

The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”*

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I. Introduction

In the past fifty years, one has heard debates about whether law is a business, a profession, or both, what these terms mean and whether it matters.¹ Regardless of what one thinks about these debates, there is a new paradigm that must be added to the mix, which is the paradigm of lawyers as “service providers.” In the *service providers* paradigm, the legal profession is not viewed as a separate, unique profession entitled to its own individual regulations, but is included in a broader group of “service providers,” all of whom can be regulated together.² In my view, this new paradigm represents a fundamental, seismic shift in the approach towards lawyer regulation.³ This perspective already has affected some aspects of U.S. (and non-U.S.) lawyer regulation and is likely to have profound implications for the future.

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1. See, e.g., Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and the Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238-42;1257 (1995); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1556 (2002) (noting the rise of a cottage industry of bar committees, conferences, commissions, and centers focusing on this “crisis in professionalism”).

2. As notes 22-89 show, the *service providers* paradigm describes the phenomenon in which lawyers are conceptualized and regulated together with other kinds of service providers. The exact configuration of service providers included in any given set of regulations, however, may vary from regulator to regulator.

3. Because of the word limit for this article, I have not offered as many citations or support as I would have preferred. I have come to terms with this by thinking about the recent call for more academics who will engage in crude thinking and cocktail party musings: “We have to learn not only to have specialists but also people whose specialty is to spot the strong interactions and the entanglements of the different dimensions and then take a crude look at the whole. What we once considered

II. The New Paradigm: Lawyers as “Service Providers”

The new paradigm of lawyers as “service providers” began to emerge in the last quarter of the 20th Century, but hit full stride in the first decade of the 21st Century.⁴ Trying to pinpoint the key factors in the evolution of this new paradigm is more art than science and individuals might disagree about the formative events. In my view, however, there are three watershed events that helped create the “lawyers as service providers” mentality that now influences U.S. and non-U.S. lawyer regulation.

The first significant event was the European Union’s 1977 adoption of the Lawyers’ Services Directive.⁵ The Lawyers’ Services Directive is exceedingly important within the EU because it grants EU lawyers the right to provide temporary legal services in another EU Member State without the need to obtain host jurisdiction licensure.⁶ From my perspective, however, it is a watershed event because of the simple fact that it linked the words “lawyers” and “services” together. EU lawyers are very proud of this Directive and refer to it often, including in the U.S.⁷ Hence, this Directive laid important ground work—even in the U.S.—for thinking about lawyers as one of many different kinds of “service providers.”

The second watershed event in the development of the *service providers* paradigm was the 1992 signing of the North American Free Trade Act (NAFTA).⁸ Although the NAFTA was not the first U.S. trade agreement to include services, it was the first high profile trade agreement to do so.⁹ The NAFTA is significant

the cocktail party stuff—that’s a crucial part of the real story.” THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 28 (Anchor Ed. 1999, 2000) (quoting Nobel Laureate Murray Gell-Mann).

4. See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000); Thomas S. Kuhn, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957); Pearce, *supra* note 1, at 1229 (“That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images . . . have lost their meaning.”).

5. Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC), O.J. L. 78/17 (1977) [hereinafter 1977 Services Directive].

6. *Id.* The 1957 Treaty of Rome established the concepts of freedom of movement for goods, services, capital and people; this freedom (and the cases implementing it) were the basis for the 1977 Directive. For links to this and other treaties, see European Union, Treaties and Laws, at http://europa.eu/abc/treaties/index_en.htm (last visited Feb. 20, 2008, as are all urls in this article). The EU is made up of three separate communities—the EC, the European Coal and Steel Community and the European Atomic Energy Community, but has one set of institutions. *Id.* In this article, the term “EU” will be used in a non-technical sense and include EC directives.

7. Although the 1977 Services Directive, *supra* note 5, implemented European case-law that had found European bar rules inconsistent with the Treaty, European lawyers now cite this Directive with pride. I have heard such comments from numerous European lawyers, including at the ABA’s hearings on multidisciplinary and multijurisdictional practice.

8. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., reprinted in 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The NAFTA became effective January 1, 1994. *Id.*

9. See Harry G Broadman, *International Trade and Investment in Services: A Comparative Analysis of the NAFTA*, 27 INT’L LAW. 623, 626, 628 (1993) (NAFTA was preceded by the 1985 U.S.-Israel Free Trade Agreement that covered services and the 1988 U.S.-Canada Free Trade Agreement that created legally binding rights and obligations regarding services).

because it demonstrates the U.S. federal government’s recognition of the important role of services in the U.S. economy and in foreign policy. As one of the individuals who worked in the Office of the U.S. Trade Representative (USTR) at the time has explained, services were a large part of the U.S. domestic economy, they were the subject of significant international trade, and they were an area in which the U.S. had a trade balance advantage (unlike trade in goods.) When the NAFTA was signed, the services sector employed approximately 79% of the U.S. work force and accounted for about 52% of U.S. Gross Domestic Product (GDP), which was more than any other sector.¹⁰ Internationally, services accounted for approximately 19% of global trade. The U.S. was the largest services exporter in the world, and “ha[d] been enjoying a rising surplus in services trade.”¹¹ Thus, including services within the NAFTA was expected to have positive economic consequences—especially if it led to an 80% increase in services exports, as the 1988 U.S.-Canada Free Trade Agreement reportedly had done.¹²

The NAFTA included both a chapter on services and a “Professional Services” Annex that had three sections, one of which was devoted to legal services.¹³ Both the NAFTA and this Annex explicitly used the term “service providers,” stating, for example:

The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of *professional service providers* and to provide recommendations on mutual recognition to the Commission.¹⁴ (Emphasis added).

Because lawyers are covered by the NAFTA, they were included within this new *service providers* framework. Commentators writing about the NAFTA widely repeated the term “service providers” to talk about those who were covered by the NAFTA, including lawyers.¹⁵ Thus, the NAFTA was an important step in the evolution of the new paradigm of lawyers as “service providers.”

The third and most important watershed event in this paradigm shift was the 1994 General Agreement on Trade in Services (GATS), which was one of

10. *Id.* at 624.

11. *Id.* at 624-625.

12. *Id.* at 625-626.

13. NAFTA, *supra* note 8, at Annex 1210.5. Section B of the Professional Services Annex addressed “Foreign Legal Consultants.” *Id.* The NAFTA defines professional services as “services, the provision of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include services provided by trades-persons or vessel and aircraft crew members[.]” *Id.* at Art. 1213.

14. NAFTA, *supra* note 8, at para. A(2) of Annex 1210.5., Professional Services, Section A General Provisions. *See also id.* at Art. 1201(d) (“This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party. . .”).

15. *See, e.g.,* Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, n. 190; Broadman, *supra* note 9, at 640.

the agreements signed as part of the creation of the World Trade Organization (WTO).¹⁶ The GATS was a critical event because it expanded to a worldwide stage this new perspective that viewed services—including legal services—as something to be traded in both a literal and political sense.¹⁷ Indeed, one of the first articles written about the GATS and legal services pointed out how, at the last minute, the U.S. agreed not to withdraw their legal services offer in exchange for advantages for U.S. semi-conductors.¹⁸ The GATS is also a watershed event in the development of the *service providers* paradigm because it spawned numerous developments including those discussed in the next section.

Some might argue that the GATS is not a watershed event because few were aware of it and because its impact is small since few countries made promises to liberalize access to their legal service market that went beyond their status quo. The alternative argument, however, and the one to which I subscribe, is that the GATS has been the impetus for profound changes because it has put the issue of regulation of legal services on the international stage in contexts that go beyond trading, has kept the issue alive, and has provided the impetus for many, many discussions (and some action) by a wide variety of stakeholders, many of whom had not been actively involved in lawyer regulation issues previously. Thus, even though the GATS uses the phrase “service suppliers” rather than “service providers,”¹⁹ I consider it the third watershed event contributing to the inclusion of legal services in the *service providers* paradigm.²⁰

16. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994), at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter GATS]. The GATS took effect January 1, 1995. For additional information, see International Bar Association, *GATS: A Handbook on Trade in Services* (2002), at <http://www.ibanet.org/images/downloads/gats.pdf> [hereinafter IBA GATS Handbook]; Laurel S. Terry, *The GATS and Legal Services in Limerick*, 15 MICHIGAN ST. J. INT'L L. 635 (2007).

17. GATS, *supra* note 16, at Art. I(b-c) (coverage definition); accord 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, 994 (2001) as revised 35 VAND. J. TRANSNAT'L L. 1387 (2002).

18. Karen Dillon, *Unfair Trade?*, AM. LAW., Apr. 1994, at 54-57.

19. See, e.g., GATS, *supra* note 16, at Art. I, II, IV, VII, VIII, IX, XIV-XVII, XIX, XXV (referring to “service suppliers”). Despite the absence of the term “service providers” in the GATS, many GATS commentators have used this terminology. 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, throughout including 965, 97 (1995); Flores, *supra* note 15, at n. 174; Terry, *GATS*, *supra* note 17, at 1000, 1005; Louise L. Hill, *Services As Objects of International Trade: Bartering The Legal Profession*, 39 VAND. J. TRANSNAT'L L. 347, 350 (2006). In my view, there isn't a significant difference between saying “service providers” and “service suppliers.”

20. It is beyond the scope of this paper to address the economic and other factors that have contributed to the development of the *services providers* phenomenon, in general. See, e.g., *infra* note 54-56 (citing clients' perspectives.) This paper focuses exclusively on the issue of why the legal profession has been included within the larger phenomenon.

In addition to the watershed events described above, there were a number of other events that either helped advance this *service providers* paradigm for lawyers or that illustrate its increased use. These events include:

- Post-NAFTA and GATS developments, including the need to develop statistical systems to “count” legal services trade and the need to implement GATS Articles VI:4 and XIX;
- U.S. approval of bilateral free trade agreements (FTAs) that apply to legal services;
- Domestic and international anti-money-laundering and terrorism initiatives directed towards service providers, including lawyers;
- Increased interest in professional services by antitrust officials;
- Increased federal efforts to regulate lawyers; and
- Increased state legislative efforts to regulate lawyers.

These developments (along with some related global developments) are briefly discussed below.

III. Examples of the New Paradigm

After the GATS was signed, there were a number of related developments that helped further the use of the *service providers* paradigm for lawyers. For example, the Organization for Cooperation and Development (OECD)²¹ sponsored several “Professional Services” conferences that brought together government representatives and several different kinds of service providers, including lawyers, in order to discuss barriers to trade.²² Dissatisfaction with these OECD conferences was one reason why the ABA, the Council of Bars and Law Societies of Europe (CCBE), and the Japan Federation of Bar Associations (JFBA) decided to organize the 1998 *Paris Forum on Transnational Practice for the Legal Profession*, which was attended by over 100 lawyers from around the world.²³ As its press release explained, the purpose of the *Paris Forum* was to discuss issues specific to the legal profession with an ultimate goal of developing a consensus that could be conveyed to the WTO.²⁴ Among other issues, the organizing bars were worried about the effect of including lawyers with other service providers in any WTO

21. The OECD was established in 1961 and consists of thirty countries, including the U.S., the EU, Australia, and other large economy countries. It “provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies.” Organisation for Economic Co-operation and Development (OECD), About the OECD, at http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html.

22. See OECD, LIBERALISATION OF TRADE IN PROFESSIONAL SERVICE (1995); OECD, INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ASSESSING BARRIERS AND ENCOURAGING REFORM (1996); OECD, INTERNATIONAL TRADE IN PROFESSIONAL SERVICES (1997).

23. See Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT’L L. 1, 23 (1999).

24. *Id.* at 10-11.

“disciplines,” *i.e.* WTO regulations.²⁵ A number of bars ultimately prepared papers that expressed concerns or outright hostility toward the idea of being included with other service sectors in any proposed WTO disciplines.²⁶

The 2004 WTO Workshop on Domestic Regulation is another post-GATS development that illustrates the inclusion of the legal profession in the *service providers* paradigm.²⁷ This Workshop brought together representatives from nine different service sectors, including legal services, to address the issue of possible WTO “disciplines” or regulations.²⁸ Trade officials at this workshop seemed skeptical of arguments that the legal profession should be treated differently than other professions.²⁹

Another post-GATS example that illustrates the increased use of the *service providers* paradigm is the ABA’s increased involvement in matters involving trade in legal services, including communications with the USTR. In 2002, the ABA

25. *Id.* at 10. See *infra* note 28 for an explanation of WTO “Disciplines.”

26. See, e.g., ABA, GATS Track 2, at http://www.abanet.org/cpr/gats/track_two.html (includes links to “disciplines” papers by various bar associations). The IBA, for example, recommended additional language to ensure that the WTO Appellate Body treats legal services in the same manner as it treats health and safety measures, thereby granting the WTO Member State the highest possible discretion in implementing its legitimate objectives. 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, 709, 738 (2004).

27. WTO, Workshop on Domestic Regulation—Programme (March 29-30, 2004), at http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/workshop_programme_march04_e.htm. (includes presentations by representatives of the legal, nursing, accounting and architectural professions; representatives of electricity suppliers and express delivery companies; and representatives of financial, telecommunications and educational services organizations).

28. GATS Article VI:4 required WTO members to develop “any necessary disciplines” with respect to certain domestic regulation measures. In December 1998, WTO Members adopted “disciplines” for the accountancy sector. See WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998* (17 Dec. 1998) [hereafter “Accountancy Disciplines”], at <http://www.abanet.org/cpr/gats/accounting.doc>. Since 1998, WTO Members have discussed whether to adopt additional disciplines and the contents of any such disciplines. In December 2005, WTO Members agreed that they *would* develop an additional set of disciplines. See WTO, DOHA Work Programme, Ministerial Declaration Adopted on 18 December, 2005, WT/MIN(05)/DEC (Dec. 22, 2005), at Annex C, para. 5 at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexc. Although Australia has proposed a set of disciplines specifically for legal services, the majority of WTO Members appears to have settled on horizontal disciplines. Compare WTO Council for Trade in Services, Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors, S/WPDR/W/34 (Sept. 5, 2005), at http://www.abanet.org/cpr/gats/aus_disp.pdf with Working Party on Domestic Regulation, REVISED DRAFT, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4, Informal Note by the Chairman, 474.08 (Jan. 23, 2008), at <http://www.tradeobservatory.org/library.cfm?refID=101417> (the latest draft available at the time this article was written). See also ABA GATS Track 2, *supra* note 26.

29. This statement is based on my memory of conversations that took place during this WTO Workshop. A common response was that every group thinks that it is unique and that nothing will get done in the WTO if a separate approach is required for each group.

created the Task Force on GATS Legal Services Negotiations in order to better respond to the increasingly frequent consultations the ABA received from the USTR.³⁰ Several of the USTR officials responsible for the legal services negotiations are not lawyers and were not initially familiar with the details of lawyer regulation; indeed, for the officials at the USTR, legal services are just one of several service sectors for which they are responsible.

A final set of examples are the efforts to develop systems to classify and count services trade, including legal services. Although most lawyers are oblivious of these initiatives and unsure how to respond even if consulted,³¹ governments and non-governmental organizations (NGOs) are investing a tremendous amount of energy in these efforts, which contribute to a *service providers* perspective for legal services.³² Because a picture is worth a thousand words, it is instructive to look at the WTO “sectoral classification list,” which included legal services as a subset of professional services (along with bookkeepers, midwives, landscape architects and veterinarians, among others), which in turn was one of six types of business services, which were one of twelve service sectors:³³

SERVICES SECTORAL CLASSIFICATION LIST SECTORS AND SUB-SECTORS

1. BUSINESS SERVICES

A. Professional Services

- a. Legal Services
- b. Accounting, auditing and bookkeeping services
- c. Taxation Services
- d. Architectural services
- e. Engineering services
- f. Integrated engineering services
- g. Urban planning and landscape architectural services
- h. Medical and dental services

30. The ABA Board of Governors Executive Committee established the Task Force in March 2003; the Board increased it to eight members in August 2003. See *Summary of Action, American Bar Association Board of Governors* 6 (Aug. 2003), at http://www.abanet.org/leadership/2003/summary_action03.pdf.

31. In 2004, the ABA was asked by the U.S. Bureau of Labor Statistics to comment on proposed definitions for legal services for the North American Product Classification System (NAPCS). The ABA had few comments and the BLS was largely left on its own. See Emails from Kristi Gaines, ABA Staff, to author (Oct. 7 and 13, 2004) (on file with author).

32. See, e.g., ABA, GATS Track 1: Documents Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations, at http://www.abanet.org/cpr/gats/track_one_class.html; United Nations Statistics Division, International Trade in Services, at <http://unstats.un.org/unsd/tradeserv/default.htm>.

33. WTO, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (July 10, 1991), at http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

- i. Veterinary services
- j. Services provided by midwives, nurses, physiotherapists and para-medical personnel
- k. Other
- B. Computer and Related Services (items a-e omitted)
- C. Research and Development Services (items a-c omitted)
- D. Real Estate Services (items a-b omitted)
- E. Rental/Leasing Services without Operators (items a-e omitted)
- F. Other Business Services (items a-t omitted)

[The remaining five and a half pages of the WTO document included sectors listed under these headings:

- 2. COMMUNICATION SERVICES
- 3. CONSTRUCTION AND RELATED ENGINEERING SERVICES
- 4. DISTRIBUTION SERVICES
- 5. EDUCATIONAL SERVICES
- 6. ENVIRONMENTAL SERVICES
- 7. FINANCIAL SERVICES
- 8. HEALTH RELATED AND SOCIAL SERVICES
- 9. TOURISM AND TRAVEL RELATED SERVICES
- 10. RECREATIONAL, CULTURAL AND SPORTING SERVICES
- 11. TRANSPORT SERVICES
- 12. OTHER SERVICES NOT INCLUDED ELSEWHERE

Lest one think that these classification systems are unimportant, the U.S.'s alleged failure to properly list U.S. state gambling prohibitions in its GATS Schedule resulted in a U.S. loss in the WTO dispute resolution system after a complaint was brought against it by Antigua. Thereafter, several countries sought compensation from the U.S., the EU threatened to seek legal services concessions as compensation and the WTO granted Antigua the right to retaliate against US intellectual property, including patents and copyrights.³⁴ Moreover, if one believes that "what gets measured, matters,"³⁵ then these new efforts by governments to classify and count legal services not only reflect the new *service providers* paradigm but have the potential for far-reaching effects for both lawyer regulation and lawyer behavior.

34. See *Antigua Awarded Modest Cross-Retaliation Rights In Gambling Dispute With US*, Vol. 12, #1 BRIDGES WEEKLY (Jan. 16, 2008), John Miller, *EU Service Firms Could Gain U.S. Access*, WALL ST. J. (Aug. 23, 2007) at A2 (suggesting the EU might seek compensation in the legal services sector); WTO DISPUTE DS285, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm; Nancy J. King and Kishani Kalupahana, *Choosing Between Liberalization and Regulatory Autonomy Under GATS: Implications of U.S.-Gambling For Trade in Cross Border E-Services*, 40 VAND. J. TRANSNAT'L L. 1189 (2007).

35. See, e.g., DAVID OSBOURNE AND TED GAEBLER, *REINVENTING GOVERNMENT* (1992).

The *service providers* paradigm has been further advanced by including legal services in a number of new U.S. bilateral free trade agreements (FTAs) that were negotiated by the USTR, signed by the President, and adopted by Congress in order to promote greater trade. At the time this article was written, the U.S. had seven bilateral FTAs in force, two were pending implementation, three were awaiting Congressional approval, and five additional sets of negotiations were underway.³⁶ These FTAs show the impact this paradigm can have and the ways in which U.S. trade agreements can create a new regulatory structure for the legal profession. The Peru and Columbia FTAs with the U.S. include side letters that required a review of selected state rules, including legal services rules.³⁷ The Singapore FTA has a side agreement that says that degrees from four U.S. law schools will be recognized for purposes of admission into the Singapore Bar and Singapore currently recognizes law degrees from those who graduate in the top 40% of their class at Harvard, Columbia, New York University and the University of Michigan.³⁸

Perhaps the best example of the possible effect of these FTAs is the 2004 U.S.-Australia FTA.³⁹ It includes an Annex on Professional Services that requires the Parties to establish a Working Group to facilitate the FTA activities.⁴⁰ In May 2006, in Washington D.C., representatives from the U.S. and Australian governments, bar associations, Conference of Chief Justices (CCJ), and lawyer regulatory organizations met to discuss lawyer regulatory issues in the context of this FTA.⁴¹ The Australian government and the Law Council of Australia have also sent delegates to meet with the (CCJ) and representatives from the highest courts in Georgia, Delaware, New York and California in order to request greater access for

36. See USTR, Bilateral Trade Agreements, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (includes links to agreements).

37. See U.S.-Peru FTA, Side Letter on State Measures, at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file180_9512.pdf; U.S.-Columbia FTA, Side Letter on State Measures, at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Columbia_FTA/Final_Text/asset_upload_file68_10158.pdf.

38. U.S.-Singapore Free Trade Agreement, Side Letter on Legal Services, at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file702_4051.pdf. A Federal Register notice proposed that Harvard, Yale, Columbia, and New York University be designated as the four U.S. law schools whose degrees would be recognized in Singapore. 69 Fed. Reg. 71095-01 (2004). See Singapore Ministry of Law, Legal Profession Act, Rule 9a and Schedule 5, http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-6GQ9MW?OpenDocument; see also Singapore Board of Legal Education, Outline, Topics L5 and R, at <http://www.lawsociety.org.sg/ble/outline.htm>. [Note: the original text said Yale not Colombia.]

39. U.S.-Australia FTA, Chapter Ten, Cross-Border Trade In Services and Annex 10-A Professional Services, at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file927_5153.pdf.

40. Annex 10-A, *supra*, at para 5.

41. Laurel S. Terry, *Current Developments Regarding The Gats And Legal Services: The Suspension of The Doha Round, “Disciplines” Developments, and Other Issues*, BAR. EXAM. 27, 29 (Feb. 2007), at http://www.abanet.org/cpr/gats/bar_examiner_2-07.pdf.

Australian lawyers.⁴² After these visits, the CCJ adopted two resolutions relevant to Australian lawyers and Delaware changed its rules to allow certain kinds of law practice by foreign lawyers.⁴³

In 2007, the ABA Task Force on the GATS Legal Services Negotiations changed its name to the ABA Task Force on International Trade in Legal Services in order to reflect the increasing number of FTA and other consultations it received from USTR.⁴⁴ In 2003, the CCJ created an International Agreements Committee in order to address the potential impact of federal trade agreements on state judicial regulation of lawyers and to provide a better mechanism for providing consultation to the USTR on legal services issues.⁴⁵ These new groups show the increasing importance to the legal profession of these global trade agreements and the increased volume of agreements that treat lawyers as simply one of many groups of *service providers*.

Although trade agreements figure prominently in the *service providers* perspective, they are not the only type of development that reflects the new paradigm. Another prominent set of examples are “gatekeeper” initiatives, such as those designed to counteract money laundering and terrorism. In 2002, the intergovernmental Financial Action Task Force (FATF), which includes the U.S, suggested that its rules be extended to:

several categories of non-financial businesses and professions that are considered by the FATF to be more vulnerable to money laundering . . . including casinos and other gambling businesses; dealers in real estate and high value items; company and trust service providers; lawyers; notaries, accountants and auditors, and investment advisors.⁴⁶

This FATF consultation explicitly referred to lawyers as “service providers” and condemned them along with these other service providers for the role they had played facilitating illegal activities.⁴⁷ The FATF Gatekeeper proposal included a “noisy withdrawal” rule that not only would require lawyers to breach confidentiality and inform appropriate officials of their clients’ conduct, but would prohibit

42. See Laurel S. Terry, Carole Silver, Ellyn Rosen, Carol Needham, Robert E. Lutz, and Peter D. Ehrenhaft, *Transnational Legal Practice: 2006-07 Year-in-Review*, 42 INT’L LAW. 83-3 (2008) [hereinafter Year-in-Review].

43. See Conference of Chief Justices, Legal Education Resolutions, at <http://ccj.ncsc.dni.us/LegalEducationResols.html>; Delaware Supreme Court Rules, Rule 55.1 and 55.2; Delaware Rules of Professional Conduct, Rule 5.5.

44. Summary of Action American Bar Association Board of Governors 9 (Feb. 2007), at <http://www.abanet.org/leadership/board/February2007SummaryofAction.pdf>.

45. See Laurel S. Terry, *Latest Developments About the GATS and Legal Services*, THE BAR EXAMINER 27, 28 (Aug. 2003), at http://www.abanet.org/cpr/gats/bar_examiner_8_03_article.pdf.

46. FATF Task Force on Money Laundering, Review of the FATF Forty Recommendations: Consultation Paper at 8, para. 27 (May 30, 2002), at <http://www.oecd.org/dataoecd/32/3/34046414.pdf> [hereinafter FATF Consultation].

47. *Id.* at 97.

lawyers from notifying their clients of the lawyers’ disclosures.⁴⁸ Although bar associations around the world have condemned aspects of the FATF proposals,⁴⁹ the issue is not yet resolved and the IBA recently was appointed to coordinate the drafting efforts on behalf of the global legal community.⁵⁰ Moreover, the issue of treating lawyers like other service providers in money laundering statutes is a world-wide phenomenon.⁵¹

The FATF Gatekeeper proposal is not the only example of “gatekeeper” rules that include lawyers within a much broader sweep. Congress and various federal agencies, including the SEC, the IRS, and the FTC, have adopted “gatekeeper” provisions that apply to lawyers and others.⁵² As one commentator recently explained, “far from treating law as a unique profession to be governed chiefly under the traditional regime of ‘self-regulation,’ each treats lawyers *along with other service providers* in a particular field more or less as peas in a regulatory pod.”⁵³ Regardless of what one thinks about each of these gatekeeper provisions, it is clear

48. *Id.* at 98.

49. See ABA, Task Force on Gatekeeper Regulation and the Profession, Report to the House of Delegates 1, (Feb. 2003), at <http://www.abanet.org/leadership/recommendations03/104.pdf> [hereinafter ABA Gatekeeper Resolution]; *Joint Statement by the International Legal Profession to the FATF on the Fight against Money-Laundering* (2003), at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/signed_statement_0301_1183723072.pdf [hereinafter Joint FATF Statement]. See also Laurel Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 494 (2005).

50. See *IBA to Coordinate Global Legal Community in Drafting Guidance*, IBA News 5 (Feb. 2008).

51. See, e.g., European Commission, *The Application to the Legal Profession of Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering*, SEC(2006) 1793 (Dec. 19, 2006), at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/commission_report_la1_1183722383.pdf; Federation of Law Societies of Canada, *Money Laundering Chronology of Events* (2003), at http://www.abanet.org/crimjust/taskforce/canada/money_laundering.pdf; IBA, *International Anti-Money Laundering Forum*, at <http://www.anti-moneylaundering.org/> (links to developments around the world).

52. See, e.g., Sarbanes-Oxley Act of 2002, § 15 U.S.C. 7245 et. seq. and 17 C.F.R. § 205.2(a)(1); Circular 230 Regulating Practice Before the Treasury, 31 C.F.R. § 10.3 (2002); the Fair Debt Collection Practices Act, 15 U.S.C. § 1692; Federal Trade Commission, *Disposal of Consumer Report Information and Records*, 16 CFR § 682.1 et. seq.; the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101 et. seq.; the American Jobs Creation Act of 2004, 26 U.S.C. § 6111.

It is beyond the scope of this article to discuss these gatekeeper initiatives. For additional information, see Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 741-46 (2004); Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not be Futile*, 2007 U. ILL. L. REV. 93 (2007); James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59 (2006).

53. Schneyer, *supra* note 52, at 582 (emphasis added).

that a new approach is afoot. Moreover, it is not just the regulators, but also clients who now think of lawyers as just one of many kinds of service providers. One commentator has observed that if one ignores lawyers' self reports and looks at what others are saying, "[t]o the company, the legal department becomes just one internal consulting group among others and outside law firms become just one type of professional service firm."⁵⁴ He has noted that "until recently, each of the professional services industries thought of itself as distinct from others," but that "this pattern is rapidly changing."⁵⁵ Another commentator, speaking about the overlap of legal services and consulting firms, has said: "As it turns out, corporations do not care how their service providers characterize the relationship, so long as they provide the services that are needed."⁵⁶

The recent antitrust or "competition law" developments also illustrate the application of a *service providers* paradigm to the legal profession. The OECD, which includes the U.S. as a member, has sponsored a number of "competition" roundtables, including one devoted to professional services in which OECD members considered:

the basic competition policy problems raised by the self regulation of *professional service providers* and the means for dealing with them, from law enforcement to advocacy.⁵⁷

This 1999 OECD Roundtable session considered how "changes in international regulation can promote competition by increasing the possibility of trade across borders for professional business services such as accounting, law, and engineering."⁵⁸ U.S. representatives not only used the "*service providers*" terminology when describing their efforts, but also appeared skeptical about whether professional services should be treated differently than other sectors:

The United States Delegate commented that one shouldn't allow regulation of quality of service to be promulgated as a disguise for what is an economic regulation and one should also be very careful to avoid a paternalistic excess of quality regulation. According to the United States Delegate, professional service markets are just like markets for any other

54. Robert Eli Rosen, "We're All Consultants Now": *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 639 (2002).

55. *Id.* at n. 298 and accompanying text (citing ROSS DAWSON, DEVELOPING KNOWLEDGE-BASED CLIENT RELATIONSHIPS: THE FUTURE OF PROFESSIONAL SERVICES (2000)).

56. Tanina Rostain, *The Emergence of "Law Consultants"*, 75 FORDHAM L. REV. 1397, 1409 (2006). She also observed that "today's law consultants, unlike managerial consultants, provide services that bear significant similarities to services provided by lawyers within attorney-client relationships." *Id.* at 1399.

57. See, e.g., OECD, COMPETITION IN PROFESSIONAL SERVICES 2 (2000), at <http://www.oecd.org/dataoecd/35/4/1920231.pdf> [hereinafter 1999 OECD Roundtable]; see also Daniel Vázquez Albert, *Competition Law and Professional Practice*, 11 ILSA J. INT'L & COMP. L. 555 (2005).

58. 1999 OECD Roundtable, *supra*, at 2 (emphasis added).

goods and services, and the market responds very well to normal incentives to provide the right level and right mix of price and quality. In the areas in which any kind of empirical study of the effect on the removal of regulation on quality has been undertaken, price in market has gone down, with no indication that the level of quality of services has decreased. In terms of a market failure for information of quality, this can be accomplished without the need for government regulation.⁵⁹

Since this Roundtable, OECD members have actively scrutinized the activities of different kinds of professional services providers, including lawyers. The U.S. has reported to other OECD members its efforts to narrow UPL rules that would restrict non-lawyers from performing real estate closings, its challenges to lawyer advertising restrictions, and its lawsuit against the “anticompetitive [ABA] law school accreditation system.”⁶⁰ In 2001, the U.K.’s Office of Fair Trading issued a report on competition in the professions, which was part of the impetus for the UK’s Clementi report, which in turn led to the October 2007 Legal Services Act that has dramatically reshaped the regulation of the legal profession in England and Wales.⁶¹ In 2003, the European Commission launched a professional services “stocktaking exercise.”⁶² It concluded that there were serious questions about the validity of a number of professional services rules;⁶³ this initiative has led to significant changes in the regulation of lawyers in individual EU Member States.⁶⁴ A December 2007 Canadian competition report examined professional services and expressed doubts about a number of Canadian regulations, including legal services regulation.⁶⁵

59. *Id.* at 202. *See also id.* at 185, n.4 (referring to ophthalmic service providers).

60. OECD, COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS 287-294 (Jan. 28, 2008), at <http://www.oecd.org/dataoecd/12/38/40080343.pdf> [hereinafter OECD Legal Professions].

61. Office of Fair Trading, *Competition in the Professions—A Report by the Director General of Fair Trading*, OFT 325 (March 2001), at http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf; Legal Services Act 2007, at http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf.

62. *See* European Commission, DG Competition, *Professional Services Competition Policy and Liberal Professions*, at http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html (includes links to key studies and reports). European Commission, Communication: Report on Competition in Professional Services, COM(2004) 83 final (Feb. 9, 2004) at 5, at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0083en01.pdf [hereinafter EU Competition Report]; European Commission, *Professional Services—Scope for More Reform: Follow-up to the Report on Competition in Professional Services*, COM(2005) 405 final at para. 26 (Sept. 5, 2005), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0405:EN:NOT> [hereinafter Scope for More Reform].

63. EU Competition Report, *supra* note 62, at ¶¶ 34, 40, 47, 52-55, 58, 64, 90.

64. *See Year-in-Review*, *supra* note 42, at § IV(B)(1).

65. Competition Bureau Canada, *Self-regulated Professions—Balancing Competition and Regulation* (Dec. 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html> [hereinafter Canadian Competition Report]. *See also* Paul D. Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation—Canada between the United States and the English/Australian Experience*, PROF. LAW. SYMPOSIUM 2008.

Although many of Australia's legal profession reforms predate the 1999 OECD Roundtable, its efforts were triggered by Australia's 1995 adoption of the Competition Principles Agreement.⁶⁶ The resulting changes have been far reaching and include, inter alia, not only MDPs, but the world's first publicly-traded law firm.⁶⁷ In addition to these actions by OECD Members, antitrust authorities around the world have shown increased interest in reviewing the legal profession regulations in their own country.⁶⁸ In 2007, the OECD held another roundtable that focused on the legal profession and its "competitive restrictions."⁶⁹ Although this Roundtable focused exclusively on the legal profession, the participants regularly referred to "service providers," thus illustrating the pervasive use of the paradigm.⁷⁰

The U.S. federal government's increased willingness to regulate the legal profession along with other service providers also demonstrates the shift to a *service providers* paradigm. The litigation over the Gramm-Leach-Bliley privacy bill might be viewed as an example because it reflects the Federal Trade Commission's (FTC) interest in treating the legal profession as just another set of "service providers." Although many lawyers know that the D.C. Circuit struck down the portions of the Act that treated lawyers as "financial institutions,"⁷¹ they may not know that lawyers are covered by other portions of this law:

All of the federal agencies authorized to make rules implementing [this law] . . . have embraced the concept of a "service provider," meaning an entity that provides services to a regulated financial institution. The FTC defines "services provider" as [is set forth in 16 CFR § 314.2(d)]. Lawyers fall within this definition in two ways Arguments that lawyers, accountants, and appraisers should not be treated as "service providers" have been rejected by the [relevant] agencies.⁷²

66. See Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 673 (2004); New South Wales' Attorney General, National Competition Policy Review of the Legal Profession Act 1987, at http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncp_index at Summary.

67. See Mark and Cowdroy, *supra*; Alexia Garamfalvi, *Law Firm Goes Public*, LEGAL TIMES (May 22, 2007), at <http://www.law.com/jsp/article.jsp?id=1179751700602>; Slater & Gordon, Ltd. Prospectus, at <http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf>.

68. See, e.g., International Institute of Law Association Chief Executives, *The Implementation of the Reform of the Legal Profession—Case Studies in Change* (New York, Aug. 18, 2006), at <http://www.iilace.org/pdf/2006NYC-Program.pdf> (meeting notes on file with author).

69. OECD Legal Professions, *supra* note 61. This Roundtable followed in the wake of roundtables for other services such as banking, real estate transactions, hospital services, telecommunications and others. *Id.* at 4.

70. See, e.g. *id.* at 43 (noting that some have argued that advertising restrictions "reduce costs for service providers.")

71. *Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457 (D.C. Cir. 2005).

72. *Attorneys' Victory in FTC Litigation Didn't Remove Data Security Duties*, 22 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 195 (April 19, 2006) (citing lawyer Michael Fleming).

In addition to this bill and the federal “gatekeeper” provisions cited earlier,⁷³ there are other examples of the legal profession being swept along in broader federal regulation. One such example is the Equal Employment Opportunity Commission’s (EEOC) age discrimination lawsuit against a law firm.⁷⁴ Consider also, the recent U.S. Department of Education (DOE) developments in which the ABA has been involved: in 2008, the ABA had to adopt minimum bar passage rates for accreditation in order to satisfy the DOE’s increased interest in “output” measurements as well as “input” measurements.⁷⁵ The federal government also has had an ongoing battle with the states about control of federal prosecutors and has been increasingly active in regulating lawyers appearing before federal courts and agencies.⁷⁶

It also appears that state governments as well as the federal government are increasingly likely to use the *service providers* paradigm and view legal services as just one of many areas they regulate and one that in many respects should not be differentiated. For example, New Jersey concluded that for former government lawyers, the state’s general conflict of interest rules trumped the screening provisions in its lawyer ethical rules.⁷⁷ The legislatures in South Carolina and other states have introduced bills to transfer regulatory authority for the bar away from the supreme court to other branches of government.⁷⁸ The Pennsylvania Bar Association recently sent email alerts asking its members to lobby against the legislature’s proposed “sales tax” on professional services, including legal services, and a bill that would make lawyers subject to the state’s general consumer protection law.⁷⁹ Although a number of states exclude lawyers from the ambit of their general consumer protection laws, either by statute or by case law, there are a significant minority of state consumer protection statutes that apply to lawyers in whole or in

73. See *supra* notes 46-52.

74. *EEOC Reaches \$27.5 Million Settlement in Age-Bias Action against Sidley Austin*, 23 ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 533 (Oct. 17, 2007).

75. *A Test Of Leadership: Charting the Future of U.S. Higher Education* 15 (Sept. 2006), at <http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf> (Spellings Report); *accord Can You Say NACIQI?*, Inside Higher Ed (Dec. 5, 2006), at <http://insidehighered.com/news/2006/12/05/naciqi> (noting the increased interest in using accreditation reviews to shape higher education); ABA Section of Legal Education and Admissions to the Bar, Recommendation and Report 113 at 4-5 (Feb. 2008), at http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredthirteen_113_FINAL.doc (“... the Council believes that adoption of an Interpretation on bar passage **is required to comply with the regulations of the Department of Education.**”)

76. See, e.g., JUDITH A. MCMORROW & DANIEL R. COUILLETTE, *MOORE’S FEDERAL PRACTICE: THE FEDERAL LAW OF ATTORNEY CONDUCT* (3d ed. 2001); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 384 nn.2, 4 (2002).

77. *N.J. Conflicts Law for Government Lawyers Trumps Ethics Rule That Permits Screening*, 23 ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 380 (July 25, 2007).

78. Vesna Jaksic, *Some States Seek Change in How Lawyers Are Regulated*, NAT’L L.J. (Jan. 21, 2008) at 6.

79. See Email from Pennsylvania Bar Association PAC, Legislative Action Alert from PBA President Andrew Susko: PA House to Consider Sales Tax Expansion to Legal Services (Oct. 29, 2007); *Pennsylvania Consumer Protection Act Does Not Apply to Attorney Misconduct*, 24 ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 6 (Jan. 9, 2008).

part.⁸⁰ Although such efforts are not always successful, this option now appears to be on the table and a number of courts⁸¹ and commentators⁸² are skeptical of the argument that lawyers should be exempt from the generally-applicable state consumer protection laws. As one court said, “We appreciate . . . that ‘it would be a dangerous form of elitism, indeed, to dole out exemptions to our [consumer protection] laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society’s health and welfare.’”⁸³ In a similar vein, some courts have been reluctant to interpret Rule 5.6 in a manner that is different than the restrictive covenant rules that apply to other service providers.⁸⁴ There are other examples of the paradigm that one could point to both within the U.S. and outside the U.S.⁸⁵

A final example of the emergence of the *service providers* paradigm is a 2007 report prepared by the Harvard Law School Program on the Legal Profession. This report, which was commissioned by the Alfred P. Sloan Foundation, was entitled “Overview of the Professional Services Industry and the Legal Profession.”⁸⁶ The opening sentence states: “This report provides a general overview of the professional services industry in the United States, with a particular emphasis on the legal profession.”⁸⁷ The first sentence of the section on the legal profession describes

80. See Arthur J. Lachman, *Deceptive Trade Practice Legislation, Materials Prepared for the 2007 APRL Mid-Year Meeting* (materials on file with author and available on the APRL Members Only Webpage, at http://www.aprl.net/Programs/program2007_02.htm).

81. *Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964 (Conn. 1997); *Crowe v. Tull*, 126 P.3d 196, 209 (Colo. 2006).

82. Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131 (2006); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 695-96, 699 (1990); Fischer, *supra* note 52.

83. *Haynes*, *supra* note 81, at 974 (*quoting* United States v. Nat’l Soc’y of Prof’l Eng’rs, 389 F. Supp. 1193, 1198 (D.D.C. 1974)).

84. See, e.g., *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723 (Ariz. 2005) (in examining a financial disincentive, court applied the same rule of reason for lawyers that it applied to restrictive covenants for doctors and other professionals); *but see* *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992) (explaining that a special rule should be applied to lawyers that does not apply to other businesses: “clients are not merchandise, lawyers are not tradesmen,” and that “restrictive covenants inappropriately barter in clients.”) *quoting* ABA Comm. on Professional Ethics, Formal Op. 300 (1961).

85. For developments outside of the U.S., see *Year-in-Review*, *supra* note 42, at § IV(B)(3) (describing the CCBE’s unsuccessful efforts to exclude lawyers from the December 2006 Services Directive and its successful efforts to amend a Parliament report that recommended that the Commission develop a harmonized code of conduct for professions, including the legal profession). Within the U.S., the ABA MDP and MJP hearings also provide useful examples, as do the recent discussions about third party equity in law firms. See, e.g., Bruce MacEwen, Milton C. Regan, Jr., Larry Ribstein, *Law Firms, Ethics, And Equity Capital*, 21 GEO. J. LEGAL ETHICS 61 (2008).

86. Sean Williams and David Nersessian, *Overview of the Professional Services Industry and the Legal Profession, A report provided to the Alfred P. Sloan Foundation by the Harvard Law School Center on Lawyers and the Professional Services Industry* (2007), at http://www.law.harvard.edu/programs/plp/pdf/Industry_Report_2007.pdf.

87. *Id.* at 1. After summarizing the three characteristics of a profession and explaining why lawyers met this definition, this paper explained why legal services “serves as a useful context in

lawyers as service providers, stating: “Lawyers in the United States are among the most highly-educated of all *professional service providers*.”⁸⁸ This paper thus illustrates the degree to which the *service providers* paradigm has influenced the way we talk about the legal profession in the U.S., including at the most influential levels.

IV. The Consequences of Viewing Lawyers as “Service providers”

In my view, the *service providers* paradigm has profound regulatory implications for the legal profession. This paradigm shift has and will affect not only *who* it is that regulates lawyers but *how* lawyers are regulated. This paradigm shift will therefore affect the work of the ABA and the relative importance of the ABA ethics codes that are the subject of this *Symposium*.

With respect to the issue of “who” regulates lawyers, this *service providers* paradigm means that there will be an increasingly large pool of lawyer regulators. Although the ABA recently reaffirmed the traditional view that lawyers should be regulated by the state judicial branch,⁸⁹ commentators have noted that lawyers already are subject to multiple sources of regulation.⁹⁰ The combination of globalization and the *service providers* paradigm means that lawyers are likely to face regulation from more and more entities. Fifteen years ago, how many U.S. lawyers had even heard of the Financial Action Task Force, let alone imagined that it might say anything relevant to the regulation of the legal profession? Now, however, U.S. lawyers face regulation from many new sources, including global entities. Moreover, the *service providers* paradigm means that state and federal legislatures and agencies will be increasingly likely to try to regulate lawyers. While it is premature to predict the demise of the traditional state judicial branch regulation of lawyers, the *service providers* paradigm will contribute to increased efforts at lawyer regulation by other entities.

In addition to changing *who* it is that regulates lawyers, this paradigm shift will affect *how* lawyers are regulated. If one views lawyers as a subset of a broader group of service providers, then one is much more likely to conclude that lawyers have rights and obligations that are similar to the rights and obligations of other

which to discuss such issues as consolidation and convergence among firms, pressures from globalization, the role of diversity, and the like.” *Id.* at 3.

88. *Id.* at 3 (emphasis added).

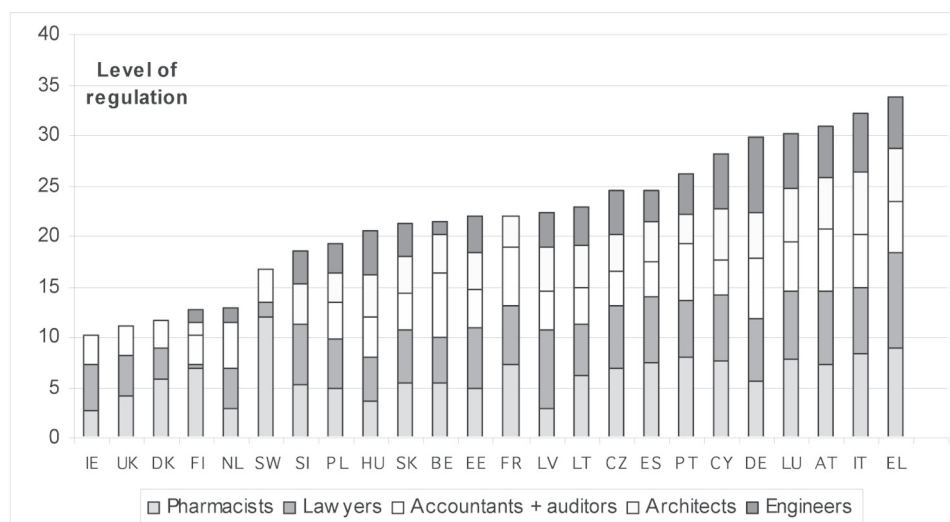
89. *See, e.g.*, ABA, Commission on Multijurisdictional Practice, Report 201A (Regulation of the Practice of Law by the Judiciary), at <http://www.abanet.org/cpr/mjp/201a.doc>.

90. A number of commentators have noted the phenomenon of multiple regulators. *See, e.g.*, Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003); Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95 (2008); Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957 (2006); David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799 (1992); Charles Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

service providers. In the past, challenges to legal profession rules often viewed those regulations in isolation: a decision might be made about whether the regulation was justified or not, but the regulation was not compared to the regulations of other professions. Moreover, the courts often have been willing to defer to the legal profession's statements about why a particular regulation was needed.

In contrast, the *service providers* paradigm makes it much more likely that lawyer regulations will be the subject of benchmarking not only across national borders, but across professions. Perhaps the starkest visual example of this type of benchmarking is contained in the EU reports on competition in professional services.⁹¹ Relying on its stocktaking and a lengthy study it commissioned, the European Commission produced the following chart that purported to indicate the level of regulation for five professions in twenty-four countries:⁹²

Figure 1: Index of level of regulation in Member States



In its follow-up report, the Commission stated that professional services regulations warranted close scrutiny by EU Member States and that the Commission was “fully committed to bringing about wide scale reform to this sector.”⁹³ The underlying IHS Study on which the Commission's initial and follow-up reports were based included this table that assigned numeric figures for the level of

91. See *supra* note 63.

92. See Scope for More Reform, *supra* note 62, at 7. The regulations covered by this table included advertising restrictions, fee restrictions, entry requirements (which would include legal education and bar examination requirements), monopoly rules, and rules restricting alternative business structures. See also EU Competition Report, *supra* note 62, at 8 (similar chart for fewer countries).

93. See Scope for More Reform, *supra* note 62 at para. 27-29.

regulation in each country, with high scores and darker colors representing a higher level of regulation.⁹⁴

	Accountants	Legal	Architects	Engineers	Pharmacists
Austria	6.2	7.3	5.1	5	7.3
Belgium	6.3	4.6	3.9	1.2	5.4
Denmark	2.8	3.0	0	0	5.9
Finland	3.5	0.3	1.4	1.3	7.0
France	5.8	6.6	3.1	0	7.3
Germany	6.1	6.5	4.5	7.4	5.7
Greece	5.1	9.5	n.a.	n.a.	8.9
Ireland	3.0	4.5	0	0	2.7
Italy	5.1	6.4	6.2	6.4	8.4
Luxembourg	5	6.6	5.3	5.3	7.9
Netherlands	4.5	3.9	0	1.5	3.0
Portugal	n.a.	5.7	2.8	n.a.	8
Spain	3.4	6.5	4.0	3.2	7.5
Sweden	3.3	2.4	0	0	12
UK	3.0	4.0	0	0	4.1

The primary conclusions in the 500-page IHS study included the following: 1) there was no sign of “market breakdown” in countries with less regulation; 2) there was no basis for questioning, based on regulation levels, the high quality and essential values of professional services in various countries; 3) in law, accounting and pharmacy, there were regulatory-induced “suboptimal” outcomes for the whole economy (and for consumers in particular), which led to:

the overall conclusion that the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for the ultimate benefit of the consumer.⁹⁵

Although the CCBE has criticized these reports, *inter alia*, because the methodology was faulty and they did not ask about the justification for individual rules, the Commission has not responded to these critiques in its subsequent reports.⁹⁶

94. See, e.g., Institut für Höhere Studien (IHS), *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States Regulation of Professional Services 3* (Vienna, January 2003), at http://ec.europa.eu/comm/competition/sectors/professional_services/studies/prof_ser_vices_ihs_part_1.pdf.

95. Id. at 5-6.

96. See CCBE, Competition Committee, at http://www.ccbe.eu/index.php?id=94&id_comite=4&L=0 (includes links to the CCBE’s multiple submissions). For more information, see Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 Nw. J. INT’L L. & BUS. (2008) (forthcoming).

Regardless of the validity of the Commission's conclusions, this EU initiative illustrates how the *service providers* paradigm can be used to affect lawyer regulation.

The December 2007 Canadian competition report provides another illustration of how the *service providers* paradigm can affect the manner in which lawyer regulations are analyzed. Unlike the EU reports, the 2007 Canadian report did not include a graphic image, such as a table or chart, which combined the analysis of all of the professions studied. But the report did provide a consolidated narrative analysis for the six self-regulated professions it studied.⁹⁷ This report identified appropriate regulatory principles and standards that could be used for all of these professions to evaluate rules concerning entering the profession, mobility, overlapping services and scope of practice, advertising, pricing and compensation and business structure.⁹⁸ The report contained a number of very specific recommendations for legal services and said that the Commission would revisit the issue in two years to see what had been accomplished.⁹⁹

What do these European and Canadian reports have to do with U.S. regulation of the legal profession? Quite a lot, I would submit. They reflect a *service providers* approach towards lawyer regulation that U.S. lawyers have already seen to some degree and are likely to see in the future. Some readers may disagree with this point and argue that the U.S. is different, perhaps citing the different ways in which the MDP issue evolved in the U.S. and elsewhere. And perhaps these readers are correct. But in my view, it is unrealistic to expect that the legal profession can turn aside the *service providers* paradigm, especially when it has become so firmly rooted in so many different places. It is much better for the legal profession to recognize and prepare for the changes, rather than simply wishing that things could be as they once were. If much of the world has changed its view of lawyers, but the legal profession remains resistant to the characterization and all that goes along with it, the legal world could find itself marginalized in a world it does not know or understand and much of its rules arguments could be viewed by others as irrelevant.

V. Recommendation and Conclusion

So what does this paradigm shift mean for the ABA and lawyer regulation in the future? On the one hand, it means that ABA model codes, intended for adoption by the judicial branch of government to regulate lawyers, will play an increasingly smaller role in the overall fabric of lawyer regulation. Thus, if the ABA wants to continue to take an active role in the development of rules and policies related to the legal profession, it needs to look beyond its traditional role in developing

97. Canadian Competition Report, *supra* note 65, at 133-136.

98. *Id.* at 37-41 and 133-136. The Report also stated that regulators "must follow certain principles to ensure regulation is in the overall public interest, based on well-defined and specific objectives, subject to regular and ongoing review, and not unnecessarily restrictive of freely competitive markets." *Id.* at 133.

99. *Id.* at 61-79, 136, 156-158.

model rules. It must recognize the importance of the alternative sources of regulation mentioned in this article, monitor the developments in these forums, participate actively, provide expertise, and help shape the dialogue. The ABA already has begun to make some shifts in this regard, but it should regularly reevaluate its work to make sure that it has not ignored forums in which key developments are occurring. In other words, both individual lawyers and the ABA need to recognize the changes in *who* it is that regulates lawyers.

Even more importantly, however, this paradigm shift means that the ABA and interested lawyers need to think about how they will respond to the changes in *how* lawyers are regulated. When these new regulators approach the topic of lawyer regulation, they are much more likely to assume that lawyers should be treated in a manner similar to other service providers. Moreover, such regulators are likely to be skeptical of claims that the legal profession is unique and should be treated differently than other professions.¹⁰⁰

One possible response would be for the legal profession to develop a regulatory approach in which it:

- 1) explicitly articulates the justification for any rule or regulatory approach it recommends;
- 2) sets forth the manner in which that regulation advances the articulated regulatory goal;
- 3) explains why the regulation is narrowly tailored and not broader than necessary;
- 4) understands and benchmarks the ways in which the proposed rule or regulation is similar to or different than the rules of other service providers within the U.S.;
- 5) understands and benchmarks the ways in which the proposed rule or regulation is similar to or different than the legal profession rules found in other countries; and
- 6) explains why any differing regulation is necessary and appropriate.

Is the approach in this recommendation particularly new? Of course not. Other than the benchmarking, these principles are substantially similar to principles that have been applied to the legal profession within the U.S. and outside of the U.S. They are similar to the First Amendment tests applied to the legal profession;¹⁰¹

100. Some may cite past history to support claims that the legal profession’s self regulation should be closely scrutinized. See, e.g., Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989). I have sat in on committee meetings where lawyers have not mentioned clients or the public when taking a position for or against a particular rule, but instead have argued whether the rule would or would not hurt particular lawyers’ competitive position.

101. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995)(applying Central Hudson test).

U.S. antitrust principles;¹⁰² OECD recommendations,¹⁰³ EU competition principles;¹⁰⁴ and Canadian competition principles.¹⁰⁵ What *would* be new is if the ABA and all other traditional lawyer regulators adopt an approach or methodology in which they routinely ask and answer these questions. Even as recently as last year, for example, officials who were arguing in favor of New York's new advertising rules failed to explain to the court why its rules were justified under the *Central Hudson* test, which is substantially similar to the questions listed above.¹⁰⁶

To ensure consistent application of this principle, it would be useful for the ABA or others to develop a standard "template" that could be used when considering a new legal profession rule. The ABA could take a leading role in creating a culture in which all proposed rules were subjected to the template analysis. This approach could have multiple benefits. For example, the introspection required by this approach hopefully would lead to better regulations.¹⁰⁷ It certainly should discourage inappropriate rulemaking considerations. Moreover, having thought through the justifications for its rules ahead of time, the legal profession should be in a better position to defend its rules if challenged. The benchmarking should help the legal profession identify those rules that are most likely to be challenged and for which it will need the strongest justifications. Using this template approach may help the legal profession maintain its current level of self regulation.

Some may argue that this approach would be unnecessarily burdensome or would infringe the autonomy and independence of the legal profession. I do not agree: this approach does not mandate a particular outcome nor does it mandate similar treatment across disciplines or across borders. What it does suggest is that where the legal profession's approach differs from the approach used elsewhere, the legal profession has to be prepared to explain why its approach is appropriate and justified to protect clients or the public. For example, the OECD *Guiding Principles for Regulatory Quality and Performance* recommend that all regulation "have a sound legal and empirical basis:" if the legal profession thinks that in certain instances, it is appropriate to regulate without first obtaining empirical data, it should be prepared to explain why that is so.¹⁰⁸

102. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

103. See OECD Legal Professions, *supra* note 60.

104. ECJ Judgment, Case C-309/99, *Wouters v. NOVA*, 2002 ECJ CELEX LEXIS 186 (Feb. 19, 2002); EU Competition Report, *supra* note 62.

105. See Canadian Competition Report, *supra* note 65.

106. *Alexander v. Cahill*, 2007 U.S. Dist. LEXIS 53602, 2007 WL 2120024 (N.D. N.Y. 2007) at n. 4 (court criticized defendant for failing to apply the *Central Hudson* test, even though instructed to do so).

107. Accord Jonathan Goldsmith, *The Core Values of the Legal Profession For Lawyers Today and Tomorrow*, 28 NW. J. INT'L L. & BUS 441 (2008) (finding the new soul-searching healthy).

108. OECD, *Guiding Principles for Regulatory Quality and Performance* 3 (2005), at <http://www.oecd.org/dataoecd/19/51/37318586.pdf>. The legal profession might ask, for example, whether this regulatory principle is appropriate in light of the difficulty of conducting empirical research and

In sum, in the past, U.S. lawyers have debated whether there is a dichotomy between the perspectives of “law as a profession” and “law as a business.” Whether we like it or not,¹⁰⁹ we now live in an era in which there is a new paradigm and vocabulary to consider. Lawyers are now viewed as simply one of many different kinds of “service providers.” The regulation of the legal profession in the future must take this new paradigm into account and must think about the best way to preserve that which we consider key to the legal profession while adapting to new circumstances.

in light of the relationship of legal profession rules to the administration of justice. The legal profession might ask whether the fragility of “the rule of law” and the difficulty of making corrections to an ill-advised deregulation means that this OECD regulatory principle is not always appropriate for the legal profession.

109. I want to emphasize that I am not endorsing the use of the *services providers* paradigm for lawyers, but am reporting its existence. Some may applaud this development and see opportunities for the legal profession, while others will denounce it. Whether one likes it or not, however, this paradigm is now a fundamental part of how lawyers will be viewed and regulated.

