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## International Trade and Licensing



### *International Outsourcing of the Legal Profession Conference*

UC Berkeley School of Law, April 25, 2008

Professor Laurel S. Terry (© 2008)

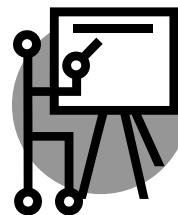
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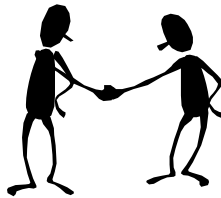
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## Overview

- Effect of the WTO's *General Agreement on Trade in Services* (GATS) on legal services
- Licensing issues [*i.e.*, unauthorized practice of law or UPL]
- The future of legal outsourcing [LPO]
- Potential impact of LPO on U.S. legal practice and lawyer regulation
- Caveats



## Why Legal Services are in Trade Agreements



### U.S. Trade in Legal Services

	1992	2006
Exports	\$1.36 billion	\$5.04 billion
Imports	\$311 million	\$971 million

### U.S. International Trade in Goods and Services

	1992	2006
Exports	\$617 billion	\$1.45 trillion
Imports	\$656 billion	\$2.2 trillion



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## GATS' Impact on Outsourcing?

- **The GATS:** 1<sup>st</sup> world trade agreement to cover services
- **Answer 1:** *The GATS is highly relevant*
  - It has changed the discussion about legal services' regulation
  - It applies to legal outsourcing
  - But its meaning is unclear/complicated
- **Answer 2:** *The GATS is probably irrelevant*
  - It doesn't clearly permit or prohibit US legal outsourcing
  - A dispute is unlikely because the WTO Dispute Resolution System requires government-to-government complaints



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# GATS 101



- Basic obligations (e.g. Article III on transparency)
- Optional obligations
  - If a sector (legal services) is listed on one’s “Schedule,” then except as otherwise noted, one must comply with:
    - Articles XVI (market access) & XVII (national treatment)
- Services are scheduled using “Modes of Supply”
  - **Mode 1** (inbound product) and **Mode 2** (outbound client)
  - **Mode 3** (foreign firms) and **Mode 4** (inbound foreign lawyer)
- GATS’ ongoing obligations (Tracks 1 and 2)
  - Art. XIX: begin new (Doha) negotiations in 5 years
  - Art. VI:4: Develop ‘any necessary disciplines’

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**EXCERPTS FROM 1994 U.S. GATS SCHEDULE (and offer), GATS/SC/90**

**Modes of supply: 1) Cross-border supply; 2) Consumption abroad; 3) Commercial presence; 4) Presence of natural persons**

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
a) 1) Legal Services: practice as or through a qualified US lawyer	For the following jurisdiction, the following commitments apply: in (all states)  1) Services must be supplied by a natural person  An in-state office must be maintained for licensure in: District of Columbia, Indiana (or an affiliate with an office and with other attorneys in the state), Michigan, Minnesota (or maintain individual residency in Minnesota), Mississippi, New Jersey, Ohio, South Dakota and Tennessee.	1) In-state or US residency is required for licensure in: Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota (or maintain an office in Minnesota), Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia, Wyoming.	

Note: a(1) Mode 2 was identical. Had an a(2) category for foreign legal consultant (FLC) rules

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## Proposed GATS “Disciplines”

- The current draft (1-08) is contentious
- It would add a new layer of WTO regulation
  - to sectors (like legal) on one’s “*Schedule*”
  - to measures that address qualification, licensing, technical standards (ethics rules), and transparency
  - but only to those legal services “measures” that are not listed (and should not be) on the U.S. *Schedule*
- The draft is not public, but available at [tradeobservatory.com/library](http://tradeobservatory.com/library)



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## Current Trade Status



- The ABA GATS webpage lists developments
- US “offer” has six new FLC rules (+ misc.)
- India did not “schedule” legal services in 1994 & doesn’t seem to have them in its current offer
- India is a key legal market for US and EU firms
  - UK Law Society is more active than US in lobbying

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## Licensing Issues



- US Lawyers are licensed state-by-state
- 2003 ‘MJP’ rules are still being implemented
- UPL laws are adopted by U.S. states
  - UPL rules are in criminal statutes, court rules or case-law
  - It is difficult to define UPL and exclusive tasks
  - As a result, UPL rules can be difficult to enforce
  - Lawyer supervision usually protects nonlawyer activity
- There are antitrust concerns about some UPL rules

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## UPL Ethics Rules for Lawyers

### Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a **partner**, 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 the person's conduct is compatible with the professional obligations of the lawyer;

### Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

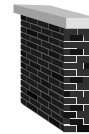
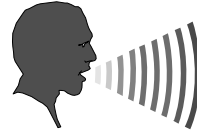
- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

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## Other Ethics Issues (plus √ other law, e.g. export laws)

- 1.1: Duty of competence
- 1.2: Objectives (clients) and means (lawyers)
- 1.4: Communication
- 1.5(e) & 5.4: Fee sharing rules
- 1.6: Confidentiality obligations
- 1.7: Conflicts of interest
- 5.1: Duty to supervise (see also 5.3 on prior slide)
- 5.7: Ancillary business rules
- 8.4: Can't assist another to break rules
- 8.5: Disciplinary authority
- Also tort liability issues (duties of inquiry/supervision)
- Malpractice disclosure & related issues



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## The Future of Legal Outsourcing?

- The LPO industry predicts a strong future:
  - 79,000 LPO jobs in India by 2015
  - LPO salaries for Indian lawyers are < \$10,000/year
  - 2006's \$146 million revenues will grow to \$640 M. in 2010
  - Another predicts growth to \$4 billion by 2015
  - Cf. Quicken WillMaker Plus sales up 33% in 2006
- Some (many?) clients want LPO cost efficiencies
- Some (many?) lawyers resist LPOs
- Things can change fast...e.g., Enron and MDPs

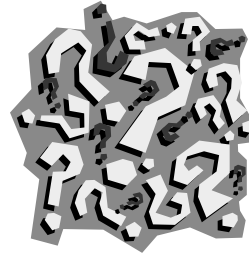


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## Impact on Legal Practice & Regulation?

- Market consolidation
- Market opportunities
- IT & systems streamlining
- Added pressures on the regulatory system
  - Regulation responds to realities (slowly)
  - But regulation can shape realities



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## To Read More About It...



### GATS and Trade Agreements:

- The ABA GATS-Legal Services Webpage,  
<http://www.abanet.org/cpr/gats/home.html>
- International Bar Association, GATS Handbook,  
<http://www.ibanet.org/images/downloads/gats.pdf>
- USTR Bilateral Trade Agreements Page,  
[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.htm](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.htm)

### Licensing, State Ethics Rules, and UPL Issues:

- Links to state ethics rules  
<http://www.nobc.org/default.asp> (See Ethics link menu item at top)
- Information about US Unauthorized Practice of Law Rules,  
<http://www.abanet.org/cpr/clientpro/client.html#UPL>
- Information about MJP Rules, <http://www.abanet.org/cpr/mjp/home.html>
- ABA/NCBE, 2008 Comprehensive Guide to Bar Admission Rules,  
<http://www.ncbex.org/comprehensive-guide-to-bar-admissions/>

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## Part 2 - To Read More About It...



### **Legal Outsourcing Ethics Issues:**

- Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 *Geo. J. Int'l L.* 401 (2007)
- Ethics Opinions:
  - ABA Formal Opinion 08-003 (forthcoming); Association of the Bar of the City of New York Op. 2006-03, Los Angeles County Bar Op. 518 (2006), San Diego County Bar Op. 2007-01, Florida State Bar Proposed Op. 07-02 (Jan. 2008); North Carolina State Bar Proposed Ethics Op. 12 (July 2007)

### **Legal Outsourcing in General:**

- See Prism Legal for a list of LPO clients, law firms and providers; *see also* Brown and Wilson's **Black Book of Outsourcing** & annual lists
- First New York LPO Summit, January 2008, [http://americanconference.com/Law\\_Firm\\_Management/LPO.htm](http://americanconference.com/Law_Firm_Management/LPO.htm)
- Numerous articles and blogs: search for 'legal outsourcing'
- Daly & Silver, *supra*, and Laurel Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 *Northwestern J. Int'l L. & Bus.* (2008)(forthcoming)

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