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U.S. LEGAL ETHICS: THE COMING OF AGE OF GLOBAL AND COMPARATIVE PERSPECTIVES

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This Article reviews the influence of comparative law during the past 100 years on the field of U.S. legal ethics. It begins by defining the field of legal ethics and then divides the last 100 years into three distinct comparative legal ethics eras. The first era consists of the time period between 1904 and 1973, during which there was both domestic and comparative legal ethics scholarship, although a relatively small amount compared to later years. The second time period, which dates from 1974, when legal ethics became a required course, to 1997, represents the coming of age of domestic legal ethics scholarship. This time period also included a significant amount of legal ethics scholarship employing a comparative or global perspective. The Article continues by analyzing the time period from 1998 to the present and offers the thesis that in 1998, there was a fundamental transformation or “sea change” that occurred with respect to the use of global and comparative perspectives to discuss U.S. legal ethics issues. The Article cites several post-1998 examples to demonstrate the coming of age of these perspectives. The final section of the Article identifies various factors that contributed to, and have helped sustain, these heightened comparative and global perspectives.

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I. INTRODUCTION

In 1904, St. Louis hosted the *Universal Congress of Lawyers and Jurists*. This Congress, at which lawyers, judges, and a few academics spoke, has been hailed as the birth of the organized study of comparative law in the United States.¹ One hundred years later, the American Society of Comparative Law, the Washington University School of Law Whitney R. Harris Institute for Global Legal Studies, and the St. Louis University School of Law Center for International Comparative Law jointly sponsored a

1. David S. Clark, *Nothing New in 2000?: Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 888–92 (2001).

conference entitled *Lawyers and Jurists in the 21st Century* to celebrate the Centennial of the 1904 *Universal Congress of Lawyers and Jurists*. One of the sessions at this conference was entitled “Legal Ethics and Professional Responsibility in a Global Context.”

In keeping with the centennial theme of this conference, this Article reviews the influence of comparative law during the past 100 years on the field of U.S. legal ethics. This Article analyzes the field of U.S. legal ethics during three distinct time periods: the distant past, the recent past, and the period from 1998 to the present. Section II of this Article begins with a definition of the “legal ethics” field that is the subject of this Article. Section III addresses the time period from 1904–1973, which I refer to as “the distant past.” Section IV of this Article addresses the time period between 1974 and 1997, which I refer to as “the recent past.” Section V addresses the time period from 1998 to the present. Section V explains why 1998 was used to measure the beginning of the present period and asserts that a fundamental transformation, or “sea change,” occurred in 1998 with respect to the use of global and comparative perspectives in discussions of U.S. legal ethics issues. Section V also explains some of the developments affecting academics, practitioners, regulators, and bar associations that contributed to this “sea change.” Section VI concludes that comparative and global perspectives are valuable additions to the field and are likely to continue in the future.

II. DEFINITION—WHAT IS THE FIELD OF LEGAL ETHICS?

In order to discuss the effect of globalization² on the field of legal ethics and the coming of age of global and comparative perspectives, it is necessary to begin with a definition of the field of legal ethics. This is no small task because there are many topics that might be included within this field and many possible definitions one could use. In this Article, I use the term “legal ethics” to refer to those issues that are studied in required (and elective) legal ethics courses,³ addressed in the scholarship of those who teach such courses,⁴ and discussed at the annual conferences legal ethics scholars

2. In this context, I am using “globalization” as a shorthand reference to the “Global Context” contained in the Symposium’s name. In the interests of space and because other articles in the Symposium address the topic, I have deleted citations to works that discuss the meaning of globalization.

3. See *infra* note 8 and accompanying text (discussing the ABA requirement regarding legal ethics instruction), and note 10 (discussing the type of material covered in such courses).

4. While legal ethics professors often publish articles in traditional law reviews, there are several specialty law journals devoted to legal ethics, including the *Georgetown Journal of Legal*

attend.⁵ Currently, there are 901 members of the American Association of Law Schools (AALS) Section on Professional Responsibility⁶ and approximately 800 members of the American Bar Association's Center for Professional Responsibility.⁷ Given the number of professors teaching courses and the range of available materials (there are more than twenty-seven books available for a legal ethics course), the definition of "legal ethics" that I have proposed provides some parameters and limitations, but still encompasses a wide variety of topics.

On the other hand, unlike many subject matter areas, the content of a legal ethics course does not depend entirely on the professor teaching the course. To my knowledge, there is no other subject taught in U.S. law schools whose content is mandated by external requirements. The American Bar Association, however, requires law schools to teach legal ethics as a condition of accreditation and further requires instruction concerning the American Bar Association (ABA) Model Rules of Professional Conduct.⁸ This ABA requirement is significant because in a large number of states,

Ethics (first issue in 1987) and the University of Alabama's *Journal of the Legal Profession* (first issue in 1976). In addition to these journals, South Texas School of Law sponsors an annual legal ethics conference and publishes papers from that conference. Hofstra University School of Law sponsors a biennial conference on legal ethics and publishes the papers from those conferences. Fordham University School of Law devotes one issue of its law review annually to professional responsibility issues. Furthermore, the annual symposium issue of *The Professional Lawyer* publishes selected papers from the ABA National Conference on Professional Responsibility.

5. In my view, the primary conferences that legal ethics professors attend are the Section of Professional Responsibility sessions at the Annual Meeting of the Association of American Law Schools and the "National Conference on Professional Responsibility" that is sponsored each year in May or June by the ABA Center for Professional Responsibility (CPR). By way of example, in 2003, 299 people attended the "ABA CPR 29th National Conference on Professional Responsibility" and 285 people attended the "30th National Conference on Professional Responsibility." The principal groups that attend the ABA National Conference are academics, practicing lawyers, and regulators of some type. Email from Arthur Garwin, Staff, ABA Center for Professional Responsibility, to author (Jan. 11, 2005) (on file with author). In addition to these and other conferences, Fordham University School of Law, Hofstra University School of Law, and South Texas School of Law have held a number of conferences devoted to particular legal ethics issues. In addition, a number of legal ethics professors attend the Law and Society and RCLS conferences.

6. Email from Jane LaBarbera, Associate Director, Association of American Law Schools, to author (Feb. 8, 2005) (on file with author).

7. Email from Benjamin Woodson, Staff Member, ABA Center for Professional Responsibility, to author (Jan. 11, 2005) (on file with author) (transmitting membership statistics). The number of books is based on the number sitting on my shelves. See *infra* note 11 for some of their titles.

8. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 2004–2005, Standard No. 302, available at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Feb. 28, 2005) ("CURRICULUM . . . A law school shall require all students in the J.D. degree program to receive instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction.").

individuals may not be admitted to the bar unless they attend an ABA-accredited law school.⁹

Notwithstanding the ABA requirements, there is great range in the material covered in required and elected legal ethics courses.¹⁰ Indeed, there is not even agreement within the field about what the course—or its materials—should be called. For example, some textbooks refer to the topic as “the law of lawyering,” whereas other books refer to the topic as professional responsibility, or as ethics, or as legal ethics, or as the legal profession.¹¹ Because the St. Louis Conference panel was entitled “Legal Ethics and Professional Responsibility,” and because many U.S. professors who teach in this field often use the shorthand phrase “legal ethics,” I use that phrase in this Article to refer to any of the topics that might be included in a required or elective U.S. legal ethics course.¹²

9. See, e.g., ABA, Section of Legal Education and National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2004*, Charts III and IV, available at <http://www.ncbex.org/pubs/pdf/2004CompGuide.pdf> (last visited Feb. 28, 2004) [hereinafter *Comprehensive Guide to Bar Admission*]. Even those states that do not limit admission to J.D. graduates of ABA-approved law schools may have requirements that are difficult to satisfy. For example, the state may require graduates of non-ABA approved schools to have practiced for a certain number of years before they are eligible to sit for the bar examination, as does Colorado. *Id.* Interestingly, the requirement that an applicant attend an ABA-accredited law school in order to become a lawyer is a product of the last 100 years. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 851 (Prac. Ed. 1986) (citing LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 525 (1973)) (“As late as 1900 not a single American jurisdiction required that an applicant have either a college or a law school degree.”).

10. For information about the content of legal ethics courses, see ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *REPORT OF THE PROFESSIONALISM COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM* 41–42 (1996); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, *A SURVEY ON THE TEACHING OF PROFESSIONAL RESPONSIBILITY* 7–9 (1986).

11. Compare GEOFFREY C. HAZARD, JR. ET AL., *THE ETHICS OF LAWYERING* (4th ed. 2005), with THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* (8th ed. 2003). See also NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* (1996); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* (6th ed. 2001); JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER’S WORK* (2d ed. 2003); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (3d ed. 2002); MORTIMER D. SCHWARTZ ET AL., *PROBLEMS IN LEGAL ETHICS* (6th ed. 2003); ROBERT F. COCHRAN, JR. & THERESA COLLETT, *CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION* (1996). As a rough measure, I have twenty-seven different potential course books sitting on my shelves.

12. My definition of legal ethics includes those topics addressed by the ABA Model Rules of Professional Conduct and the 1998 Restatement of the Law (Third), Restatement of the Law Governing Lawyers. See MODEL RULES OF PROF’L CONDUCT (2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). The Restatement’s chapters focus on the obligations of an individual lawyer, such as a lawyer’s duty of competence, confidentiality, independence and loyalty, obligations to the public, courts, third parties and the government, malpractice, and topics that focus on the lawyer’s systemic role in the society, including delivery of legal services and access to justice issues.

Because this Article addresses the topic of “comparative or global legal ethics,” one must also define the comparative law field, which is no easy task. For example, in a 1998 Symposium entitled “The Future of Comparative Law,” Professor John Merryman began his article by pointing to the confusion in the comparative law field:

Most comparative lawyers know that their field enjoys, or endures, what generous observers might praise as a healthy scholarly pluralism but more knowledgeable people decry as the sort of scholarly confusion that results from a paradigm crisis. This is old news. Recently, however, it has begun to appear that something new and interesting may be happening in comparative law. Eminent senior and interesting younger scholars seriously discuss the field, find that it lacks form and direction, and propose thoughtful ways of dealing with its problems. . . . At this writing, however, confusion still prevails.¹³

This Article does not attempt to resolve the confusion of what comparative law is or should be,¹⁴ nor does it offer a unifying theory of this field. Instead, my intent is to use an inclusive definition of comparative legal ethics that would embrace all of the approaches Professor Merryman describes; he differentiated between professional comparative law scholarship and academic scholarship, the latter of which included both humanistic and scientific.¹⁵

13. John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT’L & COMP. L. REV. 771 (1998) (footnotes omitted).

14. For another view about the “confusion” in the field, see Catherine A. Rogers, *Gulliver’s Troubled Travels, Or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149 (1998) (book review of UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997) and YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996)).

15. See Merryman, *supra* note 13.

Writers employ varying conceptions of “law,” ranging from legal texts to legal systems (of which more below), and contrasting modes of scholarship, which I will for convenience collapse into professional and academic. By professional comparative law scholarship I mean the sort of work that is principally of interest and value to lawyers, judges and legislators professionally engaged in dealing with concrete legal questions. Academic scholarship can be divided into humanistic and scientific. Humanistic scholarship is in the tradition of philosophical, historical and literary description, narrative, interpretation, analysis and criticism. I use scientific to refer to scholarship that seeks to educe generalizations that can be used as the basis for explanations of and predictions about social-legal behavior. These are categories of convenience and are not mutually exclusive; a book or article may express both professional and academic interests and may combine humanistic and scientific modes of scholarship. There may well be forms of comparative law scholarship that fit into none of these rubrics, although most of the work that one encounters can be crammed into one or the other of them without significant procrustean distortion.

Id. at 771–72.

Professor Merryman predicted that comparative professional scholarship would continue to thrive because lawyers and judges would continue to require information and understanding about foreign law in order to do their professional work.¹⁶ This prediction certainly is true with respect to legal ethics scholarship; many lawyers interact daily with lawyers from other cultures, or work in other countries, and have a practical need to better understand their counterparts and foreign ethics rules. Professor Merryman also predicted that comparative law scholarship would continue to branch out beyond the historically-dominant focus on France and Germany.¹⁷ Although much of the early comparative legal ethics scholarship focused on France and Germany,¹⁸ that is no longer true, probably because transnational legal practice occurs throughout the world. Professor Merryman also predicted that much comparative law academic scholarship would continue to be rule-based;¹⁹ this has proven true of much comparative legal ethics scholarship. Indeed, much of the focus of current comparative legal ethics scholarship is on the development of new rules to fit new global legal ethics situations. Comparative legal ethics scholarship, however, is not always rule-based and has included the humanistic and scientific approaches Professor Merryman described—indeed, some of the samples he cited are also cited in this article.²⁰

In sum, the intent of this Article is to use an inclusive definition of comparative legal ethics, to explain why I contend that 1998 marked the “coming of age” of this literature, and to offer concrete examples of situations that will give rise to the need for, and development of, future comparative legal ethics perspectives. One reason why this Article refers to

16. *Id.* at 781.

17. *Id.* at 781–83.

18. *Id.* at 783. Comparative law has been criticized because of its disproportionate focus on France and Germany:

There is an additional concern: in the United States, the attention of mainstream comparative law teaching and scholarship has been on French and German law, which were familiar to Rudolf Schlesinger and the other influential émigré scholars who were mainly responsible for the comparative law renaissance in U.S. law schools in the 1940s and 50s. Germany’s most important contribution to the civil law was German legal science, a body of legal scholarship based on rules, and France’s most widely admired contribution was the Code Civil, composed of rules. That France and Germany were strategically and economically important to the United States helped to justify an academic, as well as professional, emphasis on their primary rules. That those nations were culturally familiar and accessible to us helped solidify what has become a strong academic tradition.

Id.

19. *Id.*

20. *Id.* at 783–84 (citing, *inter alia*, LAWYERS IN SOCIETY (Richard L. Abel & Philip C. Lewis eds., 1988) and ACCESS TO JUSTICE (Mauro Cappelletti ed., 1978–1979) as examples of non-rule based comparative work).

“global legal ethics” as well as “comparative legal ethics” is because the title of the Symposium panel was “Legal Ethics in a Global Context.” The second reason is because the scope of this Article includes scholarship that addresses global developments that are relevant to the legal profession, regardless of whether such scholarship explicitly invokes a comparative perspective.

III. U.S. LEGAL ETHICS AND THE DISTANT PAST: 1904–1973

When discussing the degree to which U.S. legal ethics have taken into account global or comparative perspectives, it is useful to distinguish between the treatment of legal ethics in academia and the scholarly literature on the one hand, and the developments in legal practice that may inform the issues on the other hand.

A. *The Treatment of Legal Ethics in Academia and Literature Between 1904 and 1973*

Between 1904²¹ and 1973, there was relatively little attention paid to legal ethics issues in the United States in either academia or legal literature. Law schools, for example, were not required by accrediting agencies to offer legal ethics courses.²² Although a number of law schools during this period did offer legal ethics courses,²³ the conventional wisdom is that it was unusual for these courses to be taught by full-time faculty and students rarely took these courses seriously.²⁴

21. I have used 1904 as the starting point for this article because this Symposium celebrated the 1904 Conference. However, legal ethics topics were the subject of scholarship written before 1904. For example, when the ABA adopted its Canons of Professional Ethics in 1908, it drew upon the work of earlier commentators. See Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992). One of the leading commentators of this period was George Sharswood. See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (Philadelphia, T. & J. Johnson & Co. 1884) One of the speakers at this Symposium noted the strong comparative influence in U.S. legal literature in the pre-antebellum period, including works focusing on legal ethics, including some by John Quincy Adams. Michael H. Hoeflich, *The Origins of American Comparative Law: The Revolution to 1900*, 4 WASH. U. GLOBAL STUD. L. REV. 535 (2005).

22. See *infra* notes 43–44 and accompanying text (discussing the amendment to the ABA Standards that added the legal ethics requirement).

23. SUSAN K. BOYD, ABA, SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR 41 (1993) [hereinafter BOYD, THE ABA’S FIRST SECTION]. According to Ms. Boyd, in 1931, seventy-nine percent of AALS-accredited schools and eighty-five percent of non-AALS schools offered some sort of ethics course, and fifty-nine percent of AALS schools and sixty-eight percent of non AALS-accredited law schools offered professional ethics as a formal course. *Id.*

24. *Id.* My perception of the current conventional wisdom is supported by quotations in THE

Using the AALS as another measure of interest in legal ethics, the program for the AALS Annual Meeting did not list a meeting of the AALS Roundtable on the Legal Profession until 1962.²⁵ In 1972, when the AALS first created sections, this Roundtable became the Section on Professional Responsibility.²⁶

One of the books from this period that is still cited is a 1953 book entitled *Legal Ethics* written by Henry Drinker.²⁷ Overall, however, there was relatively little literature written on domestic legal ethics issues during the period from 1904–1973.²⁸ In addition, much of the literature from this period was written in the last ten years of the period, which corresponds to the period in which the ABA was drafting the ABA Code of Professional Responsibility and the Standards of Criminal Justice.²⁹

Perhaps surprisingly, given the relatively limited amount of U.S. scholarship about domestic legal ethics issues, there was a small but noticeable amount of scholarship written during this period about comparative legal ethics issues. Some of the topics addressed include comparative legal education,³⁰ comparative sociology, and entry requirements for judges³¹ and lawyers, including foreign lawyers.³² Other

ABA'S FIRST SECTION:

We are not critical, but it does seem to us, and it seems to most practicing lawyers, that Harvard, Yale, Columbia, etc. were not taking the responsibility . . . for the instruction of those who are coming to the bar in the basic principles of professional conduct. They are not doing it at Yale.

Id.

25. Email from Jane LaBarbera, Associate Director, Association of American Law Schools, to author (Jan. 24, 2005) (on file with author).

26. *Id.*

27. HENRY S. DRINKER, *LEGAL ETHICS* (1953). For sources from the 21st Century citing Henry Drinker, see Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 274 n.109 (2003); W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What do Honor and Shame Have to do With Civil Discovery Practice?*, 71 FORDHAM L. REV. 1567, 1567 n.2 (2003).

28. See generally books and articles cited in OLAVI MARU, *RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE 85–102* (2d ed. 1986) (bibliography); AMERICAN BAR FOUNDATION, *ANNOTATED CODE OF PROF'L RESPONSIBILITY* (1979); Richard L. Abel, *The Sociology of American Lawyers: A Bibliographic Guide*, 2 LAW & POL'Y Q. 335, 338–41 (1980) [hereinafter Abel, *The Sociology of American Lawyers*].

29. See WOLFRAM, *supra* note 9, at 59–60; see generally AMERICAN BAR FOUNDATION, *ANNOTATED CODE OF PROF'L RESPONSIBILITY* (1979).

30. See Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363 (1968).

31. See, e.g., John P. Richert, *Recruiting and Training Judges in France*, 57 JUDICATURE 145 (1973); Glenn N. Schram, *The Recruitment of Judges for the West German Federal Courts*, 21 AM. J. COMP. L. 691 (1973).

32. See generally David S. Clark, *The Organization of Lawyers and Judges*, 16 INT'L ENCYCLOPEDIA COMP. L. chap. 3 (2002); Peter Herzog & Brigitte Ecdivet Herzog, *The Reform of the Legal Professions and of Legal Aid in France*, 22 INT'L & COMP. L.Q. 462 (1973); Samuel Kucherov,

articles during this period addressed the nature of international legal work³³ or specific ethics issues.³⁴

In sum, both domestic and comparative legal ethics literature existed during the period from 1904–1973. As the subsequent sections will show, however, the volume of this literature dramatically increased as the United States moved from the distant past to the recent past and from the recent past to the present.

B. The Legal Practice Context Between 1904 and 1973 Relevant to Comparative and Global Legal Ethics

In order to better understand the comparative and global legal ethics literature during the distant past, it is helpful to have an understanding of the legal practice context for U.S. lawyers that might have given rise to comparative and global perspectives. One commentator has suggested that because it is difficult to measure the amount of international legal work in which a firm engages,³⁵ foreign branch offices can be used as a proxy for the international nature of law firms' work (even though many law firms engage in international work without opening a foreign branch office).³⁶

During the time period of 1904 to 1973, thirty-four U.S. law firms opened seventy-seven foreign offices.³⁷ Only a few of the seventy-seven offices were opened before World War II,³⁸ most opened after World War II.³⁹ The

The Legal Profession in Pre-and Post-Revolutionary Russia, 5 AM. J. COMP. L. 443 (1956); Kaname Ohira & George Neff Stevens, *Alien Lawyers in the United States and Japan—A Comparative Study*, 39 WASH. L. REV. 412 (1964).

33. See generally Benjamin Busch, *The Right of United States Lawyers to Practice Abroad*, 3 INT'L LAW. 297 (1969); Sir Thomas Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154 (1973); Arthur T. von Mehren, *The Significance of Cultural and Legal Diversity for International Transactions*, 1 IUS PRIVATUM GENTIUM 247 (1969); Louis B. Warren et al., *Role of the Lawyer in International Business Transactions*, 58 A.B.A. J. 181 (1972).

34. See Mauro Cappelletti & James Gordley, *Legal Aid: Modern Themes and Variations*, 24 STAN. L. REV. 347 (1972).

35. International trade in legal services remains difficult to measure, even today. A number of entities currently are engaged in efforts to develop various "classification" systems that could be used to measure international legal services. See generally Laurel S. Terry, Materials Submitted to the Technical Subgroup (TSG) of the Expert Group on International Economic and Social Classifications, at <http://unstats.un.org/unsd/class/intercop/techsubgroup/04-10/papers/27-IBA%20documents.pdf> (last visited Feb. 26, 2005).

36. See Carole Silver, *Globalization and the U.S. Market in Legal Services-Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1101 (2000) [hereinafter Silver, *Shifting Identities*].

37. Email from Carole Silver, Senior Lecturer, Northwestern University School of Law, to author (Feb. 4, 2005) (on file with author) (providing these statistics based on research conducted for her *Shifting Identities* article, *supra* note 36. These statistics only reflect office openings; they do not describe whether offices remained open for the entire period).

38. See Silver, *Shifting Identities*, *supra* note 36, at 1108. According to Silver, U.S. law firms who opened foreign offices before World War II began in Paris. *Id.* At least four New York-based

National Law Journal has reported that as of 1979, in the U.S. law firms it tracked, only 615 U.S. lawyers worked abroad and more than half of them worked at Baker & McKenzie.⁴⁰ One commentator has noted that the growth pattern for the foreign offices of U.S. law firms is that most grow “from very small outposts staffed by one or two U.S. lawyers to what amounts to small or medium sized firms capable of performing local and transnational work.”⁴¹

Those lawyers and law firms who did engage in cross-border legal practice often did so in order to serve a particular client. For example, in her article documenting the foreign branch offices of U.S. law firms, Carole Silver explains that William Cromwell, who represented the Paris-based New Panama Canal Company in the Panama Canal negotiations, opened Sullivan & Cromwell’s Paris office to better serve the client.⁴² She also cites the example of George Ball, a partner with Cleary, Gottlieb, Hamilton and Steen, who had served as General Counsel of the French Supply Commission in 1945; Ball’s relationship with Jean Monnet aided the development of the firm’s European practice and the Paris office was opened in order “to advise the European Coal and Steel Community and European atomic energy association (forerunners of the EEC and the EU), the French government, and many of the U.S. manufacturing subsidiaries pouring into postwar Europe.”⁴³

In sum, the fact that a small number of U.S. lawyers were practicing law in other countries during this time period may help explain both the existence of comparative and global literature focused on legal ethics issues and the relatively small quantity of such literature.

firms had Paris offices by 1930, including: Coudert (opened in 1879); Cravath, Swaine, & Moore (reportedly opened in 1929); Sullivan & Cromwell (reportedly opened in 1927); and White & Case (reportedly opened in 1926). *Id.* at 1108–09.

39. *See id.* at 1109–10. After World War II, for example, Cleary, Gottlieb, Steen, & Hamilton opened its Paris office; followed by Cahill Gordon, which arrived in Paris in 1952; Davis, Polk, & Wardwell in 1962; and Shearman & Sterling in 1963. *Id.* at 1110. By 1975, twenty-two U.S. law firms had offices in Paris; eleven were still open in 2001. *Id.*

40. Michael D. Goldhaber & Carlyn Kolker, *Supersonic Lawyers*, AM. LAW. May 2004, at 87.

41. Carole Silver, *Winners and Losers in the Globalization of Legal Services: Offshoring the Market for Legal Services* (Feb. 2005) ___ VA. J. INT’L. L. (2005) (forthcoming) [hereinafter Silver, *Offshoring*].

42. Silver, *Shifting Identities*, *supra* note 36, at 1109 (citing Sullivan & Cromwell, *Pans*, available at http://www.sullcrom.comdisplay.asp?section_id=228 (last visited Mar. 14, 2005)).

43. *Id.* at 1110.

IV. U.S. LEGAL ETHICS AND THE RECENT PAST: 1974–1997

A. *The Treatment of Legal Ethics in Academia and Literature Between 1974 and 1997*

The period between 1974 and 1997, “the recent past,” represents the coming of age of domestic U.S. legal ethics in academia and in scholarly literature. In August 1974, the ABA adopted a rule that required law schools to teach legal ethics as a condition of maintaining accreditation.⁴⁴ Because most U.S. states require prospective bar admittees to attend an ABA-accredited law school, this rule change had a dramatic impact. Although the resolution introducing the legal ethics requirement did not refer explicitly to Watergate,⁴⁵ many commentators have noted that an impetus for this accreditation standard was the extensive involvement of lawyers in the Watergate scandal.⁴⁶

44. *Proceedings of the 1974 Annual Meeting of the House of Delegates*, 99 REP. A.B.A. 568, 578 (1974) (reporting on the ABA’s adoption of a resolution to amend Standard § 302(a)(iii)) [hereinafter *Proceedings*]. This resolution, which was approved by a voice vote without debate, stated:

Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instructions.

Id. The resolution the ABA voted on was not the original resolution submitted. During both the 1974 ABA Midyear Meeting and the Annual Meeting, the State Bar of Arizona had submitted a resolution that would have required law schools to “provide in their curricula a course for credit required for graduation on the subject of the legal profession, covering its history and traditions, its future potential, ethics, professional conduct and attorney-client relations.” *Id.* at 1107.

During the ABA Annual Meeting in August, the State Bar of Arizona agreed to, and the ABA House of Delegates ultimately voted on, a substitute resolution presented by the ABA Section of Legal Education and Admissions to the Bar that toned down Arizona’s proposal by simply requiring instruction in ethics, rather than a separate course. *Id.*

The ABA had approved its first-ever Standards of Accreditation one year previously in 1973; that version had not mentioned legal ethics, but had required skills instruction and instruction about “the legal profession.” ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 98 REP. A.B.A. 351, 354 (1973) (including Standard 302, which required “instruction in the duties and responsibilities of the legal profession,” as well as to offer “training in professional skills, such as counseling, the drafting of legal documents and materials, and trial and appellate advocacy”); see BOYD, THE ABA’S FIRST SECTION, *supra* note 23, at 70–76 (discussing the battles that led to the ultimate adoption, in 1973, of the ABA Standards for the Approval of Law Schools, replacing the 1921 ABA Standards).

45. *Proceedings*, *supra* note 44, at 578, 1107.

46. One commentator has cautioned that “it is tempting to attribute the adoption of Standard 302(a) to the Watergate scandal, but such a literal connection simply cannot exist.” Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1332 (2003). Professor Hayden is correct that the drafting of the original Standard 302 predated Watergate and that the State Bar of Arizona’s February 1974 resolution to require a separate legal ethics course was introduced before the full impact of Watergate was known. *Id.* On the other hand, it seems likely that when the ABA voted in August 1974 to require legal ethics instruction, it did

After the change in accreditation rules, domestic legal ethics blossomed. Although many law schools used adjunct professors to satisfy this requirement, many law schools used new tenure-track or already tenured professors to teach this course. A number of these professors wrote in the legal ethics field in order to satisfy tenure requirements. The increased scholarly writing led to increased debate on the issues, which in turn dramatically expanded the scholarly literature.⁴⁷

Fortunately for the new legal ethics professors who were required to publish in order to obtain tenure, the ABA soon gave them ample material. In 1977, the ABA Kutak Commission began to reexamine the Code of Professional Responsibility.⁴⁸ As one commentator has noted, “in contrast to the secretive drafting process of the Code, this one was open and ‘quasi-legislative’—draft after draft circulated for comments, revision after revision responded to those comments.”⁴⁹ Six years, multiple drafts, and much scholarly literature later, the ABA replaced the Model Code with the ABA Model Rules of Professional Conduct.⁵⁰ One can sense the increased scope of this literature by looking at the citations contained in the “Model Rules Discussion Draft—White Book” that was circulated before the Model Rules

so against the backdrop of Watergate and with knowledge about lawyer involvement in Watergate. One year previously, the ABA had passed a resolution that sounds very much like it was drafted with Watergate in mind. *See, e.g.*, ABA, Summary of Action and Reports to the House of Delegates, 1973 ABA Annual Meeting, Washington, D.C., Aug. 6–8, 1973 at 23 (1973) (adopting a resolution that the ABA reaffirmed its commitment to the ethical standards in the ABA Model Code of Professional Conduct, condemned and denounced any actions on the part of the legal profession which might cast aspersions on the integrity of the profession, and urged that lawyers whose conduct contravenes the Code be disciplined and that a copy of the resolution be sent to the bars of all states).

Conventional wisdom identifies Watergate as the impetus for required legal ethics courses. *See* WOLFRAM, *supra* note 9, at 194 n.62 (“The adoption of the amendment in late summer 1974 followed close on the heels of the involvement of many lawyers in the Watergate scandal.”). Professor Hayden offered an anecdote to support this: “Beginning in the mid-1970s, while in college and working as a legal assistant for a New York law firm, I heard many law students and recent graduates refer to legal ethics courses as ‘Watergate courses.’” Hayden, *supra* note 46, at 1333 n.227. Indeed, one leading ethics casebook begins by reprinting the Doonesbury comic strip about the required legal ethics course. One character says, “Woody, did you see that we’re all being required to take a new course in ethics and the law?” Woody responds by stating, among other things, “All that ethics stuff is just more Watergate fallout! Trendy lip service to our better selves.” THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS I (8th ed. 2003).

47. *See generally* WOLFRAM, *supra* note 9; Abel, *The Sociology of American Lawyers*, *supra* note 28, at 338 (“Lawyers love to write about how other lawyers ought to behave, and this literature has expanded exponentially since Watergate.”).

48. *See* WOLFRAM, *supra* note 9, pp 60–61.

49. Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1253 (1991).

50. *See* ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE MODEL RULES OF PROFESSIONAL CONDUCT, 1982–1998 (1999).

were finally approved—law review article citations are listed for a significant number of the proposed rules.⁵¹

One measure of the robustness of the scholarly literature and debate about legal ethics during this period is the fact that there was extensive state variation when adopting the 1983 ABA Model Rules of Professional Conduct.⁵² This variation stands in contrast to the Model Code of Professional Responsibility, which was originally adopted almost verbatim in all states except California.⁵³

The years between 1974 and 1997 saw the inauguration of several journals devoted to legal ethics—this is another measure that shows the coming of age of domestic U.S. legal ethics. The University of Alabama's *Journal of the Legal Profession* began in 1976 and the *Georgetown Journal of Legal Ethics* began in 1987.⁵⁴

Another example that shows the growing importance of U.S. legal ethics is the American Law Institute's decision to begin work on a Restatement of the Law Governing Lawyers. The American Law Institute began this project in the mid-1980s; over fifteen years later, in 1998, the American Law Institute adopted the Restatement of the Law Governing Lawyers, which was published in final form in 2000.⁵⁵

At the same time that there was a blossoming of scholarly literature and activities regarding U.S. legal ethics, there was also an increase in the amount of legal ethics or legal profession scholarship that utilized a comparative or global perspective. The academics who regularly provided comparative and global perspectives on issues related to legal ethics and the legal profession include Richard Abel, who wrote numerous books and articles that provide comparative and sociological perspectives on the legal profession. His three-

51. MODEL RULES OF PROF'L CONDUCT (Proposed Final Draft 1981).

52. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, MANUAL 01:11-01:74 (2005); STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 2002 (2002) (showing selected variations in state adoptions of each ABA Model Rule). As one noted legal ethics commentator has observed:

A conjunction of political, social, and legal forces has reversed the trend toward uniformity [in lawyer ethics' codes] since the middle 1970s. Wrenching debates within the ABA over such issues as the amendment of the 1969 Code rules on delivery of legal services and advertising were greatly enlarged to include many other core professional issues during the ABA's contentious process of generating what became the 1983 Model Rules of Professional Conduct. Those debates reflect deep divisions within the legal profession itself.

WOLFRAM, *supra* note 9, at 50.

53. See WOLFRAM, *supra* note 9, at 56-57. "The 1969 Code was an impressive and quick success," and by 1972, all states save three had taken steps to adopt the Code and two of those states later adopted it. *Id.*

54. See *Georgetown Journal of Legal Ethics* (first issue in 1987); the University of Alabama's *Journal of the Legal Profession* (first issue in 1976), and *supra* note 4 and accompanying text.

55. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS XXII (2000).

volume work entitled *Lawyers in Society* that he co-edited in 1988–1989 is still one of the most important resources for those interested in comparative perspectives about lawyers, especially comparative sociological perspectives.⁵⁶ Roger Goebel was one of the first commentators to write about legal ethics issues for U.S. lawyers practicing outside the United States.⁵⁷ He also wrote extensively about lawyer access rights in the European Union and encouraged U.S. lawyers to consider a comparative perspective.⁵⁸ Mary Daly, formerly a colleague of Roger Goebel and now the Dean of St. John's University School of Law, was another very important commentator during this time period, regularly adding comparative and global perspectives to legal ethics issues.⁵⁹

In addition to the book by Professors Daly and Goebel, several other books were published between 1974 and 1997 that addressed comparative

56. *Lawyers in Society: Vol. 1, The Common Law World* (Richard L. Abel & Philip S.C. Lewis eds., 1988); *Lawyers in Society: Vol. 2, The Civil Law World* (Richard L. Abel & Philip S.C. Lewis eds., 1988); *Lawyers in Society: Vol. 3, Comparative Theories* (Richard L. Abel & Philip S.C. Lewis eds., 1989).

Richard Abel is a prolific writer; the bibliography on his webpage is ten pages long. *See, e.g.*, University of California Los Angeles Website, at <http://www.law.ucla.edu/faculty/bios/abel/xnavigation.jpg> (last visited Feb. 2, 2005). His most recent book is RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003), which recently was the subject of an issue of the *International Journal of the Legal Profession*. *See, e.g.*, v.11, nos. 1 and 2, Special Issue: Richard Abel's English Lawyer's Between Market and State (Mar. and July 2004). A few of his many other important works are RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988); Richard L. Abel, *Transnational Law Practice*, 44 *CASE W. RES. L. REV.* 737 (1994).

57. *See* Roger Goebel, *Professional Responsibility Issues in International Law Practice*, 29 *AM. J. COMP. LAW* 1 (1981).

58. *See generally* Roger Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TUL. L. REV.* 443 (1989); Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 *FORDHAM INT'L L.J.* 556 (1991–92); Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 *INT'L LAW.* 307 (Spring 2000).

59. *See generally* RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary C. Daly & Roger J. Goebel eds., 1995); Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, 1 *J. INST. STUDY LEG. ETHICS* 297 (1996); Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT'L L.J.* 1239 (1998); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 *EMORY L.J.* 1057 (1997); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Looking at the Differences in Perception Between U.S. and Foreign Codes of Conduct*, 32 *VAND. J. TRANSNAT'L L.* 1117 (1999); Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 *J. LEGAL EDUC.* 480 (2002); Mary C. Daly, *Aristocrat, Monopolist, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany and the United Kingdom After the Disintegration of Andersen Legal*, 80 *WASH. U. L.Q.* 589 (2002). A complete list of Dean Daly's publications is available at <http://new.stjohns.edu/academics/graduate/law/faculty/profiles/Daly/publications.sju> (last visited Feb. 10, 2005).

and global legal ethics issues. Interestingly, a number of these books were published under the imprimatur of a bar association. The books published under the sponsorship of the International Bar Association, for example, included *Global Law in Practice*,⁶⁰ *Liability of Lawyers and Indemnity Insurance*,⁶¹ and *Law Without Frontiers: A Comparative Survey of the Rules of Professional Ethics Applicable to the Cross-Border Practice of Law*.⁶² The Council of the Bars and Law Societies of Europe (CCBE),⁶³ co-sponsored the publication of the *Cross Border Practice Compendium*.⁶⁴ Practitioners also wrote a number of comparative legal ethics books during this period.⁶⁵ Most of these books were written in the late 1980s and 1990s.⁶⁶

At the end of the recent past, several journals devoted to international and comparative legal ethics began publication. The *International Journal of the Legal Profession* began publishing in 1994; this journal, which is edited in England and includes a multi-national International Advisory Board, promotes comparative and global perspectives on lawyers and legal ethics issues. The journal has devoted entire issues to topics such as competence and quality in the legal profession, legal education and training in Europe, legal ethics in Europe, lawyering for a fragmented world, theory in legal education, globalization and legal education, multidisciplinary partnerships, and women in the legal profession.⁶⁷ *Legal Ethics*, a journal based in the United Kingdom which also has a comparative perspective, started publishing in 1998, right as the “recent past” was ending.⁶⁸ These journals

60. GLOBAL LAW IN PRACTICE (J. Ross Harper ed., 1997).

61. ALBERT ROGERS & KARIN C.J. FRIKKEE, LIABILITY OF LAWYERS AND INDEMNITY INSURANCE (1995).

62. LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW (Edwin Godfrey ed., 1995).

63. The CCBE currently represents the interests of more than 700,000 European lawyers. See CCBE, An Introduction from the President, at http://www.ccbe.org/en/ccbe/ccbe_en.htm (last visited Apr. 4, 2005).

64. D.M. DONALD-LITTLE, CROSS BORDER PRACTICE COMPENDIUM (1991).

65. See generally IVO G. CAYTAS, TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY (1992); SYDNEY M. CONE III, THE REGULATION OF FOREIGN LAWYERS (3d ed. 1984); THE LEGAL PROFESSIONS IN THE NEW EUROPE: A HANDBOOK FOR PRACTITIONERS (Alan Tyrrell & Zahd Yaqub eds., 1996).

66. See ACCESS TO JUSTICE, *supra* note 20; SERGE-PIERRE LAGUETTE, LAWYERS IN THE EUROPEAN COMMUNITY (Patrick Latham trans., 1987); LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK (Alan N. Katz ed., 1986); LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES (1987); TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES (Dennis Campbell ed., 1982); FREDERICK H. ZEMANS, PERSPECTIVES ON LEGAL AID: AN INTERNATIONAL SURVEY (1979). See also *supra* note 65 and accompanying text.

67. 1–11 INT’L J. LEGAL PROF. (1994–2004).

68. See generally 1 LEGAL ETHICS 1 (1998).

contributed greatly to the body of literature that provides global and comparative perspectives on legal ethics issues.⁶⁹

In addition to these comparative ethics journals and the books that were published during this time period, a number of other commentators wrote journal articles that provided comparative and global perspectives on U.S. legal ethics issues.⁷⁰ Although a number of these articles appeared in the *American Journal of Comparative Law*, they were not limited to this journal.⁷¹ This scholarship addressed a range of issues, including: comparative legal education;⁷² the legal profession in a particular country;⁷³

69. I have included these two non-U.S. legal ethics journals because they are generally available in the United States and regularly include U.S. ethics issues within their coverage. *See supra* notes 67–68 and accompanying text. As a general matter, however, this article is limited to U.S. journals and does not include articles appearing in European, Canadian, Australian, or New Zealand journals.

70. It is beyond the scope of this article to provide a complete bibliography of comparative legal ethics literature written between 1974 and 1997. On the other hand, when I am doing research, I am pleased to find a string citation of resources. Accordingly, a number of the comparative legal ethics articles written between 1974 and 1997 appear *infra* in these notes.

71. *See infra* notes 71–84. The comparative legal ethics articles that appeared in the *American Journal of Comparative Law* between 1974 and 1997 included: John B. Attanasio, *Lawyer Advertising in England and the United States*, 32 *AM. J. COMP. L.* 493 (1984); David S. Clark, *The Legal Profession in Comparative Perspective: Growth and Specialization*, 30 *AM. J. COMP. L.* 163 (1982); Han Depei & Stephen Kanter, *Legal Education in China*, 32 *AM. J. COMP. L.* 543 (1984); Wilhem K. Geck, *The Reform of Legal Education in the Federal Republic of Germany*, 25 *AM. J. COMP. L.* 86 (1977); George Ginsburgs, *Legal Profession in Korea: The Judicial Scrivener and Others*, 18 *AM. J. COMP. L.* 661 (1970); Roger Goebel, *Professional Responsibility Issues in International Law Practice*, 29 *AM. J. COMP. LAW* 1 (1981); reprinted in *Corporate Counsel's Annual—1982*, p. 1415 (Matthew Bender 1982); Takeo Kosugi, *Regulation of Practice by Foreign Lawyers*, *AM. J. COMP. L.* 678 (1979); Yves-Louis Sage, *The 1990 French Laws on the Legal Profession*, 41 *AM. J. COMP. L.* 649 (1993); Glenn N. Schram, *The Recruitment of Judges for the West German Federal Courts*, 21 *AM. J. COMP. L.* 691 (1973); Martin Shapiro, *The Legal Profession in England and Wales*, 38 *AM. J. COMP. L.* 683 (1990); Henry R. Zheng, *The Evolving Role of Lawyers and Legal Practice in China*, 36 *AM. J. COMP. L.* 473 (1988).

72. *See, e.g.*, TERENCE AND CHARLES HALLIDAY, *LEGAL EDUCATION AND THE RATIONALIZATION OF LAW: A TALE OF TWO COUNTRIES—THE UNITED STATES AND AUSTRALIA* (1987); Alexander J. Black, *Separated by a Common Law: American and Scottish Legal Education*, 4 *IND. INT'L & COMP. L. REV.* 15 (1993); Jutta Bruneel, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 *J. LEGAL EDUC.* 399 (1992); Thomas Carbonneau, *The French Legal Studies Curriculum*, 25 *MCGILL L.J.* 445 (1980); Jill Cottrell, *A Change in the Structure of Indian Legal Education*, 36 *J. LEGAL EDUC.* 331 (1986); Richard J. Cummins, *International Practice and Comparative Legal Studies*, 35 *J. LEGAL EDUC.* 421 (1985); Francis A. Gabor, *Legal Education in Hungary*, 72 *OR. L. REV.* 957 (1993); Wilhelm K. Geck, *The Reform of Legal Education in the Federal Republic of Germany*, 25 *AM. J. COMP. L.* 86 (1977); John H. Harrington, *Legal Education in Australia: Anomie, Angst and Excellence*, 39 *J. LEGAL EDUC.* 189 (1989); Francis Heller & John Peck, *American Law Teachers in an Australian University: Some Observations Gleaned from a Decade of the Kansas-Vienna Exchange Program*, 42 *U. KAN. L. REV.* 507 (1994); David Kennedy, *International Legal Education*, 26 *HARV. INT'L L.J.* 361 (1985); Katalin Kollath & Robert Laurence, *Teaching Abroad: Or, "What Would That Be in Hungarian?"*, 43 *J. LEGAL EDUC.* 85 (1993); Ross Nankivell, *Legal Education in Australia*, 72 *OR. L. REV.* 983 (1993); Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 *VAND. J. TRANSNAT'L L.* 301 (1993) (author compares German and United States legal education);

comparative issues related to the judiciary;⁷⁴ specific lawyer conduct rules;⁷⁵ attorney-client privilege, especially after the European Court of Justice's

Gloria Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-first Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. Trading Partners*, 34 SAN DIEGO L. REV. 635 (1997); Clive Walker, *Legal Education in England and Wales*, 72 OR. L. REV. 943 (1993); Robert F. Williams, *Legal Education in Afghanistan Prior to the Soviet Occupation*, 6 SUFFOLK TRANSNAT'L L.J. 247 (1982). Additional articles regarding legal education in the former Soviet bloc countries, China and Japan are cited *infra* in notes 80–81.

73. See, e.g., Adam Abdelmoula, *Libya: The Control of Lawyers by the State*, 17 J. LEGAL PROF. 55 (1992); Harry Arthurs, R. Weisman & Frederick Zemans, *The Canadian Legal Profession*, 1986 AM. B. FOUND. RES. J. 447 (1986); Alexander Black, *Canadian Lawyer Mobility and Law Society Conflict of Interest*, 28 FORDHAM INT'L L.J. 118 (1994); Viraphong Boonyobbas, *Private Lawyers in Contemporary Society: Thailand*, 25 CASE W. RES. J. INT'L L. 169 (Spring 1993); Albert Brunois, *The Bar and the Legal Profession in France* (1977); Ottavio Campanella, *The Italian Legal Profession*, J. LEGAL PROF. (1994); Gerard J. Clark, *An Introduction to the Legal Profession in Spain*, 5 ARIZ. J. INT'L & COMP. L. 1 (1998); Sydney M. Cone, III, *Foreign Lawyers in France and New York*, 9 INT'L LAW. 465 (1975); John M. Grimes, 'Une et Indivisible'—*The Reform of the Legal Profession in France: The Effect on U.S. Attorneys*, 24 N.Y.U.J. INT'L L. & POL. 1757 (1992); Esa Kontinen, *Professionalism as Status Adaptation: The Nobility, the Bureaucracy, and the Modernization of the Legal Profession in Finland*, 16 LAW & SOC. INQUIRY 497 (1991); Pedro A. Malavet, *Counsel for the Situation, The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389 (1996); William D. Moull, *Law and the Social Sciences in Canadian Legal Education: Some Perspectives on the Arthurs Report*, 34 J. LEGAL EDUC. 515 (1984); Bruce L. Ottley, *Developing Legal Education in a Developing Country: A Case Study of Papua New Guinea*, 31 J. LEGAL EDUC. 183 (1981); Yves-Louis Sage, *The 1990 French Laws on the Legal Profession*, 41 AM. J. COMP. L. 649 (1993); D.R. Salter & J.B. Ojwang, *The Advocate-Client Relationship: A Kenyan Study in Comparative Context*, 33 INT'L & COMP. L.Q. 913 (1984); Haimo Schack, *Private Lawyers in Contemporary Society: Germany*, 25 CASE W. RES. J. INT'L L. 187 (1993); Martin Shapiro, *The Legal Profession in England and Wales*, 38 AM. J. COMP. L. 683 (1990); Ronald P. Sokol, *Reforming the French Legal Profession*, 26 INT'L LAW. 1025 (1992).

74. See, e.g., THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (Mauro Cappelletti ed., 1989); *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEGAL ETHICS 865 (1994); Addison M. Bowman, *Judicial Seminars in Micronesia*, 9 U. HAW. L. REV. 533 (1987); John Merryman, *How Others Do It, The French and German Judiciaries*, 61 S. CAL. L. REV. 1865–67 (1988); Muniz-Arguelles & Fraticelli-Torres, *Selection and Training of Judges in Spain, France, West Germany, and England*, 8 B.C. INT'L & COMP. L. REV. 1 (1985); Peter H. Solomon, *The Role of Defence Counsel in the USSR: The Politics of Judicial Reform under Gorbachev*, 31 CRIM. L.Q. 76 (1988); Thibault & Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271 (1976).

75. See, e.g., P.S. Atiyah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 SW. L.J. 545 (1983); John B. Attanasio, *Lawyer Advertising in England and the United States*, 32 AM. J. COMP. L. 493 (1984); Lauren Dobrowski, *Maintaining the Dignity of the Profession: An International Perspective on Legal Advertising and Solicitation*, 12 DICK. J. INT'L L. 367 (1994); Adam M. Dodek, *Comparative Confidentiality: Lessons from Canada*, 20 J. LEGAL PROF. 51 (1995–96); Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed But Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381 (1995); Olga M. Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988); Gerard Quinn, *The Right of Lawyers to Advertise in the Market for Legal Services: A Comparative American, European and Irish Perspective*, 20 ANGLO-AM. L. REV. 403 (1991); M. Catherine Harris, *Solicitors' Right to Advertise: A Historical and Comparative Analysis*, 15 GA. J. INT'L & COMP. L. 317 (1985); Gloria Ramakus, Note, *Legal Assistance to the Indigent in Italy and the United States: Does Volunteer Defense Really Work?*, 11 BROOKLYN J. INT'L L. 651 (1985).

AM&S case liming the attorney-client privilege to European Union lawyers,⁷⁶ ethics issues faced by lawyers with international practices,⁷⁷ and comparative sociology of lawyers.⁷⁸ The fall of the Berlin Wall and the changes in Eastern

76. See, e.g., Peter H. Burkard, *Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT'L LAW 677 (1988); Carsten R. Eggers & Tobias Trautner, *An Exploration of the Difference Between the American Notion of "Attorney-Client Privilege" and the Obligations of "Professional Secrecy" in Germany*, 7 INT'L L. PRACTICUM 23 (1994); Alison M. Hill, *A Problem of Privilege: In-House Counsel and The Attorney-Client Privilege In The United States and The European Community*, 27 CASE W. RES. J. INT'L L. 145 (1995); Lois Lafli & Nicole van Crombrughe, *Professional Secrecy in Belgium*, 7 INT'L L. PRACTICUM 18 (1994); Helena M. Tavares, *Colloquium on Attorney-Client Privilege in International Practice*, 7 INT'L L. PRACTICUM 9 (1994). The European Union currently is reconsidering the issue of attorney-client privilege and its application to corporate counsel. *Axzo Nobel Chemicals, Ltd. v. Commission of the European Communities*, Case T-253/03, European Court of First Instance; see also Sue Bentch, *Confidentiality, Corporate Counsel, and Competition Law: Representing Multi-National Corporations in the European Union*, 35 ST. MARY'S L.J. 1003 (2004) (discussing the Axzo Nobel case).

77. See, e.g., Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, GEO. J. LEGAL ETHICS (1995); Justin Castillo, Reporter, *International Law Practice in the 1990s: Issues of Law, Policy, and Professional Ethics*, 86 AM. SOC'Y INT'L L. PROC. 272 (1992) (panel, sponsored by the International Economic Law Interest Group, to discuss issues of professional ethics in international law); Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53 (1992/1993); Rona Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business With Mexico*, 22 ST. MARY'S L.J. 605, 647 (1991); Michael J. Maloney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: "Where Angels Fear to Tread,"* 36 S. TEX. L. REV. 933 (1995); Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW J. INT'L BUS. L. 71 (1988); Albert Pergam, *Transnational Opinions: Selecting and Collaborating with Foreign Counsel*, COLUM. BUS. L. REV. 413 (1989); M.W. Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16 INT'L LAW 693 (1982); Donald D. Wilson, *International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel*, 10 INT'L LAW 325 (1976); Takeo Kosugi, *Regulation of Practice by Foreign Lawyers*, AM J. COMP. L. 678 (1979); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250 (1996).

78. See, e.g., *supra* note 56 (citing books and articles by Richard Abel); TERENCE CHARLES HALLIDAY, *THE FRACTURED PROFESSION: STRUCTURAL IMPEDIMENTS TO COLLECTIVE ACTION BY THE AUSTRALIAN LEGAL PROFESSION* (American Bar Foundation 1987); David S. Clark, *The Legal Profession in Comparative Perspective: Growth and Specialization*, 30 AM. J. COMP. L. 163 (1982); John Flood, *The Cultures of Globalization: Professional Restructuring for the International Market*, in PROFESSIONAL COMPETITION AND PROFESSIONAL POWER 145, 146 (Yves Dezalay & David Sugarman eds., 1995); Bryant Garth, *Transnational Legal Practice and Professional Ideology*, 7 MICH. Y.B. INT'L LEGAL STUD. 14 (1985); Gary Bellow, *Legal Services in Comparative Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES 371 (1994); Henry de Vries, *The International Legal Profession—The Fundamental Right of Association*, 21 INT'L LAW 845 (1987); John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169 (1996) [hereinafter *Megalawyering*]; H. Patrick Glenn, *Professional Structures and Professional Ethics*, 35 MCGILL L.J. 424 (1990); Herbert M. Kritzer, *Abel and the Professional Project: The Institutional Analysis of the Legal Profession*, 16 LAW & SOC. INQUIRY 529 (1991); Mark J. Osiel, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2009 (1990) (reviewing *Lawyers in Society*); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994); W.J. Wagner, *The Role and Function of Legal Professions: A Comparative Study*, 16 U. MIAMI INTER-AM. L. REV. 661 (1985).

and Central European countries generated a number of articles⁷⁹ as did developments in China.⁸⁰ Japan also generated much interest.⁸¹ During this time period, Sydney Cone published his treatise *International Trade in Legal Services* that chronicled trade agreements and other laws and practices affecting U.S. lawyers' practice rights in a number of countries.⁸² A number of articles also addressed developments related to international trade in legal services, including the General Agreement on Trade in Services (GATS),⁸³

79. See, e.g., Valentin Blueger, *Observations of a Latvian Practitioner*, 24 VAND. J. TRANSNAT'L L. 389 (1991); Michael Burrage, *Advokatura: In Search of Professionalism and Pluralism in Moscow and Leningrad*, 15 LAW & SOC. INQUIRY 433 (1990); George A. Critchlow, *Teaching Law In Transylvania: Notes on Romanian Legal Education*, 44 J. LEGAL EDUC. 157 (1994); Hanna Gajewska-Kraczkowska, *The Bar in Poland: Professional Ethics and the Legal Position of the Defense Counsel in Criminal Cases*, 21 CAP. U. L. REV. 1125 (1992); Lisa A. Granik, *Legal Education in Post-Soviet Russian and Ukraine*, 70 OR. L. REV. 963 (1993); Zbigniew Gostynski & Alan Garfield, *Taking the Other Road: Polish Legal Education During the Past Thirty Years*, 7 TEMP. INT'L & COMP. L.J. 243 (1993); Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J.L. & HUMAN. 49 (1995); William D. Meyer, *Bulgarian Lawyers in Transition*, 18 J. LEGAL PROF. 123 (1993); William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POL'Y INT'L BUS. 1019 (1995); William D. Meyer, *Remnants of Eastern Europe's Totalitarian Past: The Example of Legal Education in Bulgaria*, 43 J. LEGAL EDUC. 227 (1997); Simona Pipko Roman, *Inside the Soviet Bar: A View from the Outside*, 21 INT'L LAW. 853 (1987); Andras Sajo, *The Role of Lawyers in Social Change: Hungary*, 25 CASE W. RES. J. INT'L L. 137 (1993); Dimitri Siltchenkov, *A Stranger in a Strange Land: Practicing Law After the Breakup of USSR*, 14 WHITTIER L. REV. 503 (1993).

80. See, e.g., Han Depei & Stephen Kanter, *Legal Education in China*, 32 AM. J. COMP. L. 543 (1984); Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751 (1991); Richard A. Herman, *The Education of China's Lawyers*, 46 ALB. L. REV. 789 (1982); Bing Ho, *Chinese Legal Education: A First-Hand Account by a Canadian Law Student*, 8 CALHOUSIE L.J. 32 (1984); Frankie Fook-Lun Leung, *The Re-Emergence of the Legal Profession in the People's Republic of China*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 275 (1985); Alice Erh-Soon Tay & Eugene Kamenka, *Law, Legal Theory and Legal Education in the People's Republic of China*, 7 N.Y.L. SCH. J. INT'L & COMP. L. 1 (1986); Henry R. Zheng, *The Evolving Role of Lawyers and Legal Practice in China*, 36 AM. J. COMP. L. 473 (1988); Shen Zongling, *The Role of Lawyers in Social Change: China*, 25 CASE W. RES. J. INT'L L. 163 (1993).

81. See, e.g., John O. Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape from Freedom*, 5 UCLA PAC. BASIN L.J. 1 (1986); Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 BYU L. REV. 627 (1987); Melissa J. Krasnow, *The Education and Development of Legal Professionals in Japan*, 18 J. LEGAL PROF. 93 (1993); Richard S. Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL EDUC. 27 (1989); *Japan's New Foreign Lawyer Law*, 19 LAW & POL'Y INT'L BUS. 361 (1987); *Foreign Lawyers: Regulation of Foreign Lawyers in Japan—Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, Law No. 66 of 1986, Introduced in the House of . . .*, 28 HARV. INT'L L.J. 124 (1987).

82. SYDNEY M. CONE, III, *INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE* (1996).

83. See, e.g., 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, 964, 967–68 (1995); Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 178 (1996); Annie Eun-ah Lee, Note, *Toward Institutionalization of Reciprocity in Transnational Legal*

NAFTA,⁸⁴ the European Union's directives or laws allowing mobility of lawyers within the EU (and accompanying ethics rules),⁸⁵ the Code of Conduct developed by the CCBE,⁸⁶ and the American Bar Association's adoption of a model foreign legal consultant rule.⁸⁷ During this period, the Organization of Economic Cooperation and Development (OECD) sponsored several conferences on professional services, in connection with the development of the GATS, and published the papers from those conferences.⁸⁸

Thus, during the recent past, there was a significant amount of global and comparative legal ethics literature. Despite the amount written, however, this literature was only a small portion of the scholarship and perspectives used to consider U.S. legal ethics issues. Moreover, it is my impression that this literature was rarely integral to U.S. consideration of legal ethics issues.

Services: A Proposal for a Multilateral Convention Under the Auspices of GATT, 13 B.C. INT'L & COMP. L. REV. 91 (1990). I have written extensively on the GATS, but did not do so until 2000. For the author's writings on the GATS, see *Terry Publications: GATS and Legal Services*, available at <http://www/personal/psu.edu/faculty/l/s/lst3/publications%20by%20topic.htm#2> (last visited Feb. 12, 2005).

84. See, e.g., Flores, *supra* note 83; *The Canada-U.S. Free Trade Agreement: Legal Services Left Out*, 3 GEO. IMMIG. L.J. 207 (1989); *Transnational Legal Practice in a North American Common Market*, 6 FLA. J. INT'L L. 337 (1991).

85. See, e.g., *supra* note 58 (listing articles by Roger Goebel); Jonathan Barsade, *The Effect of EC Regulations Upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 INT'L L. REV. 313 (1994); Nigel Foster, *European Community Law and the Freedom of Lawyers in the United Kingdom and Germany*, 40 INT'L & COMP. L.W. 607 (1991); Todd Saunders, *The EEC and the U.S.A.: Will the Gates Be Opened for American Law Firms in 1992?*, 3 TEMPLE INT'L & COMP. L.J. 191 (1989); Bernhard Schloh, *Freedom of Movement of Lawyers within the European Economic Community*, 9 ST. LOUIS U. PUB. L. REV. 83-90 (1990); Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe*, 26 INT'L LAW. 125 (1992); Heinz Weil, *The Proposal for a Directive on the Right of Establishment for Lawyers in the European Community*, 15 FORDHAM INT'L L.J. 699 (1992).

86. See, e.g., Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993); John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673 (1992).

87. See, e.g., American Bar Association Section of International Law and Practice, *Report to the House of Delegates: Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207 (1994); SYDNEY M. CONE, III, *THE REGULATION OF FOREIGN LAWYERS* (1977). For articles written after 1997, see Carol Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998).

88. Organisation for Economic Co-operation and Development, *LIBERALISATION OF TRADE IN PROFESSIONAL SERVICES* (1995); Organisation for Economic Co-operation and Development, *INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ASSESSING BARRIERS AND ENCOURAGING REFORM* (1996); Organisation for Economic Co-operation and Development, *INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ADVANCING LIBERALISATION THROUGH REGULATORY REFORM* (1997).

B. The Legal Practice Context Between 1974 and 1997 Relevant to Comparative and Global Legal Ethics

During “the recent past,” the global nature of U.S. lawyers’ practices increased dramatically. Because these practice developments may have influenced the literature, it is useful to review these developments. I have, once again, used the foreign branch offices of U.S. law firms as a proxy for measuring the increased international legal work done by U.S. law firms. In the twenty-three years between 1974 and 1997, sixty-nine U.S. law firms opened 356 foreign offices, as compared with seventy-seven new offices opened during the seventy years included in the distant past.⁸⁹ In other words, there was an increase of more than 350% of new foreign offices during the recent past, as compared with the distant past. In London, for example, fifteen U.S. law firms had branch offices in 1973; by 1998, which is the beginning of the period I have labeled “the present,” fifty-seven firms had opened London offices, although six of these offices closed after opening.⁹⁰ One U.S. law firm had an office in Hong Kong in 1972, whereas forty-two U.S. firms had such offices by 1998.⁹¹ In Tokyo, three U.S. law firms had offices by 1972, but this had increased to thirty-two firms by 1998.⁹² During the time period of the recent past, U.S. law firms also opened offices in other parts of Europe, Asia, the Middle East, and South America.⁹³ Some of the reasons why firms opened foreign branch offices included the evolution of practices, which moved from serving the needs of one particular client, to “meet and greet” functions, to advising on U.S. law, and finally, to advising on local law using locally trained lawyers.⁹⁴

This increase in law firm foreign branch offices should not be surprising given the dramatic increase in international trade by clients. For example, during the period between 1973 and 1998, U.S. exports of goods and services to other countries increased from \$91.2 billion to \$933.5 billion while

89. Email from Carole Silver, Senior Lecturer, Northwestern University School of Law, to author (Feb. 4, 2005) (on file with author).

90. See Silver, *Shifting Identities*, *supra* note 36, at 1113 tbl. 2.

91. *Id.* at 1116–17 tbl. 3.

92. *Id.*

93. For example, Silver explains that “Asia was the focus of expansion for U.S. firms from the mid-1980s through the mid-1990s” and that “Petro-dollars attracted twelve U.S. law firms to oil-rich cities in the Middle East from the late 1970s through the mid-1990s.” *Id.* at 1114. Other places where law firms opened offices during the 1974–1997 period included Shanghai, Beijing, Singapore, Taiwan, India, Australia, Vietnam, Moscow, and various cities in Central Europe. The move to Central Europe was short-lived for some, with half of the firms closing their Central European offices by the end of 1999. *Id.* at 1119. In Central and South America, firms have opened branch offices in Mexico, Brazil, Ecuador, and Argentina. *Id.* n.113.

94. Silver, *Offshoring*, *supra* note 41, at 23–25.

imports to the U.S. went from \$89.3 billion to \$1.096 trillion.⁹⁵ This is an increase of greater than 900 percent in exports and more than 1100 percent in imports:

In order to place the global and comparative legal ethics perspectives in context, it is also useful to understand the legal services regulatory changes that occurred during the recent past. The European Union underwent dramatic changes during this period. After a series of cases from the European Court of Justice invalidating local bar rules,⁹⁶ the European Community adopted a directive, or law, in 1977 that permitted lawyers from one EC country to provide services temporarily in another EC country.⁹⁷ In the Lawyers' Services Directive, the European Community adopted a system of "mutual recognition," in which each EC country agreed to recognize the qualifications of lawyers from another EC country.⁹⁸

Twelve years later, the European Community adopted a directive that affected the right of a lawyer from one EC country to relocate and be able to practice permanently in another EC country.⁹⁹ This 1988 directive, which was not limited to lawyers, was known as the Diplomas' Directive and has been described as follows:

The Diplomas Directive requires mutual recognition by EC Member States of higher education diplomas and regulated professional

95. See U.S. Dept. of Commerce, Bureau of Economic Analysis, Balance of Payments—International Transactions, U.S. International Transactions, 1960–present, available at http://www.bea.gov/bea/international/bp_web/simple.cfm?anon=71&table_id=3&area_id=3.

96. See generally Case 2/74, *Jean Reyners v. Belgium*, 1974 E.C.R. 631 (1974) (holding that it was improper for Belgium to require Belgian citizenship as a condition for becoming a Belgian *avocat*); Case 33/74, *van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299 (1974) (holding that it was improper for the Netherlands to deny van Binsbergen, a Dutch lawyer, the right to appear in a Netherlands proceeding merely because van Binsbergen had become a Belgian resident, although the court did indicate that it would be proper to impose specific requirements if they have as their purpose the application of professional rules justified by the general good). See also Case 71/76, *Jean Thieffry v. Conseil de l'ordre des avocats a la cour de Paris*, 1977 E.C.R. 765 (the Court held that it was improper for the Paris Bar Council to deny admission, on the ground of lack of a French law degree, to Thieffry, a Belgian advocate, who held a Belgian diploma of doctor of laws which had been recognized by a French university as equivalent to the French degree in law, and who subsequently obtained the qualifying certificate for the profession of advocate, having sat and passed that examination, in accordance with French legislation).

97. Council Directive 77/249 of 22 March 1977 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. (L 78) 17 [hereinafter Council Directive 77/248]. For a discussion of this directive, see CrossingtheBar.com's Electronic Interview with Professor Laurel S. Terry, at <http://www.personal.psu.edu/faculty/l/s/1st3/Electronic%20Interview%20of%20Professor%20Laurel%20Terry.doc> (last visited Feb. 8, 2005).

98. Council Directive 77/249, *supra* note 97.

99. Council Directive 89/48 of 21 December 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and training of at Least Three Years' Duration, 1988 O.J. (L 19) 16.

licenses for those professions that are not subject to a separate directive. Under the Diplomas Directive, the Host State can require that the transient professional either take an aptitude test or complete an adaptation period of not more than three years. For the legal profession, it is the Host State, not the individual, who has the right to determine whether to require an adaptation period or aptitude test. All EC jurisdictions except Denmark have opted to require an aptitude test rather than an adaptation period.¹⁰⁰

Although the 1988 Diplomas Directive applied to lawyers, there was interest on the part of both the CCBE and the European Commission in developing an establishment directive that applied specifically to lawyers. It was not easy, however, for the CCBE and the Commission to reach agreement about the content of such a directive.¹⁰¹ After years of debate among the CCBE, the Commission, and the Parliament, the Lawyers' Establishment Directive 98/5 received its final approval from the Commission in 1997 and from the Council in March 1998.¹⁰²

The Lawyers' Establishment Directive is important because it is exceedingly liberal and is now regularly cited during discussions of domestic U.S. legal ethics policy. The Lawyers' Establishment Directive permits a lawyer from one EC country to establish permanently in another EC country, with very few requirements other than registering with the "Host" country.¹⁰³

100. Electronic Interview with Professor Laurel S. Terry, *supra* note 97. For additional information about this directive and its implementation in European Union countries, see the website maintained by Dr. Julian Lonbay, at <http://elixir.bham.ac.uk/menu/country/default.htm> (last visited Feb. 6, 2005).

101. It took the CCBE years to prepare a draft establishment directive, but after it did so, the Commission issued a draft directive that differed substantially from the CCBE's recommendation and included a five year limit on practicing under home title. *See* SYDNEY M. CONE III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE § 8.3.4.4 (1996) (discussing reports from the CCBE and from the European Parliament's Committee on Legal Affairs and Political Rights); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country*, 63 TUL. L. REV. 443 (1989) (providing history of CCBE's efforts to develop draft establishment directive prior to their "experts" draft). The Commission later issued a revised draft directive which differed substantially from its first draft and took into account many of the comments it had received from the CCBE and the Parliament. *See* Amended Proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, 1996 O.J. (C 335) 19. This revised draft became the basis for the current directive. *See infra* note 102.

102. Directive 98/5 of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, 1998 O.J. (L 36) 77 [hereinafter *Lawyer's Establishment Directive*].

103. *See id.* For additional information on this Directive, see Electronic Interview with Laurel S. Terry, *supra* note 97; Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European*

Another important legal services regulatory change that occurred during the recent past was the development of the CCBE Code of Conduct. In 1988, the CCBE adopted a code of conduct for European Community lawyers to use when interacting with one another.¹⁰⁴ Although the CCBE itself had no power to make its Code binding, most European Community countries incorporated the CCBE Code, in some fashion, into their ethics codes.¹⁰⁵ Part of the impetus for the CCBE Code of Conduct was the 1977 Lawyers' Services Directive and the growing need for European lawyers to determine which ethics codes would apply when lawyers from different European countries interacted with one another. Because it took several years for European lawyers to agree on the contents of the CCBE Code of Conduct,¹⁰⁶ during the recent past, there were vigorous debates throughout Europe about legal ethics issues and heightened sensitivity to comparative legal ethics issues.

Another important regulatory change during the recent past was the increased importance of EU capital cities and the response of U.S. lawyers to these developments. Although a number of U.S. law firms opened offices in Brussels starting in the 1960s because of Brussels' role in the European Community, this increased dramatically with greater EU integration in 1992.¹⁰⁷ Indeed, the Brussels Bars, which historically had been resistant to foreign law firms, signed an agreement with the American Bar Association in 1993 that established the conditions under which U.S. lawyers (and later

Union: Lessons for the United States?, 34 INT'L LAW. 307 (2000); 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 (1998) (comparing the EC scheme of practice with the other major global MJP schemes) [hereinafter Terry, *Cross-Border Legal Practice*].

104. CCBE, CODE OF CONDUCT OF LAWYERS IN THE EUROPEAN UNION, available at http://www.ccbe.org/doc/EN/code2002_en.pdf (last visited Mar. 3, 2005). For more information about the CCBE Code of Conduct, see Laurel S. Terry, *The Revised CCBE Code of Conduct*, in RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary C. Daly & Roger J. Goebel, eds., forthcoming 2005); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993) [hereinafter Terry, *CCBE Code Part II*]; Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993) [hereinafter Terry, *CCBE Code Part I*]; John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673 (1991-1992).

105. For information on the current implementation of this Code by CCBE members, see CCBE, *National Situations Regarding the CCBE Code of Conduct* (Dec. 2002), available at http://www.ccbe.org/doc/En/tab1_transp_deonto_en.pdf (last visited Feb. 16, 2005). See also Terry, *CCBE Code Part II*, *supra* note 104, at 383-85 (describing Austria's original adoption of the CCBE Code, which made its application voluntary).

106. See Terry, *CCBE Code Part I*, *supra* note 104, at 7-10 (describing the drafting process, which began in 1982 and continued until the Code was adopted in 1988).

107. See, e.g., Silver, *Shifting Identities*, *supra* note 36, at 1111.

foreign lawyers) could practice in Brussels.¹⁰⁸ Thus, the lawyer regulatory developments affected the practice context and the practice context undoubtedly contributed to the regulatory developments.

Another crucial regulatory development during this period was the inclusion of legal services within regional and international trade agreements. The North American Free Trade Agreement (NAFTA) includes legal services within its coverage.¹⁰⁹ Even more important than NAFTA, however, was the 1994 General Agreement on Trade in Services (GATS). The GATS was one of several agreements that were part of the agreement creating the World Trade Organization.¹¹⁰ The GATS was the first international, rather than regional, trade agreement to include services, such as legal services, within its coverage.¹¹¹

During the period of the recent past, the two general-purpose world bar organizations—the International Bar Association (IBA) and the Union Internationale de Avocats (UIA)¹¹²—began to actively discuss and debate global legal ethics issues. Between 1974 and 1997, the IBA issued a number of resolutions and standards relevant to the regulation of the practice of law, including the 1990 IBA Standards for the Independence of the Legal Profession, the 1995 IBA Statement of General Principles for Ethics of Lawyers, and the 1995 Resolution on Money Laundering.¹¹³ During this

108. See generally Terry, *Cross-Border Legal Practice*, supra note 103.

109. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA]. See also Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 184–88 (1996); Terry, *Cross-Border Legal Practice*, supra note 103, at 1397–1400 (providing a short overview of NAFTA's application to lawyers); Laurel S. Terry, Submission to the ABA Commission on Practice, Chart Summarizing Provisions of the North American Free Trade Agreement (NAFTA) and the Proposed NAFTA Model FLC Rule (May 21, 2001), available at http://www.abanet.org/cpr/mjp-comm_terry12.doc (last visited Feb. 9, 2005).

110. See General Agreement of Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS]. For additional information about GATS and legal services, see GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS (2002), available at <http://www.ibanet.org/images/downloads/gats.pdf> (last visited Apr. 23, 2005); 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 (2001), as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002) [hereinafter Terry, *GATS' Applicability to Transnational Lawyering*]; ABA GATS Webpage, available at http://www.abanet.org/cpr/gats/gats_home.html (last visited Feb. 5, 2005).

111. See Terry, *GATS' Applicability to Transnational Lawyering*, supra note 110, at 994.

112. Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN STATE INT'L L. REV. 695, 698–99 (2004).

113. International Bar Association (IBA), IBA Resolutions, available at http://www.ibanet.org/aboutiba/IBA_Resolutions.cfm (last visited Feb. 3, 2005).

period, the IBA also revised its 1956 Code of Ethics.¹¹⁴ The UIA's activities during this period included sponsoring a seminar in February 1995 on "GATS and the Legal Profession" that was an eye-opener for its member bars.¹¹⁵

In sum, there were significant practice developments that occurred during the recent past that undoubtedly influenced the nature of scholarly writing about legal ethics issues.

V. U.S. LEGAL ETHICS AND THE PRESENT: 1998–2005

A. *Introduction—Why Measure from 1998?*

In November 1998, a sea change¹¹⁶ occurred with respect to the way in which the U.S. legal community approached discussions of U.S. legal ethics issues. In my view, November 1998 marks the first time that global and comparative perspectives became integral to the mainstream discussions of a domestic U.S. legal ethics issue.

The November 1998 sea change took place under the auspices of the ABA Commission on Multidisciplinary Practice (ABA MDP Commission). The ABA MDP Commission was "directed to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public."¹¹⁷ Among other things, it was asked to consider the "[a]pplication of current ethical rules and principles to the provision of legal services by professional service firms, and recommend any modifications or additions that would serve the public interest."¹¹⁸

In order to develop its policy position on multi-disciplinary practice issues, the ABA MDP Commission invited interested persons to submit written comments. It also held "hearings" at which it invited interested parties to speak to Commission members.¹¹⁹ During the first set of public

114. See IBA, INTERNATIONAL CODE OF ETHICS (1988), available at <http://www.ibanet.org/images/downloads/International%20Code%20of%20Ethics.pdf> (last visited Mar. 28, 2005).

115. Email letter from Delos Lutton, President Elect, Union Internationale des Avocats, to author (Feb. 22, 2005) (on file with author).

116. I'm using the term "sea change" to mean "a drastic transformation." WEBSTER II NEW COLLEGE DICTIONARY 994 (2001).

117. ABA Commission on Multidisciplinary Practice (ABA MDP Commission), About the Commission, available at http://www.abanet.org/cpr/mdp_abt_commission.html (last visited Jan. 22, 2005).

118. *Id.*

119. See generally ABA MDP Commission webpage, at <http://www.abanet.org/cpr/multicom.html> (last visited Jan. 22, 2005). This webpage includes the documents issued by the ABA MDP Commission on which it sought comment, including the Background Papers, Hypotheticals and

hearings, the ABA MDP Commission received a heavy dose of global and comparative perspectives: seven of the twenty-one witnesses who testified before the ABA MDP Commission were from outside the United States.¹²⁰

During subsequent hearings, as the ABA MDP Commission considered whether to recommend any changes to U.S. domestic legal ethics rules, it continued to hear comparative and global perspectives. For example, when the ABA MDP Commission held its second set of hearings in February of 1999, it heard from an additional four foreign witnesses.¹²¹ At the fourth set of public hearings, in August 1999, the ABA MDP Commission heard from twenty-one witnesses, nine of whom were associated with foreign or international bar associations.¹²² From my perspective, the global and

Models, and Interim and Final Reports. It also includes the written and oral testimony given to the ABA MDP Commission. The ABA had used a similar format of hearings and written comments for the ABA Commission on the Evaluation of the Rules of Professional Conduct, more commonly known as the Ethics 2000 Commission. *See also* ABA Ethics 2000 Commission webpage, *available at* <http://www.abanet.org/cpr/ethics2k.html> (last visited Jan. 22, 2005).

120. ABA, Commission on Multidisciplinary Practice, Schedule for November Hearings (1998), *available at* <http://www.abanet.org/cpr/multicomsched.html> (last visited Jan. 22, 2005). The Commission heard testimony from: Michael Govt (CCBE); Gerard Nicolay (Pricewaterhouse Coopers, Paris); Alison Crauley (Law Society of England and Wales); Elizabeth Wall (Cable & Wireless UK); J. Rob Collins (Law Society of Upper Canada); Andrew Scott (Law Institute of Victoria); and Thomas D. Verhoeven (German firm of Oppenhoff & Radler). *Id.* (providing links to the oral testimony from the hearing participant as well as written submissions). One of the reasons for the large foreign participation, was their longer experience with multidisciplinary partnerships between lawyers and nonlawyers. Other commentators have offered another explanation for the extensive foreign participation in the ABA MDP Commission hearings:

It is understandable why leaders of the more conservative bar associations from around the world came to the U.S. and sought to influence the ABA debates. They recognized that the outcome of debates about regulation in the U.S. would be more important than events in the rest of the world.

Bryant G. Garth & Carole Silver, *The MDP Challenge In The Context of Globalization*, 52 CASE W. RES. L. REV. 903, 905 (2002). In contrast to Garth and Silver's article, this article focuses more on the results of this participation by foreign lawyers and bars, rather than the causes.

121. Those testifying included:

- Neil Cochran, who practiced with an MDP in Scotland;
- Dr. Hans-Jürgen Hellwig, who was Vice-President of the Deutscher Anwaltsverein (German Bar Association);
- Gerard Mazet, the President of the International Commission of the French National Bar Council); and
- Simon Potter, who was a Member of the Canadian Bar Association International Practice of Law Committee.

ABA, Commission on Multidisciplinary Practice, Midyear Meeting Schedule (Feb. 4, 2999), *available at* <http://www.abanet.org/cpr/multicomsched299.html> (last visited Jan. 22, 2005) (containing links to the testimony of these individuals).

122. Those testifying included:

- Delos N. Lutton, from the Union Internationale des Avocats (UIA) Subcommittee on Multidisciplinary Practices;
- Bâtonnier Henri Ader, Ordre des Avocats à la Cour de Paris;

comparative perspectives that these witnesses brought to the table had an impact on the ABA MDP Commission's deliberations and recommendations.¹²³

Prior to November 1998, there certainly had been other situations in which global issues had been raised in U.S. legal conferences, legal education conferences, and even legal ethics conferences.¹²⁴ Nevertheless, I have been active in this field since 1986 and 1998 "felt" very different to me—the global and comparative discussions seemed to be received as integral to the main discussion, rather than as an interesting side-note or tangent. The ABA MDP Commission hearings were not the first time comparative views were heard, but the November hearings were a turning

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- Dan Brennan QC, Chairman, General Council of the Bar of England and Wales;
 - John Craig, President-Elect, Inter-Pacific Bar Association;
 - Elisabet Fura-Sandström, President, Swedish Bar Association;
 - Jon Stokholm, President of the Danish Bar and Law Society;
 - Ramon Mullerat, Former President, Council of the Bars and Law Societies of the European Community (CCBE);
 - Dr. Hans-Jürgen Hellwig of Germany, Vice-President of the German Bar Association;
 - and
 - Geoff Provis, Law Council of Australia.

ABA MDP Commission, Schedule for Multidisciplinary Practice Hearing (Aug. 8, 1999), *available at* <http://www.abanet.org/cpr/multicomshed899.html> (last visited Mar. 4, 2005) (containing links to the testimony of these individuals).

123. I attended all of the ABA MDP Commission's hearings up until the point at which it issued its Interim Report. My impressions are based on the discussions that occurred during these hearings among Commission members and the significance given to foreign developments in the various documents issued by the Commission. For a discussion of the information considered by the Commission, including foreign and international information, see ABA MDP Commission, *Background Paper on Multidisciplinary Practice: Issues and Developments*, pt. 1 (Jan. 1999), *available at* <http://www.abanet.org/cpr/multicomreport0199.html> (last visited Jan. 22, 2005); ABA MDP Commission, *Updated Background and Informational Report and Request for Comments*, pt. 1 (Dec. 1999), *available at* <http://www.abanet.org/cpr/febmdp.html> (last visited Jan. 22, 2005).

124. For example, the 1995 ABA Annual Meeting included a program entitled "The Globalization of the American Law School." See David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. SUPP. 261, 268 (1998). In 1998, The American Society of International Law meeting included a panel on "International Legal Ethics And Professional Responsibility." See Detler Vagts, *International Legal Ethics and Professional Responsibility*, 92 AM. SOC'Y INT'L L. PROC. 378, 378 (1998). With respect to legal education, in 1996, the AALS *Journal of Legal Education* devoted a Symposium issue to the topic of globalization. See generally 46 J. LEGAL ED. 311–466 (1996) (individual article names omitted). As for legal ethics conferences, in 1995, the ABA-sponsored National Conference on Professional Responsibility included a concurrent panel session entitled "Ethics in International Practice: It's a Small, Small World." See Materials from the 21st National Conference on Professional Responsibility (June 1–3, 1995) (on file with author) [hereinafter National Conference Materials]. This was the first time that the National Conference included a panel session devoted to international issues. Email from Arthur Garwin, Staff, ABA Center for Professional Responsibility, to author) (Feb. 2, 2005) (on file with author). Thus, it is clear that even before 1998, various conferences had included global and comparative perspectives. Despite these examples, for the reasons set forth in the text, I believe a sea change occurred in 1998.

point. Moreover, events since then have convinced me that this sea change was not illusory.

B. The Practice Context

In order to understand why there may have been a sea change in the nature of the U.S. legal ethics dialogue, it is useful to examine the current practice context for lawyers. Recent U.S. trade statistics help explain the importance of global and comparative legal ethics discussions because they reveal a significant amount of both inbound and outbound international trade by clients. As this table shows, international trade has increased significantly over the past few decades, with a forty-three-fold increase in exports between 1960 and 2004 and a seventy-seven-fold increase in imports during this period:¹²⁵

TABLE 1
U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES

| | 1960 | 1974 | 1998 | 2004 |
|---------|-------------------|--------------------|--------------------|--------------------|
| Exports | \$25.9 billion | \$120.9 billion | \$932.6 billion | \$1.15 trillion |
| Imports | \$22.4 billion | \$125.2 billion | \$1.1 trillion | \$1.76 trillion |

Another important development that affects the practice context in which lawyers work is the dramatic increase in the foreign-born U.S. population. As Table 2 shows, since the last census, there has been a 57% increase in the U.S. foreign-born population. This increase has affected large states and small states, states on the coasts and states such as Missouri, that are in the middle of the country:¹²⁶

125. This table was prepared by the author using data from U.S. Dept. of Commerce, International Trade Administration, U.S. International Trade in Goods and Services, Balance Of Payments (BOP) Basis, 1960–2004, *available at* <http://ita.doc.gov/td/industry/otea/usfth/aggregate/H04t01.pdf> (last visited Mar. 11, 2005).

126. For instance, there were 31.1 million foreign born residents in the United States in 2000, an increase of 11.3 million since 1990. Migration Information Source-Data Tools, *available at* <http://www.migrationinformation.org/USfocus/statemap.cfm#> (last visited Feb. 10, 2005).

TABLE 2
U.S. FOREIGN-BORN RESIDENTS

| State and Rank in terms of number of foreign born residents | Number of Foreign Born Residents Counted in the 2000 Census | Increase in number of foreign born residents since 1990 Census | State Rank in terms of percentage of increase |
|---|---|--|---|
| California (1st) | 8.9 million | 37.2% | 37th |
| Missouri (27th) | 151,000 | 80.8% | 26th |
| Wyoming (51st) | 11,205 | 46.5% | 35th |
| Entire U.S. | 31.1 million | 57.4% | --- |

Logic and the data in Table 2 suggest that individual clients, as well as business clients, are increasingly likely to need the services of both U.S. and foreign lawyers. Some of these foreign born individuals may need to handle family matters in their home country at some point in their lives, such as inheritance or custody matters. In a business context, foreign born residents may be more likely to set up joint ventures, distributorship relationships, or other business relationships, with individuals in their home countries. When they do so, U.S. lawyers may find themselves working with lawyers from other countries.

Given the dramatic increase in international trade of goods and services and the movement of individuals across borders, it should come as no surprise that there also has been a dramatic increase in the amount of international trade in legal services. For example, U.S. statistics show \$3.37 billion in outbound U.S. legal services trade in 2003 and \$879 million in inbound U.S. legal services trade:¹²⁷

Table 3 shows the dramatic increase in U.S. legal services trade over the last ten years.

127. U.S. Dep't. of Commerce Bureau of Economic Analysis, tbl. 1, Private Services Trade by Type, 1992-2003, available at <http://www.bea.doc.gov/bea/di/1001serv/1004serv/tab1b.xls> (last visited Jan. 22, 2005).

TABLE 3
U.S. TRADE IN LEGAL SERVICES

| | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|-----------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| U.S. Legal Services Exports | \$1.442 bil | \$1.617 bil | \$1.667 bil | \$1.943 bil | \$2.223 bil | \$2.406 bil | \$2.465 bil | \$3.103 bil | \$2.966 bil | \$3.148 bil | \$3.376 bil |
| U.S. Legal Services Imports | \$321 mil | \$383 mil | \$469 mil | \$615 mil | \$539 mil | \$655 mil | \$742 mil | \$893 mil | \$740 mil | \$780 mil | \$879 mil |

Moreover, the increase in international legal services trade has not been limited to the United States. For example, the OECD recently reported the following growth in international legal services trade in the United Kingdom, Hong Kong, and Australia:

The UK exported legal services worth GBP 1.838 billion in 2002, roughly equivalent to the UK exports of communications services, an almost 100% rise in legal services exports since 1997. Trade in legal services has also been significantly growing in other countries. Hong Kong, China's exports of legal services, for example, amounted to HKD 817 million (USD 105 million) in 2001, a sharp increase of 87% from 2000. Similarly, Australian exports of legal services have grown from AUD 74 million in 1987/88 to about AUD 250 million in 2000/01.¹²⁸

Because of the dramatic increase in legal services trade, it should come as no surprise to learn that foreign offices of law firms have grown dramatically, even within the past five years. For example, Carole Silver recently reported that for a group of forty-seven U.S. law firms with foreign branch offices in London, the average firm size in 1999 was twenty lawyers; five years later, in 2004, it was forty-four lawyers.¹²⁹ In the two years between 1998 and 2000, U.S. law firms opened forty-one new foreign offices.¹³⁰

What is even more striking is the degree to which law firms are truly global. Of the ten largest law firms in the world, all had offices in ten or more countries.¹³¹ Strikingly, six of the world's ten highest-grossing law firms had

128. Organization For Economic Co-operation and Development (OECD), *Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services* 9, TD/TC/WP(2003) 40/final (June 14, 2004), available at [http://www.oelis.oecd.org/olis/2003doc.nsf/43bb6130e5e86e5fc12569fa005d004c/39cd178d21ec94eec1256eb3003931c7/\\$FILE/JT00166062.DOC](http://www.oelis.oecd.org/olis/2003doc.nsf/43bb6130e5e86e5fc12569fa005d004c/39cd178d21ec94eec1256eb3003931c7/$FILE/JT00166062.DOC) (last visited Jan. 22, 2005) (footnotes omitted).

129. Silver, *Offshoring*, *supra* note 41, n.52.

130. Silver, *Offshoring*, *supra* note 41.

131. *The Global 100*, AM. LAW., Nov. 2004 115 (table ranking firms according to the number of

more than 50% of their lawyers working in countries outside of the firm's home country.¹³²

TABLE 4
AMERICAN LAWYER GLOBAL 100 FIRMS—2004

| Rank | Firm | Headquarters | Number of lawyers | Lawyers outside home country | Countries with offices |
|------|--------------------------------------|--------------------|-------------------|------------------------------|------------------------|
| 1 | Baker & McKenzie | US - International | 3 053 | 83% | 38 |
| 2 | Clifford Chance | UK - International | 2,684 | 62% | 20 |
| 3 | Freshfields Bruckhaus Deringer | UK - International | 2,225 | 66% | 19 |
| 4 | Linklaters | UK - International | 2 000 | 55% | 23 |
| 5 | Jones, Day, Reavis & Pogue | US - National | 1,970 | 24% | 12 |
| 6 | Allen & Overy | UK - International | 1,879 | 53% | 20 |
| 7 | Eversheds | UK - International | 1,712 | 18% | 11 |
| 8 | Skadden, Arps, Slate, Meagher & Flom | US - New York | 1,650 | 10% | 12 |
| 9 | White & Case | US - International | 1,552 | 59% | 22 |
| 10 | Latham & Watkins | US - National | 1,513 | 19% | 10 |

Although only one of the law firms in the next group of ten employs more than fifty-percent of its lawyers outside its home country, all of the firms that rank in the top twenty in size have foreign branch offices and employ more than 1,000 lawyers.¹³³

Taken together, the statistics showing trade by clients and trade by lawyers, the foreign-born population in the U.S., the information about the

lawyers they have).

132. *Id.*

133. *Id.* The firms ranked eleven–twenty were: Sidley Austin Brown & Wood; Mayer, Brown, Rowe & Maw; Minter Ellison Legal Group; DLA; Fidal; Holland & Knight; Lovells; Garrigues; Morgan, Lewis & Bockius; and Weil Gotshal & Manges. Of these, five were U.S.-based firms, two were U.K. firms and one each was Spanish, French & Australian. The one firm employing more than 50% of its lawyers outside its home country was the U.K.-based firm Lovells. *Id.*

growth in law firm branch offices, and the information about the multinational composition of the world's largest law firms demonstrate the international context in which U.S. lawyers operate. Thus, it is logical that legal ethics discussions now regularly include comparative and global perspectives.

C. Examples of Recent Global Legal Ethics Dialogue

As stated earlier, since 1998, there has been a dramatic increase in the extent to which global and comparative perspectives are invoked when policymakers discuss U.S. legal ethics issues. Listed below are several examples where such dialogue has occurred.

One of the first examples of a post-1998 comparative legal ethics dialogue occurred during the "Ethics 2000" hearings. From 1997 through 2002, the ABA sponsored a massive project to reevaluate its rules of professional conduct for lawyers; this project is commonly referred to as "Ethics 2000."¹³⁴ The ABA Ethics 2000 Commission, like the ABA MDP Commission, held numerous hearings and received extensive testimony.¹³⁵ Although the ABA Ethics 2000 Commission's hearings began in May 1998, thus pre-dating the ABA MDP Commission's hearings,¹³⁶ the Ethics 2000 Commission did not hear from any foreign lawyers or bars until after the ABA MDP hearings at which there was significant foreign lawyer and bar participation. In August 1999, February 2000, and February 2001, Ramon Mullerat offered testimony to the ABA Ethics 2000 Commission on a variety of issues.¹³⁷ Among his many credentials, Mr. Mullerat is a Spanish lawyer and the former president of the European Union's bar association, the

134. ABA Center for Professional Responsibility, Ethics 2000 Commission, *available at* <http://www.abanet.org/cpr/ethics2k.html> (last visited Apr. 23, 2005) [hereinafter Ethics 2000]; *See also* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

135. *See* Ethics 2000, *supra* note 134.

136. *Compare* ABA Ethics 2000 Commission, Testimony and Minutes from Previous Hearings, *available at* <http://www.abanet.org/cpr/e2ktest.html> (last visited Jan. 23, 2005) (showing that the Commission began meeting in October 1997 and held its first hearing in May 1998 in Montreal and its last hearing in February 2001), *with* ABA MDP Commission, *available at* <http://www.abanet.org/cpr/multicom.html> (last visited Jan. 23, 2005) (showing that its first hearing was in November 1998 and its last hearing in February 2000).

137. *See* Testimony of Ramon E. Mullerat, Former CCBE President (Aug. 5, 1999), *available at* <http://www.abanet.org/cpr/rmullerat.html> (last visited Jan. 22, 2005) (addressing the independence of the lawyer); Testimony of Ramon E. Mullerat, Former CCBE President (Feb. 10, 2000), *available at* http://www.abanet.org/cpr/mullerat_200.html (addressing confidentiality) (last visited Jan. 22, 2005); Testimony of Ramon E. Mullerat, Former CCBE President (Feb. 21, 2001), *available at* http://www.abanet.org/cpr/e2k-witness_mullerat.html (addressing five topics, including lawyer as mediator and the independence of the lawyer) (last visited Jan. 22, 2005).

CCBE.¹³⁸ Ramon Mullerat testified before the ABA MDP Commission in August 1999, which is the same time he first testified before the Ethics 2000 Commission. The Ethics 2000 Commission did not hear from many foreign lawyers or bars, but the ABA's willingness to hear from Mr. Mullerat demonstrates an implicit acknowledgement that it was appropriate to consider comparative and global perspectives when developing U.S. policy recommendations for lawyers.

Although few foreign lawyers and bar associations were motivated to speak at the Ethics 2000 hearings, the opposite was true for the hearings held approximately one year later by the ABA Commission on Multijurisdictional Practice (ABA MJP Commission). ABA President Martha Barnett created the ABA MJP Commission in July 2000;¹³⁹ its mission was:

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.¹⁴⁰

A major impetus for the creation of the ABA MJP Commission was the California Supreme Court *Birbrower* case.¹⁴¹ In *Birbrower*, the California Supreme Court held:

138. Mr. Mullerat's testimony identified him as "Ramon Mullerat, O.B.E., Lawyer of Barcelona and, Madrid, Spain, Avocat à la Cour de Paris, France, Honorary Member of the Bar of England & Wales, Honorary Member of the Law Society of England and Wales, Former President of the Council of the Bars and Law Societies of the European Union (CCBE), Member of the Academy of Jurisprudence and Legislation of Catalonia, Member of the American Law Institute (ALI), Member of the American Bar Foundation (ABF), Co-Chair of the Institute of Human Rights of the International Bar Association (IBA)." See, e.g., Mullerat Testimony (Feb. 21, 2001), *supra* note 137.

139. See ABA Commission on Practice (ABA MJP Commission), Report 3 (Aug. 2002), available at <http://www.abanet.org/cpr/mjp/intro-over.doc> (last visited Jan. 23, 2005) [hereinafter Report of the ABA MJP Commission].

140. ABA MJP Commission, Mission Statement, available at http://www.abanet.org/cpr/mjp-mission_statement.html (last visited Jan. 23, 2005).

141. *Birbrower, Montalbano, Condon, & Frank, P.C. v. Supreme Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998).

that lawyers not licensed to practice law in California violated California's misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services the lawyers rendered while they were physically or "virtually" in California.¹⁴²

Although the ABA MJP Commission began with a U.S. focus, the ABA Section of International Law successfully lobbied to have the mission statement revised to include the final sentence, which included international multijurisdictional practice within the jurisdiction of the ABA MJP Commission.¹⁴³

The ABA MJP Commission, like the ABA Ethics 2000 and MDP Commissions, solicited comments and held public hearings as it considered whether to recommend revisions to ABA Model Rule of Professional Conduct 5.5 and other multijurisdictional practice policies.¹⁴⁴ Between

142. Report of the ABA MJP Commission, *supra* note 139, at 3 (explaining the relationship between the Commission's work and *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998)).

The *Birbrower* case clearly brought a high profile to the MJP issue and the risks faced by lawyers who were engaged in activities in states in which they were not licensed. Having sat through the ABA MDP Commission hearings, however, I would not have been surprised to see the creation of an MJP Commission, even if *Birbrower* had never been decided. One of the arguments offered by MDP proponents was that the lawyers in partnership with non-lawyers were not engaged in the practice of law and therefore not doing anything improper. *See generally supra* note 119. As support, they pointed to the fact that they were simply engaged in activities that were performed by lawyers in states in which the lawyers were not licensed. *Id.* Therefore, the conduct must not be improper (or else all these lawyers were engaged in improper conduct. *Id.* I think these arguments led to increased interest in unauthorized practice of law or UPL provisions and would have led to reform of the existing MJP rules which did not match the reality of law practice.

143. The original Mission Statement was approved by the ABA Board of Governors in May 2000 and did not include what is now the last sentence of the mission statement: "The Commission shall also review international issues related to practice in the United States." This last sentence was added to the Mission Statement in October 2000 by the ABA Board of Governors. Email from John Holtaway, ABA Center for Professional Responsibility Staff Member and Counsel to the ABA MJP Commission, to author (Jan. 25, 2005) (on file with author). According to MJP Commission member Peter Ehrenhaft, this last sentence was added at the urging of the ABA Section of International Law and Practice, which sent a letter to ABA President Martha W. Barnett asking that the mission statement be expanded to include international MJP issues. Email from Peter D. Ehrenhaft, Member, ABA Commission on Practice, to author (Feb. 3, 2005) (on file with author).

144. Transcripts of the ABA MJP Commission hearings are still available on the Commission's website. Commission on Practice of Law, Transcripts and Audio, *available at* http://www.abanet.org/cpr/mjp-trans_discuss.html (last visited Feb. 12, 2005). The Commission homepage also includes the comments submitted at four different time periods: (1) March 10–11, 2000 Symposium; (2) Written Comments/Position Papers (Prior to Interim Report dated November 30, 2001); (3) Comments on Multijurisdictional Practice Interim Report November 30, 2001; and (4) Comments on June 2002 MJP Report and Recommendation. *ABA Commission on Multijurisdictional Practice*, *available at* <http://www.abanet.org/cpr/mjp-home.html> (last visited Feb. 11, 2005).

January 2001 and August 2002, the ABA MJP Commission received written comments or heard testimony from representatives from Canada,¹⁴⁵ the Law Society of England and Wales,¹⁴⁶ the CCBE,¹⁴⁷ and the Union Internationale des Avocats.¹⁴⁸ The ABA MJP Commission also received extensive charts from this author that analyzed the substantive provisions of eleven non-U.S. multijurisdictional practice rules or recommendations.¹⁴⁹

The transcripts from the ABA MJP Commission hearings suggest that Commission members were genuinely interested in the experiences of other countries regarding multijurisdictional practice issues.¹⁵⁰ For example, in February 2001, the Commission heard testimony from Paul McLaughlin, who was the Practice Management Advisor to the Law Society of Alberta and Chair of the National Ethics Group of the Federation of Law Societies of Canada (FLSC).¹⁵¹ Because the ABA MJP Commission had not yet issued any reports or recommendations, Mr. McLaughlin did not present an official position of the Law Society of Alberta or the FLSC; instead, he simply explained how the Canadian multijurisdictional practice functioned and the changes that Canada recently had adopted. In the question-and-answer session after his presentation, members of the ABA MJP Commission asked Mr. McLaughlin about: multijurisdictional practice in a federal system, including Canada's success in having its multijurisdictional practice Protocol adopted in the provinces and territories; the way in which the disciplinary system functioned, including reciprocity issues; and the way in which

145. Testimony of Paul McLaughlin to the ABA MJP Commission, 35 (San Diego, Feb. 16, 2001), available at <http://www.abanet.org/cpr/mjp-sandiego-transcript.html> (last visited Jan. 22, 2005); Paul McLaughlin, *Should We Build Walls or Gates* (Feb. 16, 2001), available at http://www.abanet.org/cpr/mjp-comm_1sa.html (last visited Jan. 22, 2005).

146. Testimony of Jonathan Goldsmith, Law Society of England and Wales, to the ABA MJP Commission, 104 (Aug. 3, 2001), available at http://www.abanet.org/cpr/mjp-trans_chicago.doc (last visited Jan. 22, 2005); *Comments from the Law Society of England and Wales, on ABA, Interim Report to the Commission on Multijurisdictional Practice*, available at http://www.abanet.org/cpr/mjp/comm2_lsew.pdf (last visited Jan. 22, 2005).

147. Testimony of Dr. Rupert Wolff, CCBE, to the ABA MJP Commission, 117 (Chicago, Aug. 3, 2001), available at http://www.abanet.org/cpr/mjp-trans_chicago.doc (last visited Jan. 22, 2005); Written Comments of the CCBE, to the ABA MJP Commission (Mar. 12, 2002), available at http://www.abanet.org/cpr/mjp/comm2_ccbe.pdf (last visited Jan. 22, 2005).

148. Written Comments from the Union Internationale des Avocats, to the ABA MJP Commission (Mar. 13, 2002), available at http://www.abanet.org/cpr/mjp/comm2_uida.html (last visited Jan. 22, 2005).

149. Written Comments of Laurel S. Terry, to the ABA MJP Commission (May 21, 2001), available at http://www.abanet.org/cpr/mjp-written_comments.html (containing links to a cover letter, a summary chart, and charts of eleven global MJP schemes) (last visited Jan. 22, 2005).

150. See generally ABA MJP Commission, *Transcripts and Audio*, *supra* note 144 (containing links to transcripts of several public hearings).

151. See, e.g., Testimony of Paul McLaughlin, *supra* note 145.

temporary services were defined.¹⁵² Mr. McLaughlin also discussed the ways in which the multijurisdictional practice system is monitored, pro bono and mandatory malpractice insurance requirements, and issues related to the administration of client security funds.¹⁵³

Approximately six months later, in August 2001, the ABA MJP Commission again seemed genuinely interested in learning more about the multijurisdictional practice approaches in other countries when it heard testimony from Jonathan Goldsmith, representing the Law Society of England and Wales, and Dr. Rupert Wolff, representing the CCBE.¹⁵⁴ Their testimony covers eighteen pages in the transcript of the August 2001 Chicago hearing. The questions posed to them by ABA MJP Commission members included questions about the operation of the EU multijurisdictional practice system and its discipline systems, including enforcement and reciprocity issues.¹⁵⁵

In November 2001, the ABA MJP Commission issued its interim report; in June 2002, it issued its Final Report and Recommendation which included nine recommendations.¹⁵⁶ Two months after the final report, on August 12, 2002, the ABA House of Delegates adopted the ABA MJP Commission's nine recommendations almost verbatim.¹⁵⁷ The recommendations included: a reaffirmation of the principle of state judicial regulation of lawyers;¹⁵⁸ a recommendation for a revision of the ABA Model Rule of Professional Conduct 5.5 to provide "safe harbors" for certain kinds of multijurisdictional practice;¹⁵⁹ a reaffirmation of the ABA Model Rule Respecting [Foreign] Legal Consultants;¹⁶⁰ and a recommendation of a new model rule allowing temporary practice by foreign lawyers under certain conditions. The foreign

152. *Id.* at 40–47.

153. *Id.*

154. Testimony of Jonathan Goldsmith, *supra* note 146 and Testimony of Rupert Wolff, *supra* note 147.

155. Transcript of the American Bar Association, Commission On Practice, Chicago Public Hearing 104–21 (Aug. 3, 2001), available at http://www.abanet.org/cpr/mjp-trans_chicago.doc (last visited Jan. 23, 2005).

156. Both reports are available at <http://www.abanet.org/cpr/mjp-home.html> (last visited Jan. 23, 2005). See generally Stephen Gillers, *Lessons from the Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002).

157. ABA, Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice (as adopted Aug. 12, 2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.doc (last visited Jan. 22, 2005).

158. Recommendation 1 was adopted as Report 201A, available at <http://www.abanet.org/cpr/mjp/201a.doc> (last visited Jan. 23, 2005).

159. Recommendation 2 was adopted as Report 201B, available at <http://www.abanet.org/cpr/mjp/201b.doc> (last visited Jan. 23, 2005).

160. Recommendation 8 was adopted as Report 201H, available at <http://www.abanet.org/cpr/mjp/201h.doc> (last visited Jan. 23, 2005).

lawyer temporary practice model rule was similar to, but more narrow than, the conditions in Rule 5.5.¹⁶¹

In my view, the global and comparative dialogue that occurred during the ABA MJP Commission hearings was serious and substantive. It also implicitly assumed that the United States might learn valuable information by studying the approaches used in other countries.¹⁶² Furthermore, by reaffirming the Model Foreign Legal Consultant Rule and adopting a new rule authorizing temporary practice by foreign lawyers, the ABA MJP Commission acknowledged that MJP occurs on both a global and a domestic basis.

Soon after the ABA adopted the recommendations of the ABA MJP Commission, there was another situation in which foreign lawyers, law firms, and bar associations offered their views about U.S. legal ethics policies and offered comparative perspectives. The context of this global and comparative dialogue was the Sarbanes-Oxley bill and the subsequent regulations that the Securities and Exchange Commission (SEC) developed in the wake of the Enron, WorldCom, and other corporate scandals.¹⁶³

Congress enacted the Sarbanes-Oxley bill in July 2002.¹⁶⁴ Section 307 of Sarbanes-Oxley is entitled “Rules of Professional Responsibility for Attorneys” and applies to attorneys who practice before the SEC.¹⁶⁵ This section directed the SEC to issue rules setting forth the minimum standards of professional conduct for lawyers appearing before the SEC.¹⁶⁶ One commentator recently summarized the SEC’s development of “up-the-ladder” and “noisy withdrawal” rules as follows:

Consistent with its definition of the corporate client, the rules promulgated by the SEC further establish an obligation for attorneys to report material violations of federal and state securities laws and breaches of fiduciary duty “up the ladder” to chief legal counsel or the chief executive officer. If the attorney does not receive an appropriate response, the attorney is obligated to take the matter to the audit

161. Recommendation 9 was adopted as Report 201J, available at <http://www.abanet.org/cpr/mjp/201j.doc> (last visited Jan. 23, 2005).

162. See *supra* notes 141–42.

163. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C. §§ 7245 *et seq.*).

164. *Id.*

165. Sarbanes-Oxley Act of 2002, *supra* note 163, § 307.

166. *Id.* This provision stated, in part, that the SEC “shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including [rules directing the lawyer to report up the corporate ladder].”

committee or the full board of directors. Alternatively, an attorney practicing before the SEC in representing a company may report evidence of material violations to the company's qualified legal compliance committee if a company has established such a committee. By making this report to the committee, an attorney has satisfied the reporting requirements and is not asked to determine if the response is adequate.

After the enactment of Sarbanes-Oxley, the SEC voted to extend the comment period for a proposal originally included in the Act known as the "noisy withdrawal" provision. This provision would require attorneys to notify the SEC of their withdrawal from representation of a company for "professional considerations." This withdrawal would be based on the attorney's belief that the company has failed to respond appropriately and is breaking the law, even after reports of such illegality have been submitted pursuant to the Act. The SEC also is considering an alternative provision to the "noisy withdrawal" proposal, which would require the company itself to notify the SEC of the attorney's withdrawal, when such withdrawal results from the company's failure to adequately respond to the attorney's initial reports of wrongdoing. To date, neither of these proposals have been enacted.¹⁶⁷

The rules originally proposed by the SEC in November 2002 had a broad definition of "practicing before the SEC" and would have applied to a significant number of foreign lawyers and law firms.¹⁶⁸ Indeed, footnote 10 of the SEC's proposed rule specifically acknowledged this fact and requested comment on this issue:

The Commission realizes that the application of Section 307 and the rules we are proposing under Part 205 to foreign law firms, law firms, and foreign lawyers employed by those law firms and foreign registrants, raises a number of significant and difficult issues. We are requesting comment on a broad range of questions in this area,

167. Robert J. Anello, *Sarbanes-Oxley's Wake Up Call to Attorneys*, 22 PENN ST. INT'L L. REV. 545, 556-57 (2004) (internal citations omitted).

168. Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8140, 67 Fed. Reg. 71670 (proposed Nov. 21, 2002) (to be codified at 17 C.F.R. § 205), <http://www.sec.gov/rules/proposed/33-8150.htm> (last visited Jan. 22, 2005) [hereinafter Original Proposed SEC Rule].

including whether foreign law firms and foreign lawyers should be exempt from Part 205.¹⁶⁹

Lawyers and bars from around the world responded to the SEC's request for comments on this issue—the SEC received forty-four comments from foreign parties.¹⁷⁰ The SEC also held a “Roundtable Discussion” on December 17, 2002, concerning the impact of the rules upon foreign attorneys.¹⁷¹ Many of the comments the SEC received focused on “the scope of the proposed rule (including, particularly, its application to attorneys who either are not admitted to practice in the United States, or are admitted in the United States but who do not practice in the field of securities law).”¹⁷² In addition to comments from foreign lawyers and law firms¹⁷³ and from U.S. lawyers and law firms working in foreign countries,¹⁷⁴ the SEC received comments from the following foreign, or global, bar associations about the proposed Sarbanes-Oxley rules on foreign lawyers:¹⁷⁵ the Canadian Bar Association,¹⁷⁶ the CCBE,¹⁷⁷ the Federation of Law Societies of Canada,¹⁷⁸

169. *Id.* n.10.

170. Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8185, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. § 205), File No. S7-45-02, available at <http://www.sec.gov/rules/final/33-8185.htm> (last visited Jan. 22, 2005) [hereinafter Final SEC Rule] at n.3 and accompanying paragraph.

171. *Id.*

172. *Id.*

173. There were numerous comments submitted by foreign lawyers, law firms, and companies from around the world. *See, e.g.*, Comments of Allen & Overy; Freshfields; Bruckhaus; Deringer; Herbert Smith; Linklaters; Lovells; and Norton Rose, Dec. 17, 2002, at <http://www.sec.gov/rules/proposed/s74502/allenfresh1.htm> (last visited Apr. 23, 2005); Comments of Nadine S. M. Baleeiro Teixeira, Renata Neeser, Maria Fernanda L.de Mello, Demarest & Almeida, members of the Brazilian Bar Association, Dec. 18, 2002, at <http://www.sec.gov/rules/proposed/s74502/nsmbaleeiro1.htm> (last visited Jan. 22, 2005); Comments of Gross, Kleinhendler, Hodak, Halevy, Greenberg & Co., Law Offices, Dec. 18, 2002, at <http://www.sec.gov/rules/proposed/s74502/gross1.htm> (last visited Jan. 22, 2005); Comments of Isao Shindo, Anderson Mori, People's Republic of China, Dec. 18, 2002, at <http://www.sec.gov/rules/proposed/s74502/ishindo1.htm> (last visited Jan. 22, 2005); and Comments of Gregory J. Leia, Wolff Leia, Barristers & Solicitors, Dec. 18, 2002, at <http://www.sec.gov/rules/proposed/s74502/gjleia1.htm> (last visited Jan. 22, 2005).

174. *See, e.g.*, Comments of Tokyo Branch Offices of Three U.S. Law Firms, Dec. 20, 2002, at <http://www.sec.gov/rules/proposed/s74502/tokyo-offcs.htm> (last visited Jan. 22, 2005).

175. The SEC has posted on its website all of the comments it received. Comments on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, at <http://www.sec.gov/rules/proposed/s74502.shtml> (last visited Jan. 22, 2005). On this webpage, the SEC has included both the comments submitted regarding the original proposed rule and the comments on the final rule. The deadline for comments for the original proposal was December 2002. There was an April 2003 deadline for comments on the noisy withdrawal proposals included with the final rule. Thus, by looking at the date of submission, one can determine the proposal addressed.

176. *See* Comments of Simon V. Potter, President, Canadian Bar Association, Dec. 13, 2002 and Comments of Simon V. Potter, President, Canadian Bar Association, Mar. 20, 2003, at <http://www.sec.gov/rules/proposed/s74502/svpotter1.htm> (last visited Jan. 22, 2005).

177. *See* Comments of the CCBE, Dec. 16, 2002, at <http://www.sec.gov/rules/proposed/s74502/>

the German Federal Bar,¹⁷⁹ the International Bar Association Section of Business Law,¹⁸⁰ the Japan Federation of Bar Associations,¹⁸¹ the Law Society of British Columbia,¹⁸² the Law Society of England and Wales,¹⁸³ the Law Society of Upper Canada,¹⁸⁴ and the New Zealand Law Society and the Corporate Lawyers Association of New Zealand.¹⁸⁵ The CCBE, for example, objected to:

the extra-territoriality of professional regulation of foreign lawyers (which is a new concept) because, among other things, it fails to take account of the sovereignty of nations and legal systems, . . . undermines local regulation by bars, and creates conflicts in applicable professional rules for lawyers, in particular in relation to the issue of noisy withdrawal.¹⁸⁶

The CCBE's comments included a more detailed explanation of the ways in which some EU regulation of lawyers was inconsistent with the proposed

ccberesponse.htm (last visited Jan. 22, 2005) and Comments of the CCBE, Apr. 3, 2003, at <http://www.sec.gov/rules/proposed/s74502/ccbe040303.htm> (last visited Jan. 22, 2005).

178. See Comments of Sherron J. L. Dickson, Q.C., President, Federation of Law Societies of Canada, Dec. 16, 2002, at <http://www.sec.gov/rules/proposed/s74502/sjldickson1.htm> (last visited Jan. 22, 2005).

179. See Comments of Dr. Dombek, President, German Federal Bar, Dec. 17, 2002, at <http://www.sec.gov/rules/proposed/s74502/dombek1.htm> (last visited Jan. 22, 2005).

180. See Comments of Fernando Peláez-Pier, Chair, International Bar Association Section on Business Law, Dec. 13, 2002 and Comments of Fernando Peláez-Pier, Chair, International Bar Association Section on Business Law, Apr. 3, 2003, at <http://www.sec.gov/rules/proposed/s74502/fpelaezpier1.htm> (last visited Jan. 20, 2005).

181. See Comments of Tohru Motobayashi, President, Japan Federation of Bar Associations, Dec. 14, 2002, at <http://www.sec.gov/rules/proposed/s74502/tmotobayashi121402.pdf> (last visited Jan. 22, 2005) and Comments of Tohru Motobayashi, President, Japan Federation of Bar Associations, Mar. 31, 2003, at <http://www.sec.gov/rules/proposed/s74502/tmotobayashi1.htm> (last visited Jan. 22, 2005).

182. See Comments of Howard Berge, Q.C., President, Law Society of British Columbia, Apr. 3, 2003, at <http://www.sec.gov/rules/proposed/s74502/lawsocietybc040703.htm> (last visited Jan. 22, 2005).

183. See Comments of Carolyn Kirby, President, Law Society of England and Wales, Dec. 12, 2002, at <http://www.sec.gov/rules/proposed/s74502/ckirby1.htm> (last visited Jan. 22, 2005) and Comments of Carolyn Kirby, President, the Law Society of England and Wales, Apr. 7, 2003, at <http://www.sec.gov/rules/proposed/s74502/lawsociety040703.htm> (last visited Jan. 22, 2005).

184. See Comments of Professor Vern Krishna, Q.C., FCGA, Treasurer, Law Society of Upper Canada, Dec. 6, 2002, at <http://www.sec.gov/rules/proposed/s74502/vkrishna1.htm> (last visited Jan. 22, 2005).

185. See Comments of Christine Grice, President, New Zealand Law Society, Dec. 18, 2002, at <http://www.sec.gov/rules/proposed/s74502/cgrice1.htm> (last visited Jan. 22, 2005); Comments of Ronald F. Pol, President, Corporate Lawyers' Association of New Zealand and Peter Turner, Chief Executive Officer & General Counsel, Australian Corporate Lawyers Association, Dec. 18, 2002, at <http://www.sec.gov/rules/proposed/s74502/rfpoll1.htm> (last visited Jan. 22, 2005).

186. Dec. 2002 Comments of the CCBE, *supra* note 177, at 1.

“noisy withdrawal” provisions that required attorneys to notify the SEC of their withdrawal from representation for “professional considerations.”¹⁸⁷

When the SEC issued its Final Rules for lawyers practicing before the SEC in January 2003, these rules were significantly narrower in scope than the proposed rules with respect to their application to foreign lawyers; the SEC also postponed any decision about the “noisy withdrawal” provisions contained in its proposed Rules.¹⁸⁸ Thus, Sarbanes-Oxley is an example not only of the existence of a global and comparative dialogue with domestic policymakers on U.S. legal ethics issues, but evidence that this global and comparative dialogue affected the outcome of the decision.

At the same time that discussions were taking place in the SEC about lawyers’ confidentiality and disclosure obligations, similar issues were being discussed in the United States with respect to the proposed action of the Financial Action Task Force (FATF). These U.S. discussions about lawyers’ obligations also received the benefit of comparative and global perspectives.

FATF is an inter-governmental body established to develop and promote anti-money laundering policies at the national and international levels.¹⁸⁹ FATF currently has thirty-three members, including the United States and a number of observer states and organizations.¹⁹⁰ In 1990, FATF adopted a set of forty recommendations.¹⁹¹ Eleven years later, in 2001, the FATF initiated a review of the forty recommendations, which resulted in its May 30, 2002, “Consultation Paper.”¹⁹² FATF’s May 2002 Consultation Paper—the “Gatekeeper Initiative”—proposed that “certain professionals, such as lawyers, should serve as ‘gatekeepers’ to the international financial and business markets.”¹⁹³ The “Gatekeeper Initiative”, like Sarbanes-Oxley’s

187. *Id.* at 5–6.

188. *See* Final SEC Rule, *supra* note 170.

The thoughtful and constructive suggestions we have received from a broad spectrum of commenters have enabled us better to understand interested parties’ views concerning the operation and impact of the proposed rule. As more specifically discussed below, the final rule we adopt today has been significantly modified in light of these comments and suggestions.

Id.

189. FATF, Homepage, at <http://www1.oecd.org/fatf/index.htm> (last visited Jan. 23, 2005).

190. FATF, Members and Observers, at http://www1.oecd.org/fatf/Members_en.htm (last visited Jan. 23, 2005).

191. *See* ABA, Task Force On Gatekeeper Regulation And The Profession, Report To The House Of Delegates 1, Feb. 2003, available at <http://www.abanet.org/leadership/recommendations03/104.pdf> (last visited Jan. 23, 2005).

192. *Id.*

193. *Id.* The ABA Report summarized the FATF Gatekeeper recommendations as follows:

The Consultation Paper proposes that certain anti-money laundering measures be extended to lawyers, such as (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance training and record-keeping

proposed “noisy withdrawal” rule, would require lawyers to breach confidentiality and inform appropriate officials of their clients’ conduct. The “Gatekeeper Initiative” would also prohibit lawyers from notifying their clients of the lawyers’ disclosures.¹⁹⁴

Although there was significant commentary on the Sarbanes-Oxley proposed rules by legal ethics academics,¹⁹⁵ there was relatively little input on FATF from U.S. legal ethics academics.¹⁹⁶ ABA representatives, however, were actively involved in providing commentary on the FATF recommendations.¹⁹⁷ In February 2003, the ABA House of Delegates approved a resolution that urged “reasonable and balanced initiatives designed to detect and prevent domestic and international money laundering.”¹⁹⁸ In April 2003, the ABA Task Force on Gatekeeper

requirements for lawyers and law firms, and perhaps most significant, (4) new “suspicious transaction reporting” (“STR”) requirements mandating that lawyers report to a government enforcement agency or a self-regulatory organization (“SRO”) information that triggers a “suspicion” of money laundering relating to a client activity. Furthermore, the Consultation Paper indicates that lawyers would be prohibited from informing their clients when an STR has been filed with the government. This is the so-called “no tipping off” rule, which is incorporated into the existing FATF Recommendations and already applied to financial institutions that have suspicious activity reporting requirements under existing law. The Consultation Paper proposes that the STR requirement be enforced through criminal, administrative, or other sanctions.

Id.

194. *Id.*

195. Those commenting on the Sarbanes-Oxley proposed rules included Professors Brewer, Cohen, Cramton, Hazard, Koniak, Moore, Morgan, Painter, Rosen, Simon, Wendel, all of whom are well-known ethics professors. The SEC also received a number of letters from practicing lawyers with significant ethics expertise. SEC Website, at <http://www.sec.gov/rules/proposed/s74502.shtml> (last visited Jan. 23, 2005).

196. The members of the ABA Task Force on Gatekeeper Regulations and the Legal Profession included George Washington University Law School professor Stephen A. Saltzburg, whose areas of expertise include legal ethics, and Loretta Argrett, who formerly was a tenured member of the faculty of Howard University School of Law and who currently serves on the ABA Standing Committee on Ethics and Professional Responsibility. ABA, Task Force on Gatekeeper Regulations and the Legal Profession, Members, at <http://www.abanet.org/crimjust/taskforce/members.html> (last visited Feb. 4, 2005). Other than these members and those they consulted, such as George Washington University Law School professor, Robert Tuttle, the Task Force heard from very few legal ethics academics. Telephone interview with Stephen A. Saltzburg, Task Force Member (Feb. 4, 2005) (on file with author). In contrast to Sarbanes Oxley or the ABA MJP Commission, neither Congress nor the ABA held hearings on the FATF Gatekeeper Initiative. Overall, this issue remained under the radar screen of most legal ethics academics. *Id.* For example, even though the National Conference on Professional Responsibility included Task Force Chair Edward Krauland on a panel to discuss the Task Force’s work, it did so on May 31, 2003, after the report had been completed. Moreover, the Task Force’s work was only one part of a panel on “The Layering of Ethics Rules: The Federal Government’s Increasing Regulation of a Lawyer’s Professional Activities.” Materials from the 29th National Conference on Professional Responsibility, May 28–31, 2003, Chicago, Illinois (on file with author).

197. *See generally* ABA, Task Force on the Gatekeeper Regulation and the Profession, at <http://www.abanet.org/crimjust/taskforce/home.html> (last visited Feb. 3, 2005).

198. ABA, Task Force on the Gatekeeper Regulation and the Profession, Actions at

Regulations and the Legal Profession issued comments on the gatekeeper provisions of the FATF Consultation Paper¹⁹⁹ and in May 2003, it sent a letter to FATF.²⁰⁰

The FATF Gatekeeper Initiative was a high profile issue for many non-U.S. bar associations and triggered extensive discussions among lawyers and bar associations from around the world about the proper balance between lawyers' obligations to their clients and obligations to society.²⁰¹ One result of these conversations was an April 2003 document about the FATF Gatekeeper Initiative that was jointly signed by representatives of the ABA, the American College of Trust and Estate Counsel, the Federation of Law Societies of Canada, the Conseil National des Barreaux [France], the Council of the Bars and Law Societies of the European Union, the Federation of European Bars, the Fédération Suisse des Avocats, the Japan Federation of Bar Associations, and the Self-regulatory Organization of Swiss Lawyers and Notaries.²⁰²

Although this comparative and global dialogue did not occur within the traditional U.S. legal ethics academic community, it is undeniable that the U.S. discussions about the FATF Gatekeeper Initiative occurred in a global context, addressed important legal ethics issues, and required the participants to engage in comparative legal ethics discussions. The U.S. discussions ultimately yielded a common position that was transmitted to policymakers.

In the spring of 2003, when bar associations around the world were delivering their Joint Statement on FATF, the Conference of Chief Justices (CCJ) created a new committee that provides another example of increased global and comparative legal ethics perspectives. The CCJ consists of the highest judicial officer from each U.S. jurisdiction.²⁰³ The CCJ was founded in 1949 and

<http://www.abanet.org/crimjust/taskforce/actions.html> (last visited Feb. 3, 2005).

199. ABA, Task Force on the Gatekeeper Regulation and the Profession, Comments on Gatekeeper Provisions of FATF Consultation Paper, Apr. 9, 2003, at <http://www.abanet.org/crimjust/taskforce/actions/gatekeeper.pdf> (last visited Feb. 3, 2005).

200. Letter from Edward Krauland, Chair, ABA Task Force On Gatekeeper Regulations and the Legal Profession, to Mr. Jochen Sanio, President, FATF, May 6, 2003, at <http://www.abanet.org/crimjust/taskforce/actions/fatf.pdf> (last visited Feb. 3, 2005).

201. CCBE, Response to the Financial Action Task Force (FATF) Consultation Paper, Sept. 2002, at http://www.ccbe.org/doc/En/ccbe_response_110902_en.pdf (last visited Jan. 23, 2005).

202. Joint Statement by the International Legal Profession on the Fight Against Money-laundering, Apr. 2003, at http://www.ccbe.org/doc/En/signed_statement_030403_en.pdf (last visited Jan. 23, 2005).

203. CCJ, About CCJ, at <http://ccj.nesc.dni.us/about.html> (last visited Jan. 23, 2005). According to its website, "the Conference of Chief Justices is governed by a Board of Directors and has several standing, temporary and special committees to assist the Conference in meeting its objectives. In 1983, the Board of Directors voted to adopt a non-profit corporate form of organization." *Id.*

provides an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.²⁰⁴

Because U.S. lawyers generally receive their law license from state supreme courts,²⁰⁵ the CCJ understandably has an interest in lawyer regulation issues. During the past decade, there has been significant interaction between the CCJ, the ABA, and the U.S. legal ethics community. For example, the CCJ has had, for a number of years, a strong interest in issues related to the application of Rule of Professional Conduct 4.2 (the no-contact rule) to lawyers working for the federal government.²⁰⁶ Another important link is the fact that Delaware Chief Justice E. Norman Veasey chaired the ABA Ethics 2000 Commission.²⁰⁷ Another example is the fact that Delaware Justice Randy Holland chaired until January 2005 ABA Joint

204. *Id.* The CCJ lists the following as examples of issues in which it has been involved:

Through resolutions, committees, and special task forces, CCJ has addressed such issues as federalism legislation, including mass torts, class actions, and the Trade legislation; violence against women; development of problem-solving courts, privacy and access to court records, self-represented litigation; the handling of child abuse and neglect cases; victims' rights; and DNA and competence of counsel.

Id.

205. For a chart showing how each state licenses lawyers, see Comprehensive Guide to Bar Admissions, *supra* note 9.

206. The application to federal prosecutors of the "no contact" provision in Rule of Professional Conduct 4.2 has engendered much discussion and debate during the past fifteen years. In 1989, in response to *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), Attorney General Richard Thornburgh issued a memorandum that said that, notwithstanding a state's adoption of Rule 4.2, federal prosecutors could not be sanctioned for contacts with a defendant "in the course of authorized law enforcement activity." Richard Thornburgh, U.S. Dep't of Justice, Memorandum, Communications with Persons Represented by Counsel, June 6, 1989, *cited in* *Matter of Doe*, 801 F. Supp. 478, 486 (Dist. N.M. 1992). In 1994, after much debate and several cases, the Department of Justice promulgated a regulation relating to contacts with represented persons. 28 C.F.R. § 77 (1998). In 1998, after more debate and cases, Congress passed the McDade Amendment, which made federal prosecutors subject to state ethics rules. 28 U.S.C. § 530B (1998). The issue of Rule 4.2 received much attention during the Ethics 2000 discussions, with the Conference of Chief Justices participating in these discussions. Memorandum Re: Discussion Draft of a Proposed New Rule 4.2 and Comment to the Members of the Conference of Chief Justices from the Special Committee on Rule 4.2 of the Model Rules of Professional Conduct (Contact with Represented Persons) (Dec. 19, 1997) (both on file with author). For information about the Rule 4.2 issue, see ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOT. MODEL RULES OF PROF'L. CONDUCT 428-29 (5th ed. 2003) (and sources cited therein) and Jesselyn A. Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707 (2001).

207. ABA, Ethics 2000 Commission Roster, at <http://www.abanet.org/cpr/e2k/roster.pdf> (last visited Jan. 23, 2005).

Committee on Lawyer Regulation;²⁰⁸ the ABA Joint Committee assists states in their implementation of the ABA Ethics 2000 Recommendations, ABA MJP Recommendations, the ABA McKay Commission Report, which recommended changes to state lawyer disciplinary systems, and the CCJ National Action Plan on Lawyer Conduct and Professionalism.²⁰⁹ The CCJ's communication with the legal profession about legal regulation issues also includes formal resolutions such as those that endorsed certain portions of the ABA Ethics 2000 Commission recommendations and the ABA MJP Commission recommendations.²¹⁰

In 2003, the CCJ created a new International Agreements Committee to consider, *inter alia*, "trade issues and other international concerns."²¹¹ The creation of this committee should lead to increased comparative and global perspectives by state supreme courts regarding lawyer regulation issues. The International Agreements Committee regularly receives reports about new international developments, especially those related to international trade agreements applicable to legal services. In addition to the formation of the International Agreements Committee, the CCJ recently has developed professional relationships that have led to increased comparative and global conversations about legal ethics and regulatory issues. Staff from the National Center for State Courts and representatives of the CCBE, for example, recently met each other for the first time and thereafter exchanged information. Representatives of the CCJ also attended portions of the August 2004 "Atlanta Summit"; the "Atlanta Summit"; was organized by the Transnational Legal Practice Committee of the ABA Section of International Law to bring European and U.S. state bar representatives together to discuss issues related to multijurisdictional practice and the ongoing GATS

208. ABA Joint Committee on Lawyer Regulation, at http://www.abanet.org/cpr/jclr/jclr_home.html (last visited Jan. 22, 2005).

209. *Id.*

210. CCJ, Lawyer Conduct Resolutions, at <http://ccj.ncsc.dni.us/LawyerConductResols.html> (last visited Jan. 22, 2005). The CCJ also submitted comments on the proposed Sarbanes-Oxley rules. See SEC Website, at <http://www.sec.gov/rules/proposed/s74502/jskaye1.htm> (last visited Jan. 22, 2005).

211. See, e.g., National Center for State Courts, vol. 10, no. 3, Washington Update 1 (Mar. 2003) (on file with the author).

Chief Judge Kaye has created a new Committee to cover Trade issues and other International concerns for CCJ. . . . Also a representative of the USTR contacted GRO staff on 3/27/03 about developing a mechanism for communicating with state courts about legal services matters in GATS. When apprised of the new Committee, the USTR staff stated that the agency will attempt to make a presentation to the Committee in the near future.

Regarding the NAFTA situation, GRO staff is meeting with a coalition of state and local organizations next week to determine what collective endeavor we could take prior to the Chile and Singapore agreements consideration by the Congress.

Id.

negotiations.²¹² Thus, as state court judges consider U.S. legal ethics issues, the work of the CCJ undoubtedly makes them more aware of the comparative and global context in which lawyers operate.

The National Organization of Bar Counsel (NOBC) is another organization that addresses legal ethics issues and in which there recently has been increased global and comparative perspectives. The NOBC is a “non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States, Canada and Australia.”²¹³ Although the vast majority of NOBC members work in the U.S. rather than Australia or Canada,²¹⁴ the presence of members from Canada and Australia means that the NOBC members necessarily are exposed to comparative and global perspectives.

The NOBC recently has taken steps to make its comparative and global focus more accessible and of practical benefit. During the debates about ABA MJP Recommendations 8 and 9 (the ABA Model Foreign Legal Consultant Rule and the ABA Model Rule for Temporary Practice by Foreign Lawyers), some commentators expressed concerns about whether these proposals would allow foreign lawyers to exploit U.S. clients and then “go home” without effective accountability. This concern—and how to respond to it—was the subject of a meeting held in August 2002 during the ABA and NOBC Annual Meetings in San Francisco. The meeting included representatives from U.S., Australian, Canadian, and European discipline systems.²¹⁵ This meeting laid the groundwork for greater communication and cooperation between the CCBE and the NOBC with respect to international discipline cooperation. Following this meeting, the NOBC created an International Cooperation and Affairs Committee and the CCBE expanded the mandate of its Working Group on Co-operation in Disciplinary Matters

212. For a discussion of the Atlanta Summit, see Laurel S. Terry, *The GATS and Legal Services: The Resumed GATS Negotiations Trigger Additional U.S. and Other Activity*, 75 B. EXAMINER 43 (Feb. 2005), available at http://www.abanet.org/cpr/gats/bar_exam_Feb_05.pdf (last visited Mar. 19, 2005) [hereinafter Terry, *The GATS and Legal Services*]. The statements in this paragraph for which there are no citations are based on my personal knowledge.

213. National Organization of Bar Counsel (NOBC), homepage, at <http://nobc.org/index.html> (last visited Jan. 23, 2005).

214. As of February 2005, the NOBC had 806 individual members. Email from Mark Armitage, Former President, NOBC, to author (Feb. 8, 2005) (on file with author). According to the NOBC, forty-five of the 806 members are Canadian or Australian individuals or agencies. Email letter from Kathy Rogers, NOBC Executive Administrator, to author (Feb. 22, 2005) (on file with author).

215. I was present at this meeting, and although the attendees thought it was premature to discuss reciprocal international discipline, they concluded that the time had come to promote international discipline cooperation and communication in an effort to address concerns about foreign lawyer accountability. The other statements in this paragraph are based on my personal knowledge.

to include international, as well as European Union, cooperation.²¹⁶ The CCBE recently invited a NOBC representative to attend the May 2005 meeting of this CCBE Working Group in order to discuss issues of mutual interest.²¹⁷ Most significantly, the NOBC and CCBE have both agreed to sponsor websites to facilitate communication among discipline authorities around the world. In April 2005, the CCBE launched its portion of this webpage and the NOBC is in the process of collecting information for the U.S. portion of the webpage.²¹⁸ The sample cover letter provided to NOBC committee members explains the background and purpose of this endeavor:

The NOBC in cooperation with the CCBE (Counsel of the Bars and Law Societies of the European Union) is undertaking an ambitious project. Its goal is to establish on our respective web sites a page containing the disciplinary rules, disciplinary procedural rules, admission rules, admission procedure rules, and mobility rules. The NOBC page will cover the Canadian Provinces, the Australian States and the United States, including the District of Columbia, Virgin Islands and Puerto Rico. The CCBE page will cover all of the members of the European Union. The information on each page will also contain a name and contact information for each participating jurisdiction. . . . As cross border practice increases, the information in this databank will be invaluable. It will also be of assistance when trying to find out how other jurisdictions address common problems and it will underscore the international nature of our organization.²¹⁹

While this cooperation does not ensure a comparative analysis of discipline issues, it makes it much more likely that such analysis will occur.

216. Email from Mark Armitage, NOBC President to author (Oct. 28, 2003) (on file with author) (regarding the establishment of the NOBC International Cooperation and Affairs Committee) and CCBE, Working Group on Co-operation in Disciplinary Matters, at http://www.ccbe.org/en/comites/disciplines_en.htm (last visited Jan. 22, 2005). The CCBE Working Group on Co-operation in Disciplinary Matters originally was established to monitor issues related to the implementation of the EU Lawyers' Establishment Directive 98/5, *supra* note 102. Email from Jonathan Goldsmith, CCBE Secretary General, to author (Jan. 26, 2005) (on file with author).

217. Email from Jonathan Goldsmith, CCBE Secretary General, to author (Jan. 28, 2005) (on file with author); Email from William P. Smith III, General Counsel, State Bar of Georgia and Chair, NOBC International Cooperation and Affairs Committee, to author (Jan. 27, 2005) (on file with author).

218. CCBE, Summary of Disciplinary Proceedings and Contact Points in the EU and EEA Member States, *available at* http://www.ccbe.org/doc/En/table_discipline_1104_en.pdf (last visited June 17, 2005). Email from William Smith, Chair, International Cooperation and Affairs Committee, National Organization of Bar Counsel, to Committee Members (Jan. 21, 2005) (on file with author).

219. *Id.* (sample cover letter attached to email) (on file with author).

The comparative dialogue that has resulted over the past six years was undoubtedly part of the backdrop that led to the “Atlanta Summit” held in August 2004 during the ABA Annual Meeting. The “Atlanta Summit” involved CCBE representatives and the leaders of many U.S. state bar associations. The purpose of this summit was to facilitate a dialogue on issues related to the GATS, the ongoing GATS negotiations, and other cross-border regulation issues of interest.²²⁰ The ABA Transnational Legal Practice Committee organized the Summit; those attending included staff members from the ABA Center for Professional Responsibility and members and staff from the CCJ.

The “Atlanta Summit” was not the first time bar leaders from different countries had gotten together to talk about issues. Prior examples include the 2003 IBA GATS Forum²²¹ and the 1998 Paris Forum on Transnational Practice for the Legal Profession.²²² Obviously, the regular meetings of the IBA and UIA also included such discussions.²²³ During the period between 1998 and the present, both the IBA and the UIA were particularly active in facilitating comparative dialogue about lawyer ethics and regulatory issues. During this time period, the IBA and the UIA have debated, discussed, and finally agreed-upon, the following resolutions:

- International Bar Association (IBA) Statement of General Principles for the Establishment and Regulation of Foreign Lawyers (adopted in Vienna, 1998);
- International Bar Association (IBA) Resolution on GATS and Deregulation of the Legal Profession (adopted in Vienna, 1998);
- International Bar Association (IBA) Standards and Criteria for Recognition of the Professional Qualifications of Lawyers (adopted in Istanbul, 2001);

220. For more information about the Atlanta Summit, see Terry, *The GATS and Legal Services*, *supra* note 212. Summit 2 was held in Chicago in August 2005 during the ABA Annual Meeting.

221. For additional information about the IBA GATS Forum, see Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN ST. INT'L L. REV. 695 (2004).

222. For additional information about the Paris Forum, see Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1 (1999).

223. INT'L ASSOC. OF LAWYERS, webpage, at http://www.uanet.org/jsp/evenements/congres/acueil_congres.jsp?locale=en (last visited Jan. 23, 2005) (the Union Internationale des Avocats 49th Congress scheduled for Fez, Morocco, Aug.31–Sept. 4, 2005 included a panel entitled “Lawyers Of The World: A Single Code of Ethics?”).

- International Bar Association (IBA) Resolution Regarding the Terminology to Use in “Track 1” of the GATS (adopted in San Francisco, 2003);
- International Bar Association (IBA) Resolution Regarding Suitability of Using the Accountancy Disciplines in “Track 2” of the GATS (adopted in San Francisco, 2003);
- Union Internationale des Avocats (UIA) Standards for Lawyers Establishing a Legal Practice outside their Home Country (adopted in Sydney, 2002);
- Union Internationale des Avocats (UIA) Turin Principles of Professional Conduct for the Legal Profession in the 21st Century (adopted in Sydney, 2002).²²⁴

Most of the prior examples involved situations in which U.S. legal ethics authorities were interested in, or received input from, those outside the United States. The global dialogue works both ways, however, and those outside the United States are also interested in contributions from elsewhere. One recent example is the UK Clementi Committee’s consideration of the proper regulation of the legal profession. In addition to the numerous comments it received from those in England and Wales, the Clementi Committee received comments from individuals and organizations located outside the United Kingdom.²²⁵ The Law Society of Upper Canada and the CCBE were among those who submitted comments.²²⁶ Clementi Committee staffers have also informally solicited input from those outside the United Kingdom.²²⁷ Furthermore, in July 2004, Exeter University, in England, hosted a conference on international legal ethics that included, in its focus, the Clementi Committee’s work. Featured speakers listed on the program included U.S. academics Robert Gordon and Bryant Garth.²²⁸

224. ABA, GATS webpage, Miscellaneous, at <http://www.abanet.org/cpr/gats/misc.html> (last visited Feb. 5, 2005) (listing the resolutions and providing links to the text of the resolutions).

225. Report of the Review of the Regulatory Framework for Legal Services in England and Wales, app. 1, (Dec. 2004), at <http://www.legal-services-review.org.uk/content/report/appendix-1.htm> (last visited Jan. 23, 2005).

226. *Id.* (including comments from the Law Society of Upper Canada, Faculty of Advocates (Scotland), Law Society of Scotland, and Union Internacional del Notariado Latino (Mexico)). See also CCBE, Response to the Clementi Consultation Document, June 2004, at http://www.ccbe.org/doc/En/ccbe_response_clementi_040604_en.pdf (last visited Jan. 23, 2005).

227. Email from Boaz Nathanson, to author (Jan. 16, 2004) (on file with author) (soliciting information on MDP resources).

228. University of Exeter School of Law, First International Conference on Lawyers’ Ethics, *New Perspectives on Professionalism: Educating and Regulating Lawyers for the 21st Century*, July 6–7,

There are numerous other examples of comparative legal ethics dialogue that have taken place outside the United States. For example, in September 2004, UIA held its 48th Congress in Geneva, Switzerland. The program included a session on “Self-Regulation of Cross-Border Legal Services By the Organised Bar: The UIA, IBA, and ABA” at which ABA President, Robert Grey, spoke.²²⁹

The Association of American Law School (AALS) 2005 Midyear Meeting provides the final example to support my thesis that comparative and global perspectives have now become a part of mainstream of the U.S. legal ethics dialogue. One of the three workshops at the 2005 AALS Midyear Meeting was titled “Legal Ethics in a New Millennium: New Practice, New Rules, New Visions.”²³⁰ One of the four plenary sessions was titled “The Changing Legal Profession: Culture Sociology, Economics, Globalization, Demographics.”²³¹ Although prior AALS and ABA Center for Professional Responsibility conferences have featured comparative and global perspectives, they typically have been part of a break-out or smaller session, not one of the featured plenary sessions.²³² The 2005 AALS Midyear Conference shows the coming of age of global and comparative legal ethics perspectives and highlights the degree to which they have become part of the mainstream dialogue about legal ethics. Even though most commentators may not have comparative or global experiences, they now expect these perspectives to be part of the mainstream dialogue about U.S. legal ethics.

Given all of these developments, it should come as no surprise that there has been a dramatic increase in legal ethics articles written between 1998 and

2004, at <http://www.ex.ac.uk/law/ethicsconf/index.html> (last visited Jan. 23, 2005).

229. UIA, Final Programme, 48th Congress, Geneva, Switzerland, Sept. 1–4, 2004, 36, at http://www.uianet.org/images/ln_bo/vign_prog_final/Final_GB_BAT.pdf (last visited Jan. 23, 2005).

230. AALS, webpage, at <http://www.aals.org/2005midyear/ethics/whyattend.html> (last visited Jan. 23, 2005).

231. *Id.*

232. Program of the January 1996 Association of American Law Schools Annual Meeting (featuring a panel entitled “Providing Legal Services Across Borders-Challenges For North American Lawyers and Lessons from European Experience”) (on file with author); Program of the January 1997 Association of American Law Schools Annual Meeting (featuring a panel sponsored by the Professional Responsibility Section entitled “The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility and International Business Law”) (on file with author).

1995 was the first time that the ABA Center for Professional Responsibility included a program on international ethics; that program was a breakout session. ABA, Center for Professional Responsibility, 21st National Conference on Professional Responsibility, June 1995 (featuring panel entitled “Ethics in International Practice: It’s a Small, Small World”) (on file with author); Email from Arthur Garwin, ABA Center for Professional Responsibility Staff, to author (Feb. 2, 2005) (on file with author). The ABA’s general meetings also have had programs that addressed global and comparative ethics issues. For example, the August 1997 ABA Annual Meeting included a panel entitled “Legal Ethics in International Business Transactions.”

the present day that have a comparative or global perspective. Some of the leaders in the U.S. legal ethics field have now written books that use such a perspective. For example, Professor Geoffrey Hazard co-authored a 2004 book entitled *Legal Ethics: A Comparative Study*,²³³ Professor John Leubsdorf wrote a book in 2001 entitled *Man in His Original Destiny: Legal Ethics in France*,²³⁴ and Professor Roger Cramton co-edited a book in 1999 entitled *Lawyers' Practice & Ideals: A Comparative Perspective*.²³⁵ In addition to these books, there have been numerous articles written since 1998, including my own,²³⁶ that utilize comparative and global perspectives.²³⁷

233. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* (2004). Professor Hazard was the reporter for the ABA Model Rules of Professional Conduct, the author of a leading legal ethics treatise and a leading casebook, and Director of the American Law Institute during the period it developed the Restatement of the Law Governing Lawyers.

234. JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DESTINY: LEGAL ETHICS IN FRANCE* (2001). Among other things, Professor Leubsdorf was the associate reporter for the Restatement of Law Governing Lawyers.

235. *LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW* (John J. Barcelo, III & Roger C. Cramton eds., 1999). Professor Cramton has co-authored a leading textbook on legal ethics and has received the American Bar Foundation's Research Award for lifetime scholarly contributions to research on law and government.

236. See, e.g., Principal Drafter, *GATS: A Handbook for International Bar Association Member Bars* (May 2002), available at <http://www.ibanet.org/images/downloads/gats.pdf>; Martin Henssler & Laurel S. Terry, *Lawyers Without Frontiers—A View From Germany*, 19 DICK. J. INT'L L. 269 (2001); Laurel S. Terry, *The Revised CCBE Code of Conduct*, in ROGER GOEBEL & MARY DALY, *RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE* (rev. ed. 2005) (forthcoming); Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, Ch. 2 in STEPHEN J. MCGARRY, *MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS* (Law Journal Press 2002); Laurel S. Terry, *Global Legal Practice Symposium—Foreword*, 22 PENN ST. INT'L L. REV. 527 (2004); Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN ST. INT'L L. REV. 695 (2004); Laurel S. Terry, *But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, 2003 Symposium Issue, PROF. L. 83 (2004); Laurel S. Terry, *MDPs, "Spinning," and Wouters v. Nova*, 52 CASE W. RES. LAW R. 867 (2002); 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 (2001), as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002); Laurel S. Terry, *MDPs: Reflections From the US Perspective*, 8 INT'L J. LEGAL PROF. 151 (2001); 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 of *The Professional Lawyer* 63 (2001); Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999); Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1 (1999); 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 (1998). All of these articles are available on my website, <http://www.personal.psu.edu/faculty/l/s/lst3/> (last visited Feb. 5, 2005).

237. It is beyond the scope of this article to provide a complete bibliography of comparative legal ethics articles written between 1998 and the present. However, some of the comparative legal ethics articles written during this period include: Michael R. Asimow, *Do First Year Law Students Think*

In sum, it is my contention that in 1998, a sea change occurred with respect to the use of global and comparative perspectives when considering U.S. legal ethics issues. The November 1998 ABA MDP hearings involved the first significant participation by foreign lawyers and regulators in the discussions about U.S. ethics rules. Moreover, U.S. regulators and legal ethics commentators seemed to view these perspectives as appropriate and integral to the discussions. This is a different state of affairs than existed before 1998 and represents a very positive development.

D. Factors Contributing to the 1998 Sea Change

Change often seems to occur in a dramatic fashion and the use of the term “sea change” in this article may suggest a sudden dramatic turn of events. But changes that seem dramatic or that seem to represent a sudden paradigm shift often are the combination of many factors, some of which may be quite

Lawyers are Sleazy? A Transnational Media Effect Study (2004), UCLA School of Law Research Paper No. 04-12, <http://ssrn.com/abstract=572964>; Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL'Y J. (2005); Owen Bonheimer, *Unauthorized Practice of Law by U.S. Lawyers in U.S.-Mexico Practice*, 15 GEO. J. LEGAL ETHICS 697 (2002); Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001); Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice* (1998); Nuno Garoupa, *Regulation of Professions in the U.S. and Europe: A Comparative Analysis*, Centre for Economic Policy Research Paper (Aug. 2004), available at <http://ssrn.com/abstract=640502>; Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States*, 34 INT'L LAWYER 307 (2000); Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593 (2002); Louise Hill, *Publicity Rules of the Legal Professions Within The United Kingdom*, 20 ARIZ. J. INT'L & COMP. L. (2003); Nancy L. Kaszak, *Practicing Law in the Global Economy*, 22 N. ILL. U. L. REV. 1 (2001); Jay L. Krystinik, *The Complex Web Of Conflicting Disciplinary Standards In International Litigation*, 38 TEX. INT'L L.J. 815 (2003); Julian Lonbay, *The Free Movement of Persons*, 53 INT'L & COMP. L.Q. 479 (2004); Julian Lonbay, *Lawyer Ethics in the Twenty-First Century: The Global Practice Reconciling Regulatory and Deontological Differences—The European Experience*, 34 VAND. J. TRANSNAT'L L. 907 (2001); Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002); Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1 (2002); D. Bruce Shine, *The European Union's Lack of Internal Borders in the Practice of Law: A Model for the United States?*, 29 SYRACUSE J. INT'L L. & COM. 207 (2002); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L LAW J. 1039 (2002); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677 (2000); Detlev F. Vagts, *The Impact of Globalization on the Legal Profession*, 2 EUROPEAN JOURNAL OF LAW REFORM 403 (2000); Brian J. Wallace, *Cross-Border Legal Practice: The Canadian Perspective*, PROFESSIONAL LAWYER (1998); Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931 (2001).

small and which may have taken place over a long period of time.²³⁸ This section of the Article identifies various factors that I believe contributed to the 1998 sea change and the seriousness with which comparative and global legal ethics perspectives are now embraced.

1. Factors Affecting Academia

One of the factors within academia that contributed to the 1998 sea change was the dramatic increase in summer abroad programs offered by U.S. law schools. The ABA's website lists ninety-eight law schools that offer 173 summer abroad programs; in 1980, there were just a handful of such programs.²³⁹ As summer abroad programs increased, staffing needs for these courses increased. As a result, many professors who traditionally taught only domestic legal ethics courses have now been exposed to global and comparative legal ethics issues as a result of teaching in a summer abroad program.²⁴⁰

The second development that has helped make more legal ethics academics aware of, and receptive to, global and comparative perspectives, is the dramatic increase in the number of foreign LL.M. students. In 2004, fifty-eight law schools offered programs exclusively for foreign LL.M. students.²⁴¹ Foreign law students, however, do not confine themselves to LL.M. programs designed exclusively for them. Between 1998 and 2003, the number of graduate LL.M. programs available to foreign law students increased 62%, with 102 schools offering 189 graduate programs available to foreign students in 2003.²⁴² Foreign students are taking advantage of these

238. *See generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1963) (discussing how paradigm shifts occur).

239. *See generally* ABA, *Annual Foreign Summer Programs*, at <http://www.abanet.org/legaled/studyabroad/foreign.html> (last visited Jan. 23, 2005). In 1980, when the Dickinson School of Law began its program in Florence, Italy, there were approximately ten summer abroad programs operated by U.S. law schools. *See* Interview with Louis Del Duca, Professor, Penn State Dickinson School of Law (Feb. 9, 2005). The ABA Processes and Criteria for Summer Abroad programs have operated for almost twenty years. ABA, *Foreign Study*, at <http://www.abanet.org/legaled/studyabroad/abroad.html> (last visited Sept. 20, 2004).

240. For example, teaching a legal ethics course in our 1987 summer abroad program first sparked my interest in this area. Professors Leah Wortham and Lisa Lerman of Columbus School of Law, The Catholic University of America, became interested in comparative legal ethics issues as a result of teaching in Poland. The summer program in which they taught may be especially likely to spark an interest in comparative legal ethics because it includes both foreign (Polish) and U.S. students. Email Letter from Professor Lisa G. Lerman, to author (Feb. 11, 2005) (on file with author).

241. *See also* Silver, *Offshoring*, *supra* note 41, tbl. 2.

242. *See* Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Non-U.S. Lawyers* (unpublished manuscript, on file with author) [hereinafter *Silver Manuscript*]. In comparison to the 189 programs available in 2003 statistics, sixty-seven schools offered graduate

opportunities. In 1999, which is the most recent year for which numbers are available, foreign students earned 52% of the total number of LL.M. degrees awarded and constituted 41% of all students enrolled in post-graduate programs at U.S. law schools.²⁴³ One indication of the increased number of foreign LL.M. students is the fact that the ABA Section on Legal Education and Admission to the Bar felt the need to adopt a formal “Statement” to address the significance of the LL.M. degree:

It is the long-standing position of the Council of the Section of Legal Education and Admissions to the Bar that no graduate degree is or should be a substitute for the J.D., and that a graduate degree should not be considered the equivalent of the J.D. for bar admission purposes.²⁴⁴

This Statement followed a 1999 letter the ABA had sent to bar officials.²⁴⁵

What do these LL.M. statistics mean for U.S. law professors in general and legal ethics professors in particular? The statistics show that over the years, there has been an increasing likelihood that U.S. professors who teach domestic law subjects, including legal ethics, will be exposed to the perspective of foreign law students and lawyers. Even if faculty members do not teach foreign LL.M. students, they are likely to have been exposed

programs available to foreign lawyers in 1998. These statistics refer to graduate programs open to foreign lawyers; the statistics do not refer to graduate or LL.M. programs designed specifically for foreign lawyers. *Id.*

According to Silver, there are no statistics publicly available regarding the number of foreign-educated lawyers in U.S. graduate law programs. *Id.* at 8. But, it is likely that there has been a significant increase in foreign LL.M. students. For example, Rick Morgan, who is with the Office of the Advisor to the Consultant on Legal Education, ABA, advised Silver that during the years 1996–1999, the percentage of LL.M. degrees awarded to foreign nationals increased from 39.8% to 52.7% of the total number of LL.M. degrees awarded. Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM J. INT’L L.* 1039 (2002) [hereinafter Silver, *The Case of the Foreign Lawyer*]. Silver also cites a 54% increase in the number of foreign lawyers sitting for the New York bar exam between 1998 and 2002 as a likely indicator that there has been a corresponding increase in the number of foreign lawyers attending U.S. law school graduate programs. Silver Manuscript, *supra*, at 8.

243. Silver, *The Case of the Foreign Lawyer*, *supra* note 242 n.27 and accompanying text (citing statistics provided by the American Bar Association Section on Legal Education and Admissions to the Bar; there were 1,616 foreign LL.M. graduates that year).

244. ABA, Section of Legal Education and Admissions to the Bar, Council Statements, LL.M. and Other Post-J.D. Degrees and Qualification for Admission to Practice, at <http://www.abanet.org/legaled/council/prior.html> (last visited Feb. 9, 2005).

245. Letter from Chief Justice Randall T. Shepard, Chairperson of the Section, to all the state Chief Justices, liaison judges, and Directors of Boards of Bar Examiners, Apr.–May 1999, at http://www.abanet.org/legaled/postjdprograms/postjd_letter.html (last visited Feb. 9, 2005) (this letter to state bar examiners warned them of the absence of ABA oversight with regard to foreign lawyer LL.M. programs).

indirectly to comparative views as a result of interactions with colleagues who teach and interact informally with foreign LL.M. students.

Another measure of the increased exposure of U.S. law faculty to, and interest in, global and comparative perspectives is the dramatic increase in the number of law reviews devoted to international law topics: “in 1976, U.S. law schools sponsored only fifteen law reviews with a foreign, comparative, or international law focus; this number increased to sixty-four law reviews in 1996 and seventy-three in 2001 . . .”²⁴⁶ In order for the increased number of internationally-oriented law reviews to survive, there must be an increase in the number of internationally-oriented articles written by academics and others. Many of these journals regularly include comparative, as well as international, articles.

The increased interest in international, transnational, global, comparative, and foreign perspectives likely has been, and will continue to be, supported institutionally. In a survey of law school deans conducted in the early 1990s, “internationalization of the curriculum was the second-most-common prediction of future changes in legal education . . . this prediction came at a time when many schools already had increased their international and comparative offerings.”²⁴⁷ This suggests that in the long term, faculty members are more likely to value comparative and global perspectives because their institutions do so.

A third development that has helped this sea change to take hold is the increased chance that legal ethics conferences will include foreign academics or lawyers. The 24th National Conference on Professional Responsibility, which took place in May 1998 in Montreal, was the first time the National Professional Responsibility conference took place outside the United States. This was the second time in twenty-four years that the National Conference on Professional Responsibility included foreign panelists.²⁴⁸ The comparative and international approach used in 1998 appears to have taken hold: in three of the six years since the Montreal conference, the National Conference on Professional Responsibility has included speakers from outside the United

246. Carole Silver, *Studying Singapore: Internationalizing the U.S. Law School Curriculum*, 51 J. LEGAL EDUC. 75, 78 (2001).

247. *Id.* at 77.

248. See Materials from the 24th National Conference on Professional Responsibility, May 28–30, 1998, Montreal, Can. (on file with author) (speakers included Rosalie Silberman Abella, a judge on the Ontario Court of Appeals; Kathleen Cranley Glass, McGill University Faculty of Medicine; Marvin J. Huberman, a partner in the Toronto firm Morris/Rose Ledgett, Barristers and Solicitors; and Brian J. Lawson, an attorney with the Vancouver firm, Lawson Lundell). In 1985, at the 11th National Conference, Jennifer Bankier, who was a professor at Dalhousie Law School, spoke during a Lawyer Telecomputer Networking panel. Letter from Arthur Garwin, ABA Center for Professional Responsibility Staff, to author (Feb. 2, 2005) (on file with author).

States.²⁴⁹ The ABA Center for Professional Responsibility membership now includes both Canadians and Australians.²⁵⁰ There also have been several symposia that focused on, or included, comparative and global legal ethics topics, which helps encourage these perspectives.²⁵¹

Another important development that has contributed to, and will help sustain, this sea change is the increased recognition of legal ethics as “law” worthy of university study outside the United States. “Law” developments that have contributed to this changing perception include: the European Union directives (including the 1977 Lawyers Services’ Directive, the 1989 Diplomas Directive, and the 1998 Lawyers’ Establishment Directive); trade agreements such as NAFTA and the GATS that apply to lawyers; various money laundering initiatives (including the FATF Forty Recommendations and Canadian money-laundering litigation); various antitrust studies directed at the legal profession; and, within the United States the addition of a Restatement devoted to “The Law of Lawyering.” The conversion of these issues from “ethics” to “law” means that an increasing number of non-U.S. academics either study these topics themselves or better understand why they are included within a law school curriculum. My personal experiences illustrate the degree to which there has been dramatic change in the way in which European academics view legal ethics issues. In 1987, it was clear that European academics were puzzled and bemused by my concentration in legal ethics issues. I encountered that same reaction in 1992 in Vienna, Austria. During 1998–1999, in Germany, I still encountered this reaction although to a lesser extent.²⁵² Since 1998, however, it has become increasingly easy to explain legal ethics interests to academics outside the United States because I can refer to the 1998 EU Lawyers’ Establishment Directive and the GATS as

249. Twenty-Fifth National Conference on Professional Responsibility, June 3–5, 1999, La Jolla, Cal. (speakers include Alison Crawley from the Law Society of England and Wales); 28th National Conference on Professional Responsibility, May 29–June 1, 2002, Vancouver, Can. (speakers included Adam M. Dodek, David M. Layton, Jerry Ziskrout, Mary Ann Cummings and Jean Whittow from Canada, Steve Mark from Australia, and Limor Zer-Gutman from Israel), 29th National Conference on Professional Responsibility, May 28–21, 2003, Chicago, Ill. (speakers included Don Thompson from the Law Society of Alberta).

250. ABA, Center for Professional Responsibility, Membership Directory 2003 (listing Australian and Canadian members) (on file with author).

251. As stated in the Introduction to this article, the *Lawyers and Jurists in the 21st Century Symposium* for which this article is written included a session entitled, “Legal Ethics and Professional Responsibility in a Global Context.” Other symposia include an April 2001 symposium at Vanderbilt University School of Law, whose speakers included Ronald Brand, Peter Ehrenhaft, Julian Lonbay, among others, and the APRL/Oxford October 2000 Conference.

252. See, e.g., Professor Dr. Martin Henssler at the University of Cologne, Germany. He was previously the Director of the Institut für Anwaltsrecht [Institute for the Law of Lawyers] and is currently director of the Documentation Centre for the Law of the Legal Profession in Europe, available at <http://www.uni-koeln.de/jur-fak/dzeuanwr/indexenglisch.html> (last visited Jan. 23, 2005).

examples of what I teach. The “law” developments have provided increased opportunity for cross-cultural legal ethics conversations.

The ABA Central European and Eurasian Law Initiative (CEELI) is another development that has contributed to academia’s growing sensitivity to comparative legal ethics perspectives. The ABA CEELI project began in Central and Eastern Europe in 1990; in 1992, it expanded to the Newly-Independent States of the former Soviet Union.²⁵³ The purpose of the program was to help those countries respond to the “enormous tasks associated with reforming their economies and legal infrastructures.”²⁵⁴ CEELI’s areas of focus include legal education reform, legal profession reform (including legal ethics), and judicial reform.²⁵⁵ In many of the countries in which CEELI has worked, it has prepared an “assessment” of proposed law related to the legal profession or judicial system.²⁵⁶ By asking many U.S. legal ethics academics to comment on proposed laws, CEELI has fostered comparative and global legal ethics perspectives by U.S. academics.²⁵⁷ Other ABA efforts that promote comparative ethics perspectives by U.S. academics include the Africa Law Initiative, the Asia Law Initiative, and the Latin American Legal Initiatives Council.²⁵⁸ CEELI

253. ABA, CEELI, History and Philosophical Premise, at <http://www.abanet.org/ceeli/about/history.html> (last visited Feb. 8, 2005).

254. *Id.* For additional information about CEELI, see Jacques de Lisle, *Lex Americana: United States Legal Assistance, American Legal Models, and Legal Change in the Post Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999).

255. ABA, CEELI, Focal Areas, at <http://www.abanet.org/ceeli/areas/home.html> (last visited Feb. 8, 2005).

256. *See* ABA, CEELI Assessments, at <http://www.abanet.org/ceeli/publications/assessments/home.html> (last visited Feb. 10, 2005) (showing assessment related to the legal profession or legal system for eleven of the nineteen countries listed on its index).

257. Many legal ethics academics have commented on proposed laws. The list of these academics includes, but is by no means limited to: Professors Father Robert F. Drinan, John M. Levy, and Edmund B. Spaeth, Jr. (Belarus); Joel S. Newman and Leah Wortham (Macedonia); Sherman L. Cohn, William B. Fisch, and H. Patrick Glenn (Ukraine); Kathleen Clark and Carl Selinger (Uzbekistan). ABA, *Analysis of the Draft Professional Code of Ethics of Lawyers for the Republic of Belarus* (Feb. 21, 1996), available at <http://www.abanet.org/ceeli/publications/assessments/belarus/lawyersethics.html> (last visited Feb. 10, 2005); ABA, CEELI, *Analysis of the Draft Amendments to the Law on the Bar of the Republic of Macedonia* (June 16, 1999), available at <http://www.abanet.org/ceeli/publications/assessments/macedonia/lawonthebar.html> (last visited Feb. 10, 2005); ABA, CEELI, *Analysis of the Draft Law on Advocacy for the Republic of Uzbekistan* (Nov. 22, 1996), available at <http://www.abanet.org/ceeli/publications/assessments/uzbekistan/advocacy.html> (last visited Feb. 10, 2005); ABA, CEELI, *Analysis of the Draft Code of Ethics for Advocates of the Republic of Ukraine* (July 27, 1998), available at <http://www.abanet.org/ceeli/publications/assessments/ukraine/codesofethicsadvocates.html> (last visited Feb. 10, 2005). CEELI has also conducted assessments that are not listed on its website. *See* ABA, CEELI, *Analysis of the Law on the Bar and the Act on Legal Counselors Provisions Restricting Foreign Attorneys for the Republic of Poland* (Nov. 24, 1997), available at <http://www.abanet.org/ceeli/publications/assessments/poland/lawonthebar.html> (Laurel Terry contributing) (last visited Feb. 5, 2005).

258. ABA, Africa Law Initiative, at <http://www.abanet.org/aba-africa/home.html> (last visited Feb.

also has sponsored the Balkan Law School Linkage Initiative that links eight U.S. law schools with Balkan partners,²⁵⁹ although this program is not limited to legal ethics academics, these linkages may have given legal ethics academics a greater interest in comparative legal ethics issues.

CEELI's post-1998 activities should help sustain academic interest in comparative and global legal ethics issues. For example, in 2002, CEELI published a concept paper entitled, *Professional Legal Ethics: A Comparative Perspective*.²⁶⁰ The contributors to this concept paper included both academics who regularly address international and comparative legal ethics issues and those who usually address domestic legal ethics issues.²⁶¹ Professor Ronald Rotunda, who co-authored one of the leading and earliest legal ethics casebooks, wrote an article about Czech legal ethics as a result of his CEELI involvement.²⁶² Professor Nancy Moore, who was the Reporter for the ABA Ethics 2000 Commission and one of the contributors to the CEELI Concept Paper, has since written about conflicts of interest for lawyers who practice in transnational law firms.²⁶³

Another post-1998 project of CEELI's that should foster interest in comparative legal ethics is the Legal Profession Reform Index project. In 2003, CEELI assembled a group of experts to create an index that could be used to assess proposed laws about the legal profession.²⁶⁴ The experts

10, 2005) and ABA, Asia Law Initiative, at <http://www.abanet.org/aba-asia/> (last visited Feb. 10, 2005). Professor Vincent Johnson is among those who have provided commentary in these projects. See Vincent Johnson, ABA, Asia Law Initiative, *Commentary on the Code of Ethics of Mongolian Advocates* (May 4, 2004), at <http://www.stmarytx.edu/law/docs/ArticleMongolia.pdf> (last visited Feb. 10, 2005).

259. ABA, CEELI, The Balkan Law School Linkage Initiative, at http://www.abanet.org/ceeli/special_projects/blsli.html (last visited Feb. 8, 2005).

260. PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE (Maya Goldstein Bolocan ed., 2002), available at http://www.abanet.org/ceeli/publications/conceptpapers/proflegaethics/professional_legal_ethics_concept_paper.pdf (last visited Apr. 23, 2005).

261. *Id.* app. A. The academics who contributed to this project included Mary Daly, Samuel Dash, Peter Joy, Louise Hill, Susan Martyn, Virginia Maurer, Nancy Moore, Laurel Terry, and Leah Wortham. The contributors also included a number of distinguished foreign experts, and Mary Devlin and Eileen Libby, who are among the professional staff at the ABA Center for Professional Responsibility, and William Hornsby Jr. who is staff counsel to the ABA Division of Bar Services and has written on marketing, advertising and ethics rules. *Id.*

262. Ronald D. Rotunda, *Legal Ethics, The Czech Republic and the Rule of Law*, PROF. LAW 1, 7 n.4 (1996).

263. Nancy Moore, *Review Essay: Regulating Law Firm Conflicts in the 21st Century Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* 18 GEO. J. L. ETHICS 521 (2005) (reviewing J. ANINE GRIFFITHS-BAKER, *SERVING TWO MASTERS: CONFLICTS OF INTEREST IN THE MODERN LAW FIRM* (2002) and SUSAN SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002)).

264. ABA, CEELI, CEELI Convenes Working Group Of Experts On Legal Profession Reform Index, available at http://www.abanet.org/ceeli/press_releases/07.02.2003_lpri_working_group_pr.html (last visited Feb. 8, 2005).

drafting the index included legal ethics academics Kathleen Clark and Roy Stuckey.²⁶⁵ In sum, there have been a number of factors over the years that have increased U.S. academics' awareness of comparative and global legal ethics issues that helped pave the way for the 1998 sea change.

2. *Factors Affecting Practicing Lawyers*

The factors described above undoubtedly contributed to, and will help sustain, U.S. academics' greater awareness of the global and comparative nature of legal ethics issues. Some of these same factors also have contributed to practicing lawyers' greater sensitivity to comparative and global legal ethics issues. For example, because a greater number of U.S. law students now attend foreign summer abroad programs, they are likely to bring those expanded perspectives into the law firms in which they work. Practicing lawyers also are more likely to encounter foreign lawyers with this dual training as a result of the dramatic increase in the number of foreign LL.M. students.²⁶⁶ Practicing lawyers also have an increased chance of interacting with foreign lawyers at conferences and meetings. For example, the Association of Professional Responsibility Lawyers (APRL) has held several of its meetings outside the United States and has invited foreign speakers.²⁶⁷ In 2000, the ABA split the annual meeting between London and New York, giving some U.S. lawyers a greater opportunity to interact with foreign lawyers.²⁶⁸

Although the split annual meeting was a one-time occurrence, the ABA has institutionalized another program that facilitates meetings among U.S. lawyers and foreign lawyers; this is the ABA President's Program for Distinguished International Guests at the Annual Meeting.²⁶⁹ According to the Director of the ABA International Liaison Office:

265. *Id.*

266. *But see* Carole Silver, *Internationalizing US Legal Education: A Report on the Education of Non-US Lawyers* (unpublished manuscript on file with author) (presenting data about the hiring practices of the foreign branch offices of U.S. law firms and noting that LL.M. foreign graduates are not hired in as large a number as one might expect).

267. *See* Laurel S. Terry, *Foreword: Global Legal Practice Symposium*, 22 PENN ST. INT'L L. REV. 527 (2004) (introducing the papers from the October 2002 APRL Conference in Florence, Italy); Charles W. Kettlewell, *Introduction: Global Legal Practice Symposium*, 22 PENN ST. INT'L L. REV. 541, 542 (2004) (explaining why APRL has sponsored international conferences and referring to APRL's programs in Shanghai, China and Cambridge, England in 2000 and Paris, France in 1996).

268. *See* ABA, 2000 Annual Meeting Program London Sessions, July 15–20, 2000 (on file with author).

269. ABA, The International Liaison's Welcome, *available at* <http://www.abanet.org/liaison/home.cfm> (last visited Feb. 10, 2005). Through this program, which originally started in a much smaller form after World War II, the ABA issues invitations to foreign bar leaders to attend the ABA

In recent years, the number of Distinguished Guests attending the Annual Meeting has increased dramatically, from around 20 per year to a record high of 52 Distinguished Guests [in San Francisco in 2002]. I anticipate that at the [2005] Chicago Annual Meeting we will again have a turn out of approximately 50 foreign bar leaders in attendance. More and more often, they choose to bring with them the Executive Directors and/or other leadership of their respective bars. ILO has used this increased interest in the Annual Meeting to encourage enrollment as international associates in order for the accompanying bar representatives to register at the reduced international associate member rate. [There have been] over 100 new international members in the past two years.²⁷⁰

The ABA Annual Meeting now typically includes at least two substantive programs for foreign bar leaders, including a Bar Leaders Roundtable discussion and an orientation program featuring the ABA President, President-Elect, Executive Director, Chair of the House of Delegates, and Chair of the Section of International Law.²⁷¹ This program has led to increased foreign lawyer attendance at ABA annual meetings, giving U.S. lawyers a greater chance to interact with foreign lawyers.²⁷² Even more importantly, these visitors have recently been included on substantive panels, which exposes a great number of U.S. lawyers to the issues and concerns of foreign lawyers.²⁷³

Another factor in the practicing bar that supports global and comparative legal ethics perspectives is the fact that many practicing lawyers face comparative and global legal ethics issues on a daily basis. Any law firm that has offices in multiple countries, staffed by lawyers from different countries, must determine which ethics regulations to use. Furthermore, practicing lawyers must learn to identify cultural differences in ethics rules. Although these lawyers and firms have to confront some of these differences on a daily basis (e.g., conflict of interest rules) and other differences less frequently (e.g., confidentiality), every multinational firm must in some measure be a comparative law specialist for risk management purposes.

annual meeting, typically holds a reception or dinner in their honor, and waives their registration fees. Email from Kathleen C. Sullivan, Director, ABA International Liaison Office, to author (Feb. 11, 2005) (on file with author).

270. *Id.*

271. *Id.*

272. *Id.* "The Program continues to be a forum that provides the opportunity for U.S. lawyers to convene and exchange ideas with foreign lawyers, the leaders in their respective countries, on how to improve the legal infrastructure worldwide." *Id.*

273. *Id.*

For practicing lawyers, much of this comparative and global ethics deliberation occurs within the law firm behind closed doors. Some developments, however, have taken place in the public domain and confirm that lawyers and firms are concerned about comparative legal ethics issues. For example, in 2001, the ABA issued a formal ethics opinion concluding that it did not violate the ABA Model Rules for U.S. lawyers to form partnerships with foreign lawyers.²⁷⁴ The ABA issues only a handful of formal ethics opinions per year; the selection of this topic suggests that it was of interest to a number of practicing U.S. lawyers.

Another example occurred in 2001 when the ABA Section of International Law and Practice successfully urged the ABA Ethics 2000 and MJP Commissions to revise ABA Model Rule of Professional Conduct Rule 8.5. The Section of International Law wanted the rule revised in order to give U.S. transnational lawyers additional ethics “choice of law” guidance.²⁷⁵ Prior to 2002, U.S. lawyers engaged in transnational legal practice had been exempt from the “choice of law” provisions in ABA Model Rule 8.5.²⁷⁶ Comment 7 of ABA Model Rule 8.5 now states that “[t]he choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”²⁷⁷ The original provision excluding lawyers engaged in transnational practice had been included at the request of international lawyers; this new change, which was requested by the Section of International Law, shows lawyers’ increased sensitivity to comparative legal ethics issues (and perhaps the liability risks such issues pose).

U.S. lawyers who interact with foreign lawyers and bar associations have had opportunities to hear about comparative legal ethics issues, which undoubtedly has helped contribute to, and will help sustain, a greater sensitivity to these issues. For example, the former president of the CCBE has urged lawyers to develop better choice of law (“double deontology”)

274. *See generally* ABA, Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-423 (2001) (discussing the formation of partnership with foreign lawyers).

275. Letter from Ellen H. Clark and Timothy E. Powers, Co-Chairs, Transnational Legal Practice Committee of the ABA Section of International Law and Practice, to ABA Commission on Practice (June 29, 2001), attaching Letter from Daniel Magraw, Chair, and Robert Lutz, Chair-Elect, ABA Section of International Law and Practice, to the ABA Ethics 2000 Commission (May 9, 2001), at http://www.abanet.org/cpr/mjp-comm_silp.html (last visited Feb. 8, 2005).

276. Prior to 2002, Comment 6 of Rule 8.5 stated: “The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.” MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 6 (2001).

277. MODEL RULES OF PROF’L CONDUCT R. 8.5 (2005).

rules to address conflicts that can arise between the ethics rules of different countries.²⁷⁸ He helped organize a Showcase Panel at the International Bar Association's Annual Conference held in Durban, South Africa in October 2002—*Contradictory Professional Duties—A Catch 22 Situation for the International Lawyer!*²⁷⁹ During a speech given in 2004 in London, he spoke about an incident where a German lawyer (Rechtsanwalt) was arrested and put in jail in London because he refused to disclose confidential information protected by German criminal law.²⁸⁰ In sum, a variety of factors undoubtedly have contributed to, and will help sustain, the practicing bar's greater sensitivity to comparative and global perspectives on legal ethics issues. These factors undoubtedly helped pave the way for the 1998 sea change.

3. Factors Affecting Domestic Regulators and Bar Associations

Developments affecting domestic regulators and bar associations also have contributed to, and likely will sustain, the use of comparative and global legal ethics perspectives.²⁸¹ Similar to academics and practicing lawyers,

278. See generally Hans-Jürgen Hellwig, *Cross-Border Practice: The Difficulty of Diversity*, EU LAW. 38 (July/Aug. 2002); Colin Tyre, Conflict of Rules: Discussion Paper For The CCBE Standing Committee, CCBE Internal Working Document on Double Deontology (Jan. 2003) (on file with author).

279. Email from Hans- Jürgen Hellwig, Former CCBE President, to author (Feb. 8, 2005) (on file with author).

280. *Id.*

281. I have chosen to discuss domestic regulators and bar associations together because there are a number of ways in which their interests and activities overlap when they are setting rules or model rules for lawyers. For observations on this issue from the European perspective, see Legal Services Review, Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales (Mar. 2004), available <http://www.legal-services-review.org.uk/content/consult/review.htm> (last visited Sept. 19, 2005) (requesting comments on various lawyer regulatory models, including Model A, which would have removed regulatory power from the Law Society of England and Wales and the Bar Council and given it to an independent regulatory body, and citing concerns about whether lawyers can adequately regulate themselves) [hereinafter Clementi Committee Consultation]; see also Jonathan Goldsmith, *Global Legal Practice and GATS: A Bar Viewpoint*, 22 PENN ST. INT'L L. REV. 625 (2004) (explicitly distinguishing between the regulatory and trade association functions of bar associations). In the United States, there has been significant commentary on the issue of self-regulation and bar associations. See Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994); Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989), reprinted in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

regulators and bar associations have been affected by regulatory developments such as the EU Directives, trade agreements (including the GATS and NAFTA), money laundering initiatives, and interest in lawyer regulation by antitrust authorities. Domestic regulators and bar associations, like practicing lawyers and academics, now operate in a world in which these international developments may affect their own domestic rules regarding lawyers. And even if these developments do not directly displace their own regulation of lawyers, they increasingly face situations in which rules from a foreign jurisdiction are cited in policy debates about their own rules.

High profile scandals are another factor that may contribute to regulators' increased global and comparative legal ethics sensitivity. Because of the Internet and the changed nature of communication, domestic regulators and bar associations are much more likely to be aware of scandals in other parts of the world than they were fifty years ago or even a decade ago.²⁸² The Enron²⁸³ scandal, for example, has caused significant discussion not just in the United States, but also outside the United States, concerning risk exposure and proper regulation of lawyers. When the U.K. Clementi Committee recently considered the issue of MDPs, it addressed Enron and WorldCom, neither of which occurred in the United Kingdom.²⁸⁴

282. See, e.g., CCBE, *Comments on the Commission's Legal Analysis in its Report on Competition in Professional Services* 4 (June 2004), available at http://www.ccbe.org/doc/En/competition_legal_critique_300604_en.pdf (last visited Mar. 11, 2005). The CCBE's response to the EU Commission's Competition Report referred to Enron, stating:

the CCBE would like to raise the question whether it is timely for DG Competition to talk about less regulation for liberal professions after the type of scandals which have recently occurred at an international and European level, such as Enron and Parmalat. In this context, the CCBE would refer to a recent proposal of the European Commission which seems to take account of these developments, i.e., the European Commission proposal for a new Directive on statutory audit in the EU of 16 March 2004.

Id.

283. For a discussion of Enron, see generally Paul D. Paton & Deborah L. Rhode, *Lawyers, Ethics and Enron*, in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* (Nancy B. Rapoport & Bala G. Dharan eds., 2004); Michael L. Fox, *Survey: To Tell or Not to Tell: Legal Ethics and Disclosure After Enron*, 2002 COLUM. BUS. L. REV. 867 (2002); Robert R. Keating, *Symposium: The Future Structure and Regulation of Law Practice: Multidimensional Practice in a World of Inevitable Ignorance: MDP, MJP, and Ancillary Business After Enron*, 44 ARIZ. L. REV. 717 (2002); Larry E. Ribstein, *Symposium: Evaluation and Response to Risk by Lawyers and Accountants in the U.S. and E.U.: Limited Liability of Professional Firms After Enron*, 29 IOWA J. CORP. 427 (2004); Florian Stamm, *A Comparative Study of Monitoring Management in German and U.S. Corporations After Sarbanes-Oxley: Where are the German Enrons, WorldComs, and Tycos?*, 32 GA. J. INT'L & COMP. L. 813 (2004).

The European Union's major corporate scandal is Parmalat. U.S. commentators have discussed Parmalat, just as European commentators have discussed Enron. See generally John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301 (2004) (comparing the Parmalat, Enron, and Worldcom scandals).

284. Clementi Committee Report, *supra* note 225, chap. F, ¶ 86.

An additional factor contributing to the greater sensitivity on the part of regulators and bar associations is their increasing awareness that lawyers and law firms are subject to multiple sets of ethics rules, which are likely to have spillover effects on a jurisdiction's own rules. Regulators are aware that the spillover may occur in a *de facto* fashion, in which lawyers, subject to multiple rules, use the other jurisdiction's rule. Alternatively, the spillover may occur more formally when lawyers and others cite legal ethics rules from other jurisdictions in domestic policy debates and lobby to have a jurisdiction's rules changed.

Domestic regulators and bar associations increasingly are aware of the fact that legal ethics issues that arise in one part of the world are likely to appear in other parts of the world and therefore it makes sense for regulators to be aware of comparative legal ethics developments. For example, the issue of MDPs is one that has arisen in many countries around the world. During the MDP debates of the 1990s, an OECD conference report observed that Germany and Australia allowed multi-disciplinary practices. The report questioned whether a multi-disciplinary practices ban was appropriate in the remaining OECD countries, given the ability of these two countries to operate without such a ban.²⁸⁵ Much more recently, authorities in the United Kingdom and the European Union have questioned multi-disciplinary practices bans.²⁸⁶ Although the U.S. Department of Justice has not questioned the multi-disciplinary practices ban in the United States, it has advised the ABA of antitrust concerns it had about the ABA's first draft of a model definition of the practice of law.²⁸⁷ Another set of examples involves money laundering. The ABA Task Force that prepared the response to the FATF Consultation was aware of the extensive Canadian money laundering provisions applicable to lawyers, the resulting litigation, and the similarity of some of the arguments and issues.²⁸⁸ Thus, because similar legal ethics issues now appear throughout the world, regulators and bar associations are much

285. Rhonda Piggott, *Report of the Rapporteur (for Member Governments)*, in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LIBERALISATION OF TRADE IN PROFESSIONAL SERVICES 235–36 (1995).

286. Clementi Committee Report, *supra* note 225, Ch. F, ¶¶ 87–100.

287. See generally Federal Trade Commission and U.S. Dep't of Justice, Comments on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), available at <http://www.abanet.org/cpr/model-def/ftc.pdf> (last visited Feb. 10, 2005).

288. Telephone Interview with Stephen A. Saltzburg, Member, ABA Task Force on Gatekeeper Regulation and the Profession (Feb. 4, 2005). For information about the Canadian money laundering litigation, see Federation of Law Societies of Canada, Task Force on Money Laundering Legislation, available at <http://www.flsc.ca/en/committees/moneylaundering.asp> (last visited Feb. 10, 2005).

more likely to engage in global and comparative legal ethics analyses and examine the experiences of other countries with similar issues.²⁸⁹

Indeed, it has become increasingly important for regulators and bar associations to be substantively familiar with other countries' legal ethics systems. For example, the EU Commission's competition (antitrust) division recently commissioned a study as part of its review of competition in professional services. The study's authors assigned point values to the rules in various countries and further determined that countries with low point values (lesser regulation) did not have a higher rate of client complaints. The Commission then asked whether this data supported the reduction of regulatory barriers and suggested that if the EU countries with a lower level of lawyer regulation had no more client complaints than EU countries with a higher level of regulation, a lower level of regulation might be appropriate.²⁹⁰ This type of comparative analysis means that domestic regulators and bar associations have more reason than ever to learn about lawyer regulation in other countries and the ways in which one country's regulation of lawyers and context may or may not be similar to another country's regulation and context.²⁹¹

Trade agreements such as the GATS also have contributed to the increased interest by regulators and bar associations in global and comparative legal ethics developments. Since 2000, there have been ongoing GATS negotiations, which are required by the agreement itself.²⁹² These negotiations originally were scheduled to end in 2005, but currently have no scheduled end date.²⁹³ This GATS process has resulted in increased

289. In the United States, state courts usually provide the initial regulation of lawyers. See ABA MJP Commission Report, *supra* note 157. U.S. courts are increasingly exposed—in a variety of ways—to laws and judges from other countries. This undoubtedly contributes to the increased likelihood of courts to use a global or comparative legal ethics perspective. But the courts' use of international law, and the many connections among judges of different countries, is beyond the scope of this Article.

290. European Commission, Competition DG, Commission Services Working Document, Regulation in Liberal Professions and Its Effects: Invitation to Comment, ¶¶ 17–18 (Mar. 27, 2003), available at http://europa.eu.int/comm/competition/general_info/invitation/en.pdf (last visited Jan. 23, 2005).

291. Several commentators have critiqued the report commissioned by the Commission and the conclusions drawn from it. The CCBE, for example, has argued that the situations in various EU countries are not comparable and that the study did not properly account for these differences. CCBE, Economic Impact of Regulation in Liberal Professions: A Critique of the IHS Report (Sept. 9, 2003), available at http://www.ccbe.org/doc/En/rbb_ihs_critique_en.pdf (last visited Apr. 23, 2005); CCBE, Comments on the Commission's Legal Analysis in Its Report on Competition in Professional Services (June 2004), available at http://www.ccbe.org/doc/En/competition_legal_critique_300604_en.pdf (last visited Feb. 10, 2005).

292. GATS, *supra* note 110, arts. VI:4, XIX.

293. See Laurel S. Terry, *The GATS, Foreign Lawyers and Two Recent Developments: Could Your State's Actions Affect U.S. Trade Policy?*, B. EXAMINER 20 (Nov. 2002).

communication among bar associations around the world as they share information and try to learn what is happening in the GATS. For example, the Office of the U.S. Trade Representative (USTR) negotiates on behalf of the United States.²⁹⁴ Although there have been recent efforts to improve communication among the USTR, U.S. state supreme courts, regulators and bar associations, there are negotiating positions and other information that the USTR does not share outside the statutorily-mandated consultation group, which has security clearance and is subject to confidentiality obligations.²⁹⁵ Thus, U.S. legal professionals sometimes receive information from other bar associations or sources before they hear about it from the USTR.

There are several concrete examples that demonstrate the increased interest by domestic regulators and bar associations in global and foreign developments. As noted earlier, the CCJ now has an International Agreements Committee.²⁹⁶ The ABA Center for Professional Responsibility has been willing to host a webpage devoted to the GATS and has committed staff resources to understanding the difficult intricacies of this development.²⁹⁷ A number of other bar associations have formed committees to consider international developments, one byproduct of which is that they are now exposed to discussions about how other jurisdictions operate.²⁹⁸ The staff of the CCJ and of the ABA Center for Professional Responsibility now communicate with their counterparts in other countries. In sum, as was true for academia and practicing lawyers, there have been a number of factors that have contributed to, and likely will sustain, the increased global and comparative perspectives of domestic regulators and bar associations.

4. *Factors Affecting Global Bar Associations*

Global bar associations also have become increasingly interested in sponsoring comparative and global discussions about legal ethics issues. As

294. See Terry, *GATS' Applicability to Transnational Lawyering*, *supra* note 110.

295. For example, in February 2005, the United States circulated to other WTO Member States an informal paper on transparency. At the time this article was written, this paper was not yet "derestricted" and thus not publicly available in the U.S. See 9 BRIDGES WKLY. TRADE NEWS DIG., 6 (Feb. 23, 2005). For information about recent efforts to improve communication, see Terry, *GATS and Legal Services*, *supra* note 193.

296. See *supra* note 211.

297. See generally ABA, *GATS*, at http://www.abanet.org/cpr/gats/gats_home.html (last visited Jan. 23, 2005). Ellyn Rosen at the ABA Center for Professional Responsibility now provides staff assistance for the ABA Task Force on GATS Legal Services Negotiations.

298. Illinois, for example, has a committee considering the impact of international developments such as GATS. See Memorandum to Members of the Illinois State Bar Association, Legal Education, Admissions and Competency Committee, from author, Update Regarding GATS and Legal Services (Aug. 14, 2004) (on file with author).

noted earlier, the IBA and the UIA are the two main, general-purpose global bar associations.²⁹⁹ For many years, these organizations have had regular meetings at which lawyers from different countries meet and exchange views. Historically, many of the panel sessions have addressed issues that might be considered legal ethics issues. Until relatively recently, however, there was little effort to engage in serious policy work about legal ethics issues. For the last decade, however, the IBA and UIA have made efforts to sponsor policy debates among the world's lawyers with respect to legal ethics issues.

One of the major factors behind this new policy orientation was the 1994 adoption of the GATS and the ongoing work it requires. Global bar associations provide a mechanism through which lawyers and domestic bar associations can pool information and develop policy statements for the WTO. Indeed, the importance of global bar associations has been reinforced by the WTO. Because World Trade Organization Member States are interested in hearing the views of "the legal profession," they seek advice from organizations whose membership is open to all WTO countries, rather than national or regional bar associations. For example, Article VI(5) (b) of the GATS states that "[i]n determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations [fn] applied by that Member."³⁰⁰ The footnote reference for Article VI5(b) states that the "term 'relevant international organizations' refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO."³⁰¹

The WTO's December 2002 consultation letter illustrates the type of situation in which WTO Member States are interested in speaking with bodies that represent the world's legal professions. This 2002 consultation letter was sent to the IBA, the UIA, and several other specialist international bar associations seeking their views about whether to extend the WTO Disciplines on Domestic Regulation in the Accountancy Sector to lawyers,³⁰² WTO members rejected suggestions to send the 2002 consultation letter to

299. One, arguably, might also include the International Law Association (ILA) within this group. Because it has a limited number of committees and study groups and does not address lawyer regulatory issues, I have not included it as a general-purpose bar association. See ILA, About Us, at http://www.ila-hq.org/html/layout_about.htm (last visited Feb. 13, 2005).

300. GATS, *supra* note 110, art. VI(5)(b).

301. *Id.*

302. Letter from Abdel-Hamid Mamdouh, to Mark Ellis, available at http://www.abanet.org/cpr/gats/iba_ltr.pdf (last visited Feb.12, 2005).

regional and other organizations.³⁰³ In order to develop a response to this consultation letter, the IBA held the GATS Forum in May 2003, and thereafter adopted two resolutions related to the GATS, one of which directly responded to the WTO's December 2002 consultation letter.³⁰⁴ The resolutions were transmitted to the WTO.³⁰⁵

Other recent examples in which the IBA has represented the world's legal profession to the WTO include: March 2004, when an IBA representative was asked to participate in the WTO Workshop on Domestic Regulation,³⁰⁶ July 2004, when the IBA was asked to conduct an education session for WTO Member State representatives about the IBA's Legal Services Terminology resolution,³⁰⁷ and November 2004, when IBA representatives spoke to the WTO Committee on Specific Commitments about the IBA Terminology Resolution.³⁰⁸ The IBA's work with the WTO has led to it being asked to convey the views of the legal profession to the United Nations (U.N.) with respect to the ongoing U.N. work to revise the Central Product Classification, which is used in the GATS negotiations.³⁰⁹

These examples have focused on the IBA, but the other general-purpose bar association, the UIA, also has met with WTO representatives and developed policy positions relevant to the GATS. In November 2004, the UIA responded to the WTO's request for comment on the advisability of adopting for the legal profession the WTO Disciplines on Domestic Regulation in the Accountancy Sector. The UIA's response to the WTO included, as exhibits: the UIA's 1999 Recommended Minimum Standards

303. See Terry, *WTO Consultation*, *supra* note 221, at 709.

304. For additional information about the GATS Forum and resulting IBA Resolutions, see Terry, *WTO Consultation*, *supra* note 221.

305. *Id.*

306. See Laurel S. Terry, PowerPoint Presentation to the WTO Workshop on Domestic Regulation, March 29, 2004—Submitted on Behalf of the International Bar Association Regarding the Application of the WTO Accountancy Disciplines to the Legal Profession, available at http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess3_terry_e.ppt (last visited Feb. 12, 2005); Index to Supporting Materials Submitted to the March 2004 WTO Workshop on Domestic Regulation, available at http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/workshop_programme_march04_e.htm (last visited Feb. 13, 2005).

307. See Terry, *The History of the WTO Consultation and the IBA GATS Forum*, *supra* note 221.

308. *Id.*

309. Laurel S. Terry, *Issues Related to the Legal Profession*, PowerPoint Presentation to the Technical Subgroup of the Expert Group on International Economic and Social Classifications, U.N. Statistics Division, Oct. 18, 2004, available at <http://unstats.un.org/unsd/class/intercop/techsubgroup/04-10/papers/26-legal-services.pdf> (last visited Feb. 13, 2005); Materials Submitted to the Technical subgroup (TSG) of the Expert Group on International Economic and Social Classifications by Prof. Laurel S. Terry, representing the International Bar Association, available at <http://unstats.un.org/unsd/class/intercop/techsubgroup/04-10/papers/27-IBA%20documents.pdf> (last visited Feb. 13, 2005). There are a number of organizations around the world that are developing or revising their statistical methods for collecting data regarding domestic and international trade in legal services.

for Multidisciplinary Practices; the 2004 UIA Standards for Lawyers Establishing a Legal Practice Outside Their Home Country; and the 2002 Turin Principles of Professional Conduct for the Legal Profession in the 21st Century.³¹⁰ The WTO's demand for a "voice" for the legal profession is a major impetus for the policy work undertaken by the IBA and UIA within the past decade.

In sum, global bar associations have become increasingly involved in discussions about, and developing policies concerning, legal ethics issues. When global bar associations become involved in these activities, the discussions, by definition, are comparative and global. These activities helped lay the groundwork for the 1998 sea change. Moreover, the ongoing activities of these global bar associations will help sustain comparative and global legal ethics perspectives.

VI. CONCLUSION—COMPARATIVE AND GLOBAL PERSPECTIVES WILL BE INCREASINGLY IMPORTANT IN FUTURE U.S. LEGAL ETHICS CONVERSATIONS

During the past 100 years, since the original St. Louis conference, there has been a gradual "coming of age" of global and comparative legal ethics perspectives. This culminated in the 1998 sea change, when global and comparative perspectives became part of the mainstream legal ethics dialogue. I predict that this comparative and global influence is unlikely to diminish in the future.

Around the world, the regulatory systems for lawyers are facing major pressures and may face major changes. Theory has significantly lagged behind the reality of transnational legal practice issues and developments. The global dialogue and comparative views that have now emerged should help us better understand these issues and will only add to the richness and depth of our understanding. In other words, it is an exciting time to be following legal ethics issues.

310. Letter from Paul Nemo, UIA President, to the WTO Working Party on Domestic Regulation (Nov. 10, 2004), *available at* http://www.abanet.org/cpr/gats/uia_letter.pdf (last visited Mar. 9, 2005). The exhibits accompanying this letter are available at ABA GATS webpage, Track 2, *available at* http://www.abanet.org/cpr/gats/track_two.html (last visited Mar. 9, 1995).