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2013

# Transnational Legal Practice (United States) [2010-2012]

Laurel S. Terry



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## Transnational Legal Practice (United States)

LAUREL S. TERRY\*

This article describes some of the more significant domestic developments in the field of Transnational Legal Practice. The companion article describes developments outside of the United States.<sup>1</sup>

### I. Introduction

The last Transnational Legal Practice Year-in-Review article was written three years ago; at that time, the leading story was the recession in the law market.<sup>2</sup> The dominant theme of this Year-in-Review is one of uncertainty and competing visions about the developments of the past three years and the future of legal services.<sup>3</sup>

These competing visions manifest themselves in different ways. For example, some see the legal market as beginning a natural recovery from a very deep but not unprecedented cyclical recession,<sup>4</sup> whereas others believe that the legal services market has undergone structural, systemic, and fundamental changes that are here to stay and that are driven at least in part by globalization and technology.<sup>5</sup> Some see the sudden collapse of respected

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\* Professor of Law, Penn State Dickinson School of Law, available at LTerry@psu.edu. This Year-in-Review article is dedicated to the memory of Peter Ehrenhaft, who believed passionately in the benefits of transnational legal practice and consistently and tirelessly urged the American Bar Association to adapt its policies to reflect the realities of globalization. Peter donated countless hours to the Association and was always one of the first to volunteer for any project. His energy and dedicated devotion will be sorely missed.

1. See Laurel S. Terry, *Transnational Legal Practice (International)*, 47 ABA/SIL YIR (n.s.) 485 (2013).

2. See Laurel S. Terry, Carole Silver & Ellyn S. Rosen, *Transactional Legal Practice 2009*, 44 INT'L LAW. 563 (2010).

3. This article is submitted on behalf of the Transnational Legal Practice Committee of the ABA Section of International Law. The Section also has a committee on U.S. Lawyers Practicing Abroad and an International Legal Education and Specialist Certification Committee.

4. William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J., July 1, 2011, at 40 (quoting Peter Kalis, chairman and global managing partner of K&L Gates as saying "I've seen various waves of purported reform crash on our shores . . . I see no paradigm shift in the business of law. What I see are evolutionary adaptations to changing market conditions.").

5. See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2010); William D. Henderson, *Rise and Fall*, AM. LAW. May 31, 2012, at 10; William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 373 (2011).

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law firm Dewey & LeBoeuf as a singular event,<sup>6</sup> whereas others think it is likely there will be a number of other large law firm failures (given the fundamental changes in the legal marketplace).<sup>7</sup> Some believe that the steep decline in the past two years of LSAT test-takers, law school applications, and law school enrollments reflects a permanent change in U.S. legal education that is attributable to the ever-increasing cost of legal education coupled with declining job opportunities and salaries and that this change will lead to a number of law school closures.<sup>8</sup> Others, however, believe that most U.S. law schools can and will tighten their belts, retool, and will adapt to the changed marketplace.<sup>9</sup>

Regulation of transnational legal practice and education is another area in which there are quite different visions of the future. For example, many believe that the Council of the ABA Section of Legal Education and Admissions to the Bar was absolutely correct when it affirmed the status quo in two decisions related to transnational legal practice and education.<sup>10</sup> Others, however, worry that the Council's decisions may contribute to the United States ceding its place as a global leader in legal education and the legal marketplace. These different visions also apply to regulatory developments outside the United States such as the United Kingdom's 2012 issuance of alternative business structure licenses. Some believe that the United Kingdom is implementing long overdue changes that will profoundly change the global marketplace and will help consumers and the profession and provide greater access to justice.<sup>11</sup> They believe that the United States will be forced to embrace these changes sooner or later and that a failure to do so proactively will hurt U.S. lawyers and clients in the long run.<sup>12</sup> Many others, however, including, inter alia, the ABA House of Delegates and the New York State Bar, believe that these U.K. changes will profoundly undermine lawyer independence, will change the profession to the detriment of lawyers and clients, and can be and should be resisted.<sup>13</sup> In short, the dominant theme

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6. See Daniel Fisher, *Dewey and LeBoeuf Bankruptcy A One-Off, But Still . . .*, FORBES.COM (May 29, 2012, 7:50 AM), <http://www.forbes.com/sites/danielfisher/2012/05/29/dewey-leboeuf-bankruptcy-a-one-off-but-still/>.

7. Debra Cassens Weiss, *Consultant Has 'Somewhat Robust' Watch List of Law Firms in Possible Danger*, A.B.A. J. DAILY NEWS (Oct. 29, 2012, 5:00 AM), [http://www.abajournal.com/news/article/law\\_firm\\_consultant\\_has\\_somewhat\\_robust\\_watch\\_list\\_of\\_firms\\_in\\_danger/](http://www.abajournal.com/news/article/law_firm_consultant_has_somewhat_robust_watch_list_of_firms_in_danger/) ("Dan DiPietro, chairman of the Law Firm Group at Citi Private Bank, is keeping an eye on law firms that could be in trouble and putting them on a watch list . . . 'We have varying degrees of concern,' he said, 'from very slight concern ranging to, 'Oh my God.'").

8. See, e.g., PAUL CAMPOS, DON'T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR'S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK (2012).

9. See e.g., Elizabeth Lesly Stevens, *Will Law School Students Have Jobs After They Graduate?*, WASH. POST (Oct. 31, 2012), [http://articles.washingtonpost.com/2012-10-31/lifestyle/35498320\\_1\\_law-schools-law-jobs-legal-career-professionals](http://articles.washingtonpost.com/2012-10-31/lifestyle/35498320_1_law-schools-law-jobs-legal-career-professionals); Brian Leiter, *Anon Business Law Professor Takes on "Scam" Bloggers*, BRIAN LEITER'S L. SCH. REP. BLOG (Oct. 31, 2012, 3:53 AM), <http://leiterlawschool.typepad.com/leiter/2012/10/anon-business-law-professor-takes-on-scam-bloggers.html>.

10. See *infra* notes 39-50 (accompanying text describes the Council's decision not to consider accreditation of institutions located outside the United States and the Council's decision not to issue a model rule that would establish conditions for full admission of foreign applicants).

11. See, e.g., LEGAL SERV. BD., MARKET IMPACTS OF THE LEGAL SERVICES ACT - INTERIM BASELINE REPORT (2012), available at [http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/Publications/pdf/market\\_impacts\\_of\\_the\\_legal\\_services\\_act\\_interim\\_baseline\\_report.pdf](http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/market_impacts_of_the_legal_services_act_interim_baseline_report.pdf). For additional information about these U.K. developments, see Terry, *Transnational Legal Practice (International)*, *supra* note 1.

12. See, e.g., Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 PROF. LAW., No. 2, 2009, at 1.

13. See *infra* notes 28-29, 68-69.

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of this Year-in-Review is that there have been a number of significant transnational legal practice developments since 2010, that there are radically different visions about the future of law practice and lawyer regulation, and that, at this point in time, it is too early to tell which vision will emerge as the correct one.

**II. Rule Proposals and Changes from the ABA Commission on Ethics 20/20**

The ABA Commission on Ethics 20/20 was created in August 2009 in order to study the impact of globalization and technology on legal practice and regulation.<sup>14</sup> It was an active commission: it held hearings, considered a wide range of issues, circulated discussion papers, and participated in a number of “outreach” events.<sup>15</sup> In August 2012, it presented six resolutions to the ABA House of Delegates for consideration.<sup>16</sup> The topics addressed in these six resolutions were as follows: Technology & Confidentiality; Technology & Client Development; Outsourcing; Practice Pending Admission (by lawyers who move from one state to another); Admission by Motion (reducing the recommended time in practice); and ABA Model Rule 1.6 Detection of Conflicts of Interest (when a lawyer is considering a change of law firms).<sup>17</sup> All of these resolutions were adopted by the ABA House of Delegates (although some were amended before their final submission to the House in order to reflect comments the Commission had received).<sup>18</sup> While all six of these resolutions may be relevant to lawyers who have an exclusively domestic practice, these resolutions clearly are relevant to lawyers engaged in transnational practice—who regularly employ technology and who operate in a world with increasing lawyer mobility. Indeed, the Commission’s information report that accompanied these resolutions explicitly noted that globalization of legal practice was one of the driving forces behind the resolutions.<sup>19</sup>

In November 2012, the Commission filed with the House of Delegates an additional four resolutions for consideration at the February 2013 ABA Midyear Meeting; the first three of these have been referred to as the “inbound foreign lawyer proposals.”<sup>20</sup> The first

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14. Terry, Silver & Rosen, *supra* note 2, at 571.

15. See, e.g., ABA Commission on Ethics 20/20, *Meetings and Minutes*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/events\\_cle.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/events_cle.html) (last visited Jan. 11, 2013); ABA Commission on Ethics 20/20, *Outreach*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/outreach.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/outreach.html) (last visited Jan. 11, 2013); ABA Commission on Ethics 20/20, *Work Product*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/work\\_product.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html) (last visited Jan. 11, 2013) [hereinafter *Work Product*].

16. See ABA Commission on Ethics 20/20, *House of Delegates Filings*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/house\\_of\\_delegates\\_filings.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html) (last visited Jan. 11, 2013) (identifying resolutions that passed and indicating the resolutions subject to amendment) [hereinafter *House of Delegates Filings*].

17. See *id.*

18. See *id.*

19. See ABA COMMISSION ON ETHICS 20/20, HOUSE OF DELEGATES FILINGS: INTRODUCTION AND OVERVIEW 5-7 (Aug. 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf) (explaining why globalization is one of the factors that has changed the ways in which lawyers practice).

20. See ABA Commission on Ethics 20/20, *Final House of Delegates Filing*, ABA (Feb. 2013), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20121112\\_ethics\\_20\\_20\\_overarching\\_report\\_](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_)

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and second proposals address the admission of foreign lawyers as in-house counsel.<sup>21</sup> The third in-bound foreign lawyer proposal establishes a recommended ABA policy on pro hac vice admission of foreign lawyers.<sup>22</sup> Until these proposals, the ABA had no policy statement on either issue, even though a number of states have found the need for these types of rules.<sup>23</sup> The fourth proposal recommended adding an additional paragraph to the comment in ABA Model Rule of Professional Conduct 8.5, Choice of Law.<sup>24</sup> The new comment elaborates on the “predominant effect” test found in Rule 8.5(b)(2) and explains that where the effect is uncertain, a lawyer and client can agree that the lawyer’s work on a matter will be governed by the conflict of interest rules of a particular jurisdiction provided certain conditions are met.<sup>25</sup> Lack of certainty about the applicable conflicts of interest rules in transnational legal practice is one reason why the Commission proposed this choice of law rule; this topic was addressed at length in the Commission’s October 2011 hearing that included testimony from representatives of the Association of the City Bar of New York.<sup>26</sup> The Commission received comments about the first three proposals that revealed the range of views about the desirability and necessity of permitting inbound transnational legal practice, but these resolutions were adopted in February 2013.<sup>27</sup>

The Commission circulated for comment additional discussion papers and possible rule changes, but in light of the comments it received, the Commission decided not to proceed on those issues. For example, after receiving extensive comments on a discussion paper, the Commission announced that it would not consider any changes to the ABA Model

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final\_with\_disclaimer.authcheckdam.pdf [hereinafter *February 2013 House of Delegates Filing*]; Joan C. Rogers, *Final Ethics 20/20 Commission Proposals Focus Mostly on Inbound Foreign Lawyers*, 28 *Laws. Man. Prof. Conduct (ABA/BNA)* 722 (Feb. 29, 2012); James Podgers, *Ethics 20/20 Proposals Crack Open The Door for Foreign Lawyers to Practice in the U.S.*, *A.B.A. J.*, Jan. 2013, at 20.

21. See ABA COMMISSION ON ETHICS 20/20, REVISED 107A (RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW) (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20130201\\_revised\\_resolution\\_107a\\_resolution\\_only\\_redline.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.authcheckdam.pdf); ABA COMMISSION ON ETHICS 20/20, REVISED 107B (MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL) (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20130201\\_revised\\_resolution\\_107b\\_resolution\\_only\\_redline.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf). See also ABA COMMISSION ON ETHICS 20/20, MEMORANDA AND TEMPLATES FOR COMMENT- INBOUND FOREIGN LAWYER ISSUES (June 1, 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/inbound\\_foreign\\_lawyer\\_memo\\_templates.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/inbound_foreign_lawyer_memo_templates.authcheckdam.pdf).

22. See ABA COMMISSION ON ETHICS 20/20, 107C AS AMENDED (ABA MODEL RULE ON PRO HAC VICE ADMISSION), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2013\\_hod\\_midyear\\_meeting\\_107c\\_redline\\_with\\_floor\\_amendment.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107c_redline_with_floor_amendment.authcheckdam.pdf).

23. Laurel S. Terry, Carole Silver, Elyn Rosen, Jennifer Haworth McCandless, Carol A. Needham, Robert E. Lutz, & Peter D. Ehrenhaft, *Transnational Legal Practice*, 43 *INT’L LAW.* 943, 953 (2009) (noting that Arizona, Connecticut, and Wisconsin had amended their in-house counsel rules to include foreign in-house counsel).

24. *Id.*

25. *Id.* The February 2013 filings did not include the proposal the Commission previously had circulated, which would have also added language to ABA Model Rule 1.7 concerning conflicts of interest.

26. ABA Commission on Ethics 20/20, *Minutes of the October 15, 2010 Meeting in Chicago*, ABA, at 3-5, [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20101510\\_minutes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20101510_minutes.authcheckdam.pdf) (last visited Jan. 7, 2013).

27. See ABA Commission on Ethics 20/20, *Inbound Foreign Lawyers Comments Chart*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/inbound\\_foreign\\_lawyer\\_working\\_group\\_comments\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/inbound_foreign_lawyer_working_group_comments_chart.authcheckdam.pdf) (last updated Nov. 15, 2012); ABA Commission on Ethics 20/20, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (homepage links to adopted resolutions).

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Rules dealing with fee sharing or partnership with non-lawyers.<sup>28</sup> It also chose not to request from the House of Delegates any changes to the fee-splitting provision in Rule 1.5, although it referred the issue to the ABA Standing Committee on Ethics and Professional Responsibility for further consideration.<sup>29</sup> The Commission also chose to circulate discussion papers, but did not propose any rule changes on, the topics of alternative litigation financing and ratings and rankings.<sup>30</sup>

Most would agree that the ABA 20/20 Commission's responses to globalization and technology developments have been quite modest. There is less agreement about whether the modest changes were appropriate because the basic regulatory framework was sound or whether the modest developments reflect a lost opportunity. Some have faulted the ABA for going too far with its proposals,<sup>31</sup> whereas others have argued that the failure to respond to change will spell the demise of the U.S. legal profession.<sup>32</sup> Some of the differences in viewpoint reflect varied views on the likely success of the U.K.'s radical changes to lawyer regulation.<sup>33</sup> Only time will tell which world view will prove more accurate. One thing seems clear, however: the Commission's work demonstrates the difficulty of mobilizing a large, decentralized organization to respond to issues as complex and multifaceted as technology and globalization.

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28. See, e.g., Press Release, ABA Commission on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120416\\_news\\_release\\_re\\_nonlawyer\\_ownership\\_law\\_firms.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf); ABA Commission on Ethics 20/20, *All Comments Received to Date (Listed by Issue)*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/all\\_comments\\_received\\_to\\_date\\_by\\_issue.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/all_comments_received_to_date_by_issue.authcheckdam.pdf) (last visited Jan. 14, 2013) [hereinafter *All Comments Received to Date*] (includes comments on uniformity/choice of law and on alternative law practice structures); see also ABA, *Work Product*, *supra* note 15, § V. Alternative Legal Practice Structures.

29. See Joan C. Rogers, *Ethics 20/20 Commission Sets Final Table Without Proposal on Interfirm Fee-Sharing*, 28 *Laws. Man. Prof. Conduct (ABA/BNA)* 684 (Nov. 7, 2012) ("But a majority of the commissioners did not see enough need for the [Rule 1.5] proposal to warrant a possible battle. Instead of making any proposal on the subject, the commission decided to request an opinion on the issue from the ABA Standing Committee on Ethics and Professional Responsibility."); cf. *February 2013 House of Delegates Filing*, *supra* note 20.

30. See, e.g., *Work Product*, *supra* note 15, § VI. Alternative Litigation Financing; ABA Commission on Ethics 20/20, *Priorities and Initiatives*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/priorities\\_policy.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/priorities_policy.html) (last visited Jan. 14, 2013) (providing links to the Commission's informational reports to the ABA House of Delegates under subheadings entitled "RATINGS AND RANKINGS" and "ALTERNATIVE LITIGATION FINANCING").

31. See, e.g., Erica Moeser, *President's Page*, 81 *B. EXAMINER*, no. 1, 2012, at 4, 5, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2012/81012beAbridged.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2012/81012beAbridged.pdf) (speaking of motion admission applicants practicing pending licensing, the president of the National Conference of Bar Examiners wrote "If ever a cart was placed before a horse, this is it. How this proposal protects or benefits the consumer is beyond me."); *All Comments Received to Date*, *supra* note 28.

32. See, e.g., Davis, *supra* note 12.

33. See, e.g., N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON NONLAWYER OWNERSHIP (2012), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=123065&template=/CM/ContentDisplay.cfm>.

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**III. The Uniform Bar Examination and its Implications for Transnational Legal Practice**

The Uniform Bar Exam (UBE) is another U.S. domestic development that has great promise for transnational legal practice.<sup>34</sup> The UBE consists of several different test products produced by the National Conference of Bar Examiners: the Multistate Essay Examination (MEE), two Multistate Performance Test (MPT) tasks, and the Multistate Bar Examination (MBE). The UBE is uniformly administered, graded, and scored by user jurisdictions and examinees receive a portable UBE score.<sup>35</sup> This means that a particular score in one UBE jurisdiction will be recognized in another UBE jurisdiction. Although the UBE score is recognized in all UBE jurisdictions, each UBE jurisdiction may decide its own minimum passing score (cut score) and whether to impose any additional state law requirements.<sup>36</sup>

The first administration of the UBE was in February 2011.<sup>37</sup> As of February 2013, thirteen jurisdictions had adopted the UBE.<sup>38</sup> None of these thirteen states, however, was a transnational legal practice “powerhouse” state such as California, New York, Texas, or Illinois. While it is clear that the UBE is a major step forward, it is not yet clear whether it will have sufficient impact to satisfy the critics who say that state regulation is impractical in an era of national and global lawyer mobility. Given its infancy, however, it is certainly possible (and some believe likely) that the UBE will become the standard bar examination instrument in an overwhelming number of U.S. states. If this happens, the UBE will have a profound impact on lawyer mobility. Even without uniform and widespread adoption, however, the UBE is a significant development for both domestic and transnational legal practice.

**IV. Activities of the ABA Section of Legal Education and Admissions to the Bar and The ABA Task Force on International Trade in Legal Services (ITILS)**

As the introduction noted, two of this year’s most noteworthy transnational legal practice developments came from the ABA Section of Legal Education and Admissions to the Bar, rather than the ABA Section of International Law. In both instances, the Council

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34. See Nat’l Conference of Bar Exam’rs, *Uniform Bar Examination*, NCBE, <http://www.ncbex.org/multistate-tests/ube/> (last visited Feb. 14, 2013) [hereinafter UBE Webpage]. Another NCBE development that might prove influential is a study it commissioned on the skills that new lawyers need. See APPLIED MEASUREMENT PROFESSIONALS, INC. (AMP), A STUDY OF THE NEWLY LICENSED LAWYER (2012), available at [http://www.ncbex.org/assets/media\\_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf](http://www.ncbex.org/assets/media_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf) (conducted for the National Conference of Bar Examiners).

35. See UBE Webpage, *supra* note 34.

36. *Id.*; see also NAT’L CONFERENCE OF BAR EXAM’RS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2012, Chart VI, (2012), available at [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf) (detailing state-specific requirements in UBE jurisdictions).

37. See Nat’l Conference of Bar Exam’rs, *UBE Jurisdictions*, NCBE, <http://www.ncbex.org/multistate-tests/ube/ube-jurisdictions/> (last visited Feb. 14, 2013).

38. UBE Webpage, *supra* note 34 (“The Uniform Bar Examination has been adopted by these thirteen jurisdictions: Alabama, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. The date of the first administration of the UBE in each jurisdiction is listed on the UBE Jurisdictions page.”).

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decided to affirm the status quo, but did so after receiving a significant number of comments.

The first significant event was the Council's decision not to accredit law schools located outside the United States. As the prior Year-in-Review noted, in 2009, the Council received the report of its Special Committee on International Issues, which endorsed further study of this and other issues.<sup>39</sup> After a new committee was established and reports were circulated, the Council sought public comment on whether it should be willing to accredit law schools physically located outside the United States provided all other ABA accreditation conditions were met.<sup>40</sup> After receiving extensive comments, many of which were negative, and two committee reports,<sup>41</sup> the Council decided in August 2012 not to consider accreditation applications from schools located outside the United States because there was not broad-base support for this idea.<sup>42</sup> The Peking University School of Transnational Law had indicated that if the Council were prepared to accredit schools outside the U.S., it would apply for accreditation.<sup>43</sup> Although the August 2012 vote was 15-0

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39. See Terry, Silver & Rosen, *supra* note 2, at 570-71 (the Special Committee on International Issues was established, at least in part, to respond to two resolutions adopted by the Conference of Chief Justices); Conference of Chief Justices, *Policy Statements & Resolutions: Resolution 7*, CCJ (Feb. 7, 2007), <http://ccj.nesc.dni.us/LegalEducationResolutions/resol7AustralianLawyersStateBarExams.html>; Conference of Chief Justices, *Policy Statements & Resolutions: Resolution 8*, CCJ (Feb. 7, 2007), <http://ccj.nesc.dni.us/LegalEducationResolutions/resol8AccredLegalEducCommonLawCountries.html>.

40. ABA Section of Legal Education and Admission to the Bar, *Resolution on the Accreditation of Foreign Law Schools*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20101201\\_resolution\\_on\\_accreditation\\_of\\_foreign\\_law\\_schools.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20101201_resolution_on_accreditation_of_foreign_law_schools.authcheckdam.pdf) (last visited Jan. 14, 2013) [hereinafter ABA Resolution Rejecting Accreditation of Foreign Schools]; ABA Section of Legal Education and Admission to the Bar, *Council Adopts Resolution on Accreditation of Foreign Law Schools*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20101204\\_resolution\\_accreditation\\_foreign\\_law\\_schools.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20101204_resolution_accreditation_foreign_law_schools.authcheckdam.pdf) (last visited Jan. 14, 2013).

41. See ABA Section of Legal Education and Admission to the Bar, *Matters for Comment: Foreign Law Schools*, ABA, [http://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment.html](http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html) (last visited Jan. 14, 2013); ABA Section of Legal Education and Admission to the Bar, *Executive Summary of the Special Committee on Foreign Law School Accreditation*, ABA (May 15, 2012), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012\\_august\\_e2\\_executive\\_summary\\_and\\_reports\\_foreign\\_law\\_school\\_accreditation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012_august_e2_executive_summary_and_reports_foreign_law_school_accreditation.authcheckdam.pdf); Steven R. Smith, *Report to the Council: Accreditation of Foreign-Based Law Schools: Legal Education*, ABA (May 15, 2012), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012\\_august\\_e2\\_executive\\_summary\\_and\\_reports\\_foreign\\_law\\_school\\_accreditation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012_august_e2_executive_summary_and_reports_foreign_law_school_accreditation.authcheckdam.pdf); but see ABA Section of Legal Education and Admission to the Bar, *Report of Special Committee on Foreign Law Schools Seeking Approval under ABA Standards*, ABA (July 19, 2010), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20100719\\_special\\_committee\\_foreign\\_law\\_schools\\_seeking\\_approval.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20100719_special_committee_foreign_law_schools_seeking_approval.authcheckdam.pdf).

42. Mark Hansen, *Final Call: Section Won't Accredit Non-US Law Schools, But Foreign Lawyers Can Be Admitted*, A.B.A. J., Oct. 1, 2012, available at [http://www.abajournal.com/magazine/article/final\\_call\\_section\\_wont\\_accredit\\_non-us\\_law\\_schools\\_but\\_will\\_help\\_foreign/](http://www.abajournal.com/magazine/article/final_call_section_wont_accredit_non-us_law_schools_but_will_help_foreign/).

43. See Peking Univ. Sch. of Transnational Law, *Submission of the Peking University School of Transnational Law to the Council of the ABA Section on Legal Education and Admission to the Bar*, ABA (July 27, 2012), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012\\_lehman\\_accreditation\\_of\\_foreign\\_law\\_schools.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012_lehman_accreditation_of_foreign_law_schools.authcheckdam.pdf); see also Terry, Silver & Rosen, *supra* note 2, at 571 n.47.

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(with two abstentions), the Council acknowledged “the need to address the issue of identifying appropriate standards for licensing foreign lawyers who seek to practice in U.S. jurisdictions.”<sup>44</sup>

The Council’s second “status quo” decision involved the issue of foreign lawyers who seek full admission as U.S. lawyers. In 2009, 2010, and 2011, more than 50 percent of states had foreign-educated applicants who applied for full admission and more foreign-educated applicants than ever applied during these three years.<sup>45</sup> The ABA currently has no model policy on the issue of full admission applications from foreign lawyers, although it now has model policies on the other ways in which foreign lawyers might practice in the United States.<sup>46</sup> Because of this policy gap and because it received a request from the Conference of Chief Justices,<sup>47</sup> the “full admission” issue was one of the issues that the new International Committee examined. After a year-long study, the Section’s International Committee drafted a Proposed Model Rule on Admission of Foreign Educated Lawyers and Proposed Criteria for ABA Certification of an LLM Degree for the Practice of Law in the United States, both of which the Council decided to circulate for comment.<sup>48</sup> The Council received a number of comments, both positive and negative.<sup>49</sup> Perhaps more significantly, in August 2011, the Conference of Chief Justices adopted a resolution in which it thanked the ABA for its work, but rescinded its 2007 resolution.<sup>50</sup> Although the ABA’s foreign LL.M. proposal now appears dormant,<sup>51</sup> the New York Court of Appeals adopted a revised admissions rule that took effect in April 2012 and contains many provisions similar to those found in the draft ABA proposal.<sup>52</sup> The strong reactions

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44. Hansen, *supra* note 42.

45. See, e.g., Laurel S. Terry, Summary of Statistics for those Educated in Law Schools Outside the U.S. (Mar. 27, 2012) (on file with author). In 2007, there were 27 jurisdictions that received admission applications from foreign-educated applicants; in 2010 and 2011, 29 jurisdictions received such applications. *Id.* In 2009, there were 5723 applicants; in 2010, there were 5761; and in 2011, there were 5620 applicants. *Id.* The previous high was 5247. *Id.*

46. See, e.g., Terry, Silver & Rosen, *supra* note 2, at 569 (discussing the ABA’s FLC and FIFO’s foreign lawyer policies); *February 2013 House of Delegates Filing*, *supra* note 20 (regarding the inbound foreign lawyer proposals that the ABA House of Delegates was asked to consider in February 2013).

47. See ABA Resolution Rejecting Accreditation of Foreign Schools, *supra* note 40.

48. A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, PROPOSED MODEL RULE ON ADMISSION OF FOREIGN EDUCATED LAWYERS AND PROPOSED CRITERIA FOR ABA CERTIFICATION OF AN LLM DEGREE FOR THE PRACTICE OF LAW IN THE UNITED STATES 4, 6 (Oct. 7, 2011) [hereinafter PROPOSED MODEL RULE AND CRITERIA], available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20110420\\_model\\_rule\\_and\\_criteria\\_foreign\\_lawyers.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf).

49. ABA Section of Legal Education and Admission to the Bar, *Comments Received as of September 27, 2011*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/20110927\\_comments\\_proposed\\_rule\\_criteria\\_foreign\\_educated\\_lawyers.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20110927_comments_proposed_rule_criteria_foreign_educated_lawyers.authcheckdam.pdf) (last visited Jan. 15, 2013).

50. Conference of Chief Justices, *Policy Statements & Resolutions: Resolution 5*, CCJ (Aug. 3, 2011), <http://ccj.nsc.dni.us/InternationalResolutions/resol5AccreditationofLegalEdu.html>; cf. Conference of Chief Justices, *Policy Statements & Resolutions: Resolution 13*, CCJ (July 28, 2010), <http://ccj.nsc.dni.us/InternationalResolutions/resol13ABA.html>.

51. See Hansen, *supra* note 42 (“The section, however, has no specific plans to address that issue [of identifying appropriate standards for licensing foreign lawyers who seek to practice in U.S. jurisdictions], said Barry Currier, the ABA’s interim consultant on legal education.”).

52. See N.Y. CT. R. FOR ADMISSION OF ATTORNEYS & COUNSELORS AT LAW 520.6, available at <http://www.nybarexam.org/Rules/Rules.htm#520.6>; PROPOSED MODEL RULE AND CRITERIA, *supra* note 48.

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provoked by these two issues illustrate the competing visions in the United States about the best way to respond to globalization developments.

The ABA Task Force on International Trade in Legal Services (ITILS) serves as a forum to help moderate these differences by soliciting views and facilitating discussions on globalization and transnational legal practice developments among groups with a wide variety of interests and perspectives.<sup>53</sup> During the past two years, ITILS has continued to hold regular phone conferences and has also provided a forum for the Office of the U.S. Trade Representative (USTR) to consult with the U.S. legal profession. These phone conferences also provide a mechanism to exchange and distribute information.<sup>54</sup> One of ITILS' projects in the past two years has been to prepare a "Toolkit" to help state bar associations and others create their own ITILS groups and develop an agenda of issues.<sup>55</sup> The *ITILS Toolkit* was modeled after the experience in Georgia; the project received significant input from Bill Smith, the recently-retired General Counsel of the State Bar of Georgia who has been a leader in educating regulators about foreign lawyer issues.<sup>56</sup> While most ITILS members now believe that it is important for all U.S. states to respond to transnational legal practice and globalization developments, the reality is that most states have few, if any, policies on these issues. The *ITILS Toolkit* is designed to help all states realize that globalization affects them and to persuade them that it is important to proactively discuss globalization-related issues and to consider what policies they want to have.

#### V. State Transnational Legal Practice Rules and Developments

Despite the failure of the ABA to issue any model rules dealing with full admission applications from foreign applicants, states have continued to grapple with transnational legal practice issues<sup>57</sup> and have developed several new rules during the past two years. In July 2010, for example, a new Massachusetts rule took effect that allows foreign-educated applicants to sit for the Massachusetts bar exam or apply for admission on motion if they meet certain criteria.<sup>58</sup> In 2010, the Utah Supreme Court admitted an applicant who had

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53. For information about the history of ITILS, see Laurel S. Terry, Carole Silver, Elyn Rosen, Carol Needham, Robert E. Lutz, Peter D. Ehrenhaft, *Transnational Legal Practice*, 42 INT'L LAW. 833, 841-42 (2008) (reviewing international legal developments for 2006-2007).

54. The ITILS has broad ABA Section representation and a number of liaisons from regulatory entities who exchange information with one another. ITILS also serves as a mechanism for sharing information such as the release of the legal services portion of the USITC's 2011 Recent Trends in Services report. See Recent Trends in U.S. Servs Trade: 2011 Annual Report, Inv. No. 332-345, USITC Pub. 4243 (July 2011) (Final), at 7-1, available at <http://www.usitc.gov/publications/332/pub4243.pdf> [hereinafter 2011 Recent Trends]; see also Terry, Silver & Rosen, *supra* note 2, at 563 n.3 (noting the 2009 Recent Trends report).

55. See ABA TASK FORCE ON INT'L TRADE IN LEGAL SERVS., INTERNATIONAL TRADE IN LEGAL SERVICES AND PROFESSIONAL REGULATION: A FRAMEWORK FOR STATE BARS BASED ON THE GEORGIA EXPERIENCE (Feb. 4, 2012), available at <http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf> [hereinafter ITILS TOOLKIT].

56. Bill Smith has long taken a leadership role with respect to transnational legal practice both within ITILS and within the legal regulatory community. See *id.*

57. See Terry, Silver & Rosen, *supra* note 2, at 569 (noting the high numbers of foreign educated bar applicants in the past three years).

58. MASS. BD. OF BAR EXAM'RS, RULE VI. FOREIGN LAW SCHOOL GRADUATES (July 2010), available at <http://www.mass.gov/bbe/foreigneducated.pdf>; MASS. CT. R. 3:01 §§ 1-2; 6.1.4; 6.2.

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not attended an ABA accredited law school.<sup>59</sup> The court directed the Bar and its rules committee to begin work toward revising the rules to provide standards and procedures for applicants seeking waiver of specific admissions requirements and to grant the Bar authority to make such waivers.<sup>60</sup> In 2012, Wisconsin joined four other states that allow graduates of foreign law schools to “sit for a bar exam after completing a qualifying LL.M. program in the U.S.”<sup>61</sup> Foreign graduates without an LL.M. can still take the bar exam if specific requirements are met.<sup>62</sup> Minnesota also made a change in 2012. After a lengthy study about how to handle applications from applicants (foreign and domestic) who had not graduated from ABA-accredited law schools,<sup>63</sup> Minnesota changed its rules to permit those who did not attend an ABA-accredited law school but who are lawyers in other U.S. states to become Minnesota lawyers.<sup>64</sup> This change affects foreign applicants. For example, in 2012, Minnesota permitted an Irish applicant who had graduated at the top of her class and successfully taken the bar and practiced in New York to waive into the Minnesota bar.<sup>65</sup> Georgia amended its Rule of Professional Conduct 5.5 to allow foreign lawyers to serve as in-house counsel.<sup>66</sup> Kentucky, on the other hand, held that a Dominican Republic lawyer who had obtained an LL.M. degree from an ABA-accredited law school could not sit for the Kentucky bar examination because the LL.M. degree was not equivalent to a J.D. degree from an ABA-accredited law school.<sup>67</sup>

New York has also been active on transnational legal practice issues beyond the LL.M. changes noted above. Its actions, however, reveal the lack of consensus that sometimes exists regarding the best way to respond to globalization developments. For example, in March 2012, the New York State Bar issued an ethics opinion that concluded that New York lawyers cannot work for out-of-state law firms owned by nonlawyers.<sup>68</sup> Eight months later, in November 2012, the New York State Bar approved the recommendations

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59. *In re Anthony*, 225 P.3d 198 (Utah 2010); see also Joan C. Rogers, *Utah Waives School Accreditation Barrier for Lawyer with Lengthy Exemplary Record*, 26 *Laws. Man. Prof. Conduct (ABA/BNA)* 125 (2010).

60. *Anthony*, 225 P.3d at 201; see also UTAH STATE BAR, RULE 14-703: QUALIFICATIONS FOR ADMISSION OF STUDENT AND FOREIGN LAW SCHOOL APPLICANTS, available at <http://www.utcourts.gov/resources/rules/ucja/ch14/07%20Admissions/USB14-703.html>.

61. Joe Forward, *New Rule Defines Paths to Admission for Graduates of Foreign Law Schools*, INSIDETRACK (Oct. 3, 2012), <http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=113862>.

62. *Id.*

63. See generally Minn. State Bd. of Law Exam'rs, *Legal Educ. Comm. of the Minn. Bd. of Law Exam'rs*, BLE (Aug. 31, 2011), <http://ble.state.mn.us/resource-center/legal-education-committee.aspx> (including links to the petition to the Minnesota Supreme Court, the Order directing the board of law examiners to submit a study of proposed amendments, the Board's Report and Recommendation, and the Supreme Court Order directing the board of law examiners to propose a rule amendment).

64. MINN. STATE BD. OF LAW EXAM'RS, RULE 4. GEN. REQUIREMENTS FOR ADMISSION, available at <http://ble.state.mn.us/rules/Rule-4-General-Requirements-for-Admission.aspx>; see also Joan C. Rogers, *Lawyers from Unaccredited Law Schools are Now Eligible to Take Minnesota Bar Exam*, 27 *Laws. Man. Prof. Conduct (ABA/BNA)* 478 (2011).

65. See, e.g., *First in Her Class Applicant Admitted in Minnesota Without Examination*, LEGAL PROF. BLOG (Sept. 26, 2012), [http://lawprofessors.typepad.com/legal\\_profession/2012/09/first-in-her-class-applicant-admitted-in-minnesota-without-examination.html](http://lawprofessors.typepad.com/legal_profession/2012/09/first-in-her-class-applicant-admitted-in-minnesota-without-examination.html).

66. STATE BAR OF GEORGIA, AMENDMENTS TO RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GEORGIA (Dec. 1, 2012).

67. *In re Sara Paniagua de Aponte*, 364 S.W.3d 176 (Ky. 2012).

68. Press Release, N.Y. State Bar Ass'n, New York Lawyers Cannot Work for Out-of-State Firms Owned by Nonlawyers, Says State Bar Ethics Committee (Mar. 21, 2012), <http://www.nysba.org/AM/Template>.

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of the Task Force on Nonlawyers Ownership, which had rejected nonlawyer ownership of law firms.<sup>69</sup> On the other hand, the Association of the City Bar of New York issued a proposal calling for changes in New York's imputation and disqualification rules noting, inter alia, the difficulties these rules presented for transnational legal practice.<sup>70</sup> The U.S. District Court for the Northern District of New York found New York's requirement of an in-state office to be unconstitutional.<sup>71</sup> In another case, the Second Circuit vacated the district court's order and permitted Jacoby & Myers, LLC to file an amended complaint in its constitutional challenge to New York's ban on nonlawyer ownership.<sup>72</sup> Because there are sometimes debates about the degree to which foreign lawyers will comply with U.S. rules, another noteworthy New York development was the resignation of a licensed foreign legal consultant who was the subject of a pending investigation into allegations that he exceeded the scope of practice as a legal consultant.<sup>73</sup> These New York examples illustrate the sometimes conflicting attitudes toward globalization and transnational legal practice issues.

## VI. Trade Agreements

During the past three years, WTO Members have made little progress in their Doha negotiations, which include the GATS market access negotiations and the GATS domestic regulation disciplines negotiations.<sup>74</sup> There have, however, been a few developments worth noting. Since the last Year-in-Review, the WTO Secretariat issued an updated report on the legal services sector,<sup>75</sup> Russia joined the WTO and made legal services commitments,<sup>76</sup> and the IBA prepared an updated GATS Handbook.<sup>77</sup> Moreover, some of the

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cfm?Section=President\_s\_?Page\_Doyle&template=/CM/ContentDisplay.cfm&ContentID=65119 [hereinafter N.Y. State Bar Ass'n].

69. See Press Release, N.Y. State Bar Ass'n, New York State Bar Association Remains Opposed to Nonlawyer Ownership of Law Firms (Nov. 20, 2012), [http://www.nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&template=/CM/ContentDisplay.cfm&ContentID=123065](http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&template=/CM/ContentDisplay.cfm&ContentID=123065) (citing the report of the NYSB Task Force on Nonlawyer Ownership). The New York House of Delegates approved the recommendations contained in this report.

70. See N.Y. CITY BAR ASSOC. COMM. ON PROF'L RESPONSIBILITY, REPORT ON CONFLICTS OF INTEREST IN MULTI-JURISDICTIONAL PRACTICE: PROPOSED AMENDMENTS TO NEW YORK RULES OF PROFESSIONAL CONDUCT 8.5 (DISCIPLINARY AUTHORITY AND CHOICE OF LAW) AND 1.10 (IMPUTATION OF CONFLICTS OF INTEREST) (Mar. 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsOfInterestinMulti-JurisdictionalPractice.pdf>.

71. See Joan C. Rogers, *New York's In-State Office Requirement is Unconstitutional*, *Federal Court Rules*, 27 *Laws. Man. Prof. Conduct (ABA/BNA)* 560 (2011) (describing *Schoenefeld v. New York*, No. 1:09-CV-0504 (LEK/RFT), 2010 WL 502758, at \*1 (N.D.N.Y. Feb. 8, 2010)).

72. *Jacoby & Meyers, LLP v. New York*, No. 12-1377-CV, 2012 WL 5870809 (2d Cir. Nov. 21, 2012), *vacating* 847 F. Supp. 2d 590, 590 (S.D.N.Y. 2012).

73. *In re Alzamora*, 914 N.Y.S.2d 916, 923-24 (N.Y. App. Div. 2011).

74. See generally Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 *AKRON L. REV.* 875 (2010).

75. Council for Trade in Services, *Note by the Secretariat: Legal Services*, S/C/W/318 (June 14, 2010).

76. See Council for Trade in Services, *Russian Federation: Schedule of Specific Commitments*, GATS/SC/149 (Nov. 5, 2012).

77. See LAUREL S. TERRY, *GATS: A REVISED HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS* (2013) (forthcoming on the International Bar Association website).

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WTO Members who were part of the group known as the “Friends of Legal Services”<sup>78</sup> have discussed services-related issues in an effort to create forward momentum in services negotiations.<sup>79</sup> As a result, during fall 2012, USTR representatives testified to Congress that “[w]e have reached agreement on a core set of objectives, and agreed to intensify our efforts this fall . . . Our next step is for the group to develop more specific negotiating parameters so that each participant can conduct the domestic consultations necessary in order to decide how to proceed.”<sup>80</sup>

There has been more U.S. trade activity on the bilateral and regional fronts than in the WTO. The 2012 implementation of the U.S.-Korean bilateral trade agreement known as KORUS has led to greater market access for U.S. lawyers.<sup>81</sup> The Office of the U.S. Trade Representative (USTR) has been involved in negotiations to create the Trans-Pacific Partnership (TPP).<sup>82</sup> The eleven-country TPP negotiations include services as well as goods and thus the TPP almost certainly will apply to legal services.<sup>83</sup> The USTR has consulted with ITILS regarding the TPP, along with other trade issues.<sup>84</sup> The Asia-Pacific Economic Cooperation (APEC) completed the legal services initiative referred to in the 2009 Year-in-Review.<sup>85</sup> The USTR has begun to explore the viability of bilateral negotiations with the EU on a number of topics, including legal services.<sup>86</sup>

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78. Special Session of the Council for Trade in Services, Committee on Specific Commitments, *Joint Statement on Legal Services*, TN/S/W/37 S/CSC/W/46 (Feb. 24, 2005) (containing communication from Australia, Canada, Chile, the European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, and the United States); Australia, Canada, the European Community, Japan, New Zealand, Norway, and the United States, *Collective Request: Legal Services*, IATP (Mar. 12, 2006), [http://iatp.org/files/451\\_2\\_78786.pdf](http://iatp.org/files/451_2_78786.pdf).

79. See, e.g., *Services Liberalisation Talks Among Group of WTO Members Move Forward*, BRIDGES WEEKLY, Oct. 10, 2012, at 3, available at <http://ictsd.org/i/news/bridgesweekly/146891/>; Kirk: *New Look at Services Trade “Long Overdue”*, BRIDGES WKLY., Sept. 26, 2012, at 13, available at [http://ictsd.org/i/news/bridgesweekly/146122/?utm\\_source=GSN+%7C+This+Week+in+Services+%282+Oct+2012%29&utm\\_campaign=Test2&utm\\_medium=email](http://ictsd.org/i/news/bridgesweekly/146122/?utm_source=GSN+%7C+This+Week+in+Services+%282+Oct+2012%29&utm_campaign=Test2&utm_medium=email) (discussing developments related to the group known as the Real Good Friends of Services, or RGF, which is now up to twenty members).

80. Kirk: *New Look at Services Trade “Long Overdue”*, *supra* note 79.

81. See generally Terry, Silver & Rosen, *supra* note 2, pt. II, at 565-69.

82. See U.S. Trade Representative, *The United States in the Trans-Pacific Partnership*, USTR (Nov. 12, 2011), <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>; Timothy Brightbill, Joseph A. Laroski Jr., Tatiana Olica Sullivan, Pablo M. Bentes, P. Lee Smith & Dave Wharwood, *International Trade*, 46 INT’L LAW. 81, 83 (2012).

83. See U.S. Trade Representative, *Outlines of the Trans-Pacific Partnership Agreement*, USTR (Nov. 12, 2011), <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>. The TPP is being negotiated by eleven countries — Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. See N.Z. Ministry of Foreign Affairs & Trade, *TPP Talk: Trans-Pacific Partnership Negotiations*, TPP TALK, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/1-TPP-talk.php> (noting the October 2012 addition of Mexico and Canada to the TPP negotiations).

84. See, e.g., ABA Task Force on International Trade in Legal Services, *Agenda for Aug. 3, 2012 Meeting*, ABA (on file with author).

85. See Terry, Silver, & Rosen, *supra* note 2, pt. II, at 565-69; 575-76.

86. See, e.g., *GATS: EU US Consultation*, 30 CCBE-INFO, May 2012, at 8, available at [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/newsletter\\_30\\_enpdf1\\_1347517429.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/newsletter_30_enpdf1_1347517429.pdf) (“The CCBE GATS Committee submitted a paper to the European Commission (DG Trade) in response to a consultation on a possible bilateral trade agreement with the United States.”). After this article was written, the U.S. and E.U. agreed to pursue trade talks. See US, *EU Formally Announce Decision to Launch Trade Talks*, BRIDGES WKLY., Feb. 13, 2013, at 1, available at <http://ictsd.org/i/news/bridgesweekly/153859/>.

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**VII. Gatekeeper Developments**

Another important development is the ABA's 2010 adoption of the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*.<sup>87</sup> Although the *Voluntary Good Practices Guidance* is probably most familiar to U.S. real estate and trust and estate lawyers, transnational legal practice lawyers should be sure to familiarize themselves with its contents.

Like the FATF recommendations from which it derived,<sup>88</sup> the ABA Guidance applies to lawyers who help clients buy or sell property, establish trusts or estates, or help their clients create, operate, or manage legal persons, including corporations.<sup>89</sup> ABA officials worked closely with U.S. Treasury Department officials when developing the Guidance and it received an "unusual" and "unprecedented" endorsement from U.S. Treasury Department officials.<sup>90</sup> U.S. lawyers should ensure that they understand the Guidance and act in a manner consistent with its principles in order to help maintain the cooperative relationship that currently exists between the U.S. legal profession and the U.S. Department of the Treasury. The ABA and others have sought to avoid the situation that has arisen in some other countries where the government has assumed a much more intrusive position in the client-lawyer relationship.<sup>91</sup> In 2009, for example, solicitors from England

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87. See ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES: VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 4, 9, 16 (April 23, 2010) [hereinafter VOLUNTARY GOOD PRACTICES GUIDANCE], available at [http://www.americanbar.org/content/dam/aba/directories/policy/2010\\_am\\_116.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_116.authcheckdam.pdf). The Voluntary Good Practices Guidance provides guidance to U.S. lawyers in assessing geographic, client, and transaction risks when applying the due diligence and "know your client" principles found in the FATF recommendations.

88. The Financial Action Task Force is an intergovernmental organization whose mission is to fight money laundering and terrorism financing. See Financial Action Task Force, *Who We Are*, FATF, <http://www.fatf-gafi.org/pages/aboutus/> (last visited Jan. 17, 2013). Because of its cooperative arrangements with regional counterparts, the FATF's recommendations have global reach. See, e.g., Laurel S. Terry, *An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance*, 2010 J. PROF'L. LAW. 3, 8-9 (2010). The FATF's original 40+9 Recommendations, on which the VOLUNTARY GOOD PRACTICES GUIDANCE, *supra* note 87, was based, were revised by the FATF in 2012. See FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS (Feb. 2012), available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20approved%20February%202012%20reprint%20May%202012%20web%20version.pdf>.

89. Terry, *supra* note 88, at 16.

90. See Michael A. Lindenberger, *Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury*, A.B.A.J., Oct. 2011, at 57; Kevin Shepherd, *Risky Business: The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence*, 25 PROB. & PROP. 11, 14 (March/April 2011) ("In an unprecedented action, the U.S. Treasury issued a statement in support of the Good Practices Guidance."); see also VOLUNTARY GOOD PRACTICES GUIDANCE, *supra* note 87, at iii ("The Treasury Department welcomes this Good Practices paper as a useful step in protecting the legal profession as well as the broader financial system from the risks of money laundering and terrorist financing. The Treasury looks forward to continuing engagement with the ABA to facilitate implementation of effective policies and procedures to protect against money laundering and terrorist financing.")

91. See, e.g., Int'l Bar Assoc., *IBA Anti-Money Laundering Forum*, IBA, <http://www.anti-moneylaundering.org> (last visited Jan. 17, 2013); see also Terry, *supra* note 88, at 23-28 (including charts summarizing the IBA data and describing ways in which the Financial Action Task Force's non-binding recommendations have influenced binding lawyer regulation and legislation throughout the world); Mikhail Reider-Gordon, Joanna Ritcey-Donohue & Truman Butler, *International Anti-Money-Laundering*, 46 INT'L LAW. 375, 386 (2012).

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and Wales filed with the government 3040 requests for consent to proceed, during which time all work for those clients had to stop and the lawyers were not permitted to tell their clients that they had been required to reveal client confidences.<sup>92</sup> As the report accompanying the ABA Guidance noted, a key purpose of the Guidance was to encourage voluntary actions by lawyers against money laundering, “thereby negating the need for federal regulation of the legal profession.”<sup>93</sup> To learn more about these FATF-gatekeeper developments, one can consult the ABA’s revamped Gatekeeper Task Force webpage, which now includes the *Voluntary Good Practices Guidance* and other useful documents.<sup>94</sup>

### VIII. New Resources

Perhaps because of the steady development of transnational legal practice rules and cases, these issues now appear to be of growing academic interest. Some of this interest likely has also been spurred on by the ABA Commission on Ethics 20/20, which issued a number of excellent discussion papers on topics related to globalization and technology.<sup>95</sup> There have been a number of conferences on globalization topics; those interested in U.S. transnational legal practice developments may find it useful to consult the webpages or symposium issues memorializing these conferences.<sup>96</sup> Additional transnational resources that might be useful include the American Law Institute’s ongoing project on international arbitration<sup>97</sup> and the ABA’s 2012 publication of two transnational legal practice-related books.<sup>98</sup>

### IX. Conclusion

U.S. transnational legal practice continues to be an area of law with increasing activity, although there often is not a consensus about the ways in which such practice and regulation should evolve. Accordingly, it is likely that there will continue to be numerous developments in this field.

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92. See Terry, *supra* note 88, at 29-31.

93. Lindenberger, *supra* note 90. The ABA and others currently are engaged in outreach efforts so that any lawyer who handles money or forms entities (trusts or corporations) or real estate is familiar with this guidance.

94. See *ABA Task Force on Gatekeeper Regulation and the Profession*, ABA, [http://www.americanbar.org/groups/criminal\\_justice/gatekeeper.html](http://www.americanbar.org/groups/criminal_justice/gatekeeper.html) (last visited Jan. 17, 2013).

95. See *Work Product*, *supra* note 15.

96. There have been high profile conferences on globalization and the legal profession held at Fordham, Georgetown, and Michigan State Universities. Other notable conferences include the Future Ed conferences jointly sponsored by Harvard Law School and New York Law School, the 2012 APRL Istanbul meeting, the International Legal Ethics Conferences held in 2010 at Stanford and in 2012 in Banff, and the work product of the innovative LawWithoutWalls™ program. Most of the materials are available online and can be found through an internet search or by contacting this Report’s authors.

97. See RESTATEMENT (THIRD) OF INT’L COMMERCIAL ARBITRATION (CURRENT PROJECT), available at [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=20](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20). Because the ALI is influential and because many U.S. lawyers engaged in transnational legal practice are involved in international arbitration, they may want to follow the ALI’s work in this area (and comment where appropriate).

98. See ABA, *THE ABA GUIDE TO INTERNATIONAL BAR ADMISSIONS* (Russell W. Dombrow & Nancy A. Matos eds., 2012); ABA, *THE UNOFFICIAL GUIDE TO U.S. LEGAL STUDIES FOR FOREIGN LAWYERS* (Albert Vincent Y. Yu Chang & Johana Mantilla Gómez eds., 2012).