WILL THE GENERAL AGREEMENT ON TRADE IN SERVICES NECESSITATE FEDERAL INVOLVEMENT IN LAWYER REGULATION? SOME CONSTITUTIONAL IMPLICATIONS OF REGULATING THE GLOBAL LAWYER

Ryan W. Hopkins[*]

INTRODUCTION

It has been over seven years since the California Supreme Court thrust the thorny issues associated with multijurisdictional legal practice onto the American Bar's agenda with its decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*.[1] The *Birbrower* court held that a New York law firm, none of whose attorneys were admitted to practice law in California, committed the unauthorized practice of law by advising a California corporation in an impending California arbitration.[2] Most troubling from a practitioner's perspective was the court's suggestion that an attorney might practice law "in California," and thereby commit the unauthorized practice of law there, by "virtually" entering the state through telephone, fax, or e-mail.[3] The *Birbrower* decision generated a great deal of

---

* L.L.M., Newcastle Law School, University of Newcastle-upon-Tyne; J.D., University of Pittsburgh School of Law. The author would like to thank Professor Ronald A. Brand for his insightful comments on a prior draft and Professor John M. Burkoff for providing background information on multijurisdictional practice that proved very helpful. Some portions of this Comment also appear in Ryan W. Hopkins, *Liberalizing Trade in Legal Services: The GATS, the Accountancy Disciplines, and the Language of Core Values*, 15 IND. INT'L & COMP. L. REV. (forthcoming Spring 2005). The author gratefully acknowledges the permission granted by the *Indiana International and Comparative Law Review* for use of this material.

1. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998). As used in this Comment, the term "multijurisdictional practice," or "MJP," refers to legal work performed by a lawyer in any jurisdiction in which that lawyer is not admitted to practice law. *See* AMERICAN BAR ASSOCIATION COMMISSION ON MULTIJURISDICTIONAL PRACTICE, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 2 (2002) [hereinafter MJP REPORT].

2. *Birbrower*, 949 P.2d at 3, 13.

3. *Id.* at 5. The court explained:

> In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. . . . Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. . . . For example, one may practice law in the state . . . although not physically present here by advising a

anxiety among American lawyers[4] and prompted the American Bar Association to create a Commission on Multijurisdictional Practice ("MJP Commission").[5] The MJP Commission was formed in July 2000,[6] with a mandate to report on the state of multijurisdictional practice in the United States and to make recommendations that would facilitate that practice in the public interest.[7] The MJP Commission ultimately made nine recommendations[8] to the ABA House of Delegates, which adopted all nine on

---

California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.

Id. See also John J. D'Attomo, *The $1 Million Message: Lawyers Risk Fees and More When Representing Out-of-State Clients*, 39 SANTA CLARA L. REV. 447, 471 (1999) ("*Birbrower*'s significance lies in the court's unprecedented suggestion that a lawyer who never physically enters a foreign state may nonetheless violate that state's unauthorized practice rules through 'virtual contacts' with the client or by maintaining a 'continuing relationship' with the client.").

4. *See* MJP REPORT, *supra* note 1, at 2 (noting that "[a]lthough the state law [at issue in *Birbrower*] was subsequently and temporarily amended to allow out-of-state lawyers to obtain permission to participate in certain California arbitrations, concerns have persisted").

5. *See* Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 686 (2002). Professor Gillers writes:

> How to reconcile our traditional lawyer licensing system with changes in the national and international economy and in the nature of law practice has been part of professional discussion for some time. But the need to move beyond discussion and toward clear answers was underscored in 1998 with the *Birbrower* decision of the California Supreme Court.

Id. (citations omitted). Professor Gillers was a member of the Multijurisdictional Practice Commission. *Id.* at 685.

6. *See* MJP REPORT, *supra* note 1, at vii.

7. COMMISSION ON MULTIJURISDICTIONAL PRACTICE OF LAW, AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, MISSION STATEMENT, *available at* http://www.abanet.org/cpr/mjp-mission_statement.html (last visited Jan. 10, 2005):

> RESOLVED that the American Bar Association establish the Commission on Multijurisdictional Practice to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law. The Commission shall analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions. The Commission shall make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other action as may be necessary to carry out its jurisdictional mandate. The Commission shall also review international issues related to multijurisdictional practice in the United States.

Id. For a comprehensive overview of the work of the Multijurisdictional Practice Commission, see Gillers, *supra* note 5.

8. *See* MJP REPORT, *supra* note 1, at 2-4. These recommendations addressed the following topics: Regulation of the Practice of Law by the Judiciary (Recommendation 1); Multijurisdictional Practice of Law (Recommendation 2); Disciplinary Authority (Recommendation 3); Reciprocal Discipline (Recommendation 4); Interstate Disciplinary Enforcement Mechanisms (Recommendation 5); *Pro Hac Vice* Admission (Recommendation 6); Admission by Motion (Recommendation 7); Licensing of Legal Consultants (Recommendation 8); and Temporary Practice by Foreign Lawyers (Recommendation 9). *Id.* at 13, 19, 35, 39, 43, 45, 55, 61 & 67.

August 12, 2002.[9] Despite these laudable efforts, state bar regulators have been slow to adopt the Commission's recommendations.[10] It seems that the American legal profession has yet to reach a consensus on when it is appropriate to permit an out-of-state lawyer to provide legal services in a state in which that lawyer is not admitted to practice.[11] Given the disparity in how out-of-state lawyers are treated across U.S. jurisdictions,[12] the prospects for eliminating multijurisdictional practice barriers from within the American legal profession seem poor. Instead, the catalyst for change may come from outside the profession, in the form of a trade agreement called the General Agreement on Trade in Services, or the "GATS."[13]

The GATS is the first multilateral trade agreement devoted to the progressive liberalization of the laws and regulations that govern the cross-border provision of services.[14] The GATS, which is administered by the

---

9. *See* Summary of Recommendations, American Bar Association House of Delegates, 2002 Annual Meeting, Washington, D.C., Recommendations 201A through 201J [hereinafter MJP Recommendations], *available at* http://www.abanet.org/leadership/recommendations02/summary.html(last visited Sept. 1, 2004).

10. Included among its nine recommendations to the ABA House of Delegates, the MJP Commission called for state implementation of the following six model rules: amended versions of Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and Rule 8.5 (Disciplinary Authority; Choice of Law) of the MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter MODEL RULES 2003], a MODEL RULE ON PRO HAC VICE ADMISSION (2002), a MODEL RULE ON ADMISSION BY MOTION (2002), the ABA MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS (1993), and a MODEL RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS (2002). *See* MJP REPORT, *supra* note 1, at 24. As of December 9, 2004, just 14 states have adopted rules at least similar to amended Model Rules 5.5 and 8.5. *See* State Implementation of ABA Model Rule 5.5, *at* http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf (last visited Jan. 10, 2005) and State Implementation of ABA Model Rule 8.5, *at* http://www.abanet.org/cpr/jclr/8_5_quick_guide.pdf (last visited Jan. 10, 2005). As of December 9, 2004, no states have yet adopted rules identical to the *Model Rule on Pro Hac Vice Admission*, the *Model Rule on Admission by Motion*, the *ABA Model Rule for the Licensing of Legal Consultants* (although this model rule is based on New York's long-standing legal consultant rule), and only Louisiana has adopted a rule identical to the ABA's Model Rule for Temporary Practice by Foreign Lawyers. *See* State Implementation of ABA MJP Recommendations, *at* http://www.abanet.org/cpr/jclr/mjp_alpha_chart.pdf (last visited Jan. 10, 2005).

11. *Compare* Mike McKee, *Bar Welcomes Out-of-Staters—For a Hefty Price*, THE RECORDER, Sept. 14, 2004 (reporting on new California MJP rules that, one observer opined, "create 'two classes of lawyers' with out-of-staters being treated as 'second-rate'") *with* Richard Acello, *Foreign Lawyers May Move In-House*, *available at* http://www.abanet.org/intlaw/committees/constituent/flc/article_foreignlawyers.doc (last visited Jan. 10, 2005) (reporting on a preliminary amendment to Washington state MJP rules that may allow lawyers licensed in non-U.S. jurisdictions to practice as in-house counsel).

12. *See infra* Part I.

13. General Agreement on Trade in Services [hereinafter GATS], Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1168 (1994) [hereinafter WTO Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Jan. 10, 2005).

14. WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 161 (1999) [hereinafter

World Trade Organization ("WTO"),[15] governs a wide array of services, including banking, tourism, and even accounting and legal services.[16] Anytime a service or services provider crosses a national border, the provisions of the GATS *might* be implicated. The possibility of the GATS' application is open in such cross-border circumstances because, when the GATS became effective in 1995, much of its governing potential regarding trade in services, including legal services, was left for future negotiation.[17]

The GATS legal services negotiations are currently ongoing.[18] The importance of these negotiations for American lawyers should not be underestimated. The GATS is important even for those practitioners engaged exclusively in domestic practice because the GATS may eventually influence how lawyers are governed in the United States.[19] In the give-and-take of the legal services negotiations, U.S. trade negotiators may be willing to grant foreign lawyers greater rights of practice than those enjoyed by domestic practitioners. This, in turn, could lead to calls from the American Bar to grant domestic lawyers greater interstate practice rights within the United States. For instance, if U.S. trade negotiations resulted in Japanese *bengoshi*[20] being permitted to practice law anywhere in the United States, the organized bar in this country would likely put significant pressure on regulators to permit out-of-state lawyers to provide legal services in states in which they are not admitted to practice.[21]

Some commentators have even suggested that the possible disparity between foreign and local lawyers precipitated by the GATS, and the difficulty of coordinating state lawyer regulations, may eventually lead to the federal government's involvement in regulating the legal profession.[22] Put another way, there is a chance that U.S. trade negotiators might set in motion a chain of events that could affect the way law is practiced in this country; and

---

GUIDE TO THE URUGUAY ROUND AGREEMENTS].

15. *See* WTO Agreement, *supra* note 13.

16. *See* WTO, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991) (listing the services sectors covered by the GATS).

17. *See infra* notes 85-94 and accompanying text.

18. *See* Laurel S. Terry, *The GATS and Legal Services: The Resumed GATS Negotiations Trigger Additional U.S. and Other Activity*, B. EXAMINER, Feb. 2005.

19. *See infra* Part II.B.

20. *Bengoshi* are Japanese lawyers engaged in private practice. For a brief introduction to the structure of the Japanese legal professions, see Kunio Hamada, *Japan*, *in* LAW WITHOUT FRONTIERS 218 (Edwin Godfrey ed., 1995).

21. *See infra* Part II.B.

22. *Id.*

they may do so without the considered input of the profession itself.[23] Because the GATS may one day profoundly influence the regulation of the American legal profession, all American lawyers have a vested interest in understanding how the GATS works and how it may come to affect the way they practice law.[24]

This Comment proposes to highlight two fundamental questions related to the potential influence of the GATS on the regulation of the American legal profession: first, whether the impetus the GATS provided will ultimately lead to changes in the way American lawyers are regulated when engaged in interstate legal practice; and second, whether the federal government could regulate lawyers consistent with the Constitution. Part I of this Comment surveys state bar admission rules and sets out the conditions under which lawyers admitted in one U.S. jurisdiction may currently practice in others. Part II explains how the GATS affects trade in legal services and how it may ultimately come to influence the regulation of domestic lawyers in the United States. An examination of the constitutional provisions that may authorize the federal regulation of lawyers is the focus of Part III. Finally, this Comment concludes that, although formidable *political* obstacles to the federal regulation of lawyers undoubtedly exist, the Constitution would not likely prohibit Congress from playing a role in the regulation of American lawyers if it chose to do so.

I. MULTIJURISDICTIONAL PRACTICE AND THE AMERICAN BAR

A. The Unauthorized Practice of Law

All United States jurisdictions prohibit the unauthorized practice of law, commonly abbreviated "UPL."[25] This prohibition extends not only to non-

---

23. *See* Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1085 (2001). Professor Terry's article is required reading for those interested in exploring the potential impact of the GATS on legal services. For those who are new to the GATS, see INTERNATIONAL BAR ASSOCIATION, GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (2002) [hereinafter IBA GATS HANDBOOK], which provides an excellent introduction to the basic workings of the GATS and comprehensive explanations of the sometimes unfamiliar terms often employed in trade agreements.

24. *See generally* Laurel S. Terry, *A Challenge to the ABA and the U.S. Legal Profession To Monitor the GATS 2000 Negotiations: Why You Should Care*, Symposium Issue, PROF. LAW 63 (2001).

25. Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331, 1339 (2003). *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 46.3 (3d ed. Supp. 2004) ("[T]he Rule limiting the practice of law to licensed attorneys has been a feature of our legal system for 200 years . . . ."). *See also* MODEL

lawyers, but also to lawyers licensed in other jurisdictions.[26] This has typically meant that unless an out-of-state lawyer's practice falls within a recognized exception in a host state,[27] only persons who have been admitted to that state's bar may practice law in that state.[28] But, as *Birbrower* amply demonstrates, the phrase "practice of law" is an inherently slippery concept for which there is no widely accepted definition.[29] Consequently, state legislatures and courts have adopted various formulations of the phrase for the purposes of their respective UPL prohibitions.[30] This diversity of definition presents challenges for the multijurisdictional practitioner because it may be difficult for her to know with certainty what is or is not the "practice of law" in any given jurisdiction.[31] Whatever gloss states may give to their unauthorized practice of law prohibitions, the purpose is, ostensibly, consumer

---

RULES OF PROF'L CONDUCT R. 5.5 (2001) (Unauthorized Practice of Law) [hereinafter MODEL RULES 2001] ("A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."). Note that this is not the current version of Model Rule 5.5. The current version of Model Rule 5.5 incorporates the concept of temporary practice by out-of-state lawyers. *See infra* notes 36-45 and accompanying text.

26. HAZARD & HODES, *supra* note 25, § 46.5 ("Legal restrictions in most jurisdictions treat lawyers who are licensed elsewhere almost as if they were lay persons for purposes of the 'unauthorized practice' rules.").

27. In MJP parlance, a jurisdiction in which a lawyer is admitted to practice is often referred to as the lawyer's "home state," and any other jurisdiction in which that lawyer seeks to practice is a "host state." *See* Gillers, *supra* note 5, at 686 n.2.

28. Needham, *supra* note 25. *See*, *e.g.*, Washko v. Platz, 534 A.2d 522, 524 (Pa. Super. Ct. 1987) ("[A]n attorney licensed to practice law only in a sister state is prohibited from practicing law in Pennsylvania unless a license to practice in Pennsylvania is obtained . . . .").

29. HAZARD & HODES, *supra* note 25, § 46.4 ("Defining the outer limits of the 'practice of law' is practically impossible. In our law-dominated society, almost every significant financial decision has at least some legal element to it, and legal elements predominate in many other common transactions.").

30. *See* MODEL RULES 2001, *supra* note 25, R. 5.5 cmt. ("The definition of the practice of law is established by law and varies from one jurisdiction to another"). A comprehensive survey of the nuances in state UPL definitions is beyond the scope of this Comment. Nevertheless, because the ABA *Model Rules of Professional Conduct*, in many ways, form the normative ethical basis for American lawyers, this Comment will employ the Model Rules as a guide to the content of state ethics rules, while also noting significant state-specific deviations, where appropriate. *See* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 4 (John S. Dzienkowski abridged ed. 2003-04). The introduction states:

> Although the ABA's codes of conduct have been influential in shaping the law of professional responsibility, they only have force as a body of rules with its voluntary members. However, the various states and the federal courts have looked to the ABA versions as a basis for regulating lawyers within the jurisdiction. Thus, the ABA's codes have been used as the basis for state and federal codes.

Id. at 4.

31. *See* Needham, *supra* note 25, at 1332 ("We have created a system in which competent lawyers chosen by their clients for their expertise in a particular field must question whether they are violating unauthorized practice of law provisions as they perform even the most routine legal work.").

protection.[32] But, when viewed from the perspective of multijurisdictional practitioners,[33] whose clients are increasingly engaged in interstate if not international transactions,[34] the lawyer admission system and UPL regulations instead represent significant barriers to effective practice.[35]

One way of helping practitioners successfully navigate the UPL minefield is for states to enact "temporary practice" rules that permit out-of-state lawyers to render legal advice in a host state under certain conditions. This was the approach endorsed by the ABA in its 2002 revision of the Model Rules of Professional Conduct. As noted above,[36] the former Model Rule 5.5 prohibited a lawyer from practicing law in a jurisdiction where doing so would violate the regulation of the legal profession in that jurisdiction.[37] In addition to clarifying and strengthening the unauthorized practice prohibition in Rule 5.5,[38] the amended Rule provides certain "safe harbors" from charges of

---

32. *See* MODEL RULES 2001, *supra* note 25, R. 5.5 cmt. ("Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."). *See also* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 435 (2001) (noting the classic justification for entry regulations as "the protection of unsuspecting consumers from incompetent practitioners"). Professor Barton also notes that "[t]his justification actually involves two connected claims: the legal market is subject to serious information asymmetries, and incompetent practitioners can inflict irreversible or irremediable harms upon clients." *Id.*

33. *See* Needham, *supra* note 25, at 1331 ("There are a variety of vantage points from which to view attorney licensing regulations. Choosing the perspective from which to view those provisions goes a long way toward predicting which issues stand out in high relief, and which recede in importance.").

34. For an early recognition of this reality, see *In re* Estate of Waring, 221 A.2d 193, 197 (N.J. 1966):

> Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion. While the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by "technical restrictions which have no reasonable justification."

Id. See also HAZARD & HODES, *supra* note 25, § 46.3 ("[T]he prohibition against unauthorized practice also functions, at least in part, as a trade restriction that precludes nonlawyers from legal tasks, however routine."). As Sydney Cone has put it, "[n]ot infrequently, the local legal profession, in the name of protecting 'the public,' has done a mighty fine job of protecting itself." SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE, In:3 (1996).

35. Needham, *supra* note 25, at 1332.

36. *See supra* note 25.

37. *Id.*

38. *See* MJP REPORT, *supra* note 1, at 24 ("Rule 5.5 would be clarified and strengthened by adoption of amended sections 5.5(a) and (b)."). Amended Rule 5.5(a) and (b) provide:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic

unauthorized practice of law for those practitioners engaged in legal work in more than one jurisdiction.[39] Amended Model Rule 5.5 has accordingly been re-titled to reflect its enhanced scope.[40]

Under amended Model Rule 5.5, an out-of-state lawyer may now practice with a local lawyer who is admitted to practice in that jurisdiction and who actively assists the out-of-state lawyer in pursuing the matter.[41] An out-of-state lawyer may also practice in a state where he has been admitted *pro hac vice*.[42] Moreover, in proceedings that do not require admission *pro hac vice*, an out-of-state lawyer may practice in the host jurisdiction if the services rendered are related to an arbitration or other alternative dispute resolution, so long as those proceedings arise out of the lawyer's practice in a state in which she is admitted to practice.[43] Where the practice does not fall within

---

and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

MODEL RULES 2003, *supra* note 10, R. 5.5.

39. *See* MJP REPORT, *supra* note 1, at 24 n.33 (reporting the Commission's decision not to use the term "safe harbor" in the amended version of Rule 5.5, but noting that "the term . . . has been a useful metaphor for conceptualizing the categories of legal work that a lawyer admitted in one jurisdiction may do in another jurisdiction"). The approach of amended Model Rule 5.5 is consistent with the approach endorsed by RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000):

§ 3. Jurisdictional Scope of the Practice of Law by a Lawyer

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

. . . .

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice [in a jurisdiction in which he is admitted].

40. *See* MJP REPORT, *supra* note 1, at 23 ("The MJP Commission proposes to re-title the Rule 'Unauthorized Practice of Law; Multijurisdictional Practice of Law.'"). The pre-2002 title of Model Rule 5.5 was simply "Unauthorized Practice of Law." *See* MODEL RULES 2001, *supra* note 25.

41. MODEL RULES 2003, *supra* note 10, R. 5.5(c)(1):

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter . . . .

42. *Id.* R. 5.5(c)(2) (applying to legal services that "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"). For a discussion of the concept of "admission *pro hac vice*" see *infra* notes 57-61 and accompanying text.

43. *Id.* R. 5.5(c)(3) (applying to legal services that "are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute 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 practice and are not services for which the forum requires *pro hac vice* admission").

the above exceptions, but nonetheless arises out of or is reasonably related to a lawyer's home-state practice, the out-of state lawyer may be admitted on a temporary basis.[44] Lastly, amended Model Rule 5.5 provides an exception for multijurisdictional practice by corporate counsel.[45]

Although the incorporation of the temporary practice concept into revised Model Rule 5.5 may signal an evolving awareness of the importance of multijurisdictional practice in the United States, not all states have been quick to adopt the revised Model Rules approach.[46] As a result, many lawyers will not necessarily be able to take advantage of these generous multijurisdictional practice provisions. Instead, they will have to qualify under special provisions of state bar admission or court rules, or sit for another bar examination. These alternative methods of admission are briefly discussed below.

B. State Bar Admission Rules: A Brief Introduction

Attempting to summarize the bar admission requirements of fifty-six American jurisdictions[47] can be a perilous undertaking. Differences, large and small, in the way states implement their respective bar admission policies often drain generalizations of much of their usefulness. Nevertheless, some categorization of American bar admission rules is possible. For the purposes of this Comment, state admission rules are divided into two broad categories: those that confer full bar membership on out-of-state lawyers, and those that merely grant limited practice rights within a state.

---

44. *Id.* R. 5.5(c)(4) (applying to legal services that "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"). Regarding the content of the requirement that the matter in the host-state jurisdiction be "reasonably related" to the out-of-state lawyer's local practice, found in both subsection (c)(3) & (c)(4), see *id.* cmt. 14.

45. *Id.* R. 5.5(d) ("A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction."). For more on multijurisdictional practice issues facing corporate, or "in-house," counsel, see generally Needham, *supra* note 25.

46. *See supra* note 10.

47. In addition to the fifty states and the District of Columbia, the following analysis also includes consideration of the bar admission rules of the U.S. dependencies of Guam, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands. This approach is consistent with the practice followed in NATIONAL CONFERENCE OF BAR EXAMINERS & AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Erica Moeser & Margaret Fuller Cornelle eds., 2003) [hereinafter COMPREHENSIVE GUIDE]. *See*, *e.g.*, *id.* at 28 (listing the fifty states, the District of Columbia, and the five dependencies).

1. The Full Admission Option: Attorneys Exams, Admission on Motion, and Reciprocity

It is always possible that an out-of-state lawyer with significant practice interests outside her home jurisdiction might choose to become a member of another state's bar in the traditional way: passing the state's standard bar examination and submitting to its character and fitness evaluation.[48] In fact, this is the only way to become a full-fledged member of the bar in some jurisdictions.[49] As an alternative to sitting for a standard bar examination, nine jurisdictions now permit out-of-state lawyers to become full members of the bar by passing a shorter examination, sometimes called an "attorneys' exam."[50] But, given the time, expense, and effort that must be devoted to taking any bar examination, even an abbreviated one, this traditional route to bar admission is an unrealistic option for most multijurisdictional practitioners.

Perhaps the most common method by which an out-of-state lawyer may become a permanent member of a host state bar is through that state's

---

48. *See* MJP REPORT, *supra* note 1, at 5 ("The traditional route to bar admission includes graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to practice law.").

49. These jurisdictions include: Alabama, Arizona, Arkansas, Delaware, Florida, Hawaii, Kansas, Louisiana, Montana, Nevada, New Jersey, New Mexico, South Dakota, Guam, Palau, and Puerto Rico. *See* COMPREHENSIVE GUIDE, *supra* note 47, at 25. As a general matter, none of these jurisdictions permit "admission on motion." For a discussion of the concept of "admission on motion," see *infra* notes 51-55 and accompanying text. Some of these jurisdictions nevertheless make exceptions to the general rule. For example, in Alabama, "[a]dmission on motion is limited to law professors with three consecutive years of full-time employment at an ABA-approved law school in Alabama and prior admission in another jurisdiction." *Id.* at 26.

50. These jurisdictions include: California, Georgia, Maine, Maryland, Mississippi, Rhode Island, Utah, Northern Mariana Islands, and the Virgin Islands. *See id.* at 28. For instance, the California Rules provide that:

> An attorney applicant who has been admitted to practice in a sister state, or any United States jurisdiction, possession, territory, or dependency the United States hereafter acquires, may elect to take the Attorneys' Examination rather than the entire California Bar Examination provided that he or she has been an active member in good standing of the bar of the admitting state or jurisdiction, possession, territory or dependency for at least four years immediately preceding the first day of the administration of the California Bar Examination for which the applicant applied.

RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA, R. IV, § 2 (2002). The Rules further provide that "[t]he Attorneys' Examination shall consist of the written questions and performance tests from the California Bar Examination and shall be graded in accordance with standards and procedures established by the Committee [of Bar Examiners] acting in its sound discretion." *Id.* at R. VIII, § 2(c).

"admission on motion" procedure.[51] Admission on motion procedures permit a lawyer who is a member in good standing of the bar of another state to become a full member of the admitting state's bar without the need to a take another bar examination.[52] Admission rules typically require the out-of-state lawyer to have actively practiced in his home state for a certain number of years prior to admission in the host state. The required term in most states is currently five out of the past seven years.[53] Lastly, many states only permit an out-of-state lawyer to be admitted on motion if the lawyer's home state bar extends the same privilege to members of the bar of the admitting state.[54] In other words, these states require an element of reciprocity between the admitting state and the applicant lawyer's home state.[55]

---

51. There are currently thirty-three U.S. jurisdictions that allow for some form of "admission on motion," including: Alaska, Colorado, Connecticut, the District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* COMPREHENSIVE GUIDE, *supra* note 47, at 25.

52. *See* Jennifer L. Binkley, *Admission on Motion: Current Practices and Rules*, B. EXAMINER, Nov. 2000, at 23 ("Motion admission . . . allows attorneys who are licensed in one jurisdiction to be admitted to another jurisdiction without taking a bar examination if they satisfy certain other requirements.").

53. Seventeen of the thirty-three states that permit some form of admission on motion require the applicant to have been actively engaged in the practice of law for five out of the last seven years. *See* COMPREHENSIVE GUIDE, *supra* note 47, at 25. This is also the length of time set in the ABA's *Model Rule on Admission by Motion* ("The applicant shall . . . (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed."). *See* MJP REPORT, *supra* note 1, at 55.

54. These jurisdictions include: Alaska, Colorado, Connecticut, Georgia, Idaho, Illinois, Kentucky, Missouri, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* COMPREHENSIVE GUIDE, *supra* note 47, at 28.

55. *See* Binkley, *supra* note 52, at 27 ("One of the most common elements of the various jurisdictions' motion admission rules is a reciprocity requirement, i.e., a requirement that the jurisdiction in which the motion applicant is already licensed allow motion admission of licensees from the jurisdiction in which the applicant seeks admission."). For example, the list of states with which Pennsylvania has a reciprocity arrangement can be found on the website of the Pennsylvania Board of Law Examiners, *at* http://www.pabarexam.org/Bar_Examination/Reciprocity_Information.htm (last visited Jan. 10, 2005) (listing thirty-one jurisdictions).

2. The Limited Admission Option: Pro Hac Vice, Corporate Counsel, and Foreign Legal Consultant Rules

Although the "temporary practice" concept incorporated into revised Model Rule 5.5 has yet to gain universal acceptance,[56] courts in all United States jurisdictions make some provision for the admission of out-of-state lawyers *pro hac vice*.[57] A motion for admission *pro hac vice* is typically brought by local counsel on behalf of an out-of-state lawyer who seeks permission to appear before the court to which the motion is made.[58] Such admission is usually limited to a particular case pending before the admitting court and generally does not permit the out-of-state lawyer to act as attorney of record.[59] The rule in each state is different, but the power to grant admission *pro hac vice* nearly always resides in the discretion of the court.[60] While *pro hac vice* admission procedures work reasonably well in the litigation context, they are generally not available outside the courtroom and

---

56. *See supra* note 10.

57. *See* MJP REPORT, *supra* note 1, at 50 ("Courts in all United States jurisdictions regularly admit lawyers from other United States jurisdictions to appear as counsel *pro hac vice*."). Admission *pro hac vice* is the temporary admission of an out-of-state lawyer admitted to practice before a particular court in a specific case. *See* BLACK'S LAW DICTIONARY 49 (7th ed. 1999). As noted above, the ABA House of Delegates has adopted a *Model Rule on Pro Hac Vice Admission*. *See supra* note 10. Because this Model Rule has not yet been widely enacted, *id.*, the examples in this section are drawn from state *pro hac vice* rules.

58. *See*, *e.g.*, PA. BAR ADMISSION R. 301(b):

> Such admissions shall be only on motion of a member of the bar of this Commonwealth. Except as otherwise prescribed by general rule, written notice of such motion shall be signed by such member of the bar, shall recite all relevant facts and shall be filed with the clerk of the court in which or with the district justice before which the matter is pending at least three days prior to the motion.

See also MJP REPORT, *supra* note 1, at 50 ("Such admission has been almost a matter of course when sought in conjunction with locally admitted counsel.").

59. *See*, *e.g.*, PA. BAR ADMISSION R. 301(a) ("An attorney, barrister or advocate who is qualified to practice in the courts of another state or of any foreign jurisdiction may be specially admitted to the bar of this Commonwealth for purposes limited to a particular matter. He or she shall not, however, thereby be authorized to act as attorney of record."). *See also* MJP REPORT, *supra* note 1, at 50 ("Typically, the *pro hac vice* process does not allow out-of-state lawyers to practice regularly in the jurisdiction and requires that the applicant attest to knowledge of and compliance with local rules of conduct and practice.").

60. MJP REPORT, *supra* note 1, at 50 ("In most jurisdictions, there is little procedural structure for addressing *pro hac vice* applications, which are entrusted solely to the discretion of the court asked to admit the lawyer."). *Cf.* PA. BAR ADMISSION R. 301(b) ("Any court or district justice shall grant such a motion unless good cause for denial shall appear.").

thus provide no protection from UPL violations to lawyers engaged in purely transactional matters.[61]

For this reason, some states have adopted an exemption from their UPL regulations for "in-house" or corporate counsel.[62] This exemption typically permits an out-of-state lawyer to practice in the host jurisdiction provided that she only performs legal services for her corporate employer.[63] In addition to creating a safe harbor from UPL violations, corporate counsel rules also facilitate lawyer specialization in large corporate enterprises, obviating the need for a company to maintain specialized legal counsel in each jurisdiction in which it does business.[64] For institutional attorneys, the corporate counsel exemptions are a marked improvement over the admission on motion process, largely because they eschew minimum practice periods that could keep in-house counsel from practicing in some jurisdictions for five or more years.[65]

---

61. Needham, *supra* note 25, at 1335 ("*[P]ro hac vice* admission is not a reliable method of ensuring permission to provide legal services. It is not available in litigated matters until after a case has been filed with a court, and such admission is not available at all for purely transactional matters.").

62. Twelve U.S. jurisdictions have enacted corporate counsel admission rules. They include: Florida, Idaho, Kentucky, Minnesota, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Washington, and the Virgin Islands. *See* COMPREHENSIVE GUIDE, *supra* note 47, at 36. Note that these rules also generally apply to other institutional entities. *See* Needham, *supra* note 25, at 1345 ("Typically, these regulations also apply to lawyers who practice exclusively for associations, governmental entities, and business organizations other than corporations.").

63. Needham, *supra* note 25, at 1344. This approach has also been endorsed by the Restatement of the Law Governing Lawyers. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3, cmt. f (2000). The Restatement observes:

> States have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client . . . and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.

Id.

64. *See*, *e.g.*, Needham, *supra* note 25, at 1340-41:

> Lawyer *A* works for *ABC Company*, serving as the expert in consumer credit issues for *ABC*'s nationwide lending operation. Especially in areas requiring sophisticated legal analysis, the attorneys in a legal department are commonly responsible for advising the corporation and its affiliates on a specific area of the law. In this system, Lawyer *A* will handle all legal questions within his assigned topic, regardless of the geographical location in which the issue arises. His office is located in New York and he usually performs most of his work there. Throughout a single day, he may answer questions regarding consumer credit regulations in California, Nevada, Pennsylvania, Florida, Illinois, Michigan, and Texas.

65. *Id.* at 1346.

Yet another avenue for a limited form of bar admission is found in the procedures for the licensing of foreign legal consultants, or "FLCs."[66] FLCs are non-U.S. lawyers who usually seek a limited form of admission in commercially important states like New York or California for the purposes of representing foreign companies doing business in the United States or U.S. companies doing business abroad.[67] Jurisdictions that permit foreign lawyers to practice as FLCs generally do not require those lawyers to sit for qualifying examinations, but they often severely restrict the types of legal services that the foreign lawyer may provide.[68] They also typically lay down requirements that relate to the FLC's prior professional experience, good standing, and general character.[69]

The New York rules for the licensing of foreign legal consultants are illustrative of the kinds of requirements that are found in other state FLC rules.[70] In order to be licensed as a foreign legal consultant in New York, a

---

66. There are currently twenty-five U.S. jurisdictions that permit the admission of foreign legal consultants. They are: Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, Utah, Washington, and the Virgin Islands. *See* COMPREHENSIVE GUIDE, *supra* note 47, at 36. The ABA House of Delegates has also adopted a *Model Rule for the Licensing of Legal Consultants* that would permit a foreign lawyer who meets certain criteria to practice on a regular basis within the state without becoming a member of a state bar, but subject to certain limitations on the lawyer's scope of practice. *See* MJP REPORT, *supra* note 1, at 61-66. In addition, the ABA has recognized the need for rules regarding foreign lawyers who may not practice regularly in the United States, and, thus, would not qualify for legal consultant status, by recommending the enactment of the ABA Model Rule for Temporary Practice by Foreign Lawyers. *See* MJP REPORT, *supra* note 1, at 67. This model rule extends the "safe harbor" concept of revised Model Rule 5.5 to foreign legal practitioners. *See id.* at 68.

67. *See generally* Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998).

68. *See generally* CONE, *supra* note 34, § 1.4.1, at 1:11 (outlining different options jurisdictions take regarding foreign lawyers).

69. *Id.*

70. New York is a logical starting point for any investigation of state FLC rules because it was among the first states to adopt a foreign legal consultant rule, doing so in 1974. For an excellent account of the developments leading to the adoption of the New York FLC rule, see *id.* §§ 3.1-3.6. The New York example is also appropriate because its FLC rule was the model for many subsequent state FLC rules and the ABA *Model Rule for the Licensing of Legal Consultants*. *See id.* §§ 4.1-4.3; State Implementation of ABA MJP Recommendations, *at* http://www.abanet.org/cpr/jclr/mjp_alpha_chart.pdf (last visited Jan. 10, 2005), at 18. Some time is spent here analyzing the requirements of the New York FLC rule because, if the GATS ultimately fulfills its promise in the legal services sector and helps dismantle barriers to the cross-border practice of law, state FLC rules will likely be the first point at which governmental regulation meets the realities of transnational legal practice. Whether state FLC rules fulfill the requirements of the GATS will depend upon the outcome of future negotiations, but understanding what these rules require is a necessary first step to reconciling the various U.S. lawyer regulatory regimes and any multilateral system that ultimately emerges from the GATS negotiations. For more on the GATS legal services negotiations,

foreign lawyer must meet several formal and substantive requirements.[71] The foreign lawyer must enjoy good professional standing in her home country[72] and have practiced the law of that country for at least three of the most recent five years.[73] She must also fulfill the necessary character and fitness requirements[74] and be over twenty-six years old.[75] In addition, she must show that she intends to practice as a legal consultant in New York and to maintain an office there.[76] An FLC's practice in New York is also circumscribed in a number of important ways. FLCs are not permitted to appear in court on behalf of their clients.[77] Moreover, the FLC may not practice at all in the areas of real estate,[78] decedents' estates,[79] and family law.[80] Lastly, when advising on New York or U.S. federal law, the FLC must seek the advice of a member of the New York Bar.[81]

---

see *infra* notes 85-94 and accompanying text.

71. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 521.1(a) (2002).

72. *Id.* § 521.1(a)(1) (stating that the Appellate Division of the Supreme Court may license an applicant to practice as a legal consultant who "is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority").

73. *Id.* § 521.1(a)(2) (permitting licensing of an applicant who, "for at least three of the five years immediately preceding his or her application, has been a member in good standing of such legal profession and has actually been engaged in the practice of law in such foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of such foreign country").

74. *Id.* § 521.1(a)(3) (permitting licensing of an applicant who "possesses the good moral character and general fitness requisite for a member of the bar of this State").

75. *Id.* § 521.1(a)(4) (permitting licensing of an applicant who "is over 26 years of age").

76. *Id.* at § 521.1(a)(5) (permittinig licensing of an applicant who "intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose").

77. *Id.* § 521.3(a). This subsection states that:

> A person licensed to practice as a legal consultant under this Part may render legal services in this State; subject, however, to the limitations that he or she shall not: (a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to section 520.11 of this Title).

Id.

78. *Id.* § 521.3(b) (stating that an FLC shall not "prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America").

79. *Id.* § 521.3(c) (stating that an FLC shall not "prepare: (1) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof; or (2) any instrument relating to the administration of a decedent's estate in the United States of America").

80. *Id.* § 521.3(d) (stating that an FLC shall not "prepare any instrument in respect of the marital or parental relations, right or duties of a resident of the United States of America, or the custody or care of the children of such a resident").

81. *Id.* § 521.3(e). An FLC shall not:

> render professional legal advice on the law of this State or the United States of America (whether

Part I of this Comment demonstrates that there is tremendous diversity in how multijurisdictional practitioners are regulated across United States jurisdictions. This lack of uniformity has created a patchwork of regulation in which lawyers must satisfy often-conflicting admission rules in order to practice, even temporarily, in multiple jurisdictions. As more and more barriers to the conduct of business across state and national borders are dismantled, the continued power of states to restrict the multijurisdictional practice of law is increasingly anomalous. The instrument of change might be found in the General Agreement on Trade in Services. It is possible that the treaty obligations that the United States has assumed pursuant to the GATS could eventually lead to federal involvement in the regulation of American lawyers. Explaining how the GATS affects "trade" in legal services, and how it might eventually lead to federal involvement in lawyer regulation is the focus of Part II.

II. THE GENERAL AGREEMENT ON TRADE IN SERVICES

A. How the GATS Affects Trade in Legal Services

The negotiation and signing of the GATS during the Uruguay Round trade negotiations signaled the large and growing importance of "trade in services" to the global economy.[82] Moreover, the centrality of the GATS in the international regulation of services regimes has led some to call the Agreement the most important development in the multilateral trading system since the General Agreement on Tariffs and Trade (GATT) became effective in 1948.[83] Nevertheless, the GATS is still in its early days, and much of how its rules will govern trade in services has been left for future negotiations.[84]

---

rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person duly qualified and entitled (other than by virtue of having been licensed under this Part) to render professional legal advice in this State on such law.

Id.

82. *See* WTO, INTERNATIONAL TRADE STATISTICS 2003 (2003), *available at* http://www.wto.org/english/res_e/statis_e/its2003_e/its2003_e.pdf (last visited Jan. 10, 2005). In 2002, the value of global services exports totaled U.S. $1570 billion, or nearly a quarter of all exports worldwide. *Id.* at 2 (Table 1). In order to get an idea of the magnitude of the growth of the services trade in recent years, consider that exports of services rose six percent over the year 2001-2002, an increase that represents approximately the same amount of growth over the ten-year period 1990-2000. *Id.*

83. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 14, at 161.

84. *Id.* ("The GATS rules are not quite complete, and are largely untested. This process of filling the gaps will require several more years of negotiations, and experience will no doubt show a need to improve some of the existing rules."). Professor Laurel Terry has described the GATS as an example of a

Article XIX of the GATS, entitled "Negotiation of Specific Commitments," provides for future liberalizing negotiations to begin no later than five years after the GATS' coming into force.[85] In accordance with this mandate, on February 25, 2000, new services negotiations began.[86] These negotiations were often referred to as the "GATS 2000 negotiations"[87] or the "built-in agenda" negotiations.[88] On November 14, 2001, the WTO Ministerial Conference meeting in Doha, Qatar, adopted the Fourth Ministerial Declaration, which launched the current round of trade negotiations known as the Doha Development Agenda (DDA).[89] This "Doha Declaration" also endorsed the work that had been done in the GATS 2000 negotiations and subsumed its future work into the DDA negotiating framework.[90] These negotiations were to conclude no later than January 1,

---

"legislative-delegation model" of regulating the cross-border provision of services because it leaves the task of developing more detailed obligations to various WTO institutions. *See* Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1392 (1998) (discussing the operation of such a model in the development of rules to govern the cross-border provision of legal services).

85. GATS, *supra* note 13, art. XIX(1):

> In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

86. Press Release, WTO, Services Negotiations Formally Launched (Feb. 25, 2000), *available at* http://www.wto.org/english/news_e/news00_e/servfe_e.htm (last visited Jan. 10, 2005).

87. *See*, *e.g.*, Director General Renato Ruggiero, Towards GATS 2000—A European Strategy, Address to the Conference on Trade in Services, organized by the European Commission, in Brussels (June 2, 1998), *available at* http://www.wto.org/english/news_e/sprr_e/bruss1_e.htm (last visited Jan. 10, 2005).

88. *See*, *e.g.*, Terry, *supra* note 23, at 1050 & n.193 (employing the term and explaining its meaning).

89. WTO Ministerial Conference, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001).

90. *Id.* ¶ 15:

> The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement.

2005,[91] and were the kind of "request-offer" negotiations that have become familiar over the past fifty years within the GATT framework.[92] There is, however, another "track" of negotiations currently ongoing in Geneva that could more profoundly affect the way that the GATS regulates trade in legal services.[93] These are the negotiations occurring in the Working Party on Domestic Regulation (WPDR), which is considering the feasibility of developing universal procedures for opening markets to foreign legal practitioners.[94] In the meantime, we are left with the Agreement itself and the ways in which it currently constrains WTO members from erecting protectionist barriers to services markets.

The GATS obligations and derogations of WTO Member States are found in the following documents: (1) the "framework agreement"[95] made up of the twenty-nine articles and eight annexes[96] found in Annex 1B of the WTO

---

91. *Id.* ¶ 45 ("The negotiations to be pursued under the terms of this declaration shall be concluded not later than 1 January 2005.").

92. *See id.* ¶ 15 ("Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003."). The Doha negotiations, including the so-called "Track 1" GATS legal services negotiations, were temporarily abandoned in September 2003 at the Fifth WTO Ministerial Conference in Cancún, Mexico. For more information on the breakdown on the Cancún negotiations see Laurel S. Terry, *Current Developments Regarding the GATS and Legal Services: The Cancun Ministerial GATS Negotiations*, B. EXAMINER, Feb. 2004, at 38. The WTO Member States resumed the Track 1 negotiations and the rest of the Doha Work Programme pursuant to an August 1, 2004, decision of the WTO General Council. The decision did not set a revised deadline for conclusion of the services negotiations but did set a May 2005 deadline for the tabling of revised services offers. See WTO, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WT/L/579, at 3 & Annex C (Aug. 2, 2004).

93. *Cf.* Paul D. Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW. ENG. J. INT'L & COMP. L. 361, 405-06 (2003) (analyzing Member State DDA proposals on legal services and noting a "very limited ambition for meaningful liberalization of legal services").

94. A fuller treatment of these "disciplines" track negotiations is beyond the scope of this Comment, but see IBA GATS HANDBOOK, *supra* note 23, at 3.

> Currently, there are two different sets of events ongoing in Geneva of which member bars should be aware (and may want to participate). The first ongoing activity is the development of horizontal disciplines on domestic regulation. The second development is the new Doha Round of negotiations for further liberalization of trade in services. Although there is some overlap between these two 'tracks' or developments, they are different and Member Bars should be aware of both.

Id.

95. *See* CONE, *supra* note 34, § 2.4.2, at 2:15 (using this phrase to describe the GATS itself).

96. GATS, *supra* note 13. Only one of these annexes, Annex on Article II Exemptions, is relevant to legal services. *See infra* notes 127-30 and accompanying text. The other annexes include: Annex on Movement of Natural Persons Supplying Services under the Agreement, Annex on Air Transport Services, Annex on Financial Services, Second Annex on Financial Services, Annex on Maritime Transport Services, Annex on Telecommunications, and Annex on Basic Telecommunications. *See* GATS, *supra* note 13. The Annex on Movement of Natural Persons Supplying Services under the Agreement would seem to apply to legal services; however, on March 1, 1995, the Council for Trade in Services effectively nullified the import

Agreement;[97] (2) the Schedules of Specific Commitments[98] reflecting obligations assumed by WTO Member States in specific services sectors at the conclusion of the Uruguay Round negotiations;[99] and (3) lists of authorized exemptions from most-favored-nation (MFN) treatment filed by WTO Members with respect to certain services sectors.[100] Each of these sources will be considered in turn.

1. The Framework Agreement

Part I of the framework agreement ("Scope and Definition") delineates the reach[101] of the GATS and provides a rather broad definition of trade in services.[102] This definition includes the supply of services in any one of four different "modes." These include: (1) the "cross-border" supply of services;[103] (2) the "consumption abroad" of services;[104] (3) the "commercial presence" of foreign services suppliers;[105] and (4) the temporary "presence of

---

of this Annex by adopting a conclusion of the Sub-Committee on Services that "what appears in the schedules of participants is sufficiently clear and . . . that there was no need for further multilateral work on this issue." Council for Trade in Services, *Issues Relating to the Scope of the GATS: Report by the Chairman of the Sub-Committee on Services*, S/C/1 (Feb. 15, 1995); Council for Trade in Services, *Report of the Meeting Held on 1 March 1995: Note by the Secretariat*, S/C/M/1 (Mar. 22, 1995).

97. GATS, *supra* note 13.

98. WTO, GUIDE TO READING THE GATS SCHEDULES OF SPECIFIC COMMITMENTS AND THE LIST OF ARTICLE II (MFN) EXEMPTIONS [hereinafter GUIDE TO READING GATS SCHEDULES], *at* http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Jan. 10, 2005) ("A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule."). For an excellent explanation of how GATS schedules developed and their foundation in the WTO request-offer system, see Terry, *supra* note 23, at 1004.

99. *See infra* notes 120-26 and accompanying text.

100. *See infra* notes 127-30 and accompanying text.

101. GATS, *supra* note 13, art. I(1) ("This Agreement applies to measures by Members affecting trade in services.").

102. *Id.* art. I(3)(b) (stating that "'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority") (emphasis added).

103. *Id.* art. I(2)(a) (defining "trade in services" as the supply of services "from the territory of one Member into the territory of any other Member"). This mode of supply is implicated whenever the service itself crosses a border. *See* Terry, *supra* note 23, at 1008 ("Mode 1 is involved whenever foreign lawyers create a legal product or advice, which is then sent from outside the U.S. border to clients inside the United States.").

104. GATS, *supra* note 13, art. I(2)(b) (defining "trade in services" as the supply of services "in the territory of one Member to the service consumer of any other Member"). This provision speaks to the ability of a consumer from one Member State to go to another Member State and to buy services while there. *See* Terry, *supra* note 23, at 1008 ("Mode 2, or Consumption abroad, involves the ability of U.S. citizens to purchase abroad the services of foreign lawyers.").

105. GATS, *supra* note 13, art. I(2)(c) (defining "trade in services" as the supply of services "by a

natural persons."[106] This multifaceted definition of "services" may, at first blush, seem rather complicated, but the four modes of supply form the categories in which WTO Member States schedule concessions.[107] The categorization of services in this way also permits meaningful comparisons of the varying restrictions that Member States may impose in particular services sectors.[108]

GATS obligations imposed on Member States come in two basic varieties: unconditional and conditional. Part II of the framework agreement (entitled "General Obligations and Disciplines") contains the unconditional obligations—those undertakings that apply to all WTO Members regardless of whether they have scheduled commitments in specific services sectors.[109] The most important of these obligations is the duty to provide most-favored-nation (MFN) treatment to services and service suppliers of other Members,[110] an undertaking already familiar to students of the GATT. There are, however, other unconditional GATS commitments unknown to the GATT, including measures related to transparency,[111] recognition of academic and professional

---

service supplier of one Member, through commercial presence in the territory of any other Member"). This is also commonly referred to as the "right of establishment." *See* Terry, *supra* note 23, at 1008 ("Mode 3, or Commercial presence, involves the ability of foreign lawyers to set up a permanent presence in the United States, such as a branch office.").

106. GATS, *supra* note 13, art. I(2)(d) (defining "trade in services" as the supply of services "by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member"). *See* Terry, *supra* note 23, at 1008 ("Mode 4, or the presence of Natural Persons, addresses the situation in which the foreign lawyers themselves enter the United States in order to offer legal services.").

107. *See infra* notes 120-26 and accompanying text.

108. GUIDE TO READING GATS SCHEDULES, *supra* note 98 ("The national schedules all conform to a standard format which is intended to facilitate comparative analysis.").

109. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 14, at 165 ("Part II sets out 'general obligations and disciplines.' These are basic rules that apply to all members and, for the most part, to all services.").

110. GATS, *supra* note 13, art. II(1) ("With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.").

111. *See id.* art. III(1):

> Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

qualifications,[112] and provisions relating to internal licensing procedures, or domestic regulations.[113]

The conditional obligations of the GATS only apply to services sectors in which a member has undertaken specific commitments.[114] The obligations are two-fold and are found in Part III ("Specific Commitments"). The first of these obligations is the prohibition on market access restrictions found in Article XVI.[115] Specifically, this provision prohibits a Member from, for instance, placing quotas on the number of foreign services suppliers,[116] limiting the total value of foreign services transactions,[117] or restricting the number of foreign persons that may be employed in a particular services sector.[118]

The second undertaking placed upon scheduled services sectors is found in the national treatment, or non-discrimination, obligation of Article XVII.[119]

---

112. *See id.* art. VII(1):

> For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers . . . a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement with the country concerned or may be accorded autonomously.

113. As used in the GATS, the term "domestic regulation" refers to any generally applicable measure that may have the potential to adversely affect the provision of trade in services for which a Member State has undertaken specific obligations. *See* GATS, *supra* note 13, art. VI(1) ("In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner."). Note, however, that some provisions of Article VI, notably Article VI(2) apply to all WTO Members, whether or not they have scheduled services in a particular sector. *Id.* art. VI(2).

114. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 14, at 171.

115. GATS, *supra* note 13, art. XVI(1) ("With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.").

116. *Id.* art. XVI(2)(a):

> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test . . . .

117. *Id.* art. XVI(2)(b) (prohibiting Members from placing "limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test").

118. *Id.* art. XVI(2)(d) (prohibiting Members from placing "limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test").

119. *Id.* art. XVII:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out

Like the undertaking to provide MFN treatment, the GATS national treatment provision enforces obligations similar to analogous GATT provisions. So, while it seems that the GATS is well on its way to injecting a measure of discipline into services regulations with tried and true liberalizing concepts, these undertakings are conditioned by the two other sources of GATS law: the Members' Schedules of Specific Commitments and the lists of Article II exemptions, both of which are addressed in the next section.

2. Derogating from the GATS: Schedules of Specific Commitments and Article II Exemptions

Although "scheduled" services sectors are subject to the more rigorous market access and national treatment obligations of the GATS, Member States were free to choose which sectors would be submitted to this enhanced discipline.[120] During the initial Uruguay Round negotiations, forty-eight Member States decided to submit their legal services sectors to the obligations inherent in Part III of the GATS.[121] Much of the sting of the market access and national treatment obligations was nonetheless removed by the content of Member States' schedules. Most of the Member States that included legal services on their Schedules of Specific Commitments did so by listing their current regulations.[122] The legal effect of listing current laws in a GATS

---

therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

120. But because inclusion or exclusion of particular services sectors was the subject of intense negotiations, some Member States scheduled services sectors that they might otherwise have sought to protect in order to gain concessions in other sectors and under different agreements. *See*, *e.g.*, CONE, *supra* note 34, § 2.3.1, at 2:6 to 2:7 (explaining how Japan was persuaded to rejoin the GATS legal services negotiations in response to intense pressure from the United States and the European Community).

121. GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 14, at 199 (Table 3.9) (including twenty-five developed countries, nineteen developing countries, and four transition economies). For individual Member States' GATS Schedules, see WTO Services Database onLine!, *at* http://tsdb.wto.org/wto/wtohomepublic.htm (last visited Jan. 10, 2005).

122. *See* Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 967 (1995) (analyzing the schedules of WTO Members that submitted legal services schedules and concluding that "in most cases, the commitments merely preserved existing regulatory

schedule is to effectively exempt those laws from the market access and national treatment obligations.[123] A Member State may not, however, impose regulations in a scheduled sector that are more onerous than the current regulations listed in that Member's GATS schedule.[124] This means that, although few restrictions on trade in legal services were rolled back during the Uruguay Round, future regulations adopted by scheduling Member States can be no more restrictive than current regulations.[125] That is why GATS is sometimes said to impose "standstill" or "grandfathered" obligations on Member States.[126]

Another means by which Member States were given the opportunity during the Uruguay Round to mitigate their obligations arising under the GATS was to submit lists of sectoral exemptions from MFN treatment.[127] If a Member State placed a particular sector on its list, it was no longer obligated to provide MFN treatment in that sector.[128] Although the Article II exemptions lists must be examined in determining the extent of Member States' obligations, very few states included legal services on their respective Article II exemptions list.[129] Therefore, a fuller treatment of the issues surrounding these exemptions is beyond the scope of this Comment.[130]

---

measures").

123. *See* GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 14, at 171 ("[S]ervice commitments resemble those in a GATT schedule at least in one very important respect: they are **bindings** which set out *the minimum, or worst permissible, treatment of the foreign service or its supplier*.") (second emphasis added).

124. CONE, *supra* note 34, at § 2.5.4, 2:32 ("Article XVII will prevent the adoption of any additional discriminatory measures that were not in effect on December 15, 1993, and not expressly covered by a Schedule of Specific Commitments or MFN list in a GATS offer in respect of legal services.").

125. Nevertheless, a Member State may have preserved its right to impose more restrictive regulations in the future by noting in its schedule that a particular sector or mode of supply is "unbound." For a detailed explanation of the terms used in scheduling commitments and the legal effect of those terms, see GUIDE TO READING GATS SCHEDULES, *supra* note 98 ("All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.").

126. *See*, *e.g.*, CONE, *supra* note 34, § 2.5.4 (using the term "standstill" to describe scheduled obligations); Terry, *supra* note 23, at 1005 (noting that the GATS "grandfathers in" existing sets of regulations).

127. GATS, *supra* note 13 (Annex on Article II Exemptions).

128. *Id.* ¶ 1 ("This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.").

129. *See* CONE, *supra* note 34, § 2.4.2, at 2:22 tbl. II (listing GATS members that submitted MFN-exemption lists in legal services, including: Brunei Darussalam, China [which was still negotiating WTO membership at the time], Costa Rica, Cyprus, Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Malta, Singapore, Turkey, and Venezuela).

130. For an excellent discussion of the unsettled issues surrounding MFN exemptions, see Terry,

In summary, in order to determine a Member State's GATS undertakings in respect of legal services, or any other services sector, one must look to three sources of GATS obligations: (1) the unconditional commitments to which all WTO Members are subject, found mostly in Part II of the GATS framework agreement; (2) the commitments found in Member States' Schedules of Specific Commitments to which the market access and national treatment obligations of Part III apply; and (3) the MFN exemptions lists submitted during the Uruguay Round negotiations, which excuse Members from granting MFN treatment in specified services sectors.

B. The GATS and the Possibility of "Reverse Discrimination"

As noted above, during the Uruguay Round negotiations that ultimately led to the adoption of the GATS, WTO Member States were free to choose which of their services sectors would be covered by the new Agreement.[131] By listing current laws regarding the legal services sector on their respective Schedules of Specific Commitments, as the United States and most Member States did, WTO Member States are permitted to continue applying lawyer licensing regulations that are otherwise inconsistent with GATS obligations.[132] This means that even though the GATS may, as a result of the ongoing legal services negotiations,[133] exert a substantial influence on lawyer regulation in the future, the Agreement currently imposes few substantive limitations on a Member State's ability to restrict access to domestic legal markets and has no impact on the way that U.S. lawyers are regulated today.[134]

Nevertheless, Professor Laurel Terry has expressed the concern that the GATS may one day exert a profound influence on the way that all U.S. lawyers are regulated, even lawyers engaged exclusively in domestic practice.[135] She worries that in the give-and-take of future services negotiations, U.S. trade negotiators may be willing to grant foreign lawyers greater multijurisdictional practice rights than those enjoyed by U.S. lawyers.

---

supra note 23, at 1003-04.

131. *See supra* note 121 and accompanying text (reporting that forty-eight Member States listed legal services on their Schedules of Specific Commitments).

132. *See supra* note 123 and accompanying text.

133. *See supra* notes 85-94 and accompanying text.

134. Terry, *supra* note 23, at 1085 ("[T]echnically, the GATS has no impact on U.S. lawyer regulations insofar as they govern U.S. lawyers.").

135. *See id.* ("Is it possible . . . that the GATS might indirectly affect domestic lawyer regulation? In my view, the answer is yes, there is such a possibility, which is one reason why I think those interested only in domestic law of lawyering issues should monitor the GATS 2000 negotiations.").

This, in turn, could lead to calls from the organized bar to grant U.S. lawyers greater multijurisdictional practice rights.[136] Even if the predictions of Professor Terry come to pass, it is not clear that any change in the multijurisdictional practice rights of U.S. lawyers will necessarily be effected in a uniform fashion. As was shown in Part I of this Comment, states have taken very different paths in regulating multijurisdictional practice. Thus, states would likely respond to the pressures engendered by the GATS in different ways, perhaps leading to change in some states and the preservation of the status quo in others. The difficulty of reconciling the current diversity of views in the American legal profession on the propriety of various forms of multijurisdictional practice, and the possibility of greater divergence in the future, have led some to call for the creation of a truly national bar.[137] Even those commentators who may be unwilling to embrace the idea of a national bar foresee the possibility of greater federal involvement in the regulation of lawyers in the future.[138]

---

136. This concern has been well-articulated by Professor Terry:

> Imagine that because of the GATS, among other reasons, a U.S. jurisdiction permits foreign lawyers who have not attended ABA-accredited law schools to practice law in that jurisdiction. What happens to a licensed U.S. lawyer from California who did not attend an ABA-accredited school? Will the jurisdiction continue to deny admission to the California lawyer, even though it permits the foreign lawyer to practice? I suspect that sooner or later, pressure will be brought to avoid this type of discrimination.
>
> Hence, I predict that the GATS' regulation of foreign lawyers will have an impact on U.S. lawyer regulations that only apply to U.S. lawyers. The reason is that if foreign lawyers are granted greater rights than domestic lawyers, the domestic lawyers will object—sooner or later—to this "reverse discrimination" and will lobby for equal treatment.

Id. at 1086-87.

137. *See* Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 703 (1995) ("One might regard the source of most of our present difficulties in interstate law practice to be the failed system of state-by-state certification of lawyers. And, to be sure, the 'solution' that one hears referred to most often is a 'national bar.'"). *See also* Marvin Comisky & Philip C. Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L.Q. 945 (1982); Eric Williams, *A National Bar—Carpe Diem*, 5 KAN. J.L. & PUB. POL'Y 201 (1996).

138. *See*, *e.g.*, Terry, *supra* note 23, at 1072 ("I would not be surprised to see greater federal regulation of lawyers in the future . . . ."). *But see* Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2000). In addressing whether Congress could enact legislation requiring states to recognize *pro hac vice* admission as a right of clients and/or out-of-state counsel instead of a court-granted privilege, Professor Goebel opined that "[c]ongressional legislation is out of the question—Congress's legislative power under the Commerce Clause to deal with a subject so closely related to state courts is quite dubious and political realities rule any such law out." *Id.* at 338. Professor Terry has questioned whether Professor Goebel's analysis would apply outside the *pro hac vice* context and where Congress chooses to regulate lawyers. *See* Terry, *supra* note 23, at 1072 n.261.

As is apparent from the discussion in Part I, the regulation of American lawyers has heretofore been the exclusive province of the states. Therefore, if U.S. GATS commitments eventually lead to calls for a federal role in lawyer regulation, important constitutional questions regarding the federal government's ability to encroach upon states' regulatory prerogatives in this area will undoubtedly arise.

III. THE GLOBAL LAWYER AND THE CONSTITUTION

There are at least three constitutional provisions that are relevant to the question of whether the federal government could assume a greater role in the regulation of the legal profession in the United States as a result of the GATS negotiations. These include the Treaty Clause, the Tenth Amendment, and the Commerce Clause.[139] Each of these provisions is considered below.

A. The Treaty Power Defined

Thus far, this Comment has been primarily concerned with the ways in which the GATS may some day indirectly influence the regulation of U.S. lawyers.[140] It has, until now, taken for granted an antecedent question, namely, whether the federal government may conclude a treaty, like the GATS, that intrudes upon a regulatory sphere historically reserved to the states.[141] That is, could the federal government dictate the conditions under which states must permit foreign lawyers to practice law in their respective jurisdictions? In order to begin to address this issue, we must first look to the constitutional provisions that give effect to treaties within the American federal system.

The first of these provisions expressly grants the treaty-making power to the President and the Senate: The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[142] The Constitution also makes clear that the power to make treaties is exclusively reserved to the federal government.[143]

---

139. Other constitutional provisions may also bear upon the federal government's potential power to regulate lawyers. No attempt is made here to comprehensively address all such bases.

140. *See supra* Part II.

141. For a comprehensive treatment of this question and a suggestion that the answer is not as obvious as it seems, see generally Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

142. U.S. CONST. art. II, § 2, cl. 2.

143. *Id.* art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .");

Treaties are further declared the supreme law of the land, and are thus made binding on the states through the Supremacy Clause.[144] The Constitution also makes treaties justiciable in federal courts.[145] Finally, the Necessary and Proper Clause enables the Congress to pass legislation needed to implement and enforce treaties in the U.S. domestic legal system.[146]

This last power is important because some treaties must be implemented through legislation before they are cognizable in federal courts. In *Foster v. Neilson*,[147] the Supreme Court drew a distinction between "executory" treaties—which require implementing legislation—and "self-executing" treaties—which take effect in the domestic legal system upon ratification. The Court explained:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.[148]

The GATS, which was implemented in the United States by the Uruguay Round Agreements Act,[149] is an example of such an executory treaty.

The Uruguay Round Agreements Act is also interesting, for purposes here, in a different respect. In passing this legislation, Congress exhibited

---

art. I, § 10, cl. 3 ("No State shall . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .").

144. *Id.* art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

145. *Id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

146. *Id.* art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

147. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

148. *Id.* at 314. *See also* Whitney v. Robertson, 124 U.S. 190, 194 (1888).

> A treaty is primarily a contract between two or more independent nations . . . . For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . .

Id.

149. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

significant deference to state law, providing, for example, that no state law may be declared invalid because it is inconsistent with the Uruguay Round Agreements Act.[150] Nevertheless, this deference may have more to do with political expediency than legal necessity. That is to say, it is unclear whether the Constitution requires this deference to state law. In order to properly address this question, one must consider the constraints that the Tenth Amendment may impose on the Treaty Power.

B. The Tenth Amendment and the Limits of the Treaty Power

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[151] As demonstrated in Part I above, a power that has historically been reserved to the states is the power to regulate the practice of law. Although the Supreme Court has placed certain constitutional limits on states' abilities to regulate bar membership,[152] the Court has also acknowledged that:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.[153]

Notwithstanding this apparently wide ambit of state regulatory discretion in bar admission and lawyer discipline, it is unlikely that the Tenth Amendment would be a hurdle to a federal rule, consistent with U.S. GATS obligations

---

150. 19 U.S.C. § 3512(b)(2)(A) (2000):

> No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.

151. U.S. CONST. amend. X.

152. *See*, *e.g.*, Barnard v. Thorstenn, 489 U.S. 546 (1989); Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (holding that a state admission rule that excluded out-of-state residents from the bar violated the Privileges and Immunities Clause of Article IV).

153. Leis v. Flynt, 439 U.S. 438, 442 (1979). This case arose out of the prosecution of Hustler Magazine publisher Larry Flynt in Ohio on state obscenity charges. Flynt's lawyers, who were not qualified to practice in Ohio, were summarily denied admission *pro hac vice* to defend Flynt. The lawyers challenged the denial of admission, alleging violations of the Due Process Clause of the Fourteenth Amendment. The Court held that lawyers wishing to appear before a court *pro hac vice* do not have an interest in representing their client that is protected by the Fourteenth Amendment. *Id.* at 438.

and adopted pursuant to the Treaty Power, that requires states to permit foreign lawyers to practice in their respective jurisdictions.[154]

In fact, in the landmark case of *Missouri v. Holland*,[155] the Court, through Justice Holmes, disclaimed any Tenth Amendment limitation on the Treaty Power.[156] *Holland* involved a treaty concluded between the United States and Great Britain for the protection of migratory birds.[157] The State of Missouri brought a bill in equity to prevent a federal game warden from enforcing the treaty as enacted into federal law.[158] Missouri's central claim was that the statute was "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment."[159] The Court rejected this reasoning, holding that the Treaty Power is not limited by the Tenth Amendment because:

> [B]y Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8 as a necessary and proper means to execute the powers of the Government.[160]

What Justice Holmes seems to be saying in *Holland* is that because the Constitution specifically delegates the Treaty Power to the federal government, it does not fall within the category of "powers not delegated to the United States by the Constitution," with which the Tenth Amendment is concerned, and, therefore, the Tenth Amendment does not constrain the Treaty Power.[161]

---

154. That is, there may be no legal constraints; however, as Charles Wolfram has pointed out, "the current political environment is not conducive to [the federal oversight of lawyers]." Wolfram, *supra* note 137, at 704.

155. Missouri v. Holland, 252 U.S. 416 (1920).

156. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 243 (7th ed. 2004).

157. Migratory Bird Treaty Act of July 3, 1918, Pub. L. No. 65-186, 40 Stat. 755 (current version at 16 U.S.C. §§ 703-712 (2000)).

158. *Holland*, 252 U.S. at 431.

159. *Id.*

160. *Id.* at 432.

161. *See* NOWAK & ROTUNDA, *supra* note 156, at 244. It is unclear whether the Tenth Amendment might impose other limitations on, for instance, regulations enacted pursuant to the commerce power. The Supreme Court had previously attempted to use the Tenth Amendment to impose some restraint on the federal commerce power, starting with *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that Congress could not subject states to minimum wage and maximum hour requirements under the Fair Labor Standards Act). These efforts were apparently abandoned in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (holding that municipal operation of a mass-transit

An argument advanced by Missouri, but rejected by the Court, was that Congress should not be able to adopt legislation by way of the Treaty Power that it would not otherwise be able to adopt pursuant to other constitutional provisions. In other words, Congress should not be able to use the Treaty Power to circumvent the Tenth Amendment.[162] Although Justice Holmes's response to this argument is rather tortured and suggests that the Treaty Power is not limited in this way,[163] Missouri's position is now duly recognized. The classic modern statement of the limits of the Treaty Power was offered by Justice Black in *Reid v. Covert*: "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[164] Thus, if federal involvement in lawyer regulation is thought desirable, a basis of congressional authority, independent of the Treaty Power, must be found to support it. This is true even if the federal government only sought regulation of foreign practitioners consistent with U.S. GATS obligations. Moreover, if the federal government were to become involved in the regulation of U.S. practitioners, a basis of federal regulation must likewise be identified. Given that multijurisdictional

---

system was not a "traditional government function," and, consequently, the transit system's public employees were not exempt from the Fair Labor Standards Act). In *Garcia*, the Court "overruled prior caselaw and held that neither the Tenth Amendment nor the structure of the federal system justified restriction of Congress' power to apply otherwise valid commercial regulations to state or local governments." NOWAK & ROTUNDA, *supra* note 156, at 208. Whether the Court's renewed interest in the protection of federalism principles, evidenced in the 1990s in such cases as *New York v. United States*, 505 U.S. 144 (1992) (striking down a federal law that required states to plan for the disposal of and assume liability for radioactive waste generated within their borders) and *Printz v. United States*, 521 U.S. 898 (1997) (striking down portions of the federal Brady Act that required implementation by local law enforcement officials), would lead the Court to invalidate the kinds of regulations contemplated in this Comment, or even whether these regulations would fall within the *New York-Printz* line of cases, will have to await further inquiry. For an argument that the Court's decisions in the earlier and more restrictive *National League of Cities* line of cases would not impede the creation of a national bar, see Comisky & Patterson, *supra* note 137, at 967.

162. *Holland*, 252 U.S. at 432:

> It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

163. *Id.* at 433:

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . .

164. Reid v. Covert, 354 U.S. 1, 16 (1957).

practice has arisen, at least in part, from the increasingly broad geographic demands of business clients,[165] the Commerce Clause may be an obvious potential basis of federal power to regulate both domestic and foreign practitioners.

C. The Commerce Clause: A New Basis for Federal Regulation of Lawyers?

The Commerce Clause of the United States Constitution provides that the Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[166] If the Commerce Clause were to serve as a basis for federal regulation of lawyers, a central, threshold question would be whether the practice of law is "commerce" within the contemplation of the Constitution. Under the Supreme Court's permissive interpretation of the Commerce Clause as applied from the New Deal era until the mid-1990s,[167] the practice of law, as it exists today, would almost certainly have fallen within the bounds of the federal commerce power.[168] Although the Court's recent, more restrictive, Commerce Clause jurisprudence, first

---

165. *See* Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 127 (2001) ("Over the past thirty years, clients have shifted toward asking firms to provide them with more and more services on a broader and broader geographic basis. For example, globalization has led many clients to ask firms to handle increasingly complex transactions across international borders.").

166. U.S. CONST. art. I, § 8, cl. 3.

167. Perhaps the high water mark of the Court's Commerce Clause jurisprudence came in *Wickard v. Filburn*, 317 U.S. 111 (1942). *See* United States v. Lopez, 514 U.S. 549, 560 (1995) (declaring *Wickard* "the most far reaching example of Commerce Clause authority over intrastate activity"). In *Wickard*, the Court held that a farmer's production of wheat intended solely for home consumption was subject to federal regulation under the Commerce Clause. *Wickard*, 317 U.S. at 127-28. The Court reasoned that although Filburn's wheat production may not itself exert a substantial influence on interstate commerce, the aggregation of production from those similarly situated could detrimentally affect the market for wheat. *Id.* In commenting on the seemingly unlimited reach of the Commerce Clause in this era, one author has joked:

> If a Martian scholar had consulted an interstellar electronic data base in 1998, he/she/it might have concluded from *Wickard v. Filburn* . . . and [its] progeny that Congress could, if it wished, regulate the prices, hours, and sanitary conditions of a 10-year-old child's lemonade stand in Illinois on proof that the lemons came from California and that purchasers of the homemade beverage might drink less Coca-Cola and Gatorade.

BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.04, at 5-24 to 5-25 (1999).

168. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 785 (1975) (holding that the provision of legal services affected interstate commerce in Sherman Act case). *See also* Comisky & Patterson, *supra* note 137, at 964 ("Since the practice of law is 'trade' or 'commerce,' Congress apparently has the power to regulate the practice of law insofar as it is in the stream of interstate commerce or insofar as it substantially affects interstate commerce.").

enunciated in *United States v. Lopez*,[169] may not permit such a definitive conclusion, it is still possible to construct a convincing argument that Congress possesses the power to involve itself in the regulation of American lawyers.[170]

The Court's decision in *Lopez* debunked the supposition that Congress's power to regulate pursuant to the Commerce Clause is unlimited.[171] This case involved the conviction of a Texas twelfth-grader under the federal Gun-Free Schools Zones Act of 1990, which made it a felony to knowingly possess a firearm in or near a school zone.[172] The Court held that the statute exceeded congressional power under the Commerce Clause and, accordingly, affirmed the Fifth Circuit's reversal of the conviction.[173] Writing for a majority of five, Chief Justice Rehnquist identified the limits of the commerce power, distilled from prior cases:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.[174]

The Court quickly concluded that the statute could not be sustained under the first two categories,[175] and proceeded to analyze whether the Act substantially affected interstate commerce, the third category of activity within the congressional commerce power.[176] But the Court seemed to suggest that the only type of regulation that could fall within this third category was one

---

169. *Lopez*, 514 U.S. at 549. *See also* Jones v. United States, 529 U.S. 848 (2000) (striking down a conviction under the federal arson statute because the residence that was the object of the arson was not property in or affecting interstate commerce); United States v. Morrison, 529 U.S. 598 (2000) (striking down a federal civil remedy for victims of gender-motivated violence contained in the Violence Against Women Act, in part, because the statute exceeded congressional power under the Commerce Clause).

170. *See* NOWAK & ROTUNDA, *supra* note 156, at 198 ("One can read too much into *Lopez*. The Court did not overrule any prior case, and it cited with approval . . . *Wickard v. Filburn*.").

171. *See* BITTKER, *supra* note 167, § 5.04[A] at 5-26 to 5-27 ("[I]n 1995, for the first time in sixty years, the Supreme Court struck down a federal statute for going beyond the Commerce Clause's 'judicially enforceable limits.' The vehicle for this ruling, variously described as a dramatic 'about face' and as a mere 'misstep,' was *United States v. Lopez* . . . .").

172. *Lopez*, 514 U.S. at 551.

173. *Id.* at 552.

174. *Id.* at 558-59 (citations omitted).

175. *Id.* at 559.

176. *Id.*

that related to economic or commercial activity, and because the Gun-Free Schools Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," it could not be upheld under the Commerce Clause.[177]

Whether legal practice possesses a "jurisdictional nexus" to interstate commerce[178] sufficient to permit Congress some regulatory control over American legal professionals may depend upon the form and scope of any proposed regulation. But, unlike the gun possession at issue in *Lopez*, there is an undeniable interstate component to the practice of law as it is conducted in the United States today. In fact, the anxiety engendered by the *Birbrower* decision[179] and the creation of the MJP Commission, to note just two examples, were direct results of the increasing prevalence of interstate legal practice.[180]

One's view of whether the practice of law bears a "substantial relation to interstate commerce"[181] is undoubtedly shaped by one's conception of the nature of legal practice itself. Those who see lawyers as multijurisdictional service providers who represent clients across the country and across the globe are apt to conceive of the practice of law as an integral part of the interstate commercial system.[182] But, to those who see legal practice as an inherently local concern that "has nothing to do with 'commerce,'"[183] arguments that removal of interstate barriers to legal practice are proper objects of the federal commerce power are unlikely to be persuasive.[184] Balancing these competing

---

177. *Id.* at 561. The Court, however, did not suggest that all non-economic activity is unconstitutional under the Commerce Clause. If the statute, for instance, had been "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," it might have survived constitutional challenge. *Id.*

178. *See id.* at 562.

179. *See supra* notes 1-5 and accompanying text.

180. *See* MJP REPORT, *supra* note 1, at 9:

> Testimony before the Commission was unanimous in recognizing that lawyers commonly engage in cross-border legal practice. Further, there was general consensus that such practice is on the increase and that this trend is not only inevitable, but also necessary. The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.

181. *Lopez*, 514 U.S. at 558-59.

182. *See* Terry, *supra* note 23, at 994-95 ("Although U.S. lawyers may not be accustomed to thinking in these terms, legal services are important not just to clients, society, and lawyers, but are also part of the world services economy and the U.S. services economy.").

183. *Lopez*, 514 U.S. at 561.

184. *See* Wolfram, *supra* note 137, at 703 n.125:

> It requires an exuberant interpretation of the Interstate Commerce Clause of art. I, § 8, to argue that

views of legal practice will not be easy, but it may be an essential step among many that will bring the American legal profession closer to crafting a rational and coherent system of multijurisdictional practice.

IV. CONCLUSION

Despite an evolving awareness among American bar leaders of the importance of multijurisdictional legal practice, significant barriers to its effective realization in the United States remain. The General Agreement on Trade in Services might be the catalyst that provokes the dismantlement of these barriers and leads to greater multijurisdictional practice rights for American lawyers. Consequently, all lawyers have an interest in the outcome of the legal services negotiations and in shaping the profound changes that may follow in their wake. At the very least, the GATS negotiations should provide an occasion for the American legal profession to assess how well our national practice system serves the needs of clients, the public, and the profession itself. It may well be true that the political will to begin removing interstate practice barriers through an assertion of the federal commerce power does not yet exist,[185] but the organized bar must recognize that the fundamental changes currently transforming the legal profession call for an integrated approach to multijurisdictional practice.

---

interstate commerce is impacted by providing assistance in a divorce or child custody matter in another state. It is true that the often-cited *Wickard v. Filburn* . . . seems to trivialize any judicial role in enforcing the commerce clause as a limitation on Congress's power. But the traditional, long-standing power of courts to regulate lawyers would move Congress into regulatory terrain that it has never so boldly attempted to occupy.

185. *See* MJP REPORT, *supra* note 1, at 13 ("The Commission believes that the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on legal practice, should be preserved, and therefore recommends that the ABA affirms its support for this fundamental principle."). *See also* Wolfram, *supra* note 137.