Law Practice Regulation in the United States & Issues Raised by Cross Border Legal Practice

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By Gregory E. Mize, Judicial Fellow, National Center for State Courts

The expansion of global legal practice creates many challenges for state supreme courts in their duties to oversee lawyer licensing, promulgate ethical codes, and enforce those codes. At the Fifth International Conference of Legal Regulators last October, delegates from dozens of countries and every continent discussed recent developments in the regulation of cross border legal practice and identified issues that must be addressed by responsible bar regulators. The meetings substantiate the ever-growing interplay of proactive lawyer regulation, international free trade and investment agreements, cross-border commercial transactions, and evolving information technology. These circumstances necessitate improved coordination and information sharing among legal communities in order to curb regulatory confusion in legal services markets. The CCJ Working Group on Foreign Lawyers and the International Practice of Law has been a vehicle for such coordination. It conducts international conference calls with lawyer regulators and bar members from around the world. The last call took place on Tuesday, January 9.

The fruits of that networking inform this statement of regulatory issues facing state supreme courts.

A. Background

Like other parts of modern commerce, legal markets are changing in size and complexity. These changes stem from: socio-political developments, the globalization of legal service organizations, technological advances, changes in lawyer regulation in developed countries, and efforts by nations to enter into agreements promoting commercial investments and trade in services.

- **Socio-Economic-Political.** Social trends around the world have intensified disputes with respect to product consumption, the environment, business competition, and human rights. In addition, during severe economic downturns, legal problems for citizens can increase without concomitant availability of legal services. At the macro level, there can be pressures coming from the International Monetary Fund and the European Central Bank to induce some debtor countries to liberalize their labor markets and make structural changes in their professions including lawyers, courts, and civil codes.

- **Globalization.** As shown by the first map below, cross-border trade in all goods and services has huge monetary value for all states. Not one state has less than 800 million dollars worth of annual foreign exports. That volume of commerce means lawyers, foreign and domestic, are involved. Hence international law firms and their corporate clients are growing in number and size. The second map portrays the number of law firms in each state that have foreign offices. In the interest of improving their market position, some may want to exert influence on lawyer regulation policies.
Why This Issue Matters to Your State

Law Offices *per* State That Also Have Foreign Offices

Map prepared by Prof. Laurel Terry ([Lterry@psu.edu](mailto:Lterry@psu.edu)), *Penn State’s Dickinson Law*, based on data provided by General Counsel Metrics, LLC based on the websites of law firms with approximately 37 lawyers or more.
Technology. Online legal services are ubiquitous. Document production, especially with respect to electronically stored information, is outsourced and in-sourced in large volume across continents. Artificial intelligence products enable documents to be analyzed mechanically and stored in a cyber space that transcends physical boundaries. Teams of lawyers can collaborate efficiently across offices and oceans using ever improving voice, video, and messaging platforms. Online dispute resolution is becoming widely used. These developments prompt some redefining of “legal services.” “law firm,” “maintaining client confidentiality,” and more.

Regulation. Australia, the UK, and several Canadian provinces have taken steps to oversee the provision of “legal services” in innovative ways. Over a decade ago, New South Wales, Australia authorized lawyers to incorporate with both lawyer and non-lawyer partners. To address ethical issues related to non-lawyer participation in legal services, Australian regulators also moved from the traditional complaints driven regulatory system to a proactive, management-based approach (PMBR). This proactive approach to regulation joins a regulator’s overarching statement of legal service objectives with a system of self-assessments by regulated parties. Regulators first establish law practice objectives and then promulgate self-assessment instruments that require lawyers to state with specificity how they are meeting the practice objectives in their service to clients. Australian regulators identified ten regulatory objectives including legal competence, effective communication, timely delivery of service, conflict of interest avoidance, skillful records management, and quality staff supervision.

In 2007 the UK also shifted its lawyer regulatory scheme from a traditional rules violation approach to an “outcomes-focused regulation” (OFR) paradigm. OFR, like Australia’s regulatory objectives, emphasizes establishment of high-level principles and concomitant practitioner reports of steps they are taking to attain target outcomes. The Solicitors Regulatory Authority will soon issue two Handbooks (codes of conduct) will clarify the distinction between the obligations of individual practitioners and those imposed on legal service entities.

In Canada, six major law societies (regulators) are evaluating proactive, management-based regulation with respect to private law firms and solo practitioners. Since there is no central regulatory authority and law societies have varying jurisdictional authority, the law societies are proceeding at different paces. The Canadian Bar Association has development a self-assessment tool modeled upon the Australia’s. The Prairie Provinces (Alberta, Manitoba, Saskatchewan) are working in concert. They have drafted regulatory objectives (including access to justice objectives) and self-assessment tools for private practitioners to fill out. The Law Society of Ontario recently approved a policy allowing

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1 The principles are: Protecting and promoting the public interest; Supporting the constitutional principles of the rule of law; Improving access to justice; Protecting and promoting the interest of consumers; Promoting competition in the provision of services; Encouraging an independent, strong, diverse and effective legal profession; Increasing public understanding of the citizen’s legal rights and duties; Promoting and maintaining adherence to the professional principles. Legal Services Act 2007, c. 29, s.1, http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1.

non-lawyers and paralegals to provide legal services to charities and civil society organizations. Rules have not yet been promulgated. In the province of Nova Scotia, PMBR is already becoming operational. Regulators have adopted regulatory objectives and law firms there are required to develop practices that emulate a model template called the Management Systems for Ethical Legal Practice (MSELP). There are ten goals including, “Lawyers and legal entities provide enhanced access to legal services.”

- **International Trade Agreements.** Numerous international trade agreements (whether finalized or pending negotiation) cover “services.” Finalized trade agreements include General Agreement on Trade in Services (GATS - the grandparent of subsequent multilateral proposals) and the North American Free Trade Agreement (NAFTA). Incomplete agreements include the Trans-Pacific Partnership (TPP) agreement (with respect to Pacific Rim countries), the Trade in Services Agreement (TiSA) (involving 23 nations who have expressed impatience with the GATS process), and the Transatlantic Trade and Investment Partnership (commonly called T-TIP or the US-EU trade agreement). With respect to trade in services generally, there is no indication of any change in the USTR’s negotiation approach on professional services. The USTR has consistently taken the position that there should be a “mutual recognition” approach to the regulation of professions such as accounting, architecture, and the law. This means the USTR encourages the regulators professions to engage in meaningful dialogues to create inbound licensing policies that promote rather than inhibit cross border exchange of goods and services.

In this dynamic atmosphere, lawyer regulators around the globe are increasingly raising fundamental questions.

- What are the optimum ways to regulate individual service providers and service entities?
- How can professional responsibility standards become compatible across national borders and different legal cultures?
- Should lawyer regulation vary depending on the size or sophistication of the client? Should it be rules based or outcomes based or both?
- With the advent of many virtual legal services (not limited by geography), where should legal regulation occur?

Several state supreme courts and bar leaders are asking these questions and beginning to formulate responses.

**B. Issues for State Supreme Courts and the Bar**

There are at least six issues that are likely to challenge state supreme courts over the next five to ten years:

1. **Has the Time Arrived to Ardently Embrace Proactive Management-Based Regulation (PMBR):** As noted above, regulators in Australia, the UK, and Canada are focusing on the management practices of law firms in order to ensure ethical practice by individual lawyers. Their innovations interrelate two concepts: (a) entity regulation

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and (b) a goals-compliance approach to regulation in contrast to a complaint-based approach. Lawyer regulators in these countries seek to enlist the aid of law firm to assure public policy goals. By way of analogy, they are saying it is time to be fire preventers as well as fire fighters. Toward that end, the regulators promulgate highly principled practice goals and challenge law firm managers to prove that the law firm is taking all necessary steps to achieve and maintain those practice standards.

Positive effects from these regulatory methods are supported by extensive research on the management-self-assessment system established in Australia. Hofstra Law School Professor Susan Fortney, a leading researcher of the Australian system, has concluded that the PMBR is a better public protection method than the typical reactive discipline system. Her study findings revealed that Australia’s management-based regulation, adopted in 2001, “successfully provides firm directors the incentive, tools, and authority to take steps to improve the delivery of legal services.” For example, complaint rates against law firm lawyers went down two thirds after firms completed their self-assessment forms. As shown in Table 1, the vast majority of law firms revised their policies and procedures

<table>
<thead>
<tr>
<th>Steps Taken by Firms in connection with the First Completion of the Self-Assessment Process</th>
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<tbody>
<tr>
<td>Reviewed firm policies/procedures relating to the delivery of legal services</td>
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<tr>
<td>Revised firm systems, policies, or procedures</td>
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<tr>
<td>Adopted new systems, policies, or procedures</td>
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<tr>
<td>Strengthened firm management</td>
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<tr>
<td>Devoted more attention to ethics initiatives</td>
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<tr>
<td>Implemented more training for firm personnel</td>
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<tr>
<td>Sought guidance from the Legal Services Commissioner/another person/organization</td>
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<tr>
<td>Hired consultant to assist in developing policies and procedures</td>
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2. Whether it is advisable to create bar admission and practice requirements that are similar across jurisdictional boundaries: Some American lawyers advocate for more unified procedures within the US in order to promote cross border commerce (domestic and foreign) and cooperative problem solving. At the 43rd National


Conference on Professional Responsibility last summer, Robert Creamer made an impassioned plea upon receiving the Michael Frank Professional Responsibility Award:

_The current system of individualized and inconsistent state ethics rules makes no sense in our integrated and interconnected economy. Uniform standards are inevitable. It’s not possible to predict when that will happen or what the precipitating factors will be. But it will surely happen. As mentioned above, the question for this group is how to respond to that reality: whether to get ahead of the situation, participate in the process, and help shape the outcome; or to sit back and become bystanders—or perhaps collateral damage._

With respect to admissions standards, the Uniform Bar Examination (UBE) could have a favorable impact on cross-border admissions. The UBE is intended to eliminate redundant licensing tests. Twenty-nine US jurisdictions have adopted the UBE. This map depicts the landscape.

![Adoption of the Uniform Bar Examination](image)

3. Whether there can be a more consistent and effective processes for admitting non-US trained lawyers: Foreign law graduates increasingly seek admission to practice in the US. Foreign-educated lawyers recognize the importance of U.S. law in international business transactions and are seeking admission to practice in a U.S. jurisdiction for business purposes and as a professional credential that is highly valued in certain regions of the world. Past efforts to discern a way to certify the quality of foreign
legal education programs have been unsuccessful. New law schools based on the American model are being established in other countries. The evaluation of those schools by state supreme courts and bar admissions officials remains difficult.

4. **Whether Re-formulating the Regulation of Some Legal Services Can Reduce Current Deficits in Access to Justice and Legal Services to Disadvantaged Citizens:** Lawyer regulators in the UK, Australia, Canada, Europe, and Singapore authorize alternative business structures (ABS) and private capitalization of legal service enterprises. Advocates of these developments assert that ABS and equity investments can improve service provider infrastructures (for example, digital and information technologies) and thereby make legal services available to a larger population at reduced cost. Publicly listed law firms in Australia assert they can now fund major class actions and bear overheads associated with novel, cutting edge litigation. In order to close the justice gap in America, would it be prudent for state supreme courts to monitor, evaluate and, to some degree, follow the foreign models?

5. **Examining How Ongoing Free Trade Negotiations Can Influence Cross-border Lawyer Regulation:** Since many foreign trade agreements address cross border exchange of services, it is incumbent upon state supreme courts to be mindful of how their regulatory counterparts in trade-partner countries are regulating both inbound and outbound law practitioners.

6. **Whether Investor-State Dispute Settlement (“ISDS”) Systems Arising From Investment Treaties or Trade Agreements Circumvent Traditional State Court Authority:** The ISDS process is a long-established mechanism used in many international investment agreements to protect investors from expropriation of assets or other unfair treatment by a host country. In negotiations of international investment agreements and free trade agreements (FTAs), the inclusion of ISDS processes are invariably discussed. ISDS clauses enable foreign investors, who believe a host country has taken action that directly or indirectly expropriates the value of their investment, to present their claims against the host government to arbitration panels instead of going through established courts of that treaty partner. An investor’s home country prosecutes the claims against the host government. Under of terms of these agreements, decisions of arbitral panels normally cannot be challenged in a party’s governmental courts.

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In 2009 a special ABA committee recommended development of a model rule that required foreign law graduates to complete a specially designed L.L.M. program in the United States, but concluded that:

[The Accreditation Council should not expand into accreditation of [foreign law school] . . . because of] the sheer number of foreign law schools, coupled with the complexity and diversity of foreign law programs, the limited expertise that currently exists to devise appropriate standards, and the staff resources that would be required among other factors. *Report of the Special Committee on International Issues*, American Bar Association (Jul. 15, 2009), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20090715_international_issues_report.authcheckdam.pdf.

Following review of the special committee’s recommendations, the CCJ concluded that the proposed approach might undercut legal education requirements for American students and could encourage a challenge by non-accredited US law schools on equal protection grounds.
The U.S. first agreed to an ISDS clause in 1959. Since then countries across the globe have agreed to hundreds of ISDS provisions. The UN Conference on Trade and Development (UNCTAD) released its second report on trends in the use of investment arbitrations and new ISDS case filings. Key findings include:

- **Countries continue to use IIAas as a tool for making international investment policy.** There are currently over 3200 IIAs in effect.
- **Investors continue to use the ISDS mechanism. In the first seven months of 2017, investors initiated 35 new cases, bringing the total number of known cases to 817. The new ISDS cases in 2017 were commenced against 32 countries. Five countries and economies – Bahrain, Benin, Iraq, Kuwait and Taiwan Province of China – faced their first (known) ISDS claims. Developed-country investors brought about two thirds of the 35 known cases.
- **Looking at outcomes of 530 cases concluded in July 2017, about one third were decided in favor of the state, one quarter in favor of the investor, and one quarter settled.**
- **On average, a successful claimant was awarded some $522 million – about 40 percent of the amount claimed.**

As ISDS arbitration cases continue to be filed, there is a growing mood that ISDS settlement mechanisms need to be improved. The NCSC and CCJ have been monitoring criticisms of ISDS. Some critiques seem well founded while other accusations suffer from political hyperbole. *The Economist* characterized the ISDS process this way: “[T]he proceedings are not open to the public and the arbitrators making politically and fiscally important decisions are often moonlighting corporate lawyers. It is no surprise that some believe ISDS stacks the rules of globalization in favor of big firms.” Other criticisms include: inconsistent arbitral panel interpretations of IIA provisions, lack of public access to arbitral proceedings and documents, and the absence of a common code of conduct for arbitrators. In 2017, UNCTAD published a summary proposals to reform the way international investment disputes are handled. These reforms include limiting the range of situations in which investors can resort to arbitration, promoting alternative dispute resolution methods, adjusting the current ISDS system to provide more transparency and ways to challenge arbitrators impartiality, and introducing an appeals system. The UN Commission on International Trade Law (UNCITRAL) recently created a working group to study reforms of ISDS.

Critics of ISDS processes within the United States assert that the jurisdiction of domestic courts can be displaced. When a Mississippi state court jury ruled against the Loewen Group (a Canadian funeral home conglomerate) in a private contract dispute, Loewen launched an ISDS claim against the U.S. government under the North American Free Trade Agreement (NAFTA). In the underlying court ruling challenged by Loewen, the company was hit with a jury damages award requiring it to pay the local funeral home $500 million. Loewen sought to appeal. Following both federal and

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10 In 2017, the European Commission proposed the establishment of a permanent Multilateral Investment Court as the forum of first and appellate resort in investor-state disputes. The Commission’s initiative followed calls for ISDS reform from UNCTAD, the Organization for Economic Co-operation and Development, and the World Bank.
Mississippi state court procedures, Loewen posted a bond as part of the appeal process. After a failed bid to lower the bond, Loewen reached a settlement for approximately $85 million. But then Loewen launched a NAFTA case for $725 million, claiming that the bond requirement and the biased communications of the trial judge to the jury violated the company’s investor rights under NAFTA. The arbitral panel explicitly ruled that court decisions, rules and procedures were government “measures” subject to challenge and review under the ISDS regime. On the merits and despite opposition from the US government, the tribunal agreed with some of Loewen’s claims and “criticize[d] the Mississippi proceedings in the strongest terms.” Although the ISDS case was subsequently dismissed, some argue that the ruling demonstrated that foreign corporations that lose tort cases in the United States can seek an ISDS tribunal to second-guess the domestic decisions and to shift the cost of damages to U.S. taxpayers.

Regarding these concerns, Thomas Fine, the USTR’s Director for Services and Investment and the lead negotiator of the cross-border trade in services chapter of the EU-US trade agreement (T-TIP) affirmed to the CCJ Working Group on Foreign Lawyers & The International Practice of Law that no other case like Loewen has arisen thereafter. He informed the Working Group that, for decades, ISDS has effectively protected the global community against confiscatory governmental actions. He pointed out that the overwhelming majority of cases where ISDS arbitration has been invoked involve US-based investors making claims against foreign states. In seventeen cases brought by foreign investors against the United States, the government has never lost.

With the recent appointment of Mr. Robert E. Lighthizer as the US Trade Representative, the Office of the USTR is taking a fresh look at the ISDS system. Before his appoint, Mr. Lighthizer was critical of ISDS mechanisms as potentially threatening the sovereignty of federal and state governments in this country.

C. Responsive Actions

The CCJ. Given the publicity and debates with respect to ISDS provisions in trade and investment agreements, the CCJ adopted a resolution urging the United States Trade Representative and the Congress: (1) to negotiate and to approve, respectively, provisions in trade agreements that recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments; and (2) “to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than U.S. citizens and businesses.”

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12 Id. Loewen’s bankruptcy lawyers filed for reincorporation as a U.S. firm under bankruptcy protection and thereby nullified Loewen’s foreign investor status.
To keep up with the multiplicity of developments in global lawyer regulation and to promote readiness of the full Conference to make timely and appropriate recommendations with respect to domestic lawyer regulation, the CCJ Working Group on Foreign Lawyers & The International Practice of Law meets two times a year. NCSC staff monitors relevant developments throughout the year. The Working Group meetings involve international teleconferencing with participants typically calling in from Australia, Europe, and North America. At one teleconference, Thomas Fine of the USTR stated the USTR believes that, with respect to regulated professions such as accountants, architects, engineers, and lawyers, trade agreements should not directly attempt to regulate these professions. Instead the professions’ leaders and duly constituted regulators should work out mutual recognition arrangements that could be supported in trade agreement texts. Toward that end, the USTR promotes trade agreement provisions that encourage the regulated professions and their regulators to form “working groups” as forums to “harvest good ideas under one umbrella.” He cited the CCJ efforts to bring together lawyer regulator stakeholders as a model of meaningful professional collaboration.

The CCJ devoted several sessions during its 2014 mid-year meeting to the topic of “Lawyer Regulation in the Global Arena.” State chiefs communicated with USTR’s Thomas Fine, the Secretary General of the Council of Bars & Law Societies of Europe, leaders of the Law Council of Australia, Professor Laurel Terry, and representatives of the ABA Task Force on International Trade in Legal Services of the State Bar of Georgia’s Committee on International Trade in Legal Services. It became clear to many CCJ members that a reasonable first step to helping state supreme courts become more ready to address the forces of legal market globalization would be for state courts to learn from any peer court system that has demonstrated success in doing so. At that time Georgia was the only state to adopt rules establishing five ways in which foreign lawyers may appropriately perform legal services in Georgia. These rules were the product of several years of study undertaken by the State Bar of Georgia’s Committee on International Trade in Legal Services. Indeed the work thus far of the State Bar of Georgia has been published by the ABA as “a tool kit” entitled “International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience.” By the end of that mid-year meeting, the CCJ adopted a resolution encouraging its members to consider the tool kit “as a worthy guide for their own state endeavors to meet the challenges of ever-changing legal markets and increasing cross-border law practices.” With such encouragement, the D.C. Bar established a Global Legal Practice Task Force to develop policy recommendations with respect to both inbound and outbound legal practitioners.

Momentum within the CCJ for finding appropriate policies to govern foreign lawyer practice in the United States picked up speed in the next year. The full CCJ adopted a resolution that “strongly encourages its members to adopt explicit (emphasis supplied) policies that permit the following qualified activities by foreign lawyers as a means to increase available legal services and to facilitate movement of goods and services between the United States and foreign nations:

- Temporary practice by foreign lawyers (ABA Model Rule for Temporary Practice by Foreign Lawyers),
- Licensing and practice by foreign legal consultants (ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants),
- Registration of foreign-licensed in-house counsel (ABA Model Rule of Professional Conduct 5.5),
• *Pro hac vice* appearance in pending litigation in a court or agency by licensed foreign lawyers (ABA Model Rule for *Pro Hac Vice Admission*),

• Foreign lawyer participation in international arbitration or mediation, as counsel, arbitrator, or mediator (ABA Model Rule for Temporary Practice by Foreign Lawyers and ABA Policy Favoring Recognition of Party Freedom to Choose Representatives Not Admitted to Practice Law),

• Formal professional association between foreign and United States lawyers who are duly licensed in their home country (ABA Model Rule of Professional Conduct 5.4 and ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants allow such association), and

• Foreign lawyer employment of United States lawyers and United States lawyer employment of foreign lawyers who are duly licensed in the United States as a foreign legal consultant or in their home country (ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants provides that locally licensed lawyers may be employed by a law firm based in another country (or lawyer based in another country)).

The current status of state-by-state action with respect to these foreign practice rules is set forth in the following map.

**Jurisdictions with Rules Regarding Foreign Lawyer Practice**

Prepared Jan. 19, 2018 by Laurel Terry (LTerry@psu.edu), Professor, *Dickinson Law*

![Map of Jurisdictions with Rules Regarding Foreign Lawyer Practice](chart.png)

**LEGEND** (see back page for additional information)

*Yellow shading* = has a foreign legal consultant rule

*Blue* = rule permits temporary practice by foreign lawyers (also known as FIFO or fly-in, fly-out)

*White star* = rule permits foreign pro hac vice admission

*Triangle* = rule permits foreign in-house counsel

*Circle* = has had at least one foreign-educated applicant sit for a bar exam between 2010 and 2016.

The Supreme Court of Colorado. Last year the Colorado Supreme adopted a new preamble to the Rules of Professional Conduct that lists the Rules’ regulatory objectives.
The objectives resemble some of those used in Australia, the UK, and those being contemplated in several Canadian provinces. In addition, the Court’s Office of Attorney Regulation Counsel recently undertook a form of proactive regulation. Building upon the requirement that Colorado bar members update their registration information within 30 days of a change in practice or physical address. Upon learning that a lawyer is switching from government or large law firm practice to solo practice, the Office sends an email to the lawyer with a checklist to help the lawyer learn the challenges in managing a private practice. The list addresses such things as trust accounts, the Lawyer Assistance Program, an Attorney Mentoring Program, and various online resources.\(^\text{14}\)

**The Supreme Court of Illinois.** Last year, the Illinois Supreme Court launched a PMBR program to address the data showing that 41% of solo practitioners don’t have malpractice insurance and 84% do not have a written succession plan. The new program mandates that any practitioner who actively represents clients and who does not carry malpractice insurance must obtain insurance or complete a four-hour interactive, online self-assessment regarding the operation of their law firm. There is no cost to take the CLE accredited course. The self-assessment requirements are linked to the annual bar registration system and became fully operational this month.

**The Supreme Courts of Idaho, Iowa, Florida, Minnesota, New Mexico, Texas and Wyoming.** These states have created a committee or an office in the state supreme court to examine whether some forms of PMBR make sense for that jurisdiction.

**The American Bar Associations (ABA).** The ABA’s Standing Committee on International Trade in Legal Services monitors both inbound and outbound foreign lawyer regulation.

In 2016, the ABA Commission on the Future of Legal Services published a comprehensive issue paper seeking public comment on the potential benefits and risks associated with ABS including whether there is any other available evidence of the impact of authorizing ABS. The paper describes the authorization in Washington State, the District of Columbia, Canada, Australia, New Zealand, the UK, other European countries, several Canadian provinces, and Singapore. It offered a balanced list of assertions made by proponents and opponents of ABS as well as citations to evidentiary studies from around the globe.\(^\text{15}\) The issue paper summarized the empirical studies by stating: (1) there is no evidence that ABS has caused harm, (2) ABS in the UK has increased funding for innovation, and (3) jurisdictions authorizing ABS have stayed with it. The comment period closed after two months and the submissions were overwhelmingly in opposition to ABS authorization by states.

In 2013, the ABA adopted a resolution and “Guidelines for an International Regulatory Information Exchange” that encourage state regulatory authorities to enter

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\(^{15}\) The issue paper lists the potential benefits as: increased access to justice, enhanced financial flexibility, enhanced operational flexibility, increased cost-effectiveness and quality of services. The potential risks are: threat to lawyers’ core values (particularly independent judgment and client loyalty), decreased pro bono work, threat to attorney-client privilege, and failure to deliver claimed benefits such as attraction of non-lawyers to work in law firms.
into voluntary arrangements with their foreign regulatory counterparts to facilitate the exchange of information on formal disciplinary actions taken on bar members. The Law Council of Australia finds the Guidelines to be a good model for disciplinary information sharing.

The International Bar Association (IBA). The IBA on May 27 adopted “Guidelines for an International Regulatory Information Exchange Regarding Disciplinary Sanctions Against Lawyers.”

Also in May, the Committee on International Trade in Legal Services Committee of the IBA Issues Commission sent a letter to the IBA president urging him to develop a balanced factual and analytical assessment of the advantages and disadvantages of ISDS provisions in treaties and to identify alternatives that are responsive to any assessed needs.

The IBA published a “Global Cross Border Legal Services Report” in 2014. The ABA and the NCSC were instrumental in orchestrating the data collection from US bar admissions administrators, bar disciplinary counsel, and state supreme courts. The Report serves as a valuable resource to regulators and to lawyers around the world who practice or seek to practice before multiple jurisdictions and who want a reliable statement of lawyer regulation in a desired host jurisdiction. Given the dynamics of lawyer regulation around the globe, the IBA is undertaking updates and revisions to the 2014 document.

The District of Columbia Bar. In tune with the previously noted foreign lawyer practice rules established by Georgia, the DC Bar created a Global Legal Practice Task Force to study, among other things: lawyer mobility, cross-border practice, international developments in the legal profession, inbound legal services, and outbound legal services. With respect to foreign lawyers not trained in ABA-approved law schools seeking admission to the DC Bar, the Task Force’s final report recommends that the Bar Board of Governors and the D.C. Court of Appeals approve rules that would:

- Reduce the number of required education credit hours at an ABA-accredited law school from 26 hours to 24 hours;
- Establish subject matter requirements of 6 credit hours from a list of mandated courses, 6 credit hours of subjects tested on the UBE, and 12 credit hours in elective courses; and
- Allow any amount of the additional education requirements to be completed by distance education that the law school would certify as complying with ABA distance education standards.

The D.C. Bar Board of Governors will likely vote on these rules early this year.

The UK. As in the USA, England’s justice gap in legal aid has become acute due to severe cut backs in public funding. In response, the UK’s chief lawyer regulatory authority, the Legal Services Board (LSB),16 in 2012 issued a comprehensive evaluation of how effectively its outcomes-focused regulations are delivering the originally identified outcomes, looking at: (1) Consumers should experience the values identified in the of codes of conduct, (2) The public interest is a key part of the wider justice system, (3) Guidance provided by regulators is clearly discretionary and does not unnecessarily restrict firms in how they deliver the outcomes, (4) Education and training standards

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(both at entry and on an ongoing basis) ensure that appropriate service standards are achieved and maintained including diversity in the profession, and (5) Effective advisory services are available to regulated entities and individuals. That report contained minimum discussion of access-to-justice metrics. LSB researchers recognize that that evaluation data, like much of the research thus far on this topic, was inconclusive. Consequently, the Board commissioned a series of “tracker surveys” to quantify what legal services are being purchased and at what cost. The surveys separately track legal services for small businesses and for individuals. The latest survey results show that, since the UK reforms took effect, the number of fixed fee services to consumers in all categories of legal services has increased significantly. This is especially so in family matters where the rate of fixed fees increased from 12% to 45%. A 2016 survey showed that the number of citizens who do not seek legal advice for their problems has grown dramatically. The surveys thus far do not indicate whether alternative business structures are a factor in legal fees becoming more predictable or whether ABS is contributing to lowering costs to legal service consumers.

In June, the LSB published the results of its study to discern what ABS law enterprise investors choose to invest in." Limited data indicated that outside investments mainly aim to increase staff size, marketing, and IT capacity. Overall, LSB study shows a relatively low level of external investment in UK law firms. So far, it is speculative whether ABS improves access to legal services.

Australia. The state of New South Wales (includes Sydney) authorized private investment in legal enterprises beginning in 2001. Related to the open question whether such ownership structures can reduce the cost of legal services or increase the availability of legal services to a wider segment of consumers, Tahlia Gordon and Steve Mark (former NSW Commissioner for Legal Services) completed a pilot study of four law firms with non-lawyer ownership interests. They concluded:

_Additional funds as a result of external ownership can better enable law firms to acquire existing offices and open new offices in areas where the demand for legal services are being unmet; expand practice areas to offer clients assistance in a wider range of legal areas; introduce alternative billing arrangements such as fixed fees for all retainers (not just for personal injury matters); develop online services thereby facilitating greater access for clients; and, provide pro bono and other non-legal services clients often require._

Concerns about the diminution of ethics and professionalism are unfounded and arise out protectionism and excessive self-interest. As the events of Dewey & LeBoeuf illustrate, law firm structures have little to do with lawyers behaving badly. Rather than seeing the demise of professional ethics as a result on non-lawyer involvement, the legal services marketplace in both Australia and England and Wales is flourishing. Legal services are being provided to a greater number of people than before. The authors submit that lawyers and regulators of the legal profession who fail to acknowledge this fact will soon find themselves left behind.

The American Legal Academy. Pennsylvania State University-Dickinson Law Professor Laurel S. Terry has been an enthusiastic proponent of proactive lawyer regulation. She recognizes that not all states have the resources or readiness to soon adopt explicit regulatory objectives (as Colorado has done) or require law firm managers to undertake an ethics self-assessment process (now in place in Australia, the UK, and parts of Canada). Hence, she points to an already made tool to emulate proactive lawyer regulation. Namely, any state ethics rule that is the equivalent of ABA Model Rule of Professional Conduct 5.1(a) provides a launching point to inspire lawyer managers to focus on the steps they take (or do not take) to assure all lawyers in the firm are living up to ethical standards. The ABA Model Rule version of Rule 5.1(a) states:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Professor Terry suggests that, if a state wanted to implement a more proactive approach to lawyer regulation, it could begin by adding two questions and an Internet site to every lawyer’s annual bar dues statement. (1) Are you subject to Rule 5.1(a)? And (2) if so, are you in compliance with this Rule? These questions would be accompanied by a link to the regulator’s webpage identifying common problems lawyers historically face under the Rules. The webpage might also provide information like what Colorado does for lawyers transitioning from practicing in a legal organization to solo practice.

James W. Jones, Senior Fellow at the Center for the Study of the Legal Profession at the Georgetown University Law Center, led a team of authors in publishing “Reforming Lawyer Mobility – Protecting Turf or Serving Clients?” The authors assess the current problems with regulation of cross border lawyer mobility in the United States. In response, they contend that current state rules regarding multijurisdictional practice by licensed lawyers (foreign and domestic) impede the ability of clients to achieve more

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22 Anthony E. Davis, Partner - Hinshaw & Culbertson LLP; Simon Chester, Counsel – Gowling WLG (Canada) LLP; Caroline Hart, Senior Lecturer – School of Law and Justice – University of Southern Queensland (Australia).
efficient and cost effective legal services, do not truly protect the interests of clients, and undermine the integrity of the overall regulatory structure by articulating requirements that, in practice, cannot be complied with. They believe federal legislation is needed. Specifically, they propose that:

Congress should adopt a narrowly drawn statute that mandates mutual recognition of rights of practice by lawyers across state borders as described below:

(1) Acting under its constitutional authority to regulate interstate and foreign commerce and its general legislative powers, the Congress should mandate that:

- In all matters pending before the courts of the United States;
- In all matters involving federal law;
- In all matters involving international treaties;
- In all matters involving tribal law; and
- In all matters affecting interstate or foreign commerce;

any person licensed to practice law and in good standing in any United States jurisdiction will be deemed qualified to practice law in every other United States jurisdiction (whether or not specifically licensed there), subject only to the restrictions set out below.

(2) Any person who holds himself or herself out to the public as regularly practicing or as a practitioner licensed in a jurisdiction in which the practitioner is not licensed must comply with the qualification requirements of that jurisdiction, regardless of the broad practice rights described in paragraph (1) above.

(3) Any person who, pursuant to the practice rights described in paragraph (1) above, practices law in a jurisdiction in which he or she is not otherwise admitted to practice shall be subject to the disciplinary rules of such jurisdiction with respect to his or her activities in such jurisdiction, provided that the requirements imposed under such rules are no more onerous than requirements imposed on persons who are licensed to practice in such jurisdiction.24

D. Conclusion

The international aspects of law practice and lawyer regulation are complex and ever evolving. There are many stakeholders. Licensing authorities, bar organizations, and researchers must continually communicate and address the many outcropping issues and challenges.

24 Id. at 189-190.