The Regulation of the Transnational Legal Profession in the United States

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I. The Nature of Professional Regulation and Regulatory Methodologies

A. Regulatory Methodologies

In the United States, there are mixed receptions to “regulation”—whether it is directed at private commercial activity (big or small), the professions, or is designed to constrain the acts of government. When private enterprise’s laissez faire excesses fail to account for the public interest, civil society frequently implores government to intervene on behalf of the greater good to bring equilibrium and to preserve certain public interests. In contrast, when the clamp of governmental regulation becomes too onerous for the private sector (e.g., standards-setting, licensing and compliance requirements, taxes, etc.), requests for relief (“deregulation”) are often sought by affected sectors in coordination with certain public sectors, which feel the government has overreached. Even the government, which

* Paul E. Treusch Distinguished Professor of International Legal Studies, Southwestern Law School, rlutz@swlaw.edu. This article and the related article symposium are dedicated to the memory of Professor Steve Zamora, good friend and colleague, who inspired this and many North American transnational legal initiatives. Steve organized and served as the Executive Director of the North American Consortium of Legal Education (“NACLE”); the biennial gathering of academics from the participating law schools—on March 10-12, 2016 in Monterrey, Mexico—served as the platform for presentations from the authors of this symposium on the topic of the “Regulation of the Legal Profession.” Steve’s much too early and sudden death left important planned work to be done on building bridges for the legal profession among our countries, and memory of him and his steadfast commitment to these efforts will continue to inspire us.

1. Some of the themes about professional regulation and other insights also benefitted from the author’s chairmanship of and longtime active involvement in the American Bar Association’s Task Force (now an ABA Standing Committee) on International Trade in Legal Services (ITIL) (2002-present), where he served as Chair for 2006-10, his chairmanship of the ABA Section of International Law (2001-02) (SIL), his chairing of the SIL Transnational Legal Practice Committee, and his participation in the La Biennale Business & Droit Rencontre Entre Acteurs de L’Entreprise et du Droit, at the Palais de la Bourse, Lyon, France (Dec. 2, 2011). An article of his on the subject was published in LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES (July 26, 2012; Lexis-Nexis Publishers), entitled La conformite: Nouvelles regles et nouveaux defis pour professions juridiques internationals—Une perspective americaine (“An Essay on the American Perspective on Lawyer Conduct and Discipline: New Norms and Challenges for the International Legal Profession”—translated from English into French by Bertrand du Marais).
maintains surveillance over its own regulatory activities, will go through various cycles of regulatory reform to strike the correct balance (e.g., with respect to transparency, accountability, and administrative efficiency) among the goals of ensuring innovation, profitability, flexibility, freedom of action, and the public good.2

Thus, even though “regulation” is generally defined as “the imposition of rules by government, backed by use of penalties that are intended specifically to modify the economic behavior of individuals and firm [sic] in the private sector,”3 the methods employed and the imposing authority may be other than “government,” by delegation or simply by the desire of a business to self-regulate. In short, “regulation” can mean many things to many people, and its public acceptance can be cyclical.

II. Overview of the Regulation of the U.S. Legal Profession

A. GENERAL

In the realm of the regulation of the professions,4 America’s lawyers may be a privileged lot, especially with respect to how their profession is regulated. Compared to the regulation of the legal profession in other countries, lawyers in the United States are, to a large extent, self-regulated. That is, they are regulated from within the profession itself by the representative organizations of the profession.5 U.S. state bar associations and U.S. state supreme courts are the principal standard-setters and enforcers on a state-by-state basis.6 More specifically in recent years, the Conference of State Chief Judges (“CCJ”), an organization composed of sitting chief justices of state supreme courts, has focused on transnational issues involved in regulating the legal profession, attempting to guide the nation’s states with respect to such issues.7 State supreme courts also have a principal role in governing qualification and setting standards regarding required conduct of those in the profession, as well as meting out punishment to those who may stray. While model ethical standards are developed at the national level, and mostly by the American Bar

2. See, e.g., “Over-regulated America”, The Economist, Feb. 18-24, 2012, at p. 9. See also other related articles in the same issue: “Tangled up in green tape” (p. 27-28); “Of Sunstein and sunsets” (p. 28-29); “America is becoming a less attractive place to do business” (p. 71); “measuring the impact of regulation—The rule of more” (p. 77); “European financial regulation—Laws for all” (p. 56).


5. See discussion infra.


Associations, they are adopted and subject to implementation by the various states’ legal profession, with the discipline carried out primarily by the bar associations’ disciplinary boards. Malpractice cases—where clients bring lawsuits against lawyers for failing to meet reasonable standards of providing legal services—supplement this process and can serve as an independent pathway for relief to those injured by improper lawyer conduct.

Notwithstanding the state-centric (i.e., non-national) nature of this institution, we call the “American Legal Profession,” with the pressures of globalization and the growth of technologies that make jurisdictions porous, is challenging the U.S. state-by-state regulatory role and imposing new pressures from beyond state borders.

B. THE RELATIONSHIP OF LEGAL EDUCATION AND QUALIFICATION TO THE FUTURE OF THE TRANSNATIONAL LEGAL PROFESSION

As presented later in this article, the challenges of technology and globalization are shaping the practice of the legal profession. At the same time, legal education plays a significant role in the preparations of the lawyers who will be engaged in these challenges. The regulation of the legal educational process differs from regulation of the legal profession in terms of the regulator and subject. That is, unlike the regulation of the U.S. legal profession—which is centered on U.S. states—legal education is regulated in large part by an accreditation process at the national level. The responsible governmental entity, the U.S. Department of Education, delegates accreditation responsibility to the American Bar Association’s Section of


10. See discussion infra.

11. See 34 C.F.R. 4, s. 6.02; American Bar Association, Section of Legal Education and Admissions to the Bar, ABA Standards, https://www.americanbar.org/groups/legal_education/resources/standards.html (last visited June 9, 2017) (The ABA refers to this process as both an “approval” and accreditation process. States, usually via the state’s bar association and its Supreme Court, may also impose a variety of additional requirements particularly with respect to qualifying to take the bar examination and passing it. For example, even though all states use the Multi-State Bar Examination (MBE) as part of their bar exam, states will employ quite different bar test scores to pass. See National Conference for Bar Examiners, Multistate Bar Examination, Jurisdictions Administering the MBE (last visited June 9, 2017). States are also known to impose additional education standards on law schools within the state. E.g., the California Bar, after a study by a task force, proposed law schools should require students to take fifteen credit units of “skills” courses. See State Bar of California, Task Force on Admissions Regulation Reform: Final Phase 1 Report, at 15 (June 24, 2013)).

Legal Education and Admission to the Bar. But admission of students to accredited institutions for the Juris Doctor degree is determined in part by a nationally standardized examination, the Law School Admission Test ("LSAT") administered by the Law School Admission Council ("LSAC"), a different body. The LSAT tests a student's reading comprehension, analytical, and logical reasoning, and is intended to provide law schools with a uniform way to assess applicants, in addition to a student's college grade-point average ("GPA"). Thus, the front-end of the regulation of the profession—when students are preparing to become professionals—is governed at the national level by standardized testing and accreditation, but the decision as to which students enter the legal educational process (i.e., law school acceptances) is the province of the individual law school.

1. Qualification and Interstate Mobility

Although law schools are accredited nationally, U.S. state bars, frequently supervised in many states by the state's supreme court, still have control over qualifying those who graduate from accredited law schools with respect to whether they may be licensed to practice. This is done via "Bar Examinations," which also contain character or moral qualification checks. So, while national entities regulate the standards for accreditations, the fifty states of the United States (plus the District of Columbia), largely through their bar associations with support of the state's supreme court, determine whether a lawyer can successfully qualify to practice law in the state. Notwithstanding each state's control over the qualification process, efforts to make it more nationally uniform have led to the development of other examinations, namely the Uniform Bar Examination ("UBE"). The overall objective is to enable lawyer mobility in our fifty-plus jurisdictions; a UBE score achieved in one jurisdiction is portable because it is recognized in the other UBE jurisdictions. As of 2016, twenty-five jurisdictions have adopted

13. See United States Network for Education Information, supra note 4.

14. The LSAC is composed of members from more than 200 law schools in the U.S. and Canada; in other words, all schools accredited by the ABA are members of LSAC. The LSAT has existed in some form since 1948, today costs $175 to take, is a half-day exam, and has six sections: four graded multiple-choice sections; an unscored experimental section; and an unscored writing section.

15. The ABA Section on Legal Education and Admission to the Bar is delegated the authority to accredit U.S. law schools by the U.S. Department of Education.

16. Only Wisconsin will license persons without a bar exam, based on their graduations from an accredited Wisconsin law school. Graduates from other ABA-accredited law schools must take a bar examination to become a member of the Wisconsin Bar.

17. The UBE is administered by the National Conference of Bar Examiners ("NCBE"), a not-for-profit corporation that develops licensing tests for bar admission and provides character and fitness services. The website for NCBE, ncbex.org, notes that the jurisdictions adopting the UBE uniformly administer, grade, and score the exam, and independently decide who may take the exam and who will be admitted to practice; determine underlying education requirements; make all character and fitness determinations; and set passing scores, etc.
the UBE. Concerns about the numbers of persons entering the legal profession have circulated for years, but the issue is primarily, if at all, addressed by law schools pursuant to their admission policies and the state bars via their grading of the bar examinations. Although the standards for approval of new law schools require a showing of need, there seems to have been no apparent effort to cap the overall number of law schools and the number of law students who are annually produced.

2. Interstate Practice Issues

Whether a lawyer licensed in one state can engage in interstate practice (i.e., represent his or her clients in other states in the United States) without becoming a member of the other state’s bar is dependent on the extent to which other state(s) allow such temporary interstate practice. Some states have adopted the ABA Model Temporary Practice Rule to facilitate such practice. That Rule enables a lawyer admitted in another U.S. jurisdiction to provide temporary legal services under certain conditions. They may do so if those services:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to


20. Raymond J. Werner, Licensed in One State, But Practicing in Another: Multijurisdictional Practice, Probate & Property, 19 (Temporary practice conducted interstate or internationally is also referred to as “fly-in, fly-out” or “FIFO.”).

21. Laurel Terry, Jurisdictions with Rules Regarding Foreign Lawyer Practice, The American Bar, (Oct. 14, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf. (Eight jurisdictions—Colorado, District of Columbia, Delaware, Florida, Georgia, New Hampshire, Pennsylvania, and Virginia—adopted this rule since it was approved by the ABA House of Delegates in 2002 after being proposed by the ABA Commission on Multijurisdictional Practice (“MJP”). In other states, such practice may be deemed “unauthorized practice of law” (“UPL”) or not subject to regulatory enforcement if de minimus).

22. Id.
practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.23

3. **Practice-Ready Lawyers**

What has been missing in this distribution of legal responsibility regarding legal education and qualification is that "practice" has not been integrated into the process of legal education in any comprehensive way. Students traditionally upon graduation have little or no understanding or experience about the "practice" of law.24 Increasingly, however, legal education is starting to recognize this deficit, make advancements in teaching "skills," and expose students to practice as an integral aspect of a law school education.25

4. **International Mobility: A Transnational Challenge**

The international mobility challenge for the legal profession is what one might call "a two-way street"—it has inbound to U.S. and outbound from the U.S. aspects. The American Lawyer reported in 2014 that "[m]ore than 25,000 lawyers from [its list of 200 law] firms work in foreign offices in more than 70 countries."26 From the inbound perspective, the publication named *The Bar Examiner* recently reported some startling statistics27: in 2013 in New York, foreign-educated applicants were almost thirty percent of those taking the bar examination, coming from 111 countries; during a ten-year span (2005 to 2015), almost 48,000 foreign-educated applicants passed the New York bar exam.28 While many law schools have responded to the demand from foreign law students for an advanced legal education by offering Master of Laws ("LL.M") degree programs,29 the Juris Doctor

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23. ABA MODEL R. OF PROF'L CONDUCT, § 5.5(c).
25. See ABA Standards of Rules of Procedure for Approval of Law Schools, ch. 3, §§ 302-304, p. 15-18; see also Karen Sloan, California’s Practical-Skills Plan Alarms Out-of-State Dreams, NAT’L L. J. (2015) (Law schools are increasing their offerings of externships—some call them “internships”—and most offer in-house clinical courses, and now “skills” courses); see also Robert Lutz & Aliona Cara Rusnac, The Education of Transnational Lawyers (In the United States and Abroad), in Festchrift für Dr. Christoph Vedder – Recht und Realität, 511-36 (Stefan Lorenzmeier ed., 2017.).
28. Id.
curriculum at most U.S. law schools that could prepare students for a transnational law career is wanting.

III. Regulatory and Other Recent Changes in the U.S. Affecting Transnational Legal Practice

While the pressures on legal education and its responses profoundly affect the downstream regulation of the profession, legal education is but one of several analytical foci of the regulation of the U.S. legal profession. As the comments above demonstrate, the regulation of the post-law school qualification process is also affected by academia or legal education at one end and by the practice community at the other. Thus, it is helpful to view the regulation of the legal profession as a continuum from admission to law school, education to prepare for practice, qualification by state bars, to vigilant attention to professional responsibility and protection of the public. In large part, the focus of the regulation in the U.S. at each of these stages is on the individual, and as discussed below, the primary regulator is either a national or a state entity. With the desire for single standards and pressures for uniformity, there seems to be a trend toward national norm-setting that, at a minimum, provides models for states to follow.

A. Articulation of Regulatory Objectives

Many who study the regulation of the American legal profession have encouraged the adoption of regulatory objectives, especially given the array and, in some cases, disparity of state regulatory systems. In February 2016, the American Bar Association’s House of Delegates officially adopted a set of Model Regulatory Objectives. Distinguished from the profession’s core values, the objectives serve the following:

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30. Rather than the law firm or entity providing legal services, as is frequently the case in other countries.


33. See Commission on the Future of Legal Services, Standing Committee on Professional Discipline Criminal Justice Section, Law Practice Division, Standing Committee on Legal Aid and Indigent Defendants, Standing Committee on Client Protection, ABA Model Regulatory
First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular regulation is transparent. Thus, when the regulatory body administering the regulation is questioned—for example, about its interpretation of the regulation—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the regulation and of public debate about proposed regulation. Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.34

The adopted ABA Model Regulatory Objectives for the Provision of Legal Services sets out the following, and the Commission that developed them35 encourages courts and bars to use them “when considering the most effective way for legal services to be delivered to the public”

A. Protection of the public.
B. Advancement of the administration of justice and the rule of law.
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems.
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections.
E. Delivery of affordable and accessible legal services.
F. Efficient, competent, and ethical delivery of legal services.
G. Protection of privileged and confidential information.
H. Independence of professional judgment.
I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs.
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.36


34. See Terry, Mark & Gordon, supra note 31, at 2686.
35. The ABA Commission on the Future of Legal Services, supra note 33.
36. Id. at 40 (notes that similar regulatory objectives for the legal profession have been adopted abroad in recent years in Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces).
B. IN-BOUND REGULATION INITIATIVES

Although the typology is not perfect, one way to assess the current U.S. regulatory system intended to foster and regulate transnational legal activity and the profession in general is to examine those initiatives that are directed at “in-bound” legal activity, and then to observe significant developments regarding outbound activity that might have an impact on U.S. legal practice in other countries.

There are five ways that foreign lawyers might practice in the United States:

1) Full admission as a licensed lawyer in a U.S. jurisdiction;
2) License that permits only limited practice as a Foreign Legal Consultant;
3) Via a rule of court that permits temporary transactional work by foreign lawyers;
4) Via a rule of court that permits foreign lawyers to apply for pro hac vice admission, enabling the lawyer to appear in court before a judge; and
5) Via a rule that permits foreign lawyers to serve as in-house counsel.

Each of these approaches is described below.

1. Foreign Legal Consultants

At the heart of regulation of inbound foreign lawyers in the U.S. is the now iconic “foreign legal consultant” (“FLC”) status. Endorsed by the ABA since 1993,37 (and adopted in similar form in many other countries38), the FLC rule permits lawyers from other countries to practice their home country law and “international law” while in the U.S.39 For lawyers who—for reasons of language, inadequate qualifying credentials, or other—choose not to take a bar examination to qualify as “fully-licensed,” this status becomes a pathway to practicing law in a U.S. state, albeit one that is significantly limited in scope. It contemplates the foreign lawyer’s residence in the U.S., and state supreme courts are encouraged to adopt the model as a rule of court, or state legislatures to adopt it to ensure that foreign lawyers

39. See Larry B. Pascal, Making Texas More Competitive in International Law, 77 TEX. B. J. 620, 621 (2014) (In 2006, the FLC model rule was revised and again became ABA policy upon passage by the ABA House of Delegates.).
advising on their home countries' laws will not be prosecuted for "unauthorized practice of law."\textsuperscript{40}

As of June 29, 2016, thirty-three states had adopted an FLC rule modeled after the ABA model rule.\textsuperscript{41} Noteworthy is the fact that some states did not go as far as the model rule in allowing FLCs to provide legal advice on local law "on the basis of advice from a person duly qualified and entitled . . . to render professional legal advice in this jurisdiction . . . ," but rather limited the FLC scope of practice to the FLC's home country law and international law.\textsuperscript{42}

2. Temporary Practice or "FIFO"

The "fly-in, fly-out" temporary practice rule, prepared by the ABA Commission on Multijurisdictional Practice ("MJP"), was adopted as ABA policy by the ABA House of Delegates in 2002 (\textit{as amended} in 2013 pursuant to the proposal of the ABA Commission on Ethics 20/20). In 2013 and in 2015, the Conference of Chief Justices endorsed the rule noting its reasons included:

[T]he number of foreign companies with offices and operations within the United States has grown rapidly over the past decade and is expected to continue to increase . . . the proportion of the United States population with family, property, estate and business interests abroad has increased substantially over the past decade; and the number of legal transactions and disputes involving foreign law and foreign lawyers is increasing as a result of these trends . . . \textsuperscript{43}

The FIFO rule, now adopted by eleven jurisdictions,\textsuperscript{44} enables foreign lawyers—who are members in good standing in their profession, in their home jurisdictions, and are subject to effective professional regulation and discipline in their home jurisdiction—to perform legal services in the U.S. jurisdiction "on a temporary [and limited] basis" if:

\begin{itemize}
  \item See Terry, \textit{supra} note 21.
  \item See id. (The thirty-three jurisdictions offering an FLC status are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Mississippi, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Washington.).
\end{itemize}
• The services are performed in association with a lawyer admitted to practice in the jurisdiction and actively participates in the matter;
• The work is reasonably related to a pending or potential proceeding in a jurisdiction outside the United States in which the lawyer is authorized to appear, reasonably expects to be so authorized, or is assisting such a person;
• The services are reasonably related to a pending or potential alternative dispute resolution proceeding for which there is a nexus to the lawyer's practice in the lawyer's jurisdiction of admission; or
• The services are for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice; the services are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice.45

3. **Pro Hac Vice Admission**

Also as a limited practice license, *pro hac vice* enables foreign lawyers to appear at the discretion of the judge in judicial and other adjudicative proceedings.46 Because of the transnationality of much business today, foreign companies in particular often desire their own counsel involved in arguing their cases in court or guiding local attorney in doing so. The *pro hac vice* Rule provides for that possibility. The Model Rule was recently modified to provide judges with guidance criteria for the exercise of their discretion.47 In the past, this limited license was applicable only to U.S. lawyers doing interstate work; now eighteen jurisdictions permit foreign lawyer court access via this Rule.48

4. **Foreign In-House Counsel**

This provision for an inbound limited practice capability of in-house counsel contains registration and scope of practice components. Both were proposed by the ABA Commission on Ethics 20/2049 in an effort to respond

45. Id.


49. See ABA Commission on Ethics 20/20, American Bar Association, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited June 7, 2017) (The author was a participant in the work of the Commission, which had a three and half-year life—August 2009 to February 2013.).
to the changes that globalization and technology have brought to the legal profession. Twenty-two states have adopted versions of the scope and registration rules. The Registration Rule enables foreign licensed lawyers to engage in a limited practice of law representing their employer. Registration under the model rule subjects in-house counsel to Rules of Professional Conduct of the host jurisdiction and maintains jurisdiction over the registered lawyer with respect to the conduct of the lawyer to the same extent it has over lawyers admitted in the jurisdiction. A major change in the scope of practice addresses the foreign in-house counsel's ability to advise the employer about local law (i.e. of the host jurisdiction). Under the newest amendment (in 2013) to ABA Rules of Professional Conduct, Rule 5.5, foreign in-house counsel may advise the corporation about local law, the law of another U.S. jurisdiction, or federal U.S. law if "such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice."  

5. Other Innovations to Enhance Mobility

Pressures to accommodate the mobility of lawyers and their legal practices come hand-in-hand with the technological developments that blur boundaries between countries. However, with the territorial-based nature of lawyer regulation rooted deeply in its history and implementation in the U.S., the changes come slowly and are undertaken cautiously. Nonetheless, several initiatives of recent years—regarding virtual law practice and limited specialized licensing—demonstrate the American legal profession’s willingness to move towards greater flexibility and recognition of the need to be responsive to mobility concerns.

a. Virtual Law Office Practice (VLO)

While the regulation of the profession is state-centric and depends on a territorial-jurisdictional structure, emerging technologies and the changing nature of legal practice that largely ignores geographical boundaries pressure the regulatory structure to allow some degree of transborder physical and virtual activity. Both types of legal activity risk being the "unauthorized practice of law" (UPL) if the person performing the service is not licensed by the bar in which the activity occurs, but some temporary physical presence, recognizing the multijurisdictional nature of modern practice (MJP), is generally allowed now as qualified by the Model Rule and its commentary. VLO or "eLawyering" contrasts with MJP. It does not have to involve a physical presence where the lawyer is unlicensed, but can nevertheless raise issues of UPL. The lawyer may perform his/her services from the state of

50. See Jurisdictions That Have Adopted the UBE, supra note 18.
51. See id.
52. MODEL RULES OF PROF'L CONDUCT r. 5.5(d)(1); see also MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL, B.2.c.
53. See MODEL RULES OF PROF'L CONDUCT r. 5.5.
licensure; the delivery of the services, however, may occur via cyberspace to
the client residing in another location where the lawyer is not licensed. If
the virtual practice in the unlicensed jurisdiction is "substantial," UPL is a
concern. Moreover, since we are dealing with the provision of legal services,
client confidentiality safeguards are necessary and distinguish eLawyering
from just operating as a "mobile lawyer." 54

The pace of technological development and consumer acceptance of it
predict that the delivery of legal services via the Internet platform will
continue to grow. Traditional law firm models and protectionist resistance
can stall the legal profession's acceptance of virtual practice; yet eLawyering
can affordably deliver many legal services to an ever-increasing group of
consumers. "Software-powered legal services delivered over the Internet
will provide the pathway for the legal profession to reinvent itself, retain its
identity as a learned profession that serves society, and provide a decent
living for its members." 55

b. Limited License Legal Technician

Much has been said about the justice gap in the United States. 56 In order
to respond to consumer legal needs, a number of new, lower-cost providers
have entered the legal marketplace. Such pressures, with the help of some
forward-thinking futurists, 57 have spurred a reconsideration of traditional
law practice and which elements of it could be routinized. 58 A major
example of this in the U.S. is the creation of a new category of licensed legal
service provider called a "limited license legal technician" (LLLT). The
purpose of an LLLT is to provide services where there are unmet civil legal
needs. The state of Washington established such a status in 2012. 59

A LLLT rule could apply to any practice area for which there is unmet
civil legal need, and the Washington LLLT Board, appointed to implement
the rule, initially determined there were high unmet needs in family,
immigration, landlord-tenant, and elder law. Ultimately, the Board settled

55. Id. at 101; See generally Stephanie Kimbro, Virtual Law Practice: How to Deliver Legal
Services Online, (2015); see also Richard Susskind, Tomorrow's Lawyers: An Introduction into your
56. William C. Hubbard, The Relevant Lawyer, supra note 54, at Foreword ("Eighty percent of
people who are poor, and many others of moderate means, do not get the civil legal assistance
they need. In some states, in ninety-five percent of cases in the family courts at least one party
is not represented by counsel. Almost 3.7 million people use the nation’s nearly 500 court-
based legal self-help centers, but many centers have to turn people away. Half of those who
apply for legal aid are turned away because of lack of resources.").
57. See id.
58. See generally Richard Susskind, The End of Lawyers?: Rethinking the Nature of
Legal Services (revised ed., 2010).
59. In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal
on family law as its first area of concentration and developed a curriculum to qualify potential licensees administered in collaboration with Washington law schools and the Washington community college system.60

The LLLT rule in Washington sent a “wake-up call” to other states that providing access to some critical legal needs can be addressed by non-lawyer professionals, properly trained and educated.

c. State Tool Kit61

This tool kit, designed by the Georgia State Bar’s Committee on International Trade in Legal Services, demonstrates how state bars might organize and adopt rules that specifically address the ways in which foreign lawyers may appropriately perform legal services. The Georgia Committee modeled its proposal after the Georgia experience—which involved on an ongoing basis the monitoring of the impact of international developments on the legal profession from the perspective of both inbound and outbound legal services, the education of bar members on the issues and vocabulary surrounding cross-border practice, review of existing bar rules, and recommendations of appropriate rule-changes to the Georgia State Bar authorities.62 More specifically, the Tool Kit recommends that states develop policy positions for each of the five methods by which foreign lawyers might actively practice in the jurisdiction (i.e., FLC, FIFO, pro hac vice, foreign in-counsel, full qualification) and provides links to the ABA’s inbound foreign lawyer policies. In short, the Tool Kit provides a “roadmap” of how state legal regulatory agencies through the active engagement of the bar might organize to develop policies and rules that would facilitate transnational legal practice.

In early 2014, the Conference of State Chief Justices at its Midyear Meeting encouraged chief justices of all U.S. states to “consider the . . . [State Tool Kit] as a worthy guide for their own state endeavors to meet the challenges of ever-changing legal markets and increasing cross-border law practices.”63

C. OUTBOUND INITIATIVES

Initiatives identified in the category of “outbound” are those that aid U.S. lawyers to practice transnationally by easing regulatory or facilitating access to foreign bars. Some of these arrangements are designed with reciprocal treatment in mind, others are motivated by a desire to pursue international comity.

61. Int’l Trade in Legal Services and Prof’l Reg.: A Framework for State Bars Based on the Georgia Experience, AMERICAN BAR ASSOCIATION TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES, (2014) [hereinafter “State Tool Kit”].
62. Id. at 7-8.
1. **2002 Directive to U.S. Trade Representative (USTR)**

In 2002, the ABA Section of International Law authored and proposed a resolution for adoption of the ABA House of Delegates regarding the rights of U.S. lawyers seeking to practice abroad. The resolution urged the United States Trade Representative ("USTR")\(^{64}\) to seek practice rights for "outbound" U.S. lawyers that were the equivalent to the practice rights set forth in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants (the FLC Rule). Note that U.S. states via other ABA policy\(^{65}\) are urged to apply the same prescribed FLC rule to foreign inbound lawyers.

The 2002 Resolution remains fundamental ABA policy with respect to what it seeks from foreign jurisdictions\(^{66}\) to minimally accommodate U.S. transnational lawyers seeking to locate abroad, and articulates the ABA's basic national goals regarding foreign access to legal services provisions. It guides the U.S. Trade Representative in its efforts to negotiate international trade deals with respect to legal services.

2. **Outsourcing of U.S. Legal Services**

In recent years, in an effort to find less costly and more efficient methods, U.S. practitioners have found it financially viable to outsource certain procedural/discovery pre-trial legal services.\(^{67}\) After much "hand-wringing" about the role of the bar in guiding U.S. practice as to its ethical responsibilities when U.S. lawyers "outsource" legal work to others (in particular, in foreign jurisdictions, which is often referred to as "off-shoring"), the ABA responded with, arguably, clear policy by issuing "ABA Formal Opinion 08-451," entitled "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services."\(^{68}\) That Opinion identified key ethical considerations lawyers should take into account under the ABA Model Rules of Professional Conduct ("MRPC") when outsourcing domestically or internationally.\(^{69}\) For business reasons, it is worth noting that providers of domestic and international outsourcing are also sensitive to ethical considerations and obligations, such as ensuring quality control, providing adequate security over personnel and information, and increasing

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\(^{64}\) See Office of the USTR, www.ustr.usgov (last visited June 7, 2017) (The USTR, in the Office of the President, is the principal negotiator of international trade agreements for the United States.).

\(^{65}\) See FLC discussion, supra notes 39-42.


\(^{69}\) Id. e.g., the appropriateness of fees, competence, scope of practice, confidentiality, conflicts of interest, safeguarding client property, adequate supervision of lawyers and non-lawyers, unauthorized practice of law, and independence of professional judgment.
opportunities for oversight by lawyers, law firms, and clients, whose work is being outsourced.70

When the ABA Commission on Ethics 20/20 addressed this issue with respect to whether outsourcing raised concerns that should be reflected in the MRPC, it focused on competency, the lawyer’s responsibility regarding a non-lawyer assistant’s conduct, and UPL. Commentary to MRPC 1.1 was added to identify factors applicable when a lawyer is considering outsourcing work to a lawyer outside his/her firm, such as education, experience, and reputation of the non-firm lawyer(s), the nature of the services assigned to the non-firm lawyer, and the legal and ethical environment in which the services are performed.

In the outsourcing context, non-lawyer-non-firm assistants are often engaged. Thus, commentary to MRPC 5.3 indicates that a series of factors, quite similar to those mentioned in the commentary to MRPC 1.1, are advised to determine whether the non-lawyers’ activities may be reasonably expected to be compatible with the hiring lawyer’s professional obligations.

Finally, vigilance is cautioned with respect to the work outsourced by U.S. lawyers and law firms to ensure that U.S. lawyers and law firms do not run afoul of statutes and rules relating to the unauthorized practice of law. The Comment to MRPC 5.5(a) states “a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.”71

3. **Partnerships with Foreign Lawyers and Sharing Legal Fees with Non-lawyers**

The nature of transnational lawyering that demands crossing borders physically and virtually, and the professional interactions across borders by U.S. lawyers with lawyers and others who are not members of a U.S. bar, demand that a variety of adjustments be made in the typical regulatory model. To clarify the U.S. lawyer’s responsibilities in these interactions, several Formal Ethics Opinions were issued by the ABA over the last fifteen years.

For example, a 2001 Opinion72 indicated that U.S. lawyers were permitted to form partnerships or other entities to practice law in which foreign lawyers are partners or owners, as long as the foreign lawyers are members of a recognized legal profession in a foreign jurisdiction and the arrangement is in compliance with the law of the jurisdictions where the firm practices. The problem under the MRPC, specifically Rule 5.4, is that foreign persons of a profession not recognized as a legal profession by the foreign jurisdiction are deemed “nonlawyers,” and admitting them to partnership would violate Rule 5.4 (pertaining to the professional

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70. See Lutz & Rosen, supra note 67.
71. MODEL RULES OF PROF’L CONDUCT, supra note 53.
independence of a lawyer). Accordingly, responsible lawyers in a U.S. law firm have an ethical obligation to take reasonable steps to ensure that the foreign lawyer qualifies under this standard and that the arrangement is in compliance with the law of the jurisdictions where the firm practices. The permission granted by this opinion greatly facilitates the ability of U.S. lawyers and firms to expand to other jurisdictions by partnering with foreign lawyers.

The expansion of multidisciplinary firms in a number of foreign jurisdictions imposes increasing pressure on the long-standing prohibition by the American Bar Association regarding sharing legal fees with non-lawyers. Despite these pressures, there continues to be significant resistance in the American bar to multidisciplinary practice which might include non-lawyer partnerships. A 2013 ABA Opinion declared that lawyers subject to the Model Rules may work with other lawyers (or law firms) practicing in jurisdictions with rules that permit sharing legal fees with non-lawyers. In such a situation as a single billing to a client, a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in the other jurisdiction, even if the other lawyer or law firm might eventually distribute some portion of the fee to a non-lawyer, provided that there is no interference with the lawyer's independent professional judgment.

Related to the sharing of fees issue is the concern about "alternative business structures" (ABSs) and the fear that non-lawyer ownership that might be involved may affect lawyers' independent judgment. ABSs are those business models through which legal services are delivered in ways that are currently prohibited because of the Model Rule prohibition against non-lawyer ownership, management, and sharing fees. This issue will be addressed below.

4. Reciprocal Disciplinary Information Exchange

Concerns about protecting the public with respect to the delivery of legal services remain high on the list of regulatory objectives for the regulation of lawyers. When thinking about how to regulate the practice of foreign lawyers in one's jurisdiction, essential aspects of that regulation include the ability to verify qualifications, experience, and the professional standing of the foreign lawyer (including the status of any disciplinary proceedings involving the lawyer). They also include the obligation to communicate to

73. Model Rules of Prof'l Conduct, supra note 53, at r. 5.4.
76. See id. at 4.
77. See id. at 13.
the foreign regulatory body of the foreign lawyer (e.g., bar association or law society) any professional disciplinary actions by the host bar. Thus, for a host bar to feel comfortable that it has adequate enforcement tools to protect its public, it requires the ability to exchange information with foreign regulatory bodies, and possibly, to encourage reciprocal enforcement when disciplinary action is undertaken by one regulatory body or the other.

To advance this effort, and at the request of the ABA Standing Committee on Professional Discipline and the then-ABA Task Force on International Trade in Legal Services, the ABA's House of Delegates "urge[d] the highest courts of [U.S.] states and lawyer regulatory authorities to coordinate with their foreign regulatory counterparts and enter into voluntary arrangements to facilitate the exchange of relevant information, consistent with the jurisdictions' rules, and adopt the Guidelines for an International Regulatory Information Exchange."78 The CCJ also adopted a resolution "in support of the proposed ABA Guidelines for an International Regulatory Information Exchange" and encouraging the ABA House of Delegates to adopt the proposed Guidelines.79 The Guidelines are a template for an International Regulatory Information Exchange. It provides a way for state supreme courts and lawyer regulatory authorities to coordinate with their foreign regulatory counterparts and to enter into voluntary arrangements to facilitate the exchange of relevant information—consistent with each jurisdiction's rules regarding the admission, licensure, and disciplinary status of its own licensed lawyers.

5. Resolving Multinational Ethical Conflicts: The Choice of Law Rule

Lawyers engaged in transnational practice confront a wide-range of ethical issues that implicate foreign jurisdictions, as well as their own. Often a variety of ethics-related choices of law are engaged as multiple jurisdictions are also involved, and what ethical rules apply to any factually complicated legal events are difficult to ascertain. Of course, for U.S. lawyers, a lawyer admitted to practice in a particular U.S. jurisdiction "is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."80 The Rule also indicates that a lawyer not admitted to the jurisdiction is subject to the disciplinary authority of the jurisdiction "if the lawyer provides or offers to provide legal services" in the jurisdiction.81 Further, the Rule recognizes that the lawyer admitted to a jurisdiction may

79. C.C.J., Res. 9, c.C.J. 2013 CCJ Annual Meeting (July 31, 2013) (enacted) (in support of the proposed ABA Guidelines for an International Regulatory Information Exchange, the resolution was proposed by the C.C.J. Task Force on Foreign Lawyers and the International Practice of Law).
80. Model Rules of Prof'l Conduct r. 8.5(a) (Disciplinary Authority; Choice of Law) [hereinafter Model Rule 8.5].
81. Id.
be subject to more than one jurisdiction, which is quite often the case in transnational law practice.

To resolve such situations, the Model Rules recognize conflicts of law rules regarding what ethical rules apply with respect to conduct in connection with matters pending before "tribunals" (judicial entities) and other conduct (non-judicial) that might occur. Model Rule 8.5(b)(1) provides if the matter is before a foreign tribunal, the law of the tribunal's jurisdiction would usually apply. In any matter not before a court (e.g., a transactional one), the lawyer may have to determine the jurisdiction where his/her conduct has its "predominant effect." As mentioned above, this may be problematic, as there often are multiple jurisdictions involved and identifying "predominant effect" may add uncertainty to the transaction, especially where there may be conflicting rules of conduct related to conflicts of interest. In an effort to facilitate transnational transactions, the ABA Commission on Ethics 20/20 proposed a choice of rule approach to reduce the uncertainty often attached to such situations. The proposal was adopted by the ABA House of Delegates as part of the Commentary to 8.5 that "a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as [the jurisdiction of predominant effect]...may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement." Although not automatically binding on a court deciding the issue, such agreement would, according to its proponents, operate much like a choice of law clause is treated in a contract—it is enforceable by the court as a matter of contractual autonomy of the private parties.

IV. New Challenges for "Transnational" Law

The foregoing survey of regulatory approaches demonstrates efforts in the U.S. to facilitate the transnational provision of legal services. Legal education and qualification developments suggest greater uniformity to facilitate mobility within the profession, and the creation of new skills education that will ready graduates for practice.

Inbound regulation should seek to protect consumers of legal services and result in positive benefits for the local economy. In the case of inbound transnational practice, the consumer is frequently a sophisticated, budget and quality-conscious multinational company with bargaining power. Consumer and other public interest protections are not normally a concern. Usually the concerns of the local bar are rooted in protectionism and the fear that there will be competition from foreign lawyers. In truth, however, most instances of inbound foreign lawyers (particularly FLCs and FIFOs)

82. Id. at 8.5 (b)(1).
83. Id. at (b)(2).
84. Id. at cmt. 5.
bring legal business into the local community and result in a multiplying economic effect.85

However, future developments do create new challenges. The delivery of legal services—domestically and internationally—are taking many new forms, and are not necessarily by way of law firms or qualified lawyers. As mentioned, to reach persons who are not being served by the legal profession in the U.S.,86 states are experimenting with specifically certified persons to deliver services more reasonably and effectively.87 In addition, there are pressures to embrace multidisciplinary practice, which is occurring in a number of foreign jurisdictions, and to consider the possibility of alternative business structures ("ABS") in the form of non-lawyer ownership of law firms. And while these are areas of controversy within the profession, there are also trends to alter the regulatory approach currently in vogue, i.e., to regulate via law firms as well as the individual lawyer.

The regulation of outbound transnational practice takes on uniquely different challenges. First, an anti-globalism sentiment seems to be infecting initiatives to negotiate and approve multilateral trade agreements that would pave the way to foreign lawyer access.88 The current prospects that either the TPP or the T-TIP will succeed to approval in the U.S. are not optimistic.89

Second, expanding U.S. lawyer access to foreign jurisdictions is best achieved by some form of agreement between/among countries or bar associations. Countries need to agree to remove barriers to the trade in legal services. While many countries in the world are not subject to effective regulatory control, there is a group of countries with greater regulatory control that are willing to submit to liberalization efforts amongst themselves. This "group of the willing" can be used to establish a modicum of liberalized uniformity and serve as a model of how countries should regulate legal services. New initiatives, for example, from the Australian Law Council that proposes a set of objectives or goals to which nations should strive with respect to transnational legal services,90 are encouraging

87. See Crossland & Littlewood, supra note 60.
like-minded bars to consider agreeing to greater and more specific open access rules.

Third, law firms that are permitted to expand to foreign jurisdictions need the ability to associate with local lawyers to provide legal services to their clients. What constitutes an acceptable relationship between local lawyers and foreign law firm lawyers can normally entail a wide-range of professional relationships,\footnote{See Int'l Bar Ass'n Int'l Trade in Legal Services Committee, *Discussion Paper: What should the Guiding Principles for assoc'n between overseas and local lawyers be?*, p. 4 (Apr. 2015).} and is dependent upon the willingness of the host country being receptive to having those services provided in part by foreign lawyers usually in concert with local ones.\footnote{Id.}

Professor Terry has argued that in the very near future, we will witness significant change with respect to the who, what, when, where, why, and how of lawyer regulation:

The regulatory changes elsewhere in the world to date are changes with respect to
who regulates lawyers,
what is regulated (individuals or firms, services or providers),
when regulation occurs,
where it occurs (matching a geographic-based regulations system to a world of virtual practice),
why regulation happens, and

The transnational legal profession and its regulation have undergone significant change in the last several decades. Their educational and qualification components, the profession's legal services delivery models, and regulation of inbound access and outbound practice opportunity have all been exposed. Transnational legal practice is an important part of legal practice in the U.S. because of the changing demography and its role in building the rule of law in the world. State and national actors will continue to be the important stakeholders in the efforts to extinguish barriers and develop a vibrant system that promotes transnational legal practice.\footnote{The developments recited above are the products of many efforts by ABA groups such as: the Multi-disciplinary Practice (MDP) and Multi-jurisdiction Practice Commissions (MJP), Ethics 2000, Commission of Ethics 20/20, the Commission on the Future of Legal Education, the Commission on the Future of Legal Services. All of these were formed with limited tasks and were subject to a sunset. Other groups, like the ABA Standing Committee on International Trade in Legal Services and the Working Group on Foreign Lawyers and the International Practice of Law of the Conference of Chief Justices (CCJ), are ongoing and will be prominent participants in future regulatory development. The newly formed International Conference of Legal Regulators will add international and comparative perspectives which may stimulate new ideas and approaches. While the development of model rules and approaches are developed at the national level, implementation takes place at the state level and usually depends on initiatives of the state bar through its committees.}
Indeed, the future offers many opportunities and challenges for the transnational lawyer.