eu/comm/competition/sectors/professional\\_services/overview\\_en.html](http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html) (last visited Mar. 26, 2008).

125. The EC conducted a stocktaking exercise, followed by a February 2004 report, both of which were discussed in the last Year-in-Review report. *See* Lutz et al., *2004 Developments*, *supra* note 10. In September 2005, the EC issued its follow-up report that suggested that further investigation by national competition authorities would be appropriate. *Commission Communication on Professional Services: Scope for More Reform*, COM (2005) 405 final (Sept. 5, 2005), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0405:EN:HTML>.

126. In March 2006, the CCBE filed an Economic Submission that challenged some of the analysis contained in the Commission's follow-up report. CCBE, ECONOMIC SUBMISSION TO COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES, *available at* [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/ccbe\\_economic\\_submis1\\_1182239202.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf). In October 2006, the European Parlia-



The European Commission urged E.U. Member States to examine their own regulation of the legal profession, and a number of them have done so. For example, after a Danish commission recommended major changes in the organization of the Danish Bar and Law Society and in the way in which complaints against lawyers are handled, the Bar agreed to give up its representative functions and operate solely as a regulator.<sup>127</sup> This action followed the European Court of Human Rights decision in *Sorenson and Rasmussen*, which had addressed mandatory bar membership.<sup>128</sup> The Polish government has adopted legislation that revised its lawyer discipline system.<sup>129</sup> The Polish Constitutional Tribunal found unconstitutional a number of provisions that addressed lawyer admission and training, and the efforts to develop a replacement law have been very controversial.<sup>130</sup> In October 2006, the Dutch National Competition Authority “launched a public consultation on the legal services market in the Netherlands,” seeking input on such issues as outside investment in law firms; it has now issued a report to which the government has responded.<sup>131</sup> In December 2006, the Irish Competition Authority released its final report on legal services finding, *inter alia*, “that the market for legal services is permeated with unnecessary and disproportionate restrictions on competition and is in need of substantial reform” and recommended twenty-nine reforms; other developments are underway because of publicized solicitor fraud.<sup>132</sup> Different conclusions are found in the November 2006 report of the Northern Ireland Legal Services Review Group, which concluded that external ownership of law firms could carry with it unwanted problems and that the existing restrictions should therefore be retained.<sup>133</sup> The CCBE has prepared several position papers that are relevant to these reform efforts but are not specific to a particular country or particular reform proposal.<sup>134</sup>

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ment adopted a resolution that supported the Commission’s efforts to rid the sector of overly restrictive regulation, but it also called on all of those involved in the reform process to pursue it in a constructive manner, called on the Commission to show the extent of new jobs and additional growth that could be expected from a systematic pro-competitive reform of the sector, and issued several cautionary notes. *Resolution on Follow-Up to the Report on Competition in Professional Services*, EUR. PARL. DOC. 2006/2137(INI) (Oct. 12, 2006); see also CCBE Position Papers, *infra* note 135.

127. See Email from Jonathan Goldsmith, CCBE Secretary General, to Laurel S. Terry (Dec. 2, 2007) [hereinafter Goldsmith Email]; *National Competition and Regulatory Developments*, 17 CCBE-INFO (CCBE, Brussels, Belg.), Jan. 2007, at 4-5, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/n\\_17\\_enpdf1\\_1179229661.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_17_enpdf1_1179229661.pdf) [hereinafter *National Developments*]. In October 2006, the Lawyers’ Commission published its report on the Danish legal services market and recommended that the Danish Bar and Law Society become a public institution.

128. *Competition: National Developments*, 15 CCBE-INFO (CCBE, Brussels, Belg.), May 2006, at 4, available at [www.ccbe.org/fileadmin/user\\_upload/NTCdocument/n\\_15\\_enpdf1\\_1180964538.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/n_15_enpdf1_1180964538.pdf)

129. *Poland*, 19 CCBE-INFO (CCBE, Brussels, Belg.), Oct. 2007, at 4, available at [www.ccbe.org/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_enpdf1\\_1193300073.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf).

130. *Id.* (noting that the IBA and the CCBE have sent a delegation to meet with representatives of the Courts, Parliament and the legal profession, in order to share their concerns and that in September 2007, the CCBE organized a roundtable entitled “Defending the rule of law in Poland”); Goldsmith Email, *supra* note 128.

131. *National Developments*, *supra* note 128, at 5; Goldsmith Email, *supra* note 128.

132. *National Developments*, *supra* note 128, at 4; Goldsmith Email, *supra* note 128.

133. *National Developments*, *supra* note 128, at 5.

134. See CCBE POSITION PAPER ON NON-LAWYER OWNED FIRMS (June 2005), available at [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/ccbe\\_position\\_on\\_non1\\_1182254612.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_position_on_non1_1182254612.pdf) [hereinafter NON-LAWYER OWNED FIRMS]; CCBE POSITION PAPER ON MULTI-DISCIPLINARY PARTNERSHIPS (June 2005), available at [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/ccbe\\_position\\_on\\_mdp1\\_](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_position_on_mdp1_)

The most high-profile review, however, is undoubtedly the U.K.'s Clementi Report, which was not instituted in response to the E.U. Competition Report but in response to other events, including the 2001 U.K. Office of Fair Trading Report.<sup>135</sup> The Clementi Report led to proposed legislation to reform the legal services market in England and Wales; the resulting Legal Services Act of 2007 received Royal Assent on October 30, 2007.<sup>136</sup> This Act changes the regulatory structure for solicitors and barristers in England and Wales by creating a Legal Services Board and an Office for Legal Complaints, both of which require a majority of members who are not lawyers.<sup>137</sup> The Legal Services Act allows legal services to be provided by firms organized under new business models, according to rules to be developed by the new Legal Services Board; depending on the rules the Board adopts, such business models could include publicly-traded law firms.<sup>138</sup> The Act was controversial. The CCBE, for example, asserted that "there are overriding non-economic reasons which go beyond the purely economic arguments and which clearly speak against the introduction of such business structures [involving non-lawyer ownership of law firms]"; it urged the government to preserve the core values of the legal profession.<sup>139</sup> The CCBE position paper expressed similar concerns with respect to multidisciplinary partnerships.<sup>140</sup>

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1182254536.pdf; CCBE POSITION ON REGULATORY AND REPRESENTATIVE FUNCTIONS OF BARS (June 2005), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/ccbe\\_position\\_on\\_reg1\\_1182254709.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf). These papers are similar to the CCBE's Response to the Clementi Report. CCBE RESPONSE TO THE CLEMENTI CONSULTATION DOCUMENT (June 2004), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/ccbe\\_response\\_clemen1\\_1183706107.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_response_clemen1_1183706107.pdf). See also CCBE ECONOMIC SUBMISSION TO COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES (March 2006), available at [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/ccbe\\_economic\\_submis1\\_1182239202.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf).

135. See SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES (Dec. 2004), available at <http://www.legal-services-review.org.uk/content/report/report-chap.pdf>. The Clementi Report was not, however, instituted in response to the E.U. Competition Report or stocktaking but in response to the 2001 UK Office of Fair Trading Report. See OFFICE OF FAIR TRADING, COMPETITION IN THE PROFESSION: A REPORT BY THE DIRECTOR GENERAL OF FAIR TRADING (Mar. 2001), available at [http://www.offt.gov.uk/shared\\_offt/reports/professional\\_bodies/oft328.pdf](http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf).

136. Legal Services Act of 2007, ch. 29, available at [http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga\\_20070029\\_en.pdf](http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf) [hereinafter Legal Services Act 2007]; see also U.K. Ministry of Justice, Legal Services Act 2007, <http://www.justice.gov.uk/publications/legalservicesbill.htm> (last visited Mar. 26, 2008) (includes links to the bill and explanatory notes, the latter of which includes links to the Clementi Report and other important background information).

137. See Legal Services Act 2007, *supra* note 137, at art. 2, schedule 1 (Legal Services Board) & art. 114, schedule 15 (Office for Legal Complaints); see also Legal Services Bill para. 36, 2006, H.L. Bill [9] (U.K.), available at <http://www.publications.parliament.uk/pa/ld200607/ldbills/009/en/07009x—htm>. Schedule 1, para. 2(1) requires lay persons to be a majority of the Legal Services Board, and Schedule 15, para. 2(1) requires lay persons to be a majority of the Office for Legal Complaints.

138. Legal Services Act 2007, *supra* note 137, pt. 5. For example, Article 72(2) defines a licensable body (B) as one in which "(a) another body ('A') is a manager of B, or has an interest in B, and (b) non-authorised persons are entitled to exercise, or control the exercise of, at least 10% of the voting rights in A." *Id.* art 72(2). The exact terms on which law firms can be publicly traded will be established once rules are made by the Legal Service Board and in accordance with those rules. See also Jack Straw, Foreword from the Lord Chancellor and Secretary of State for Justice, [http://www.tribalmicrosites.co.uk/lb/index.cfm?page=Foreword\\_from\\_the\\_Lord\\_Chancellor\\_and\\_Secretary\\_of\\_State\\_for\\_Justice](http://www.tribalmicrosites.co.uk/lb/index.cfm?page=Foreword_from_the_Lord_Chancellor_and_Secretary_of_State_for_Justice) (last visited Mar. 26, 2008).

139. NON-LAWYER OWNED FIRMS, *supra* note 135, at 5.

140. *Id.*

## 2. *Attorney Client Privilege and Akzo Nobel*

Another significant European development that will directly affect many U.S. lawyers is the September 2007 *Akzo Nobel* decision in which the European Court of First Instance (CFI) addressed the issue of attorney-client privilege in EU antitrust (competition) proceedings.<sup>141</sup> In 1982, the European Court of Justice (ECJ) decided *AM&S*, which has been interpreted as denying the attorney-client privilege to European in-house counsel.<sup>142</sup> Many U.S. lawyers had hoped that *Akzo Nobel* would provide an opportunity to reverse the *AM&S* decision, but it did not do so.<sup>143</sup>

The *Akzo Nobel* court found that certain documents at issue were protected by attorney-client privilege, and 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.<sup>144</sup> The Court agreed that the privilege covered internal company documents that were drawn up exclusively for the purpose of seeking legal advice from an independent lawyer.<sup>145</sup> But it rejected the argument that communications with the company's in-house counsel were protected.<sup>146</sup> The court held that *AM&S* applied only to independent lawyers and that their privilege did not apply to internal communications involving in-house lawyers.<sup>147</sup> The Association of Corporate Counsel-Europe (ACC), the IBA, the CCBE, and the Netherlands Bar unsuccessfully argued that the decision should be overturned, with the ACC arguing that such a privilege should be recognized and the others arguing that the Court should defer to national law and should recognize the attorney-client privilege for in-house counsel in those jurisdictions in which communications with in-house counsel are covered by the national law concept of professional privilege.<sup>148</sup> The period for an appeal is pending at the time this article is being written.<sup>149</sup>

## 3. *Free Movement of Lawyers Issues*

Three recent developments affect the ability of an E.U.-citizen lawyer to move among E.U. Member States. (U.S. lawyers who are also licensed European lawyers may not take advantage of the EU lawyer directives unless they are also EU citizens.) In September 2006, the ECJ invalidated Luxembourg's implementation of the Establishment Directive

141. *Akzo Nobel* refers to two joined cases: Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chems. Ltd., Akros Chems. Ltd. v. Comm'n*, Judgment of the Court of First Instance (First Chamber, Extended Composition) of Sept. 17, 2007, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-125/03>.

142. Case 155/79, *AM & S v. Comm'n*, 1982 E.C.R. 1575.

143. The Association of Corporate Counsel Europe (ACCE) which is the European Chapter of the Corporate Counsel Association, (formerly known as ACCA, the American Corporate Counsel Association), filed a brief in support of that position. See *Akzo Nobel*, *supra* note 142. The ACCE Intervention Statement is available at <http://www.acc.com/public/amicus/ak20.pdf>

144. *Id.* at ¶ 101.

145. *Id.* at ¶¶ 122-23.

146. *Id.* at ¶¶ 166-69.

147. *Id.*

148. *Id.* at ¶¶ 11, 146-49; see also *Akzo Nobel Case*, 19 CCBE-INFO(CCBE, Brussels, Belg.), Oct. 2007, at 2, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_enpdf1\\_1193300073.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf) [hereinafter CCBE: *Akzo Nobel*].

149. See CCBE: *Akzo Nobel*, *supra* note 149, at 3.

after concluding that Luxembourg should not have imposed a language test, should not have prohibited Host State lawyers from accepting service on behalf of companies, and should not have required lawyers to produce a Home State certificate of registration each year.<sup>150</sup> Second, in December 2006, in the *Cipolla* and *Meloni* cases, the ECJ concluded that Italian rules that set forth a minimum fee schedule violated non-Italian E.U. lawyers' freedom to provide services but that it was up to the national courts to determine whether the restrictions were warranted.<sup>151</sup> Third, and most significantly, in December 2006, the E.U. adopted the draft Services Directive discussed in the prior Year-in-Review.<sup>152</sup> This directive was controversial, and the CCBE lobbied unsuccessfully to exclude lawyers from its scope.<sup>153</sup> The new directive is significant, among other reasons, because it shifts some regulation of E.U. lawyers to the E.U. Community from the Member States.

#### 4. Codes of Conduct

Also relevant to transnational practice are the efforts in the E.U. to develop European, rather than national, codes of conduct. In May 2006, the CCBE issued a revision of its

150. Case C-193/05, *Comm'n v. Luxembourg*, 2006 E.C.R. I-8673; Case C-506/04, *Wilson v. Ordre des Avocats du Barreau de Lux.*, 2006 E.C.R. I-8613.

151. Joined Cases C-94/04 & C-202/04, *Cipolla v. Fazari, Macrino v. Meloni*, 2006 E.C.R. I-11421.

152. Council Directive 06/123, 2006 O.J. (L 376) 36 (EC) [hereinafter *Services Directive*]. The draft version of this Directive was discussed in the 2004 Year-in-Review, which explained that the key provisions of this Directive included:

(1) *Cutting red tape*: The new legislation would require member states to cut through administrative burdens preventing businesses from offering their services across EU borders or to set up shop in another member state.

(2) *Country of origin principle*: Service providers would be subject to the laws of their country of origin rather than the country where the service is provided. This principle is one the most controversial parts of the Directive, but services provided by lawyers appear to be excluded from this provision on the basis that existing directives applying to lawyers already provide adequate solutions.

(3) *Improved national co-operation*: National authorities are to exchange information and cooperate to replace the current duplication of national regulations and controls with a more coherent and business-friendly system.

(4) *Basic common rules*: These are measures to increase trust and confidence in cross-border services, such as appropriate levels of professional indemnity insurance, lifting bans on advertising for certain professions (including lawyers), and the regulation of multi-disciplinary practices. There is also an article that calls for the drafting of EU-wide codes of practice for the professions, including lawyers.

(5) *Rights of service users*: The right of consumers to use services across the EU prevents member states from imposing restrictions on such services. This includes specific authorizations to use a service (for example, architects or builders) or discriminatory tax rules.

Lutz et al., *2004 Developments*, *supra* note 10, at 628-29. The CCBE has prepared a commentary about this Directive, but it is not yet publicly available. See *Services Directive*, 18 CCBE-INFO (CCBE, Brussels, Belg.), May 2007, at 2. The European Commission has published a handbook about the implementation of the Directive. EUROPEAN COMMISSION, HANDBOOK ON IMPLEMENTATION OF THE SERVICES DIRECTIVE (2007), available at [http://ec.europa.eu/internal\\_market/services/docs/services-dir/guides/handbook\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf).

153. See Press Release, CCBE, The CCBE Considers that Lawyers and Legal Services Should Not be Included in the Draft Services Directive (July 7, 2005), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/pr\\_0505\\_enpdf1\\_1190193761.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/pr_0505_enpdf1_1190193761.pdf).

Code of Conduct for Cross-border Practice.<sup>154</sup> (This code applies to U.S. citizens who are licensed EU lawyers engaged in matters involving other EU-licensed lawyers.<sup>155</sup>) Second, in November 2006, the CCBE adopted its Charter of Core Principles of the European Legal Profession.<sup>156</sup> In 2007, vigorous discussions about the proper role of the European Commission in drawing up code(s) of conduct for European lawyers resulted in Article 37 of the new services directive, which encourages E.U. countries to encourage their professional bodies to draw up harmonized codes of conduct.<sup>157</sup> In May 2007, following the adoption of the Services Directive, the European Commission launched a consultation about codes of conduct.<sup>158</sup> And in July 2007, a committee of the European Parliament issued a report that asked the European Commission to prepare a voluntary code of conduct that would apply to, among others, lawyers.<sup>159</sup> The CCBE lobbied successfully against this portion of the report, and the Parliament deleted the paragraph before it approved the report.<sup>160</sup> Nevertheless, increased discussion in Europe about com-

154. CCBE CODE OF CONDUCT FOR EUROPEAN LAWYERS (May 2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/2006\\_code\\_enpdf1\\_1182240432.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1182240432.pdf).

155. *Id.* arts. 1.4 & 1.5.

156. CCBE CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION (Nov. 2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/Charter\\_of\\_core\\_prin1\\_1183986811.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Charter_of_core_prin1_1183986811.pdf). The ten principles are the following:

- a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case; b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy; c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; e) loyalty to the client; f) fair treatment of clients in relation to fees; g) the lawyer's professional competence; h) respect towards professional colleagues; i) respect for the rule of law and the fair administration of justice; and j) the self-regulation of the legal profession.

*Id.* at 2.

157. See Services Directive, *supra* note 153, art. 37. The section regarding codes of conduct at the Community level states:

- 1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community level, particularly by professional bodies, organizations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community law.

*Id.* art. 37(1); see also Hans-Jürgen Hellwig, *Challenges to the Legal Profession in Europe*, 22 PENN ST. INT'L L. REV. 655, 669 (2004) (stating that "if the professional organizations at the European level do not do the job, the Commission will issue a draft directive to harmonize the national rules of conduct").

158. *Commission's Consultation on Codes of Conduct*, 19 CCBE-INFO (CCBE, Brussels, Belg.), Oct. 2007, at 10, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_enpdf1\\_1193300073.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf). The CCBE responded to the online questionnaire in July 2007. *Id.*

159. *European Parliament Report on Obligations of Cross-Border Services Providers*, 19 CCBE -INFO (CCBE, Brussels, Belg.), Oct. 2007, at 10, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/newsletter\\_19\\_enpdf1\\_1193300073.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf). The European Parliament Committee on the Internal Market and Consumer Protection (IMCO) "adopted a report on the obligations of cross-border service providers" and included a paragraph that asked the European Commission "to draw up a voluntary code of conduct in which service providers could participate in order to gain greater trust from consumers and with a quality certification mechanism and an inbuilt dispute settlement system involving appropriate bodies in order to assist in simplified dispute resolution." *Id.* at 10-11.

160. *Id.* at 11 ("The CCBE considered this provision to be in conflict with Article 37 of the Services Directive which encourages the drawing up of Codes of conduct by professional bodies").

munity-wide codes of conduct applicable to lawyers are underway, and such codes, if adopted, will affect E.U., U.S. and other non-E.U. lawyers engaged in transnational practice.<sup>161</sup>

### 5. Money Laundering Issues

The application of money laundering initiatives to lawyers continues to be a controversial issue in Europe with several new developments.<sup>162</sup> As noted earlier, the CCBE has been among those consulted regarding the FATF recommendations.<sup>163</sup> In addition, in December 2006, the European Commission issued a report about the impact on the legal profession of the E.U.'s 2001 (Second) Money Laundering Directive.<sup>164</sup> The CCBE challenged aspects of this report.<sup>165</sup> Finally, the ECJ rejected a challenge to the lawyer reporting obligations in the 2001 Money Laundering Directive.<sup>166</sup> The Court concluded that the reporting obligation did not breach the right to a fair trial when imposed on lawyers participating in financial transactions with no link to judicial proceedings.

### 6. Lawyer Education and Training Initiatives

A final European development worth noting is the May 2007 Bologna Process Ministerial Conference.<sup>167</sup> The Bologna Process seeks to create the European Higher Education

161. Another development that is not directly relevant but that may contribute to increased interest in harmonized codes of conduct is the CCBE's new Multi-jurisdictional Law Firm Committee, which was created to "enable a platform for discussion and policy proposals at a European level regarding issues relevant to law firms which have an office in more than one jurisdiction of the EU on a permanent basis." *Multi-jurisdictional Law Firms Committee*, 18 CCBE-INFO (CCBE, Brussels, Belg.), May 2007, at 8, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/n\\_18\\_enpdf1\\_1178795635.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_18_enpdf1_1178795635.pdf); see also CCBE, Committees & Working Groups, [http://www.ccbe.eu/index.php?id=94&id\\_comite=15&L=0](http://www.ccbe.eu/index.php?id=94&id_comite=15&L=0) (last visited Mar. 26, 2008).

162. See sources cited *supra* note 10.

163. See CCBE: *FATF*, *supra* note 77.

164. *Commission Staff Working Document: The Application to the Legal Profession of Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering*, SEC (2006) 1793 (Dec. 19, 2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/commission\\_report\\_la1\\_1183722383.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/commission_report_la1_1183722383.pdf).

165. The CCBE stated that the Directive had been implemented in many disparate ways across Europe, causing unworkable levels of severity in reporting and due diligence in cross-border matters, that the directive had been challenged in court, and that the report did not constitute the proper evaluation required by article 2 of the Directive. For these reasons, the CCBE argued that "the low level of reporting by legal professionals or the perceived reluctance on the part of legal professionals to report, should not, in the absence of a more in depth and scientific examination of the issues involved, justify" any substantive conclusions. See CCBE, COMMENTS ON THE COMMISSION STAFF WORKING DOCUMENT (Feb. 2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_130207\\_CCBE\\_comme1\\_1194003555.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_130207_CCBE_comme1_1194003555.pdf); see also *Money Laundering*, 18 CCBE-INFO (CCBE, Brussels, Belg.), May 2007, at 2; Press Release, CCBE, CCBE Comments on Commission Report on Lawyers' Reporting Obligations (Feb. 13, 2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/pr\\_0207\\_enpdf1\\_1182175691.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/pr_0207_enpdf1_1182175691.pdf).

166. Case C-305/05, *Brussels Bars v. Council of Ministers*, 2007 E.C.R. I-5305. The CCBE had "intervened in support of the Belgian Bars' contention that the reporting obligations were an unjustified infringement of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights." See Press Release, CCBE, CCBE is Disappointed by the Decision of the Court of Justice on Lawyers' Reporting Obligations (June 26, 2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/pr\\_0507\\_enpdf1\\_1182925713.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/pr_0507_enpdf1_1182925713.pdf).

167. See UK Bologna Secretariat, Bologna 5th Ministerial Conference, <http://www.dfes.gov.uk/londonbologna/index.cfm?fuseaction=content.view&CategoryID=23> (last visited Mar. 26, 2008).

Act by 2010, includes ten Action Lines, and has the potential to affect dramatically the education and licensing of European lawyers.<sup>168</sup> According to a September 2005 CCBE report, the Bologna Process has led to changes in the legal education degree structure in seventeen European jurisdictions, and there probably have been even more changes since September 2005.<sup>169</sup> The Bologna Process also provided the impetus for numerous recent developments, including a September 2007 CCBE conference on legal education and training.<sup>170</sup> The Quality Assurance and Accreditation Committee of the European Law Faculties Association (ELFA) has and will continue to explore issues related to the Bologna Process.<sup>171</sup> In November 2007, the CCBE passed a recommendation to harmonize training outcomes for European lawyers.<sup>172</sup>

## V. Conclusion

In sum, there have been significant developments in the area of transnational legal practice since the Committee's last Year-in-Review. In light of the ever increasing volume of transnational legal practice, the pace of developments is likely to continue in the future.

168. See, e.g., Laurel S. Terry, *The Bologna Process, Its Impact in Europe and Implications for the U.S.*, 1 VAND. J. TRANSNAT'L L. (forthcoming 2008) [hereinafter Terry, VAND. *Bologna*]; Laurel S. Terry, *The Bologna Process and its Implications for U.S. Legal Education*, 57 J. LEGAL EDUC. 237 (2007).

169. CCBE TRAINING COMM., COMPARATIVE TABLE ON TRAINING OF LAWYERS IN EUROPE: INFORMATION ABOUT ACADEMIC AND PROFESSIONAL TRAINING 26 (Sept. 2005), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/comparative\\_table\\_en1\\_1183977451.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comparative_table_en1_1183977451.pdf); see also Terry, VAND. *Bologna*, *supra* note 169, app. 17 (explaining which countries are included among the seventeen).

170. See CCBE, *Improving Legal Education and Training in a Converging Europe*, <http://www.ccbe.eu/index.php?id=163&L=0> (last visited Mar. 26, 2008).

171. See ELFA, QUAACAS Committee, [http://www.elfa-afde.org/html/about\\_committees.html#QUAACAS](http://www.elfa-afde.org/html/about_committees.html#QUAACAS) (last visited Mar. 26, 2008). This committee also is involved in the Tuning Project-Law. *Id.*

172. See CCBE, CCBE RECOMMENDATION ON TRAINING OUTCOMES FOR EUROPEAN LAWYERS (Nov. 2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Training\\_Outcomes1\\_1196675213.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf).

