

AALS Workshop on Legal Ethics in the New Millennium The Changing Legal Profession: Globalization¹

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I. Globalization is a Phenomenon That Affects Clients.

- A. Business clients are increasingly likely to interact with suppliers, distributors, consumers or owners located outside the U.S. (See <http://www.bea.doc.gov/bea/di1.htm> for some statistics.)
1. In 2003, the U.S. exported \$1.02 trillion in goods and services and imported \$1.5 trillion in goods and services. In 2003, the U.S. had \$723.7 billion in merchandise exports. In 2002, the U.S. received \$1.06 trillion of capital direct investment in the U.S. by majority-owned foreign companies.
 2. This means there were many transactions involving U.S. clients and foreign entities. Foreign lawyers likely were involved in many of these transactions.
- B. Because of the growth in immigration, individual clients increasingly may have contacts with, and legal matters involving, other countries. See <http://www.census.gov/population/www/socdemo/foreign.html> and <http://www.migrationinformation.org/USfocus/statemap.cfm#>.
1. Between the 1990 Census and the 2000 Census, the U.S. gained 31.1 million foreign-born residents, an increase of 57.4%.
 2. California has the most foreign-born residents - 8.9 million. But California only ranked 37th in the country in terms of its percentage increase between 1990 and 2000, with a 37.2% increase. Wyoming ranked 51st in the country in terms of absolute numbers, with 11, 205 foreign-born residents. It had a 46.5% increase, ranking 35th in the country in its percentage increase. The state with the largest percentage increase in foreign-born residents was North Carolina, with a 274% increase between 1990 and 2000, going from 115,077 to 430,000 foreign-born residents.

¹Much of this outline is taken from a recent article I wrote entitled Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 Wash. U. Global Studies L. Rev. ___ (2005)(forthcoming)(this article will be available on SSRN and my website). Full citations and explanations are available in that article. I also maintain a "Global Legal Practice Resources" webpage that contains many useful web links and information related to globalization and the legal profession. That page is available at <http://www.personal.psu.edu/faculty/l/s/lst3/globalprac.htm>. Some of the developments mentioned in this paper are discussed in the articles in the *Global Legal Practice Symposium*, 22 Penn State Int'l L. Rev. 527 (2004).

II. Globalization is a Phenomenon That Affects Lawyers.

- A. There is a significant amount of international trade in legal services. For example, in 2003, the U.S. exported \$3.376 billion in legal services and imported \$879 million. These numbers may significantly understate trade in legal services. *See* §V(B), *infra*.
- B. International trade in legal services has grown dramatically. Between 1992 and 2003, U.S. exports of legal services grew 149% and imports grew 183%. According to the OECD, other countries also have experienced dramatic growth in legal services trade. *See* §II, OECD, Trade Policy Working Paper #2, linked from http://www.abanet.org/cpr/gats/track_one_class.html.
- C. It has become increasingly difficult to identify the home countries of large law firms. In the *American Lawyer's Global 100*, six of the ten largest firms had more than 50% of its lawyers working in countries outside of the firm's home country. Look at these firms' websites!
- D. Even beyond the 10 largest firms, there has been a dramatic increase in both the number of foreign offices of U.S. law firms and the size of those offices. *See, e.g.,* Carole Silver, *Winners and Losers in the Globalization of Legal Services: Offshoring the Market for Legal Services*, 45 Va. J. Int'l L. ___ (2005)(forthcoming)(and her other works cited therein).

III. Globalization Has Changed the Context in Which Legal Services Regulators and Experts Operate.

- A. Introduction: In the article cited in n. 1, I assert that a "sea change" occurred in 1998 regarding the use of global and comparative perspectives to discuss U.S. legal ethics issues. I believe that the hearings held by the ABA Commission on Multidisciplinary Practice marked the beginning of a new era of "global dialogue" about legal ethics issues.
- B. The Power of Personal Contacts: Globalization, the Internet and email have led to increased personal contacts among U.S. and foreign legal ethics regulators, experts and commentators. In my view, one cannot underestimate the importance of the fact that the staff of the ABA Center for Professional Responsibility now communicates regularly with individuals at the CCBE (which is the bar association of the European Union), the Law Society of England and Wales, the Law Society of Upper Canada, the Law Council of Australia and the Law Society of New South Wales, Australia, among others. The members of the National Organization of Bar Counsel, which includes representatives from the U.S., Canada and Australia, also exchange ideas regularly. It has become much more common to see academic conferences - both within and outside the U.S. - that include both U.S. and non-U.S. academics. It will become increasingly difficult to discuss domestic ethics issues without taking into account the global

implications of U.S. rules and the treatment of similar issues elsewhere in the world.

- C. International Cooperation and Initiatives: There have been a number of global initiatives that have the potential to affect the regulation of lawyers. It is now common to see international cooperation and coordinated responses to these initiatives. For example:
1. The ABA was one of a number of international organizations, including bar associations from Canada, the European Union, and Japan, that signed an April 2003 Joint Statement responding to the Consultation Paper circulated by the Financial Action Task Force (FATF). The FATF is an intergovernmental body established to develop and promote anti-money laundering policies at the national and international level; it has more than thirty countries as members, including the U.S. The gatekeeper provisions of the FATF's Consultation Paper required lawyers to break confidentiality and inform appropriate officials of their clients' conduct and prohibited lawyers from notifying their clients that they had done so. *See* http://www.ccbe.org/doc/En/signed_statement_030403_en.pdf.
 2. Both the International Bar Association (IBA) and the Union Internationale des Avocats responded to the December 2002 consultation by the World Trade Organization regarding the suitability of applying to the world's legal professions the *WTO Disciplines for Domestic Regulation in the Accountancy Sector, S/L/64 (17 Dec. 1998)*. The ABA has representatives in each of these organizations. (For additional information, *see* http://www.abanet.org/cpr/gats/track_two.html.)
 3. The ABA, the CCBE and the IBA, among others, have commented on the proposed code of conduct for lawyers appearing before the International Criminal Court. *See* http://www.icc-cpi.int/defence/defconsultations/code_conduct.html.
- D. The Internationalization of Legal Education: The internationalization of legal education is another important globalization development. Some of the specific developments include: 1) an increase in the number of international courses and journals in the U.S.; 2) an increase in the number of foreign LL.M. students and the programs open to these students; 3) efforts to have cross-border dialogue and affiliations among accreditation and education associations, including the creation of ELFA, the European Law Faculties Association, and the AALS' recent international initiatives; 4) the creation of the EU's Socrates Mundus program, which funds affiliations of EU and non-EU (including U.S.) academic programs; and 5) the cross-fertilization of education promoted by the ABA CEELI project and similar projects.

IV. Increasingly, "Domestic" Legal Ethics Issues Have International Implications and Trigger International Comments. Some Examples Include:

- A. MJP: The work of the ABA Commission on Multijurisdictional Practice (MJP) is an example of an issue that originally was viewed as a U.S. domestic legal ethics issue but that turned out to have international implications. The ABA MJP Commission initially was directed to address U.S. domestic MJP issues. Its mission was later expanded to include international MJP issues. Several international regulators and commentators addressed the ABA Commission about these issues. *See* http://www.abanet.org/cpr/mjp/comm_summ2.html.
- B. Sarbanes Oxley: Another example of a seemingly domestic U.S. issue that had international implications is the Sarbanes Oxley Act, which was passed in the wake of the Enron and other scandals. The rule first proposed by the SEC included a broad definition of "practicing before the SEC" and would have applied to a significant number of foreign lawyers and law firms. The SEC received 44 comments from foreign parties, including foreign lawyers, U.S. lawyers practicing in foreign countries, and 11 foreign or global bar associations. Following these comments, the SEC revised its proposed rule to include fewer foreign lawyers. *See* <http://www.sec.gov/rules/proposed/s74502.shtml>.
- C. Non-U.S. Examples: An example of a domestic policy debate outside the U.S. that triggered international commentary is the U.K.'s December 2004 Clementi Committee Report. The March 2004 Clementi Consultation and resulting Report considered the regulation of the legal profession in England and Wales, including whether barristers and solicitors should continue to be regulated separately. The Clementi Committee received comments on its report from the CCBE and the Law Society of Upper Canada, among others. *See* <http://www.legal-services-review.org.uk/content/report/index.htm>. Another example is the Axzo Nobel case currently pending before the European Court of First Instance (Case T-125/03). This case reconsiders the decision of AM&S, which addressed EU attorney-client privilege and had implications for EU corporate counsel and non-EU lawyers.

V. Globalization Has Affected U.S. and Non-U.S. Regulation of Lawyers.

- A. Trade Agreements: Numerous trade agreements now apply to legal services, with the potential to alter the traditional regulation of lawyers. This potential shift of power and regulation has occurred with relatively little policy debate.

1. The GATS

- a. Introduction: The GATS is Annex 1b to the 1994 *Agreement Establishing the World Trade Organization*. The U.S. is a signatory;

the GATS applies to legal services. *See* http://www.abanet.org/cpr/gats/gats_home.html.

b. GATS Track 1: GATS Article XIX requires WTO Members to conduct negotiations to further liberalize trade in services; these negotiations currently are underway & are handled by the Office of the U.S. Trade Representative. There are debates about the legal significance of listing U.S. state lawyer regulations in the WTO document called the *U.S. Schedule of Specific Commitments* and whether the current document is accurate. Regardless of the answers to these debates, the GATS has focused attention on U.S. lawyer regulations by U.S. and non-U.S. entities, including the U.S. Dept. of Justice.

c. GATS Track 2: Pursuant to GATS Article VI(4), WTO Members are negotiating the terms of "disciplines" or regulations that would set the standards against which certain lawyer regulations would be measured when applied to foreign lawyers. The U.S. has proposed transparency disciplines that would require the opportunity for prior notice and comment.

d. Global Bar Associations: Because the World Trade Organization wants to hear about legal services from organizations open to all WTO Members, global bar associations have an important policy role to play. As a result, some of the policy debates that may be most important to U.S. lawyers now occur in a global context (with relatively little involvement by U.S. commentators).

2. Other U.S. Free Trade Agreements (FTAs): The U.S. has entered into a number of multilateral and bilateral FTAs that apply to legal services, with very little commentary or debate. For example, the U.S.-Singapore FTA specified that degrees from four U.S. law schools would be recognized for purposes of admission into the Singapore Bar. A December 8, 2004 Federal Register notice proposed that Harvard, Yale, Columbia and New York University be designated as the four U.S. law schools. See 69 Fed. Reg. 71095-01. Few U.S. law schools appear to have noticed or complained.

3. Impact of Foreign Agreements, Such as the EU Directives: It is now easier for a lawyer from one EU country to work in another EU country than it is for U.S. lawyers licensed in one U.S. state to work in a different U.S. state. It has been increasingly common to have this fact pointed out during domestic U.S. debates and to have commentators note the EU's apparent lack of significant problems. In my view, the EU system has made some European and U.S. lawyers much less tolerant of the U.S. situation and less likely to accept the arguments about why the current U.S. situation is necessary. For information, see <http://www.personal.psu.edu/faculty/l/s/lst3/>.

B. The "Classification" of Legal Services is an important initiative, with potential to

affect the monopoly of law. A number of organizations currently are engaged in efforts to develop mutually exclusive categories that can be used to "count" trade in legal services, both domestically and internationally. The organizations engaged in such efforts include the United Nations, the World Trade Organization, the U.S. Census Department, the U.S. Bureau of Labor Statistics, and national and regional statistical offices from around the world. These efforts have potentially significant policy implications, but have taken place, for the most part, with relatively little lawyer input. For information about classification systems, see <http://unstats.un.org/unsd/class/intercop/techsubgroup/04-10/papers/27-IBA%20documents.pdf> In my view, these "classification" initiatives are quite important because policy-makers may make decisions based on the amount of trade in legal services and because these exercises inevitably raise questions about what constitutes the practice of law and what areas should be reserved to lawyers. For example, California recently took the position that mediation done by a lawyer is the practice of law, but there have been recent efforts to remove ADR services, including mediation, from the U.N. and WTO legal services classification categories.

- C. Antitrust authorities around the world have shown increasing interest in the regulation of lawyers. The antitrust authorities in a number of countries have shown increasing interest in the regulation of lawyers. For example, part of the impetus for Australia's recently-completed "National Profession Project" reportedly was pressure from antitrust authorities. The CCBE's former president, Dr. Hellwig, reports that the antitrust authorities in Denmark, Finland, Ireland, Norway, the Netherlands, Spain and the United Kingdom have focused on regulation of the legal profession. I have received a Fulbright grant for academic year 2005-06 to study the Report issued by the European Commission Competition (antitrust) Department and Germany's response to that report. See EU Report on Competition in Professional Services, http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf. The antitrust authorities around the world talk to each other, just as bars and the legal profession talk to one another. Therefore, it seems likely that, in the future, issues that arise in one country may surface in another country. For example, after New South Wales' adoption of a rule allowing the sale of shares in law firms, the Clementi Report suggested a similar rule for England and Wales, based partly on antitrust concerns. See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=673021 and §IV(C), *supra*.

VI. Globalization Has Implications for U.S. Professional Responsibility Academics.

So what does globalization mean for teachers and scholars of professional responsibility? I believe it is increasingly likely that domestic U.S. legal ethics debates will refer to, and have to

take account of, developments that occur in other countries. In my view, even those academics who do not teach a separate course on global legal ethics should begin to monitor these developments and incorporate them into their teaching and scholarship. I hope that more U.S. academics will become involved in the policy debates that occur globally. I highly recommend that all PR professors subscribe to the free quarterly email newsletters of the CCBE and the Law Society of England and Wales. Subscription information is listed on my Global Resources Webpage *supra* n.1. In my view, globalization will contribute to several significant changes in U.S. regulation of the legal profession, including a shift in regulation from the state judiciary to federal and global entities, a shrinking of the monopoly of law, the need for global choice of law provisions, and pressure for harmonization of different countries' legal ethics rules.