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To: ABA Issues Paper Comments
Subject: ABA Commission on the Future of Legal Services

DEAR MS. ENGLEHART,

I WRITE IN RESPONSE TO THE ISSUES PAPER OF THE COMMISSION, DATED NOVEMBER 3, 2014. IN REGARDS TO ITEM 7 OF THE ISSUES FOR PUBLIC INPUT, SPECIFICALLY "WHAT ADDITIONAL DATA IS NEEDED?" THE ATTACHED ARTICLE, "WHAT WE DON'T KNOW CAN HURT US:

THE NEED FOR EMPIRICAL RESEARCH IN REGULATING LAWYERS AND LEGAL SERVICES IN THE GLOBAL ECONOMY," MAY BE OF USE. THE ARTICLE IDENTIFIES A NUMBER OF AREAS REGARDING THE MARKET FOR LAWYERS AND THE EFFECT OF REGULATION OF THAT MARKET WHICH ARE CHARACTERIZED BY DEFICIENCIES IN INFORMATION, AND SUGGESTS THE NEED FOR RESEARCH TO FILL IN THE GAPS AND IN ORDER TO INFORM FUTURE EFFORTS TO REVISE OR EXTEND REGULATION. I hope this is useful in some way to the Commission.

All best regards,
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WHAT WE DON'T KNOW CAN HURT US: THE NEED FOR EMPIRICAL RESEARCH IN REGULATING LAWYERS AND LEGAL SERVICES IN THE GLOBAL ECONOMY

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I. INTRODUCTION

Crossing borders is the essence of globalization, and this is as pertinent to legal services as to other activities. The relevant actors¹ - whether individual lawyers, law firms, in-house legal

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1. The issue of which actors are relevant is both changing and contested, and legal process outsourcing firms as well as the individuals working there might well be included in the list. For present purposes, however, a more traditional view of providers of legal services is adopted; *but see* discussion at *infra* notes 112 and 142.

departments or law schools - increasingly demand international mobility as part of their toolkit for delivering services. But while mobility may mean physical presence, it more often may relate to services themselves, including sending legal advice to a client or documentation to a counterparty in a second jurisdiction, or delivering a law school lecture live over the Internet or through a web-based program that is received on demand or in real-time by students situated in multiple locales.² The ease and frequency of international mobility, particularly as it is enabled by new technology, challenges the existing regulatory framework governing these actors and their conduct.³ In addition, new

2. It is not without question that credits earned through a web-based course would be recognized by bar regulators. *See*, for example, New York Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law (22 NYCRR 520.3(c)(3)), which rejects credit earned in “correspondence courses.” The meaning of “correspondence” is not entirely clear, but in describing acceptable credits for purposes of qualifying foreign law graduates for bar eligibility, the New York State Board of Law Examiners suggests that on-line teaching is unacceptable (*see* <http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm>, interpreting 22 NYCRR 520.6(b)(1)(ii) as prohibiting “[d]istance study, correspondence study, external study, and on-line programs”).

3. Speaking in 2002, the American Bar Association (ABA) acknowledged these challenges in its report on multijurisdictional practice; the evolution of technology and its influence on practice in the intervening years makes this even more significant. *See* AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 3 (2002), *available at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf.

[M]odern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions’ laws.

Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer’s work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer’s practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers’ ability to meet their clients’ multi-state and interstate legal needs efficiently and effectively.

Id. More recently, the ABA has considered technology more central to its policy making work. ABA Commission on Ethics 20/20 Preliminary Issues Outline 2 (2009), *available at* <http://www.abanet.org/ethics2020/outline.pdf>, identifies as two of its three areas of focus “issues that arise in light of current and future advances in technology that enhance virtual cross-border access;

regulatory frameworks adopted in other jurisdictions, such as the United Kingdom and Australia,⁴ and the anticipation that these will exert a competitive influence in the U.S. and on worldwide markets for lawyers' services, have spurred reconsideration of how lawyers and legal services are regulated in the context of globalization. At the same time, pressure is being felt by U.S.

and ... particular ethical issues raised by changing technology."). In the interest of full disclosure, I am a member of the 20/20 Commission; see <http://www.abanet.org/ethics2020/>.

4. The regulatory framework in Australia and the alternative role occupied by Australia's legal services regulator is described in Steven Mark, *The Future Is Here: Globalisation and the Regulation of the Legal Profession, Views From an Australian Regulator*, paper prepared for ABA Center for Professional Responsibility-Georgetown University Law Center, Center for the Study of the Legal Profession, Conference for the Conference of State Supreme Court Chief Justices (2009), available at <http://www.law.georgetown.edu/legalprofession/documents/May27-2009-StevenMark-Paper.pdf> ("requiring incorporated legal practices to implement an ethical infrastructure - that is, formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practices - that support and encourage[] ethical behaviour through ethical infrastructures" (footnote omitted)).

The new U.K. regulatory regime governing lawyers has generated a proposal to regulate corporate law firms separately. See Nick Smedley, *Review of the Regulation of Corporate Legal Work* i-ii (2009), available at http://www.legalregulationreview.org.uk/files/report_smedleyfinal.pdf:

The changes I recommend are accordingly designed to strengthen the capacity of the SRA [Solicitors Regulatory Authority] to regulate and supervise the corporate legal sector, so that the risks of regulatory failure are reduced – be that a major and serious failure affecting the standing of the whole profession, or a breach of the rules. This is an important safeguard in protecting the public interest and the clients of corporate law firms, and in maintaining the ethics and standards of the legal profession at large. This is in the interests not only of corporate clients and corporate law firms, but of the UK economy and the ability to compete in global legal markets. Recent failures in the financial services sector show how sudden and dramatic regulatory failure can be, with wide implications going well beyond the immediate sector involved. Although the corporate legal profession is different in many ways from the financial services sector, it is nevertheless timely to review the regulatory framework under which these solicitors operate. No-one inside or outside the profession wants the next major scandal of regulatory failure to occur in the legal sector.

Id. "Corporate law firms" are defined with regard to the proportion of their work devoted to corporate clients:

[C]orporate *client* is an organisation which has regular, repeated relationships with law firms, which is a sufficiently knowledgeable procurer of legal services (often, this will mean that it has its own in-house legal team), and which has the knowledge and purchasing power to negotiate on equal terms with corporate lawyers. I therefore include in this definition Government Departments, local authorities and some other large public or not-for-profit sector institutions. Often, corporate clients will have built up relations with a number of senior partners in different law firms over time.

Id. For a response to Smedley in the context of a broader report, also commissioned by the Law Society, see *The Hunt Review of the Regulation of Legal Services* (2009), available at <http://www.legalregulationreview.com/files/Legal%20Regulation%20Report%20FINAL.pdf>.

regulators to respond to the demands of foreign⁵ actors, including law schools,⁶ law firms, and individual lawyers.⁷ As a result, there are calls for reconsidering regulation in light of globalization.⁸

5. "Foreign" in this article refers to jurisdictions outside of the U.S. For example, "foreign lawyer" means a lawyer licensed only in one or more jurisdictions outside of the U.S.

6. For example, as noted at the Miller-Becker Institute Inaugural Symposium, the Peking School of Transnational Law has indicated to the ABA Section of Legal Education and Admissions to the Bar, among others, its intention to apply for accreditation, despite being located in Shenzhen, China. See remarks of by Stephen Yandle, Associate Dean of the Peking School of Transnational Law, available at <http://www.uakron.edu/law/video/miller-becker-symposium-2009.dot>.

7. See, for example, Supreme Court of Texas, Order Establishing the Task Force on International Law Practice in Texas, Misc. Docket 9141 at 2 (Aug. 24, 2009), available at <http://www.supreme.courts.state.tx.us/miscdocket/09/09914100.pdf> ("The Task Force is charged with reviewing and recommending revisions to the rules necessary to clarify the relevant issues, reflect recent developments in the law related to foreign-trained lawyers, modernize existing criteria to meet the needs of international practice in Texas."); see also Minnesota Supreme Court Order Directing the Board of Law Examiners to Submit a Study of Proposed Amendments to the Minnesota Rules for Admission to the Bar, available at http://www.mncourts.gov/Documents/0/Public/Clerks_Office/2009_08_10%20BLEStudyOrder.pdf (based on a petition seeking to amend the rule requiring graduation from an ABA-accredited law school for lawyers admitted in another U.S. jurisdiction to qualify for bar eligibility; one of the petitioners earned his law degree outside of the U.S. and is admitted in New York).

8. See Press Release, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Sept. 4, 2009), available at http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730. Several recent conferences have addressed the challenges of globalization for lawyer regulation, including *The Future Is Here: Globalization and the Regulation of the Legal Profession*, a conference jointly sponsored by The American Bar Association Center for Professional Responsibility and Standing Committee on Professional Discipline and The Center for the Study of the Legal Profession of Georgetown University Law Center (May 27, 2009) available at <http://www.law.georgetown.edu/LegalProfession/documents/CCJ-2009-WebMaterials-final.doc>; *Globalization of the Legal Profession*, Conference convened by Harvard Law School Program on the Legal Profession (Nov. 2008), available at http://www.law.harvard.edu/programs/plp/pages/globalization_conference.php:

Does international commerce or finance provide common ground for practitioners, for example, or is there broader commonality among counsel in other fields, such as human rights lawyers? What are the proper contours of a genuine debate over matters such as ensuring minimum standards of qualification, guarding domestic province from outside intervention, protecting clients and the public, the role of lawyers as aspect of national identity, and the like? What can we do – as international scholars, educators, and practitioners – to adapt to the rapidly-changing economic, social and political environment and prepare the next generation of lawyers – domestic and international – to meet the challenges that globalization will continue to present?

Id. Harvard's symposium included four panels examining the globalization of the legal profession in terms of the impact on law firms, international and domestic regulatory frameworks, and a case study focusing on the legal profession in India. *Id.*

See also Laurence Etherington & Robert G. Lee, *Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm*, 14 IND. J. OF GLOBAL LEGAL STUD. 95 (2007); Matthew T.

In addition to changes relating to globalization serving to challenge the regulatory regime governing lawyers, however, calls for reconsidering the lawyer regulation regime also contest the credibility of the existing self-regulatory framework. Critics have addressed the inadequacy of the system in preventing lawyer misconduct,⁹ its inefficiency and negative effect on the cost and nature of services for corporate clients,¹⁰ as well as the accuracy of the “self-regulatory” label.¹¹ Self-regulation has been perforated

Nagel, *Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe*, 6 WASH. U. GLOBAL STUD. L. REV. 455 (2007). See generally Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice* (working paper on file with author) (suggesting the need to consider - but not recommending - reform), and *supra* notes 3-4 and accompanying text. For an analysis of globalization of legal ethics, see Bjorn Fasterling, *The Managerial Law Firm and the Globalization of Legal Ethics*, 88 J. BUS. ETHICS 21 (2009). States, also, are reconsidering rules in light of globalization; see, e.g., FINAL REPORT FROM THE ILLINOIS STATE BAR ASSOCIATION TO THE SUPREME COURT OF ILLINOIS ON THE GENERAL AGREEMENT ON TRADE IN SERVICES (2005), adopted by the ISBA Assembly on December 10, 2005 (“The Illinois State Bar Association (ISBA) Special Committee on GATS . . . appointed in November 2004, was charged with reviewing the General Agreement on Trade in Services . . . and was asked to make recommendations on any modifications that might be needed in the current Illinois rules on admission and professional conduct.”). On self-regulation by lawyers generally, see also Lexington, *First, Let's Regulate All the Lawyers*, ECONOMIST, Sep. 4, 2009, available at http://www.economist.com/blogs/lexington/2009/09/first_lets_regulate_all_the_la (“Since the lawyers in Congress are determined to set rules for doctors, a doctor writing in the Wall Street Journal suggests that doctors be allowed to do the same for lawyers.”).

9. See, e.g., Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia*, 18 GEO. J. LEGAL ETHICS 325 (2005); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning From Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65 (1999); RICHARD L. ABEL, AMERICAN LAWYERS 143 (1989) (“The suspicion that professional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation is strengthened by the inadequacy of enforcement mechanisms. . . . [E]thical rules are not self-enforcing. Surveys repeatedly show that lawyers are ignorant of many rules and fail to internalize those they do know.”).

10. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008).

11. The notion of self-regulation also is contested, and for the purposes of this article, my use of the term is not intended to take a position in this debate. See, e.g., Tanina Rostain, *Self-Regulatory Authority, Markets and the Ideology of Professionalism*, in Robert Baldwin, Martin Cave and Martin Lodge, OXFORD HANDBOOK ON REGULATION (2010) (“The days of expansive professional self-regulatory prerogatives—based on broad collective commitments to protect clients, facilitate access, and safeguard the legal system—have most certainly passed. But the shape of what will take their place can only be glimpsed dimly on the horizon.”); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1172 (2009) (“The presence of persons with legal training among the regulators . . . does not automatically mean that the regulators tilt the law in lawyers’ favor.”).

in the new regulatory framework adopted in the U.K.,¹² home of the most significant competitors to the large U.S. law firms that are repeat players in the global legal services market.¹³ As Chris Kenny, Chief Executive of the U.K. Legal Services Board, commented:

If one looks around any profession, pure self-regulation is dead. Full stop. No matter what its strengths – and it would be foolish to pretend that it does not have some – it no longer convinces in a world where the media and the public demand some independent verification that the man in the white coat or the man in the white wig – and they usually are men – is acting in their interest.¹⁴

In the U.K., as elsewhere, regulators' conceptions of lawyers has shifted to a "service provider" model, according to Laurel Terry, who considers "the service providers paradigm . . . a fundamental, seismic shift in the approach towards lawyer regulation."¹⁵ Whether calls for rethinking the lawyer regulatory regime in light of globalization ultimately result in restructuring the existing framework may very well depend on perceptions of how current regulators respond to the challenges of globalization. But globalization is a slippery concept, and its force creates ripples that can be difficult to discern; regulating in a global context challenges the jurisdiction and authority of regulators.

My goal here, however, is not directly to challenge the framework of lawyer regulation. Instead, I write to suggest an adjustment to the existing regulatory regime, setting aside, at least for the moment, any challenge to the merits of the system itself. My proposal is quite modest: in order to inform the choices

12. See *infra* note 14, comments of Chris Kenny. U.K. legal services will be subject to a new panel of regulators in which nonlawyers play a significant role. U.K. Legal Services Act (2007) Chapter 29, available at http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_1. For a description of the changes implemented by the Act, see Ministry of Justice, Legal Services Reform, <http://www.justice.gov.uk/about/legal-services-reform.htm> (last visited April 16, 2010).

13. On competition between U.S.-based firms and U.K.-based firms, see generally Richard Lloyd, *The Great Game: Global Networks Shield Big Firms From Economic Downturns - At Least, That's the Theory. How Did It Work Out in Real Life?*, AM. LAW. (Oct. 2009) (in Global 100 list of largest and top grossing law firms, U.S.-based and U.K.-based firms take top spots).

14. Chris Kenny, Chief Executive of the Legal Services Board, Speech to Oxford/Harvard Legal Symposium (Sept. 2009), available at http://www.legalservicesboard.org.uk/news_publications/speeches_presentations/2009/pdf/speech110909.pdf.

15. Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as 'Service Providers'*, 2008 PROF. LAW. 189, 189.

implicit in rulemaking, regulation ought to be based upon sound empirical evidence. This is particularly important because of the complexities brought about by globalization. To generate this foundation for regulation, it is important to reach beyond the stakeholders typically represented on regulatory agendas so that the larger context in which lawyers act and legal services are delivered is visible. To this end, a new collaboration is suggested, combining empirical scholars who study lawyers, the organizations that participate in the “production of lawyers,”¹⁶ and professions generally,¹⁷ with regulators and policy-makers to generate a comprehensive understanding of the activities and actors comprising the legal profession as it exists in the context of globalization. The aim of this proposed collaboration is more effective regulation, while at the same time offering a slice of participation and responsibility to scholars, whose guidance in developing the evidence will be crucial to the effort. A suggested framework for this role is outlined later in the article.

Collaboration between empirical scholars and regulators may benefit the legal academy, too. Law students, faculty and related scholars may gain new insight into the challenges facing regulators and the regulated as well as into processes of rule-

16. RICHARD L. ABEL & PHILIP S.C. LEWIS, *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* 205-06 (1988).

Controlling the production of producers necessarily is the first stage of the professional project. Only when this has been achieved and a professional association created can the latter seek to restrict competition. . . . By 1948, more than 400 bar associations had formed committees to fight what they characterized as the “unauthorized practice of law.” These bodies sought legislative and judicial action defining the professional monopoly as broadly as possible - indeed, American lawyers are unusually imperial in their exclusive claim to the entire field of legal advice.

Id.

17. Among the recent examples of fascinating lessons of empirical research relating to the legal profession are Christine E. Parker, Robert Eli Rosen, & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation*, 22 *GEO. J. LEGAL ETHICS* 201 (2009) (investigating lawyers as gatekeepers and game-players in their advisory work for clients); RONIT DINOVIETZ ET AL., *AFTER THE JD II: RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 35 (2009) (longitudinal study investigating careers of year 2000 graduates of U.S. law schools); SUSAN SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002) (investigating the way lawyers practicing in a wide variety of settings perceive and resolve conflicts); JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005); YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1998); JOHN HEINZ & EDWARD LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1994).

making and adoption. Perhaps scholarship also will shed light on the production and adoption of lawyer regulation, which in turn may generate some response from regulators. Along the lines of “sunlight being the best disinfectant,”¹⁸ an openness to study may do more for the effectiveness and credibility of the existing regulatory framework than simply provide information as a foundation for rethinking regulatory policies.

Finally, many creative mechanisms for responding to client demands and containing costs fall between the clear-cut authorized/prohibited dichotomy of existing regulations. This sometimes results in lawyers hiding their approaches, for fear that discovery will lead to sanction or simply unwanted publicity. But it is crucial for regulators to be aware of this activity, to consider the risks it raises, if any, and to take it into account in their decision-making. Consequently, we need a safe way to elicit information to inform policy decisions. The research program outlined here will enable activities to be revealed while identities are protected, because the purpose of disclosure is to inform rather than related to compliance. Whether the existing regulatory framework continues or is replaced, empirical evidence about the profession will be crucial to any regulatory effort.

The idea of relying on empirical evidence to inform ethical rulemaking is not new. The American Bar Association (“ABA”), for example, in its advisory role, considered this through its commissions studying multijurisdictional and multidisciplinary practice; the two commissions were stymied by the goal of assessing the impact of future potential changes.¹⁹ That is, their

18. A foundational notion of the securities disclosure regime, *see* LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

19. *See, e.g.*, AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, *FINAL REPORT OF COMMISSION ON MULTIJURISDICTIONAL PRACTICE, CLIENT REPRESENTATION IN THE 21ST CENTURY* 16 (2002), *available at* <https://www.wisbar.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=50634>.

This debate is difficult to resolve, in large part, because of the absence of empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States, and the inability to obtain such evidence without authorizing national practice. Although there is no evidence that current common multijurisdictional practices pose a significant disciplinary threat or result in the provision of incompetent representation, one cannot necessarily conclude from this that eliminating geographical restrictions in their entirety will be harmless. Many believe that common

interest was in assessing what would happen after modifying a particular rule.²⁰ Without a laboratory for experimentation and control, this is difficult to do, although the variation enabled by our state-based regulatory system allows some comparison between different approaches in certain circumstances. Still, this is not the goal pursued here. Instead, my suggestion is two-fold. First, there is much that is knowable but unknown about U.S. legal practice in a global context even under existing rules, and we should inform ourselves to the extent possible before tinkering with relevant regulation. Second, once the tinkering begins, regularly updating our information base will allow us to consider how and what is changing, possible explanations for the changes, and policy implications of the revised reality.

wisdom suggests otherwise. Nor is there evidence that clients will be better served by permitting national law practice, rather than by authorizing multijurisdictional practice by the judicial branch of government on a more limited basis. Thus, the question is how to proceed in an area of uncertainty.

Id. See also AMERICAN BAR ASSOCIATION COMMISSION ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (2000), available at <http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html>.

In response to the House of Delegate's August 1999 Resolution, the Commission also sought the assistance of the American Bar Foundation (ABF). The ABF asked two top economists about the "utility of conducting market research about the demand" and was advised that "questions about services in the abstract would not be effective in telling what people might actually do," and "that there is only one way to find out if there is a demand, and that is to see if there turns out to be a market."

Id. "The ABF's response also made the telling historical observation that there was a lack of demand for business litigation (except defense work and the collection of debts) and business consulting until these services became available, at which time a dramatic increase in demand occurred. Letter to Arthur Garwin from Bryant G. Garth, Director, American Bar Foundation (Mar. 28, 2000). Additionally, the ISR (Institute for Social Research at the University of Michigan, "the nation's longest-standing laboratory for interdisciplinary research in the social sciences") suggested that a survey regarding demand might be possible, if proponents and opponents were able to agree on the statements that should be presented to those surveyed. The ISR estimated the cost at \$250,000." *Id.*

20. The challenge to regulators has been analogized to a burden of proof issue in another context by Laurel Terry. See Testimony of Laurel Terry to the ABA Commission on Multidisciplinary Practice (Mar. 12, 1999), available at <http://www.abanet.org/cpr/mdp/terryremarks.html>.

So given this uncertainty, who has the burden of proof? Do those who want to *change* MRPC 5.4 have the burden of convincing the Commission that this change is good and the risks minimal? Or is the burden on those who want to *keep* MRPC 5.4, which places limits on the way lawyers can organize and practice? *Changers* or *keepers*, who has the burden? For me, this question of who has the "burden of proof" ends up being a critical question since I don't know what the future holds. I ended up deciding that for me, the *keepers* have the burden of proof.

Id.

An example may be useful to point out the importance of providing evidence that can inform decision-making in the context of globalization and simultaneously help regulators avoid acting on the basis of speculation and assumptions about the risks inherent in lawyers' work.²¹ This is particularly important with regard to the conduct of actors who are viewed with more skepticism because they are foreign.²² Certain regulators have

21. See, for example, AMERICAN BAR ASSOCIATION, INTERIM REPORT OF COMMISSION ON MULTIJURISDICTIONAL PRACTICE 14 (2001), available at http://www.abanet.org/cpr/mjp/mjp-final_interim_report.pdf (also in AMERICAN BAR ASSOCIATION, FINAL REPORT OF COMMISSION ON MULTIJURISDICTIONAL PRACTICE 8 (2001), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf), describing goals that certain restrictions on multijurisdictional practice further, but without evidence either that these risks exist or that the regulations actually address or lower them:

Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties.

Id.

22. See generally Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 699 (2002).

[A] possible assumption behind the . . . reasons in favor of liberalization. . . . may be seen to operate from the premise that lawyers who would cross borders to represent clients pose greater dangers than home state lawyers pose. This does not have to be the premise, of course. The benign concern may be that border crossing lawyers are no worse and no better than a state's own lawyers, but that the jurisdiction has less control over them and is therefore less able to deter misconduct or afford a remedy if misconduct occurs. The prior three paragraphs respond to the latter concern, which is valid and explored further below. Invalid, however, is a position that would drive policy on the assumption that out-of-state lawyers are less able, less honest, or less willing to limit their work to matters within their competence. This is a position for which there is no empirical support and which should not be recognized as a valid basis for stringent rules that interfere with otherwise legitimate client choices and the usual deference to private ordering.

Id. (footnote omitted). See also Bonnie Honig, *Immigrant America? How Foreignness "Solves" Democracy's Problems*, 56 SOCIAL TEXT 1, 3 (1998).

In the various versions of the myth of an immigrant America, the immigrant's foreignness positions him or her to enhance or reinvigorate the national democracy: our faith in a just economy, our notions of community or family, our consent-based sense of legitimacy, and our voluntarist vigor are so moribund that only a foreigner could revive them. But the dream of a national

assumed, for example, that foreign law graduates who work in the U.S. as foreign legal consultants, a license that offers a limited scope of practice, will be tempted to exceed the boundaries of their licenses and advise clients in what amounts to unauthorized practice.²³ Others assume that an application to sit for a state bar exam always indicates an intent to establish a permanent presence

home, helped along by the symbolic foreigner, in turn animates a suspicion of immigrant foreignness at the same time. “Their” admirable hard work and boundless acquisition put “us” out of jobs. “Their” good communities, admired by some, look like ethnic enclaves to others. “Their” voluntarist embrace of America reaffirms but also endangers “our” way of life. The foreigner who shores up and reinvigorates the regime also unsettles it at the same time. Nationalist xenophilia tends to feed and (re)produce nationalist xenophobia as its partner.

Id.

23. This fear has been articulated by state regulators in conversations about how to approach regulating admission of foreign law school graduates. *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES (July 15, 2009), *available at* <http://74.125.95.132/search?q=cache:8KET2oioveEJ:www.abanet.org/legaled/committees/International%2520Issues%2520Report%2520%28final%29.DOC+American+Bar+Association+Section+of+Legal+Education+and+Admissions+to+the+Bar,+Report+of+the+Special+Committee+on+International+Issues+%28July+15,+2009%29.&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a>.

The current program of certification of “foreign legal consultants” has produced a system that many believe allows (as a practical matter) a broader scope of practice than that intended because of difficulties with oversight. Adopting formal accreditation standards for foreign programs may provide a clear avenue for those foreign lawyers who want to practice more broadly on behalf of their clients in the United States. Additionally, concern has been expressed over whether persons working as foreign legal consultants have an understanding of the ethical standards and regulations governing the practice of law in U.S. jurisdictions.

Id.

In fact, evidence of repeated and common overstepping of bounds or ethical lapses by foreign legal consultants is sparse. A thorough search for FLC disciplinary cases involving overstepping the boundaries of the limited license revealed the following: *In re Peluso*, 838 N.Y.S.2d 771 (N.Y. App. Div. 2007) (Italian lawyer and NY licensed legal consultant resigns his legal consultant license after being charged with holding himself out as a licensed New York lawyer, in violation of the NY Rule on Legal Consultants); *In re Antoine*, 844 N.Y.S.2d 221 (N.Y. App. Div. 2007); *In re Zakaria*, 39 A.D.3d 831 (N.Y. 2007) (Egyptian lawyer and NY licensed legal consultant suspended from acting as a legal consultant as a result of having held herself out as a NY licensed lawyer and performing services as a lawyer in NY); *In the matter of: Yinkang Hu, Foreign Legal Consultant*, IL Disp. Op. M.R. 17049, 2000 WL 34234645 (Ill. 2000) (censuring Yinkang Hu); *In re Pinto*, 151 A.D.2d 157 (N.Y.A.D. 1989) (revocation of legal consultant license of a Peruvian attorney, who held himself out as a NY-licensed lawyer). *See also In re Max D. Antoine*, 2010 N.Y. Slip Op. 03031 (N.Y.A.D. 1 Dept.) (suspending Haitian lawyer’s legal consultant license for misrepresenting his status on documents filed with the court). On disciplinary actions involving foreign lawyers, *see* Noah Waisberg, *Substantially Equivalent: A Performance Evaluation of New York’s Foreign Educated Lawyers* (paper on file with author) (finding that foreign lawyers are no more likely than U.S.-licensed lawyers to be the subject of disciplinary action in New York).

in that state, whether the applicant is a foreign law graduate who has earned a one-year LL.M. degree in the U.S.²⁴ or a J.D. graduate who is a U.S. national. In fact, little is known about foreign legal consultants and what they do in the U.S.,²⁵ or the intentions of foreign law graduates sitting for a U.S. bar exam regarding their future work plans,²⁶ much less about the work and success of U.S. offices established by foreign law firms. As a result, our rules may be overly broad compared to the risks they aim to prevent and, at the same time, may ignore important areas of potential harm.²⁷ In today's competitive market for legal services, this mismatch between regulation and reality creates risks of its own: that the regulatory structure will be so burdensome for U.S. lawyers and legal institutions that they will be hampered in effectively competing with their counterparts in other jurisdictions, who are bidding for the same clients, lawyers (new graduates and more experienced laterals) and dollars²⁸ and are unencumbered by U.S. rules. In addition, as more individuals and organizations connect across borders, regulations affecting some impinge on others. This means that regulation may shape opportunities for transnational collaboration, too. The integration of empirical evidence of the activities and actors involved in a U.S. and global legal services market into the regulatory process

24. The LL.M. is a post-graduate law degree in the U.S. As used in this article, LL.M. refers to any masters' level post-graduate degree. More information on the LL.M. is available through the ABA Section of Legal Education and Admissions to the Bar, Overview of Post J.D. Programs, <http://www.abanet.org/legaled/postjdprograms/postjd.html> (last visited Apr. 16, 2010).

25. See Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 536 et seq. (2003) (describing a study of the working environments of 311 legal consultants then licensed by New York); Pamela Stiebs Hollenhorst, *Options for Foreign-Trained Attorneys: FLC Licensing or Bar Admission*, 68 B. EXAM'R 1, 7 (1999).

26. In a study of foreign law graduates who pursue the U.S. LL.M. degree, only 16 percent of respondents reported that bar qualification was a significant motivation for enrolling in a U.S. law school LL.M. program. See Carole Silver, *Agents of Globalization in Law: Phase I*, 9 (LSAC Research Report 2009), available at <http://www.lsacnet.org/Research/gr/Agents-of-Globalization-in-Law-Phase-1.pdf>.

27. See, e.g., John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 1050 ("transnational lawyers are confronted less by over-regulation than by a regulatory vacuum." (footnote omitted)).

28. On competition for financial support, whether in dollars or local currency, see Anthony Sebok, *The Inauthentic Claim*, VAND. L. REV. (forthcoming 2011), available at <http://www.law.georgetown.edu/LegalProfession/documents/SebokTheInauthenticClaim.pdf>; Burford Capital, <http://www.burfordcapital.com/> (last visited Apr. 28, 2010) ("Burford Capital Limited is a publicly listed fund that invests in commercial disputes."); Gina Passarella, *Some Law Firms Cool to Idea of Dewey-Style Bond Offerings*, LEGAL INTELLIGENCER, Apr. 21, 2010 (describing Dewey LeBoeuf's efforts to refinance bank debt).

of governing those actors and activities will strengthen the likelihood that regulation addresses real problems rather than phantom concerns.

To this end, this article suggests a framework for pursuing the development of an empirical basis for regulation as well as particular areas that may deserve inquiry. My aim in assessing information needs and voids is limited to actors whose work affects the U.S. market in legal services in a global context, although consideration of how other countries approach the job of gathering relevant information might yield opportunities for cooperation.²⁹ Once the facts of global legal practice are available, regulators will be able to turn to the task of tinkering with or revamping the rules, if necessary, to better suit a global environment, as well as considering the development of regulatory objectives.³⁰

29. The International Division of the Law Society of England and Wales, among others, gathers relevant data on legal services and globalization for England and Wales. In addition, International Financial Services London produces periodic reports, including *LEGAL SERVICES 2009*, available at <http://www.ifsl.org.uk/output/ReportItem.aspx?NewsID=87>, on services delivered by U.K.-based firms and in London by foreign firms. The Report appears to draw on existing sources of information rather than original research. Additional sources of information on globalization and legal services are the International Bar Association, which has developed a survey to assess the consequences of regulation, and the Asian-Pacific Economic Cooperation Legal Services Initiative, which aims to collect information on regulations governing foreign lawyers.

30. On regulatory objectives (which may be explicit or implicit) in the context of regulating lawyers, see U.K. Legal Services Act (2007), Section 1, available at http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt1-11g1.

The regulatory objectives[:] (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of— (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services within subsection (2); (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen’s legal rights and duties; (h) promoting and maintaining adherence to the professional principles.

Id.

See generally, George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 436-37 (1994) (suggesting that executive orders that “instructed the federal agencies to channel their regulatory interventions in such a way as to show greater respect for certain economic and political values, among them federalism” are evocative of “the European Community legal principles of proportionality and subsidiarity”).

Perhaps the best known of these instruments [Executive Orders] is Executive Order 12,291, issued under the Reagan administration. Although it has since been repealed, many of its features are carried forward in the 1993 Executive Order of President Clinton that replaces it. Executive Order 12,291 called

The article proceeds as follows. Section II begins with a consideration of the general issues that globalization raises for regulators of lawyers and legal services. Section III suggests possible areas for research by identifying several voids in our current understanding. In doing this, it describes a number of relevant actors and institutions whose work intersects with global forces and who thus might be the subject of fruitful investigation. This general outline for thinking about how globalization matters in the world of legal services is offered only as a starting point; the identification of relevant actors and activities necessarily will change over time, as new mechanisms emerge for delivering legal services and our traditional forms of organization adapt to changed circumstances.³¹ Even the relevant issues may require modification because of changes that cannot now be anticipated. Section IV suggests a possible institutional structure for the outlined research. Finally, the conclusion offers suggestions for first steps in implementing the project.

II. GLOBAL STAKES, REGULATORY CHALLENGES

The stakes are high in the global legal services market. Worldwide revenue from legal services in 2007 was estimated at \$458.2 billion, according to the U.S. International Trade

upon the executive branch agencies, when ‘promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation,’ to observe certain general regulatory principles. Besides ensuring that they had adequate information justifying the need for a proposed measure and assessing its consequences, and that they set regulatory objectives so as to maximize the net benefits to society and reflect overall regulatory priorities, the agencies were also required to satisfy themselves that the action’s “potential benefits to society . . . out-weighed . . . the potential costs to society,” and that the action chosen entailed, as compared to alternative ways of achieving regulatory objectives, “the least net cost to society.”

Id. at 437 (footnotes omitted) (quoting Exec. Order No. 12, 291, 46 FR 13193 (1981)).

31. For an example of how legal services may change, see Larry Ribstein, *The Death of Big Law* at 23 (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467730 (suggesting new ways of delivering “legal knowledge”); see also Georgetown University Center for the Study of the Legal Profession, Spring 2010 Symposium, *Law Firm Evolution: Brave New World or Business as Usual?*, information and call for papers, available at <http://www.law.georgetown.edu/legalprofession/> (including panels titled *Business Models: Strategy and Governance*, *Creative Destruction and Innovation*, and *Capitalizing Law Firms*).

Commission.³² U.S. law firms (and their lawyers) have reaped enormous rewards in this activity, accounting for slightly over 50 percent of worldwide revenue.³³ The Department of Commerce reported U.S. trade in legal services yielded a surplus of more than \$5 billion in 2008.³⁴ In addition to the revenue generated by lawyers in practice, at least two other categories of U.S.-based actors also participate in financial rewards related to increased mobility and globalization of legal services. First, U.S. law schools earn tuition from foreign law graduates in post-graduate one-year LL.M. degree programs, and from foreign nationals who pursue the three-year J.D. degree in the U.S. In 2009, U.S. law schools earned an estimated \$130-160 million in tuition from foreign law graduate students enrolled in LL.M. programs.³⁵ Second, regulators earn fees from foreign lawyers wishing to gain access to the U.S., who apply for general admission or for the foreign legal consultant license. Foreign legal consultant application fees can be as high as \$3,000 per application.³⁶ Application fees for general admission by bar examination are \$250 in New York,³⁷ where more foreign law graduate applicants

32. USITC, RECENT TRENDS IN U.S. SERVICES TRADE, 2009 ANNUAL REPORT 6-1 (2008), available at <http://www.usitc.gov/publications/332/pub4084.pdf>, (citing Datamonitor, *Industry Profile: Global Legal Services*, at 9 (2008), as the source of the figure).

33. *Id.* ("... the U.S. legal service firms are very competitive in the global market, accounting for 54 percent of global revenue in 2007 and 75 of the top 100 global firms ranked by revenue." (citing Datamonitor)).

34. See U.S. Bureau of Economic Analysis, available at <http://www.bea.gov/international/xls/tab7a.xls>. The U.S. earned \$7.269 billion and imported \$1.902 billion in 2008 with regard to legal services. These figures include intrafirm transfers.

35. This is based on a conservative estimated 4,000 foreign law LL.M. students per year. See Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143, 155 (2006) for information on this estimate. The figure is based on assumed tuition of \$40,000 for the year, which is slightly lower than most private law schools for 2009-2010 (Columbia University's tuition for the 2009-2010 year is \$46,332, see Tuition, Fees, and Financial Aid, http://www.law.columbia.edu/llm_jsd/tuition_fees (last visited Apr. 16, 2010)) but more than the public law school tuition (for example, tuition at the University of Minnesota Law school for 2009-2010 was just under \$36,000 for the year, see University of Minnesota 2009-2010 Twin Cities Campus Tuition & Fees Reference, http://onestop.umn.edu/pdf/tuition_2009-10.pdf (last visited Apr. 15, 2010)).

36. The application fee varies by state; Georgia's is \$3,000; in Illinois it is \$800. Other jurisdictions, including New York, do not charge for the application. See Foreign Legal Consultant Rules, http://www.abanet.org/cpr/mjp/for_legal_consultants.pdf (last visited Apr. 15, 2010) (ABA chart of FLC provisions with application fees indicated).

37. See The New York State Bar Exam, <http://www.nybarexam.org/TheBar/TheBar.htm#application> (last visited Apr. 15, 2010).

have taken the bar than in any other U.S. jurisdiction.³⁸ These fees brought New York an estimated \$1,131,500 in 2009, which might offset all or part of the³⁹ costs of reviewing additional applications.⁴⁰

In addition to these earnings related to globalization, U.S. lawyers and law firms have looked to overseas opportunities as holding the promise of salvation in the current economic downturn. One story described recently laid-off lawyers sending their resumes to foreign offices of U.S.- and foreign-based law firms in the hopes of finding work outside of the U.S.⁴¹ Others detail activity that implies earnings, such as through law firm mergers and the establishment of new offices in distant cities.⁴² If a strategy of globalization can protect against the ill-effects of the current economic crisis in the U.S., then more actors may move in that direction in the future too, making an appropriate regulatory framework all the more important.

Regulation in the context of globalization raises at least two basic concerns. On one hand is apprehension that regulation not unduly interfere with activity or weigh down the competitive position of the regulated in the global marketplace.⁴³ This is a

38. National Conference of Bar Examiners, Statistics, Persons Taking and Passing the 2009 Bar Examination by Source of Legal Education 11 (2009), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2009_Stats.pdf

39. 5,723 foreign law graduates sat for the New York bar examination in 2009. *Id.*

40. *See* Comments Offered by New York Board of Bar Examiner Officials During the ABA Section of International Law Spring Meeting 2009, at a Panel Entitled Standards of Qualification: Transparency in U.S. Bar Eligibility for Foreign-Educated Law Graduates (Apr. 17, 2009), *available at* <http://www.abanet.org/legaled/committees/International%20Issues%20Report%20>.

41. John Bringardner, *Lawyers Wanted: Abroad, That Is*, N.Y. TIMES, Nov. 23, 2008, at BU (“But with Wall Street in tatters and London struggling as the credit crisis plays out, lawyers and analysts say that the most promising places for legal careers are such far-flung locales as Dubai, Abu Dhabi and Hong Kong.”).

42. On new offices opened during the downturn, *see, e.g.*, Sue Reisinger, *Spanish Gambit*, AM. LAW. (Sept. 2009) (“Though the Spanish economy is bleak, at least two global law firms see a golden opportunity for growth. London-based Herbert Smith and New York-based Dewey & LeBoeuf are maneuvering to make Spain a key future asset. Both have downsized elsewhere—in May, Herbert Smith let go 31 lawyers in London, while Dewey has eliminated at least 35 attorney positions since last December—but in June each firm opened a new office in Madrid.”). *But see also* Leigh Jones, *Big Firms Slashed Headcount at International Offices, ‘NLJ 250’ Shows*, NAT’L L.J., Nov. 11, 2009 (“Attorneys in the international offices of the nation’s top law firms weren’t spared a pummeling by a recession that hit global proportions in 2009. A big piece of the 4 percent decline in the total number of attorneys at large law firms came from losses in international offices, according to The National Law Journal’s NLJ 250 . . .”).

43. For a more thorough discussion of this concern, *see, e.g.*, Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice, or Why (and How) the New Regulatory System Being Put in Place in London May Lead to Changes in U.S. Lawyer*

universal challenge for regulation, and particularly important where competitors are subject to different regulatory regimes, as is the case for lawyers and law firms. On the other hand is the concern that certain actors and/or conduct may elude the attention of all possible regulators and, as a result, wreak havoc for all. Again, this is not a risk unique to the global or legal services contexts, but as actors cross jurisdictional lines, the prospect of escaping each regulator - by arguing that their work is governed by another - increases. In both of these instances, concerns are based at least as much on the unknown as on identified risks. If regulators and policy-makers are armed with solid empirical data about who is active in the U.S. market for legal services and the role of U.S. actors in the global legal services marketplace, they will be better equipped to construct a workable framework for balancing the interests of all actors while supporting successful competition.

Unfortunately, we have neither the information relevant to making choices about a global regulatory approach nor a framework in place for generating that information. Without this, we are challenged to determine where the problems and risks are now and where none have materialized, which would inform regulatory decisions. Even setting the agenda for *thinking* about what to change in the regulatory mix is risky without information on how existing systems work. In this regard, empirical scholars have much to offer. For example, in thinking about investigating the world of international commercial arbitration, Bryant Garth and Yves Dezalay faced the challenge of determining who to study.⁴⁴ No comprehensive list of arbitrators existed and arbitration decisions typically were confidential. This absence of transparency led them to study insiders, outsiders and those on the margins of the arbitration world, and to make the mapping of these positions a central part of their work. Similarly, in thinking about regulation in light of globalization, a broad investigation will help

Regulation - And Why London May Replace New York as the World Headquarters for Legal Services, paper prepared for ABA Center for Professional Responsibility-Georgetown Law Center, Center for the Study of the Legal Profession conference for Council of Chief Justices, (2009), available at <http://www.law.georgetown.edu/legalprofession/documents/May-27-2009-AnthonyDavis-Paper.pdf> ("In the long run, because of the enactment of the Legal Services Act 2007, the ability of law firms in London to structure arrangements and ventures with non-lawyers will give those firms individually, and the English legal profession collectively, a hitherto unimaginable competitive advantage.").

44. See generally YVES DEZALAY AND BRYANT G. GARTH, *DEALING IN VIRTUE* (1996).

us identify and understand not only central actors, but also those on the margins or in emerging positions and those whose work seems not to have a meaningful global connection. Each of these is an important element for regulators to understand when drawing lines implicit in rulemaking.

III. PARAMETERS AND FOCUS

This section addresses that challenge of identifying the actors and institutions potentially worthy of investigation in the context of describing the information voids relevant to regulators and their decisions. The traditional division between inbound and outbound services may help this description. But an initial challenge posed by any research relating to globalization is one of definition. Specifically, what is meant by the terms “globalization,” “global lawyering” or the “global market for legal services?” In this article, I adopt the broadest possible definition so that relevance can be determined after categories of actors and activities are identified, rather than defining away the breadth that globalization necessarily implies.⁴⁵ “Global” here denotes matters that involve either multiple jurisdictions or mobility of individuals, organizations or their services across national boundaries, or a combination of these factors. That is, global legal services include a lawyer who represents a U.S. citizen residing in the U.S. and interested in purchasing property in Spain, or the Spaniard coming to the U.S. and acquiring property here,⁴⁶ as well as a U.S.-based multinational corporation acquiring a Singaporean company that

45. This is consistent with the breadth inherent in the General Agreement on Trade in Services approach to legal services; see generally Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT’L LAW. 943, n.24 (2009); Laurel Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services* this symposium issue; see also JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 5 (2003) (defining globalization as “the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders”).

46. Immigration is one way to account for increased globalization and the legal needs resulting from it. See generally Migration Information Source, *US In Focus: Frequently Requested Statistics on Immigrants and Immigration in the United States*, <http://www.migrationinformation.org/USFocus/display.cfm?ID=714#1> (last visited Apr. 15, 2010). (“In 1980, according to the US Census Bureau, the foreign born represented 6.2 percent (14.1 million individuals) of the total US population. By 1990, their share had risen to 7.9 percent (19.8 million individuals) and, by the 2000 census, they made up 11.1 percent (31.1 million individuals) of the total US population. As of 2008, immigrants comprised 12.5 percent (38.0 million) of the total US population.”).

engages in business activities in Australia or Argentina. In addition, it includes U.S. lawyers working on behalf of non-U.S. clients, regardless of the location of the lawyers: the U.S. lawyer representing a French woman seeking a divorce from her American husband, and the U.S. lawyer advising a German corporation on a dispute with an Israeli licensee relating to a product sold worldwide. All of these activities involve cross-border issues, and each implicates the problems made more urgent by the ease of travel and technology that supports simple and instantaneous world-wide communication. Globalization also extends to a Chinese law graduate who earns an LL.M. in a U.S. law school. The mobility of the student and the focus of the U.S. law school on generating an international student body bring the exchange of information, tuition and cultures under the global umbrella. Likewise, law firms and corporations with networks of lawyers working in other countries are considered “global” here, even if the lawyers are host-country educated and licensed, advising principally on host country law, or working as nonlawyer reviewers of documents.⁴⁷ The necessary interaction of lawyers working in different jurisdictions, and their consideration of other legal systems, is sufficient to justify applying the “global” label. Whether a similarly broad definition is adopted in the research described here is one of the issues that regulators and researchers, working together, must address.

In the following discussion, relevant actors are suggested but the focus is on information challenges and the ways in which an empirical investigation might illuminate issues that now are resolved by the implicit assumptions that contribute to the challenges posed to the existing regulatory system. The discussion is organized by actors, including law schools that educate lawyers, state bar licensing and disciplinary authorities, individual lawyers and law firms. In addition, clients, both through corporate counsel and directly as business entities, participate in the growth of legal services. What follows is simply a starting point and lays no claim to comprehensiveness; certain potentially-important actors (the ABA and regulators that address specialty practitioners, such as

47. Foreign law graduates, particularly those with a U.S. LL.M., sometimes accept work as contract lawyers when law firm jobs are unavailable. On foreign lawyers working in overseas outsourcing; see Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401 (2007); Helen Coster, *Briefed in Bangalore*, AM. LAW. (Nov. 2004).

the Securities and Exchange Commission) are omitted. The discussion below suggests a framework for thinking about how globalization matters in the world of legal services. The framework itself is necessarily tentative, both because changes that cannot be anticipated now will demand reflection and because others may identify additional important areas for investigation.

A. *State Regulators (Licensing and Discipline)*

The analysis begins with regulators, including those who oversee licensing and disciplinary proceedings. Licensing is the access point for entering the profession in the U.S. and serves a gate keeping function for foreign law graduates and foreign lawyers, as well. What experience have regulators had with foreign law graduates and foreign lawyers, both in terms of admission and other licensing mechanisms, and with regard to disciplinary problems? What do we know about the way these rules work, and what does this tell us about how regulation might be reconceived in light of the increased mobility of lawyers and clients pressed by globalization, and the extension of law firms and corporate counsel groups across national borders?

Foreign law graduates interested in working in the U.S. often are met with regulatory barriers that prevent them from becoming qualified without first completing a three-year J.D. degree at a U.S. law school. Each U.S. jurisdiction establishes its own conditions for bar eligibility. J.D. graduates of ABA-accredited law schools comprise the largest group of bar examination test-takers nationwide,⁴⁸ but graduates of foreign law schools who have not earned a U.S. J.D. also are eligible in certain jurisdictions.⁴⁹ Generally, separate rules govern the conditions necessary for foreign law graduates to sit for a state's bar exam.⁵⁰ These may impose conditions related to study in a U.S. law school

48. According to the National Conference of Bar Examiners, 68,887 J.D. graduates of ABA-accredited law schools and 5,723 foreign law graduates sat for a U.S. bar exam in 2009. See NCBE 2009 Statistics, *supra* note 39, at 11. The issue of graduates of non-accredited U.S.-based schools is beyond the scope of this article.

49. Graduates of non-U.S. law schools here are referred to as "foreign law graduates."

50. See, e.g., New York Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law (2009) § 520.3 (governing graduates of ABA-accredited law schools) and § 520.6 (governing graduates of foreign law schools); Illinois Art. VII. Rules on Admission and Discipline of Attorneys (2009), Rule 713 (legal education as required by the ABA) and Rule 715 (admission of graduates of foreign law schools), available at http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/.

(for a limited period of time, typically one academic year),⁵¹ the home country legal system of an applicant (English speaking, common-law, for example),⁵² or distinguish between applicants based on their qualification to practice at home.⁵³ Many U.S. jurisdictions have no rule addressing the conditions for foreign law graduates to sit for their bar exam,⁵⁴ and many of those with such rules have few applicants.⁵⁵ Of course, whether or not there is a rule allowing foreign law graduates to take the bar, regulators may administer the exam to applicants who apply for a waiver of a state's general conditions.⁵⁶

A separate and limited license to practice in the U.S. is available in 31 U.S. jurisdictions in the form of a foreign legal consultant ("FLC") license.⁵⁷ This requires no examination, but it also typically restricts licensees to advising on the law of their

51. See NCBE and ABA Section of Legal Education and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2010*, Chart X at 30 (indicating the following jurisdictions as allowing foreign law graduates with "additional education at an ABA-approved law school" (either alone or with other necessary conditions) to sit for the bar exam: Alabama, Alaska, California, District of Columbia, Massachusetts, Missouri, New York, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia; in addition, New Hampshire and Palau allow foreign law graduates with a U.S. LL.M. from an ABA-approved law school to sit for their bar exams). These jurisdictions may impose additional requirements on applicants. See also Silver, *Regulatory Mismatch*, *supra* note 25 (reviewing admission rules for foreign law graduates).

52. See *Comprehensive Guide 2010*, *supra* note 51, at 30 (indicating the following jurisdictions as allowing foreign law graduates from common law jurisdictions where English is the language of instruction to sit for the bar exam: Alabama, Alaska, Colorado, Hawaii, Massachusetts, Nevada, New Hampshire, Oregon, Utah, Vermont, Washington, West Virginia, Puerto Rico). These jurisdictions may impose additional requirements on applicants. See also Silver, *Regulatory Mismatch*, *supra* note 25 (reviewing admission rules for foreign law graduates).

53. See, e.g., Illinois Supreme Court Rule 715, available at <https://www.ibaby.org/rule715.action>, which requires that "[d]uring each of no fewer than 5 of the 7 years immediately prior to making application in Illinois, the lawyer must have verifiably devoted an annual minimum of 500 hours to the practice of the law of such country and/or to the law of any U.S. jurisdiction(s) where licensed."

54. See NCBE, Statistics 2009, *supra* note 39, at 10-11; *Comprehensive Guide 2010*, *supra* note 51, at 30.

55. See NCBE, Statistics 2009, *supra* note 39, at 10-11.

56. At the Spring 2009 meeting of the ABA Section of International Law, the Transnational Legal Practice Committee organized a panel on bar eligibility for foreign law graduates in which officials from New York and California commented that applications for waiver of conditions to admission were common in their jurisdictions. But see *Wei Jia v. Board of Bar Examiners*, 696 N.E.2d 131 (Mass. 1998) (refusing to grant a waiver of conditions for bar eligibility to foreign lawyer); *Florida Board of Bar Examiners In re Kevin Charles Hale*, 433 So.2d 969 (Fla. 1983) (refusing to grant a waiver of conditions for bar eligibility to foreign lawyer).

57. See *Comprehensive Guide 2010*, *supra* note 51, at 36; ABA Center for Professional Responsibility, Commission on Multijurisdictional Practice Commission, available at <http://www.abanet.org/cpr/mjp/1> (list of states with FLC rules).

home jurisdiction.⁵⁸ Foreign legal consultant rules condition licensing upon evidence that an applicant has experience in advising on the law of his or her home jurisdiction; a five-year practice experience requirement relating to the law of the applicant's home country is a common, although not universal, requirement for an FLC license.⁵⁹

A second type of limited license available to lawyers working in corporate counsel positions also may extend to foreign-licensed lawyers. This is a more recent regulatory development than the FLC license. While the model rule on multijurisdictional practice of corporate counsel applies only to U.S.-licensed lawyers,⁶⁰ six states have extended the rule to lawyers admitted only outside of the U.S.⁶¹ So long as the lawyer continues to work in-house, the

58. See, e.g., Illinois Art. VII, Rule 712(e) (2009).

A person licensed as a foreign legal consultant under this rule may render legal services and give professional advice within this state only on the law of the foreign country where the foreign legal consultant is admitted to practice. A foreign legal consultant in giving such advice shall not quote from or summarize advice concerning the law of this state (or of any other jurisdiction) which has been rendered by an attorney at law duly licensed under the law of the State of Illinois (or of any other jurisdiction, domestic or foreign). A licensed foreign legal consultant shall not: . . . (8) render professional legal advice on or under the law of the State of Illinois or of the United States or of any state, territory or possession thereof or of the District of Columbia or of any other jurisdiction (domestic or foreign) in which such person is not authorized to practice law (whether rendered incident to the preparation of legal instruments or otherwise) . . .

Id.; but see New York Rules of Court, Court of Appeals, Part 521.3 (2009):

A person licensed to practice as a legal consultant under this Part may render legal services in this State; subject, however, to the limitations that he or she shall not: . . . (e) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person duly qualified and entitled (other than by virtue of having been licensed under this Part) to render professional legal advice in this State on such law. . . .

Id. See generally SYDNEY M. CONE, INTERNATIONAL TRADE IN LEGAL SERVICES (1995) (discussing the origins of the legal consultant rules); Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 HOUS. J. OF INT'L L. 527 (2005) (discussing distinctions in FLC rules, including scope of practice provisions).

59. See Carole Silver & Nicole DeBruin, *Comparative Analysis of United States Rules Licensing Legal Consultants* (2006), available at http://www.abanet.org/cpr/mjp/silver_flg_chart.pdf.

60. See Model Rule for Registration of In-House Counsel, paragraph A (limited to lawyers admitted to a U.S. jurisdiction), available at http://www.abanet.org/cpr/mjp/in-house_registration.pdf. See generally Terry, *From GATS to APEC*, *supra* note 45.

61. See ABA Center for Professional Responsibility, *Commission on Multijurisdictional Practice, In-House Counsel Rules, Comparison of ABA Model Rule for Registration of In-House*

license authorizes him or her to work in the U.S. and advise “on matters directly related to [his or her] work for the entity.”⁶²

Finally, certain U.S. jurisdictions also may extend to foreign lawyers the right to admission *pro hac vice* for purposes of appearing in court⁶³ or to waive in on the basis of their home country expertise,⁶⁴ in a similar manner available to lawyers from other U.S. jurisdictions.

In all, there are at least five possible paths foreign lawyers might pursue to gain the right to practice in the U.S., including one - full admission through bar examination - which is available also to foreign law graduates who may not be licensed to practice in their home countries.⁶⁵

Counsel with State Versions, available at <http://www.abanet.org/cpr/mjp/>; Terry, *From GATS to APEC*, *supra* note 45.

62. Paragraph B.1. of the Model Rule provides that the registered lawyer may advise “only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules of Professional Conduct [or equivalent provision in the jurisdiction].”

63. Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions and Amendments Since August 2002, available at http://www.abanet.org/cpr/mjp/prohac_admin_comp.pdf.

64. Rules of the Supreme Judicial Court of Massachusetts, 3:01(Attorneys and Rules of the Board of Bar Examiners), available at <http://www.mass.gov/bbe/barrules.pdf>.

Attorneys Admitted in Foreign Countries. A person who has been admitted or enrolled as an attorney of the highest judicial court of a foreign country may apply to the Supreme Judicial Court to be admitted, without examination, as an attorney in this Commonwealth. The Board of Bar Examiners may, in its discretion, excuse the applicant from taking the regular law examination on compliance with the following conditions: 6.2.1 The applicant's principal residence is in the Commonwealth of Massachusetts. 6.2.2 The applicant shall have been admitted in the foreign country for at least five years prior to applying for admission in the Commonwealth, and shall have engaged in the active practice or teaching of law for five out of the past seven years immediately preceding the filing of the petition for admission on motion. 6.2.3 The applicant shall have completed the equivalent of American high school; shall have completed work in college or university equal to that warranting a bachelor's degree in the United States; and shall have completed such legal education as, in the opinion of the Board of Bar Examiners, is equivalent to that provided in law schools approved by the American Bar Association. 6.2.4 The applicant shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications. . . . 6.2.6 The applicant shall have passed the Multistate Professional Responsibility Examination.

Id. at Rule 6.2.

65. AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES, *supra* note 23, at 6:

There are three areas, however, in which the ABA might have foreign-educated lawyer admission policies, but does not. First, even though some

State bar licensing authorities share basic data on the number of test takers in their jurisdiction with the National Conference of Bar Examiners (“NCBE”), a non-profit organization that has developed multistate bar examinations and also gathers and disseminates statistics on licensing and admission in the U.S.⁶⁶ The NCBE reports information disclosed by the states, including data on foreign law graduates who sit for a state bar exam.⁶⁷ Foreign law graduates are those who completed their primary legal education or first degree in law outside of the U.S. That is, U.S. J.D. graduates are excluded from this group.⁶⁸

Foreign legal consultant applicant records were added to the NCBE reports in 2004.⁶⁹ The information parallels bar admission data, and addresses only new FLC licenses sought and awarded. Unlike bar admissions, however, most FLC rules require residency

states permit pro hac vice admission by foreign lawyers, the ABA does not have a policy on this issue. Second, even though twenty-five jurisdictions permit a foreign law graduate to sit for a bar examination under certain circumstances, the ABA does not have a Model Rule for the Admission of Foreign-Educated Applicants. Finally, although six states permit foreign in-house counsel to work for their employer in the U.S. provided they register with the state, the ABA does not have a policy on this issue.

Id. (footnotes omitted).

66. The NCBE describes its mission as:

to work with other institutions to develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law, and to assist bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law, disseminating relevant information concerning admission standards and practices, conducting educational programs for the members and staffs of such authorities, and providing other services such as character investigations and conducting research.

NCBE, <http://www.ncbex.org/> (last visited Apr. 16, 2010) (About the National Conference of Bar Examiners).

67. This is reported by categorizing applicants on the basis of the source of their legal education. *See Comprehensive Guide 2010*, *supra* note 51, at 30.

68. For most states that permit foreign law graduates to sit for the bar, however, this categorization according to source of legal education has the potential to create confusion, because many states’ rules governing foreign law graduates require them to complete some legal education in a U.S., ABA-accredited law school before they are bar-eligible. *See supra* note 51. As a result, it is possible that states under-report, confusing the question regarding source of legal education and mistakenly failing to report foreign law graduates who have completed some education in a U.S. law school in this “foreign law school” category. This confusion is pointed out here only to identify possible ambiguities even in the information gathering and reporting that currently exists.

69. For data on admission of FLCs for each year from 2005-2009, *see* NCBE, Statistics 2009, *supra* note 39, at 29 (Admissions to the Bar by Type, 2005–2009). According to the NCBE, “Data for the first nine charts [which includes FLC data] were supplied by the jurisdictions.” *Id.* at 1.

as a continuing condition of maintaining the license, but we know very little about whether FLCs voluntarily relinquish their licenses upon leaving the U.S.⁷⁰ In addition, the total number of FLCs in most jurisdictions is so small that it raises the question of whether the license is worthwhile as a regulatory status.⁷¹ There exists no comprehensive data on what FLCs do and how well the license serves them, or whether it instead is used as a comfortable way to wait until full admission is obtained.⁷² Generating information on licenses not awarded because the applicant failed to satisfy the necessary conditions and on the licensing process (including the time required from application to license and the cost and time involved in preparing an application), often described by FLCs as overly cumbersome and time consuming, would round out knowledge about the effect of existing FLC rules.⁷³ Finally, not all foreign lawyers working in the U.S. obtain either an FLC license or full admission to the bar;⁷⁴ information on individuals practicing in the U.S. outside of these regulatory categories also would be useful, both to understand the reasons for avoiding licensure and the nature of their work and presence in the U.S.

Admission by motion also is reported by the NCBE, but foreign lawyers are not separated out, so no information on the

70. See, e.g., Illinois Rules on Admission and Discipline of Attorneys Rule 712(a) (2009): "In its discretion the Supreme Court may license to practice as a foreign legal consultant on foreign and international law, without examination, an applicant who: . . . (4) intends to practice as a legal consultant in the State of Illinois and to maintain an office therefore in the State of Illinois[.]"

71. See NCBE, Statistics 2009, *supra* note 39, at 29 (Admissions to the Bar by Type, 2005–2009).

72. For information on FLCs, see Silver, *Regulatory Mismatch*, *supra* note 25 at 531–41 (describing the work settings of lawyers licensed as legal consultants in New York); Hollenhorst, *supra* note 25.

73. Reports by FLCs and foreign lawyers who have not obtained the license indicate that the application process in certain states is time consuming and requires information sometimes difficult to obtain. While character and fitness applications are challenging, even more mundane requirements, such as the need for a letter from home country authorities, presents difficulty. For an example of this sort of requirement, see the Indiana Rule on Licensing Foreign Legal Consultants, *Rules for Admission to the Bar and the Discipline of Attorneys*, Burns Ind. A.D. 5(2)(b) (2003) (requiring "a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country and a letter of recommendation from at least one attorney who is licensed to practice law in the State of Indiana other than as a foreign legal consultant . . .").

74. Foreign lawyers working in the U.S. in jurisdictions with FLC rules and/or opportunities for full admission may interpret these as optional rather than mandatory. In addition, foreign lawyers may work in jurisdictions in which neither the legal consultant license nor admission is available.

usage rate for foreign lawyers is available.⁷⁵ Information on corporate counsel, *pro hac vice*, and admission upon application for a waiver generally is not disclosed by the NCBE, and the states may not make this information available to the NCBE.⁷⁶

Finally, little is known about the roles played by foreign law graduates who gain full admission. Does bar admission indicate an intent to work in the U.S.? Or is it just as likely that it is a signal of credibility used primarily outside of the U.S., at least for lawyers from particular countries?⁷⁷ For those who choose to work in the U.S., we lack basic data about their home countries, gender, age, whether they are licensed as lawyers in their home jurisdictions (unless this is a condition of U.S. admission), and the practice settings where foreign law graduates work in the U.S.⁷⁸ Occasionally, states disclose some of this information; Hawaii, for example, identifies its foreign law consultants by name and by their home jurisdiction in an on-line web listing of Hawaii-licensed lawyers.⁷⁹ New York has in the past shared with law school LL.M. administrators, among others, information on pass rates by country of origin for its bar applicants. But a comprehensive picture is lacking, and without it, regulators are unsupported in their consideration of important policy questions, including where to focus their monitoring resources, and whether a single bar exam reflects the needs of the public and the pool of bar applicants.

Information about state regulatory procedures for foreign lawyer and foreign law graduate applicants also might help explain the assumptions underlying existing attitudes. For example, what differences characterize licensing and disciplinary matters with regard to foreign lawyers and foreign law graduates?

75. See NCBE, Statistics 2009, *supra* note 39, at 27-28 (Admissions to the Bar by Type, 2005-2009).

76. See generally *id.*

77. See Carole Silver, *The Variable Value of US Legal Education in the Global Legal Services Market*, GEO. J. LEGAL ETHICS (forthcoming 2010-2011) (discussing the reasons U.S. bar admission is valued outside of the U.S., even apart from the credibility it lends with regard to expertise in U.S. law); Carole Silver & Mayer Freed, *Translating the U.S. LLM Experience: The Need for a Comprehensive Examination*, 101 NW. U. L. REV. COLLOQUY 23 (2006).

78. See generally Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1039-84 (2002) (describing foreign lawyers working in New York).

79. See Authorized to Practice Law Listing, updated as of Feb. 23, 2010, <http://hsba.org/resources/1/Status/active.htm> (identifying 4 foreign law consultants registered with the state, two from Japan and one each from South Korea and Switzerland).

Do regulators identify certain staff members as experts in oversight of foreign lawyers and law graduates? Is there coordination among states on general issues relating to assessing foreign academic records, for example? In discussions on potential rule changes to expand opportunities for foreign law graduates to sit for a bar examination or become licensed as a foreign legal consultant, bar regulators inevitably raise the problem of limited staffing and funding.⁸⁰ Bar applications from foreign law graduates present special challenges, including learning about foreign universities and foreign accreditation systems. In addition, it is sometimes more difficult to verify information because of unfamiliarity with foreign legal systems, schools and licensing organizations.⁸¹ At the same time, foreign applicants increase potential fees for regulators (which admittedly may not offset time required in vetting applications),⁸² and annual fees typically are imposed on all lawyers, including foreign lawyers licensed as legal consultants.⁸³

In addition to the licensing work of state regulators, disciplinary authorities also have a role to play in terms of globalization and legal services. Foreign lawyers and foreign law graduates working in the U.S. - whether under a limited license or upon full admission - are subject to their jurisdiction.⁸⁴ Regulators expressed concern that foreign lawyers either will advise on matters outside of their competence or engage in unauthorized practice.⁸⁵ While only a handful of disciplinary cases involve foreign legal consultants exceeding the boundaries of their scope of practice, the absence of a substantial number of problem cases has not persuaded regulators that there is no reason for concern; perhaps the concern is based less on experience than some sort of general anxiety about foreigners.

Much of the regulation of foreign law graduates and foreign lawyers is justified as necessary to ensure competence as well as

80. See Comments Offered by New York Board of Bar Examiner Officials, *supra* note 40, at 37-38.

81. See *id.* at 15-17.

82. See *supra* note 36 and accompanying text.

83. See, e.g., Silver & DeBruin, *supra* note 59.

84. MODEL RULES OF PROF'L CONDUCT R. 8.5; See State Implementation of ABA Model Rule 8.5 (Disciplinary Authority; Choice of Law).

85. See generally *supra* note 23.

that ethical obligations are satisfied.⁸⁶ These concerns justify certain of the conditions imposed on foreign law graduates and foreign lawyers seeking admission in U.S. jurisdictions (U.S. legal education, for example), and on foreign legal consultant applicants (limited scope of practice). Nevertheless, knowledge of disciplinary charges against foreign law graduates and foreign lawyers is limited, and no investigation of malpractice charges involving them has been uncovered. Research into the experiences of disciplinary authorities and legal insurers would provide greater insight, particularly if compared to the record for J.D. graduates.⁸⁷ We also know nothing about the policies of employers of foreign lawyers, and whether they find it advisable to provide special training or oversight to compensate for the absence of a first degree in law earned in the U.S. Together, research into these issues will lead to the development of a basis for assessing risks associated with foreign lawyers and law graduates and U.S. admission and licensing. Without it, we risk allowing fear to guide our regulatory approach.

The discussion thus far has focused on U.S. regulators' governance of inbound foreign lawyers. But U.S. lawyers working overseas also may encounter challenges in satisfying their duties, for example, in the event of a conflict between the ethical or other obligations imposed by their U.S. jurisdiction and those

86. See generally David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799 (1992) (suggesting malpractice as an alternative to discipline).

87. See generally ABA Center for Professional Responsibility, ABA National Lawyer Regulatory Data Bank, <http://www.abanet.org/cpr/regulation/databank.html> (last visited Apr. 16, 2010).

The ABA's National Lawyer Regulatory Data Bank is the only national repository of information concerning public disciplinary sanctions imposed against lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline. Although information concerning sanctions that are matters of public record is available from each jurisdiction (<http://www.abanet.org/cpr/scpd/disciplinary.html>), the difficulty involved in locating and examining individual court records is obvious. Through the voluntary cooperation of courts in forwarding to the Data Bank orders imposing public discipline, the ABA has been able to offer a valuable service to the profession and the public. The data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere. All states and the District of Columbia, as well as many federal courts and some agencies, now provide disciplinary information to the Data Bank.

Id.

imposed in the host country where they work.⁸⁸ This is a topic that garners quite a bit of concern among lawyers practicing in large international law firms,⁸⁹ but the evidence of these conflicts is limited. We would benefit by learning more about the contexts in which they arise as well as their frequency and resolution.

Essential issues guiding our investigation, then, include considering the work of regulators in managing increasing numbers of applicants whose credentials require some knowledge of a foreign legal regime. What resources will they need, and are there reasons to create a new regulatory body that specializes in globally-related actors?⁹⁰ Specific questions aimed at developing a foundation for addressing these issues are suggested below. In each case, bracketed information indicates possible sources of relevant information.

1) Regulation

a) Admission and licensing

i) Inbound

(1) Bar admission (applicants and admittees for each item)

88. Examples of other obligations that may result in conflicts include data protection and whistleblower regulations; see Laurel Terry, *Global Innovation and the Shifting Regulatory Environment: Developments Beyond the GATS*, presentation at Harvard Law School/American Society of International Law Conference on Globalization of the Legal Profession (2008), available at

http://www.personal.psu.edu/faculty/l/s/1st3/presentations%20for%20webpage/Terry_harvard_globalization.pdf. See also *Akzo Nobel Chemicals Ltd, v. Commission of the European Communities*, The Court of First Instance of the European Communities (2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML>.

89. See, e.g., Announcement of International Bar Association meeting, Message from the BIC Chair (March 2009), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1D244EF2-E0CA-4786-A411-08EF6A2A789C> ("Another session will analyze the double deontology rules which lawyers doing cross-border work can be subject to."); program from APRL meeting (May 2008, Amsterdam), available at http://74.125.95.132/search?q=cache:5aDt4IzrLncJ:www.aprl.net/pdf/Amsterdam_Agenda.doc+double+deontology+and+allen+%26+Overy&cd=3&hl=en&ct=clnk&gl=us (panel: "At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation, described as including discussion of "[l]awyers engaged in transnational practice are obliged to comply with their home jurisdiction's professional rules of conduct and those of the host jurisdiction. A choice of law problem in the United States, this issue has also been referred to as the double deontology dilemma. The panelists will explore how this issue affects U.S. lawyers practicing in the European Union, the nature of the conflicts that arise, proposed solutions, the status of E.U. legislation, policies of the organized bar and reciprocal disciplinary implications.").

90. See, e.g., Smedley Report, *supra* note 4, recommending such a bifurcated approach for the purpose of regulating large law firms separately.

- (a) Number *[NCBE]*
- (b) Diversity information (including gender, ethnicity)
- (c) Citizenship *[state admission records]*
- (d) Jurisdiction of primary legal education? *[bar application records]*
- (e) Jurisdiction where licensed to practice (if at all)? *[bar application records]*
- (f) How do bar applicants satisfy the conditions for application for admission, if relevant (this is particularly relevant to LL.M. graduates with regard to their choice of U.S. law school, the focus of their U.S. law studies, and visa issues)? *[bar application records]*
- (2) Foreign legal consultant licenses
 - (a) Number *[available for newly licensed FLCs from NCBE]*
 - (b) Diversity information
 - (c) Citizenship *[FLC state application]*
 - (d) Work setting in U.S. *[FLC application]*
 - (e) Home country where licensed *[FLC application]*
 - (f) Information on applicants who were refused an FLC license (and who completed the application process) *[state reviewing authority records]*
 - (i) Number
 - (ii) State refusing
 - (iii) Grounds for refusal
 - (iv) Home country (where licensed)
 - (g) Number of FLCs who relinquished license upon leaving state *[state licensing authority]*
 - (h) Number who relinquished license upon gaining full admission to a U.S. bar *[state licensing authority]*
 - (i) Number who report foreign residence/business address but who still are on rolls as FLC *[state licensing authority]*
 - (j) Application process information for FLCs (length of time application takes to complete, length of time required for state to act upon

- application; challenges of completing application; cost)
- (3) Where in the U.S. are they foreign law graduates licensed (which jurisdiction(s))? *[NCBE]*
 - (4) How long do foreign law graduates maintain their U.S. license and for how long do they work in the U.S. (longevity)? *[state bar admission and registration records]*
 - (5) Who is working in the U.S. (snapshot, but updated at regular intervals)?
 - (a) Diversity information
 - (b) Home country (where primary legal education completed or, for those licensed, where license obtained, if different)
 - (c) Licensed in home country?
 - (d) Working as fully admitted lawyers in the U.S. or as FLCs or under another limited license? *[state licensing and registration records]*
 - (e) Where in the U.S. are they working?
 - (i) Type of organization, if any *[organization information, such as law firm websites]*
 - (ii) Location of organization (U.S.-based, or foreign-based?)
 - (iii) Relationship of organization to home country of applicant, if any
 - (6) Temporary practice by foreign lawyers
 - (a) Number of individuals engaged in temporary practice
 - (b) Diversity information
 - (c) Citizenship
 - (d) Home country where licensed to practice?
 - (e) Do they work with or opposed to U.S. lawyers in their work here? *[state records on pro hac vice admission]*
 - (f) Duration of their stay (physically)
 - (g) Repeated visits to the U.S. on same matter or client during a 12 month period?
 - (h) Did they encounter bar regulatory authorities? Immigration issues? Other issues?
 - (7) Corporate counsel license

- (a) Number of applicants [*state licensing authorities*]
- (b) Licenses granted [*states licensing authority*]
- (c) U.S. states involved [*state licensing authorities*]
- (d) Where working (size of corporation, U.S.-based or foreign based, size of legal department) [*state licensing authorities*]
- (e) Position of individual (general counsel, other) [*state licensing authority*]
- (f) Diversity information
- (g) Home country where licensed [*state licensing authority*]
- (h) Duration of license [*state licensing or registration authority*]
- (i) If relinquished, reasons [*state licensing or registration authority*]
- ii) Outbound
 - (1) Dual-licensed to practice?
 - (a) Where are they working? [*sample information on law firm websites*]
 - (b) Number of lawyers working overseas?
 - (c) Diversity information
 - (d) From which U.S. jurisdictions (where are they admitted in the U.S.)?
 - (e) Practice setting overseas
 - (2) Limited license to practice (akin to FLC license)?
 - (a) Where are they working?
 - (b) Number of lawyers working overseas?
 - (c) Diversity information
 - (d) From which U.S. jurisdictions (where are they admitted in the U.S.)?
 - (e) Practice setting overseas
 - (3) Regardless of license or admission, in what settings do they practice?
 - (a) Law firms? (size of firms, where is firm based?)
 - (b) Corporate counsel positions? (where is corporation based?)
 - (c) Sole practitioners?
 - (d) Other organizations? (non-law professional service firms, NGOs, government, etc)

- (4) Temporary practice, outbound
 - (a) Jurisdictions where they work
 - (b) Number of lawyers
 - (c) Diversity information
 - (d) Duration and number of visits
 - (e) Work with host country lawyers?
 - (f) Contact with host country bar regulators?
Immigration authorities? Tax authorities?
- b) Discipline
 - i) Disciplinary charges or proceedings against foreign lawyers who work in the U.S. under a limited foreign legal consultant license? *[reported cases and disciplinary committees]*
 - (1) Nature of charges
 - (2) Resolution of charges/investigation
 - (3) What do we know about the lawyer's record in her/his home country?
 - (4) Level of sophistication of client involved in matter that led to disciplinary charges, if a client was involved?
 - (5) Was advice rendered/sought in an area that was beyond the scope of practice authorized for FLCs in the host country?
 - ii) Disciplinary proceedings against foreign law graduates/foreign lawyers who work in the U.S. after passing a U.S. bar exam and being fully admitted to practice in the U.S.? *[reported cases and disciplinary committees]*
 - (1) Nature of charges
 - (2) Resolution of charges/investigation
 - (3) What do we know about the lawyer's record in her/his home country, if admitted there?
 - (4) Level of sophistication of client involved in matter that led to disciplinary charges?
 - (5) Was advice rendered/sought related to home country expertise of lawyer?
 - iii) Disciplinary proceedings against foreign lawyers who work in the U.S. after waiving into the bar and being fully admitted to practice in the U.S.? *[reported cases and disciplinary committees]*
 - (1) Nature of charges

- (2) Resolution of charges/investigation
- (3) What do we know about the lawyer's record in her/his home country?
- (4) Level of sophistication of client involved in matter that led to disciplinary charges?
- iv) Disciplinary proceedings against foreign law graduates/foreign lawyers who work in the U.S. on the basis of a corporate counsel license? [*reported cases and disciplinary committees*]
 - (1) Nature of charges
 - (2) Resolution of charges/investigation
 - (3) What do we know about the lawyer's record in her/his home country?
 - (4) Level of sophistication of client involved in matter that led to disciplinary charges?
 - (5) Was lawyer still working in corporate counsel position when conduct resulting in charges occurred?
- v) Disciplinary proceedings against foreign law graduates/foreign lawyers who work in the U.S. on the basis of *pro hac vice* admission? [*reported cases and surveys to disciplinary committees*]
 - (1) Nature of charges
 - (2) Resolution of charges/investigation
 - (3) What do we know about the lawyer's record in her/his home country?
 - (4) Level of sophistication of client involved in matter that led to disciplinary charges?
 - (5) Was lawyer working with a U.S.-admitted lawyer on matter, and how was this relationship structured?

B. Law Schools

U.S. law schools are involved in a variety of activities that relate to globalization. First, their student bodies are increasingly international. While steady but small increases in the number of international students enrolling in the three-year J.D. program that is the basic degree for U.S. lawyers generally are described by law school admission officers, the presence of international law

graduates - those who earned their first degree in law from a school situated outside of the U.S. - is significant in the one-year⁹¹ post-graduate LL.M. programs offered by U.S. law schools. Schools house these programs for multiple reasons, including as a way to tap into a new applicant pool (particularly since credentials of LL.M.s are not part of the U.S. News & World Report rankings data). Second, several U.S. law schools have created entire degree programs based in whole or in part outside of the U.S. and aimed at teaching U.S. law to non-U.S. law graduates.⁹² Related to these programs are efforts to educate foreign students about U.S. law in pre-enrollment courses.⁹³ Third, U.S. law schools have launched increasing numbers of programs that take U.S. law students overseas, both through summer study abroad programs for law students, course components for seminars and clinics that begin in the U.S. and include a travel component,⁹⁴ and more elaborate

91. At least one school offers a two-year LL.M.: Georgetown's Extended LL.M. with Certificate in American Legal English for International Students, *see* <http://www.law.georgetown.edu/graduate/twoyearllm.htm> (last visited Apr. 10, 2010) ("The extended LL.M. degree is a program of 4 semesters of full-time study at Georgetown Law, offered for foreign law graduates, leading to a Master of Laws degree (LL.M.) and a Certificate in American Legal English. This degree program recognizes the increasing importance of English in the international legal community. English is now the language of communication for most international law practice."). At the other end of the timing spectrum are LL.M.s for foreign law graduates taught in concentrated periods, such as Washington University in St. Louis's 12-week Executive LL.M. program, <http://law.wustl.edu/llmexecutive/documents/llmexebrochure09.pdf> (last visited Apr. 28, 2010) and Northwestern's Executive LL.M. program in Seoul and Madrid, <http://www.law.northwestern.edu/graduate/llmexec/> (last visited Apr. 28, 2010).

92. Temple's programs based in Japan and China are examples (*see* Graduate and International Programs, http://www.law.temple.edu/servlet/RetrievePage?site=TempleLaw&page=Graduate_LL_M_Transnational (last visited Apr. 15, 2010), as are Northwestern's programs in Spain, Israel and Korea (*see* Executive LL.M. Program, <http://www.law.northwestern.edu/graduate/llmexec/> (last visited Apr. 15, 2010)). NYU and National University of Singapore offer a dual-degree LL.M. program, LL.M. Singapore, <http://www.law.nyu.edu/llmjsd/llmsingapore/index.htm> (last visited Apr. 15, 2010), described as "genuine collaboration between the two institutions, going beyond the exchange model to integrate courses into a whole that is greater than the sum of its parts." LL.M. Singapore, About the Program, <http://www.law.nyu.edu/llmjsd/llmsingapore/abouttheprogram/index.htm>.

93. Two examples are the U.S. Law Project of Stetson University College of Law, described as "an asynchronous online course with a companion book. . . . [that] can assist . . . those who seek knowledge of how the U.S. legal system is structured and functions." (Stetson Brochure (on file with author)), and Georgetown's Foundations of American Law and Legal Education, described as a one-month course that "prepares international law students for their graduate legal education in the U.S." (<http://www.law.georgetown.edu/foundations/index.html>).

94. *See, e.g.,* Georgetown Law's Human Rights Fact-Finding Seminar: *Access to Essential Medicines in the Dominican Republic*, available at http://www.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=1804:

programs based outside of the U.S. that integrate students enrolled in U.S. and foreign law schools, such as the Center for Transnational Legal Studies, Georgetown University Law Center's global initiative.⁹⁵ Finally, faculty and student exchanges also are increasingly common; NYU, for example, built its Global Law School identity around faculty exchanges, among other things.

Each year, Georgetown Human Rights Action and the Human Rights Institute identify a new topic on which to work. In 2009-2010, the selected topic is Access to Essential Medicines in the Dominican Republic: Trade-Related Barriers. As such, the 2009-2010 seminar will analyze how trade agreements impact people's access to medicines, looking in particular at the effects of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). In the fall, students will learn about the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), TRIPS flexibilities, the Doha Declaration, and the history of the access to medicines movement. We will discuss how access to medicines is a human rights issue, analyze DR-CAFTA, discuss U.S. trade policy, and learn about new incentive mechanisms in this field. The class will also cover fact-finding skills and methodology, including project design, question development, and interviewing skills. In January 2010, we will travel as a group to the Dominican Republic to conduct interviews on this subject. Upon our return, students will work on drafting their report and engaging in advocacy surrounding their findings. There will be four 3.5 hour class sessions in the spring semester that will help guide students through these processes; sessions will cover topics such as report writing, administrative advocacy, international advocacy, legislative advocacy, and messaging/media outreach. Over the year, students will be expected to devote an additional 100 hours outside of class time to this project; all students must submit a record of this time.

Id. Northwestern University Law School's international team project (ITP) course takes a slightly different approach.

Each ITP course is designed by students and combines an intensive semester-long course with group research and two weeks of field research in the foreign country. Teams of students, along with a faculty advisor, develop a comprehensive semester-long curriculum and a two week international field experience. Research teams prepare a paper of publishable quality detailing their research and findings. ITP courses provide a unique opportunity for students to explore various issues of comparative law and to develop a comprehensive understanding of the complex issues faced by a globalized legal profession. Many of the countries selected for ITP study are in the midst of great change struggling with the development and implementation of new laws to meet the needs of their changing societies. ITP not only provides students with an understanding of these difficult issues but, because of its comparative nature, also solidifies students understanding of U.S. law.

Northwestern Law, International Team Projects, <http://www.law.northwestern.edu/itp/> (last visited Apr. 16, 2009). See generally Carole Silver, *Adventures in Comparative Legal Studies: Studying Singapore*, 51 J. LEGAL EDUC. 75 (2001).

95. For information on CTLS, see Center for Transnational Legal Studies, <http://ctlts.georgetown.edu/> (last visited Apr. 15, 2010).

Schools also connect with overseas counterparts through exchange and related agreements for collaboration.⁹⁶

Law schools, then, are engaged in activities that usefully can be considered within the traditional categories of inbound and outbound flows. On the inbound side are foreign law graduates coming to the U.S. for LL.M. degrees, foreign nationals entering J.D. programs, foreign faculty teaching in U.S. law schools, and foreign exchange students in U.S. law schools. Outbound activities include U.S. students studying abroad in U.S. and foreign law school programs, U.S. law faculty teaching abroad, and U.S. law schools offering their courses and degrees abroad. In these activities, schools are importing and exporting students and faculty, but also offering degree programs outside of their traditional venues.

The existing regulatory framework for the schools is two-fold. First is the ABA Section of Legal Education and Admissions to the Bar, which accredits law schools on the basis of their J.D. programs.⁹⁷ A second and indirect regulatory influence is imposed by state bar admission rules to the extent they require particular courses or elements of legal education in addition to graduation from an accredited law school for bar qualification purposes or, in at least one jurisdiction, impose a requirement of a particular immigration status.⁹⁸ The structure imposed by the

96. See, e.g., the exchange relationships of Bucerius Law School in Germany, <http://www.law-school.de/71.html?&L=1> (last visited Apr. 28, 2010). More than 25 U.S. law schools are partner schools with Bucerius, meaning that Bucerius students may spend a semester at one of these schools. See <http://www.law-school.de/partneruniversitaeten.html?&L=1>.

97. American Bar Association, Section of Legal Education and Admissions to the Bar, *The Law School Accreditation Process*, at 3, available at http://www.abanet.org/legaled/resources/13665_ABA_accred_web150.pdf. (“Under Title 34, Chapter VI, §602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the first professional degree in law.”); see generally ABA Section of Legal Education and Admissions to the Bar, on accreditation, available at <http://www.abanet.org/legaled/accreditation/acinfo.html>.

98. Louisiana Supreme Court Committee on Bar Admissions, Rule XVII. Admission to the Bar of the State of Louisiana, “Section 3. Requisites for Admission to the Bar. Every applicant for admission to the Bar of this state shall meet all of the following requirements: . . . (B) Be a citizen of the United States or an alien lawfully admitted for permanent residence, or an alien otherwise authorized to work lawfully in the United States. [Amended effective January 1, 2009]” available at http://www.lascba.org/admission_rules.asp. See also *Leclerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), cert. denied, 551 U.S. 1158 (2007); *Lacavera v. Dudas*, 441 F.3d 1380 (Fed. Cir 2006), cert. denied, 549 U.S. 1205 (2007).

For most students in J.D. degree programs, which largely are comprised of U.S. nationals, their programs of study are covered by these two regulatory levels. The overseas summer programs

ABA approval and accreditation process is largely irrelevant for most foreign national students studying in U.S. law schools because they typically are enrolled in graduate level LL.M. programs, which are not accredited by the ABA Section of Legal Education.⁹⁹ Instead, the ABA simply acquiesces in the existence of LL.M. programs on the basis that they do not interfere with the basic J.D. experience. But the absence of ABA oversight has resulted in bar admission authorities being suspicious of LL.M. programs, and they are quick to point to the absence of standardization in LL.M. programs as justification for their mistrust. Suspicion also is fueled among overseas students, who worry that LL.M. programs are more a source of revenue and only secondarily the substantive focus of their U.S. law schools.

The work of law schools in the context of globalization might raise particular concern for two groups of graduates: first, inbound foreign law students in LL.M. programs, because their period of study in the U.S. is abbreviated, and second, U.S. lawyers practicing outside of the U.S., because their education in U.S. law may be largely irrelevant to their work. To learn more about the activities of law schools and students, then, would be useful in considering whether and how reliance on law schools, in combination with the bar examination, allows for weeding out ill-prepared students and lawyers. But in addition, if the connections that come with globalization mean more interaction for lawyers from different countries, then law schools can play a crucial role in educating lawyers about their foreign counterparts, which will help lawyers as they work outside of their home countries. LL.M. students might serve as teachers for J.D.s, and vice versa. Thoughtful integration and interaction will lead to lawyers being more capable of working in a global context.¹⁰⁰ To this end,

popular with J.D. students also are subject to review and approval by the ABA Section of Legal Education. American Bar Association, Section of Legal Education and Admissions to the Bar, *Foreign Study*, available at <http://www.abanet.org/legaled/studyabroad/foreignstudyhome.html> ("Standard 307 of the ABA Standards for the Approval of Law Schools provides that an ABA-approved law school may not grant credit for studies or activities in a foreign country unless those studies or activities are approved in accordance with the Rules of Procedure and Criteria adopted by the Council.").

99. See *The Law School Accreditation Process*, *supra* note 99, at 3.

100. See Carole Silver, *Educating Lawyers for the Global Economy: National Challenges*, 44 KYUNG HEE L. J. 419 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1519387 (suggesting a framework for integrating J.D. and foreign law graduates enrolled in LL.M. programs in order to better prepare them to work together in practice).

regulation might be productive in encouraging this sort of interaction.

Law schools report many details of their activities and about their students to the ABA Section of Legal Education through an annual questionnaire,¹⁰¹ but the focus of the questionnaire is on issues relevant to accreditation.¹⁰² Since the LL.M. is not accredited, despite it being the most popular degree program for foreign law students, the framework for disclosure largely skips over the degree program with the strongest connection to globalization, and relatively little information is generated about foreign students and the activities and resources related to them. The absence of meaningful oversight by the ABA Section of Legal Education of LL.M. programs and students may explain the incomplete reporting of LL.M.-related information by U.S. schools. For example, certain schools have failed to inform the ABA of new LL.M. programs, and as a result the ABA's list of programs open to or aimed at foreign law graduates is incomplete.¹⁰³ This is a shame, since the Section of Legal Education is in place to serve as information-gatherer-in-chief with regard to law schools. But without the teeth of a regulatory consequence, the schools simply may not have the appropriate incentive to generate and share their data.

Putting aside this problem, the current questionnaire does not solicit information that might be especially useful to reconsidering regulation with regard to globalization. For example, the questionnaire does not ask, with regard to foreign national students whether in a J.D., LL.M., or SJD program, about home country, course of study in the U.S., whether graduates sit for a U.S. bar exam, and, if they do, in which jurisdictions and with what results. Nor does the questionnaire generate information about the site and

101. *The Law School Accreditation Process*, *supra* note 97, at 8. For the ABA questionnaire for law schools, see <http://www.abanet.org/legaled/questionnaire/questionnairedocuments.html>.

102. *The Law School Accreditation Process*, *supra* note 97, at 8.

103. See list at American Bar Association, Post J.D. Programs by Category, <http://www.abanet.org/legaled/postjdprograms/postjdc.html#2foreign> (last viewed Apr. 16, 2010). See also list at Silver, *Internationalizing U.S. Legal Education*, *supra* note 35. A quick comparison reveals a number of differences, including, for example, that Northwestern University's LL.M. programs are not included on the ABA's list. The absence of ABA Section of Legal Education oversight of LL.M. programs has limited its ability to gather complete information; the Section remains the most viable source of information.

nature of post-graduation work for foreign graduate students.¹⁰⁴ This data would be useful in thinking about whether a one-size-fits-all bar examination is appropriate for foreign law graduates.¹⁰⁵ A broader duty to report likely also would encourage schools to discover the career paths of their LL.M.s and the role of U.S. legal education in these.¹⁰⁶

Law school admissions officials report anecdotally that the number of foreign nationals in J.D. programs is increasing, too. Some of these J.D. students have studied law at home and others have pursued another undergraduate focus or completed their undergraduate degrees in the U.S. These students internationalize U.S. law classes, too, but we have almost no separate information about them once they become part of the J.D. student population. Are they successfully integrated into their law school classrooms? Do they find the same sorts of opportunities as American J.D. students? Do they pursue work related to their home countries and their international identities? And what proportion returns to their home country after graduation?¹⁰⁷ As schools follow their graduates through alumni surveys, they should be sure to include foreign law graduates LL.M.s as well as foreign national J.D. graduates.¹⁰⁸

104. See generally ABA Questionnaire, Enrollment, available at <http://www.abanet.org/legaled/questionnaire/2009/2009%20AQ%20Part%202%20-%20Enrollment.doc>.

105. See *supra* notes 78-79 and accompanying text; Silver & Freed, *supra* note 77.

106. Bryant Garth, Dean of Southwestern Law School and former director of the American Bar Foundation, has suggested that it might be considered malpractice for law school deans to be uninformed about the careers of their alumni. Foreign law graduate LL.M.s (and foreign national J.D. students) should be included in the alumni pool to which this information obligation arises. Comments at conference on Carnegie Report, "Yes We CArNegie!" held at John Marshall Law School, Chicago, July 2009.

107. See Piset Wattanavitukul, *Hai Gui: The Sea Turtles Come Marching Home*, ASIAN BUS. STRATEGY & ST. INTELLIGENCE EZINE (Apr. 2002), available at <http://www.apmforum.com/columns/china19.htm> (describing the common path for Chinese nationals referred to as "sea turtles," of studying outside of China and staying for work for a lengthy period, and only later returning to China: "'Hai Gui' means the returning 'Sea Turtles' - an abbreviation that sums up returnees from overseas. The pronunciation also suggests the Chinese phrase for sea turtles that were born on the shore, grew up at sea, but eventually returned to the shore again. The name was first used by Ren Hong, a young man returning with a degree from Yale seven years after leaving China aboard a tea freighter from Guangzhou for the U.S."). Korea also has an appetite for its nationals who are educated overseas; Carole Silver & Jae-Hyup Lee, *Globalization and South Korea's Market for Legal Services: Regulatory Blockages and Collateral Circulation Reveal Global Strategies* (working paper on file with author).

108. The stay-rate for graduate students in the sciences has been the subject of considerable study. See Heike C. Alberts & Helen D. Hazen, *There Are Always Two Voices... : International*

Legal education plays an important role in facilitating lawyer mobility. This puts law schools in a central role in our investigation of the context of globalization. But in addition, the law schools themselves are expanding their footprints and are active participants in the market to produce global lawyers. The issues identified below aim to illuminate the role of legal education in shaping global careers and opportunities, as well as the interplay of education and regulation in the context of globalization.

2) Law schools

a) Degree programs and courses

i) Programs for inbound students [*ABA questionnaire (limited) and law schools*]

(1) Special J.D. programs for foreign lawyers or law graduates, or special admission policies for foreign law graduates applying to J.D. programs [*law schools*]

(a) Description of program's characteristics and distinctions, if any, from typical three-year J.D. program [*law schools*]

(b) Number of students [*law schools and ABA questionnaire*]

(c) Diversity information [*law schools*]

(d) Special admission qualifications/conditions [*law schools*]

(2) LL.M. programs open to (or exclusively for) foreign law graduates

(a) Number of applicants [*law schools*]

(i) Country of origin

(b) Number of students [*law schools*]

(i) Country of origin

(c) Diversity information [*law schools*]

(d) Curriculum description [*law schools*]

(e) Required courses [*law schools*]

Students' Intentions to Stay in the United States or Return to Their Home Countries, 43 INT'L MIGRATION 131 (2005), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/118685810/PDFSTART>. In terms of where graduates work if they do not stay in the U.S., my study of LL.M.s indicates that the U.S. LL.M. is a signal that may support mobility generally, including outside of the U.S. or home country. See Silver, *Agents of Globalization in Law*, *supra* note 26.

- (f) May LL.M. students take any classes with J.D.s? Describe proportion of courses in this category for LL.M. students [*law schools*]
- (g) May LL.M.s participate in extracurricular scholarly activities (law review, moot court)? Describe proportion of LL.M. students who participate in these activities [*law schools*]
- (h) May LL.M.s enroll in clinical courses (which ones, if limited)? Number and proportion of students who take such courses [*law schools*]
- (i) What do LL.M. students in general programs study? (U.S. law? International law? Business? Human rights? Other?) [*law schools*]
- (j) Interest in and availability of non-law courses (business, other) [*law schools*]
- (k) Where taught (in U.S. or overseas)? [*law schools*]
 - (i) Must be sensitive on this issue because of possible negative consequences to reporting
- ii) Courses and programs for outbound
 - (1) Exchange programs [*ABA, law schools*]
 - (a) Schools offering exchange opportunities for students, partner schools and their jurisdiction [*ABA, law schools*]
 - (b) Number of students per semester who go out/come into the U.S. [*ABA, law schools*]
 - (c) Diversity information [*law schools*]
 - (d) Credit earned [*ABA, law schools*]
 - (e) Substantive focus and connection, if any, with host country [*law schools*]
 - (f) Language of study in host country (are courses in English available only for foreign students?) [*law schools*]
 - (g) Connection to this host country/its lawyers [*law schools and alumni surveys*]
 - (2) Summer programs [*ABA questionnaire and/or review application for approval of summer programs*]
 - (a) Schools offering [*law schools*]
 - (b) Number of students [*law schools*]
 - (c) Diversity information [*law schools*]

- (d) Credit earned [*law schools*]
 - (e) Substantive focus and connection, if any, with host country [*law schools*]
 - (f) Do students connect with host country law school and/or law students? [*law schools*]
 - (g) Do students connect with host country lawyers? [*law schools*]
 - (h) Connection to this host country/its lawyers [*law schools and alumni surveys*]
- (3) Courses (including clinical course) that require travel-study component but are based in U.S. (and some portion of which is taught in the U.S.)
 - (a) Schools offering [*law schools*]
 - (b) Number of students per course [*law schools*]
 - (c) Diversity information [*law schools*]
 - (d) Description of course and travel-study component [*law schools*]
 - (e) Do students connect with host country law school and/or law students? [*law schools*]
 - (f) Do students connect with lawyers in host country? [*law schools*]
 - (g) Costs of travel - who pays? [*law schools*]
 - (h) Connection to this host country/its lawyers [*law schools and alumni surveys*]
- (4) Semester programs
 - (a) Law schools offering the programs [*law schools*]
 - (i) Number of U.S. law school students who participate (J.D.s, LL.M.s?) [*law schools*]
 - (ii) Diversity information on students [*law schools*]
 - (iii) Focus of study in U.S. and international connection? [*law schools*]
 - (iv) Work experience pre- or post- program outside U.S.? In host country? [*law schools*]
 - (v) Connection to this host country/its lawyers [*law schools and alumni surveys*]
- b) Information on law students and law graduates (some of these questions overlap with program questions, above)
 - i) Inbound students

- (1) LL.M. students/graduates, SJD students/graduates
(focus here is on students who are foreign law school graduates)
 - (a) Number of students, number of degrees granted
[ABA, law schools]
 - (b) Diversity information *[ABA, law schools]*
 - (c) Citizenship *[ABA, law schools]*
 - (d) Home country where first degree in law was earned? *[law schools]*
 - (e) Qualified to practice in home country? *[law schools]*
 - (f) Worked in home country pre-LL.M.? If yes, work setting *[law schools]*
 - (g) Bar exam in the U.S.? *[law schools, states]*
 - (i) Number of students who sit for a U.S. bar exam at the end of the LL.M. year *[law schools, states]*
 - (ii) In which state do they consider taking the exam? *[law schools]*
 - (iii) Where do they sit for the exam (state)? *[law schools, states]*
 - (iv) Number of students who pass exam *[law schools, states]*
 1. State where they pass *[states]*
 2. Home country of these students (where completed primary legal education) *[states]*
 3. Diversity information *[states]*
 4. Number of these who stay in U.S.? *[law schools and alumni surveys, states]*
 5. If yes, where located
 - a. Work setting in U.S. *[law schools and alumni surveys, states]*
 - b. Duration of their stay in the U.S. *[law schools and alumni surveys, states]*
 - c. Visa/immigration issues? *[law schools and alumni surveys]*
 - (v) Number of students who fail bar exam *[states, NCBE]* or do not sit for exam *[law schools]*

1. Are they working in U.S.?
 - a. Work setting and job as it relates to law, if at all [*law schools and alumni surveys*]
 - b. Relationship of work setting to community of home country population, if at all [*law schools and alumni surveys*]
 2. Relationship through work with U.S. licensed lawyers, if any [*law schools and alumni surveys*]
- (h) If working outside U.S.
- (i) Work in country where licensed to practice (where completed primary legal education?)
 - (ii) Work for U.S.-related firm or entity?
 - (iii) Advise on U.S. law?
 - (iv) Work for U.S. clients?
 - (v) Work in English?
 - (vi) Intent to return to U.S.?
- (2) J.D.s (foreign nationals)
- (a) Home country [*LSAC, law schools*]
 - (b) Studied law at home? [*LSAC, law schools*]
 - (c) Licensed to practice at home? [*law schools*]
 - (d) Work as lawyer or in law-related job at home? [*law schools*]
 - (e) Diversity information [*law schools*]
 - (f) English speaking home country? [*law schools from applications*]
 - (g) Bar passage rate for foreign national J.D.s? [*law schools, states*]
 - (h) Do graduates stay in the U.S. to work, go back to their home countries, go to a third country? [*law schools and alumni surveys*]
 - (i) Does work relate to home country? [*law schools and alumni surveys*]
- (3) Exchange students (inbound)
- (a) Number of students [*law schools*]
 - (b) Home country of students [*law schools*]
 - (c) Diversity information [*law schools*]
 - (d) Intent to return to U.S. for LL.M. or additional study/work? [*law schools and alumni surveys*]

- ii) Outbound students/graduates
 - (1) Summer programs run by law schools outside of the U.S.
 - (a) Number of students *[ABA, law schools]*
 - (b) Location? *[ABA, law schools]*
 - (c) Diversity information *[ABA, law schools]*
 - (i) Proportion of students from U.S. organizing law school, from foreign schools, from other U.S. law schools? *[law schools, ABA]*
 - (d) Connection to host country lawyers and law schools? *[law schools]*
 - (e) Relationship to this country in work? *[law schools and alumni surveys]*
 - (2) Exchange students
 - (a) Number of students *[ABA, law schools]*
 - (b) Where do they go *[ABA, law schools]*
 - (c) Diversity information *[ABA, law schools]*
 - (d) Relationship to this country in work? *[law schools and alumni surveys]*
 - (3) Semester programs
 - (a) Number of students *[ABA, law schools]*
 - (b) Home country of other students in program (if not all U.S.) *[ABA, law schools]*
 - (c) Diversity information *[ABA, law schools]*
 - (i) Proportion of students from U.S. organizing law school, from foreign law schools, from other U.S. law schools? *[law schools, ABA]*
 - (d) Location of program *[ABA, law schools]*
 - (e) Connection to host country students/lawyers/law school? *[law schools]*
 - (f) Relationship to this country or students in program in work? *[law schools and alumni surveys]*
 - (4) Courses with travel-study component
 - (a) Law schools *[law schools]*
 - (b) Number of students *[law schools]*
 - (c) Location of travel/focus of course *[law schools]*
 - (d) Diversity information *[law schools]*
 - (e) Connection to host country students/lawyers/law school/organizations? *[law schools]*

- (f) Relationship to this country or the topic of the course in work? [*law schools and alumni surveys*]

C. Individual Lawyers

Lawyers' work reflects their clients. For those representing businesses, as business increasingly competes in a multinational or regional marketplace, the problems that arise and require lawyers' services also reflect that multinational or regional context. Whether the client is partnering with an overseas entity, purchasing or selling goods in new markets outside of the U.S., hiring or firing employees who work overseas, or simply competing for a share of an overseas market, legal work related to this activity takes the U.S. lawyer beyond his or her typical domestic framework, and requires sensitivity to foreign legal systems as well as knowledge of the role of lawyers in those regimes.¹⁰⁹

But lawyers representing individual clients also find their work increasingly touching a global context. As individuals travel more, they also encounter challenges that cross borders. They may require help with estate planning involving foreign assets, advice on immigration and family law matters involving children or a spouse resident in or connected by citizenship to a foreign jurisdiction,¹¹⁰ or counsel in foreign criminal law issues. Just as in the business client context, these problems require U.S. lawyers to

109. According to the important study of lawyers' careers, AFTER THE JD:

A large minority of attorneys were doing at least some work that involved clients from outside the United States or cross-border matters. Forty-four percent (44%) of attorneys reported such work. The lawyers most likely to report doing international legal work were those in the largest law firms, where two thirds reported doing it, and inside counsel, where almost as many (65%) reported work that involved non-U.S. clients or cross-border matters. Among legal services and public defense lawyers, work that involved non-U.S. clients or non-U.S. law was also common, with 61% of attorneys reporting they had done some such work during the past year. The international work in large corporate firms mainly serves foreign corporate clients, while the work of legal services and public defense lawyers likely involves individual clients who are facing immigration issues.

DINOVITZER ET AL., *supra* note 17.

110. See, e.g., *Israelsson v. Hicks*, 2006 WL 3826698 (Cal. Ct. App. 2006) (U.S. and Swedish parents in custody battle).

identify and work with foreign lawyers and develop a sensitivity to the general framework of a foreign legal system.¹¹¹

In addition to these substantive matters is the issue of mobility for lawyers themselves. Individual lawyers related to the global legal marketplace usefully might be categorized along the traditional inbound and outbound groups. These can be further divided between temporary and long-term or permanent presence, and by citizenship and license to practice. A very preliminary organization of the relevant individual actors might be conceived as follows:

111. On the education and preparation for practice in a global context, *see generally* Silver, *Educating Lawyers*, *supra* note 100.

Figure 1: Individual Lawyers with Global Nexus

	Citizenship	License to practice	Temporary?	Long-term/permanent
Inbound	Foreign citizens working as lawyers in the U.S. (may be U.S.-licensed or foreign-licensed, or both)	Foreign-licensed lawyers working in the U.S.	Foreign-licensed lawyers working primarily overseas, present in the U.S. to represent a client in a particular matter (or to help their law firm/employer on a temporary basis)	Foreign-licensed lawyers working in the U.S. on a permanent basis or long-term assignment
Outbound	U.S. citizens working as lawyers overseas (may be U.S.-licensed or foreign-licensed, or both)	U.S.-licensed lawyers working overseas	U.S.-licensed lawyers working primarily in the U.S., present overseas to represent a client in a particular matter (or to help their law firm/employer on a temporary basis)	U.S.-licensed lawyers working overseas on a permanent basis or long-term assignment

In the temporary outbound category, for example, are U.S.-licensed lawyers who travel overseas for limited and brief periods to represent clients in particular matters. Other U.S.-licensed lawyers may choose to work on a more-or-less permanent basis

overseas (the outbound long-term category), and perhaps even gain admission to practice in the host country. They may work for a U.S.-based law firm or a foreign law firm, or other organizations also based in the U.S., the host jurisdiction or elsewhere. Between these extremes are those lawyers who spend substantial periods outside the U.S. over the course of a year, for example, which may rise to the level of a routine presence for a limited duration. This sort of regular travel pattern may also raise the interest of bar, tax and/or immigration authorities in the host country.

Virtually no information about U.S. lawyers working overseas is reported systematically through the lawyer regulatory regimes currently in place in the U.S. Visa and immigration authorities may capture some information, as may tax returns, but none is likely to be shared with state bar regulators as a matter of routine. For lawyers working with law firms, the firms are a potential source of information on their lawyers' presence, and this may be reflected in information reported on their websites or to other sources (American Lawyer, National Law Journal, Martindale-Hubbell or state listings of lawyers and law firms) if the assignments are long-term. Longer overseas work arrangements may necessitate registration with bar authorities, but regulators may be interested in capturing information even about brief periods of work in their jurisdictions. One can imagine a coordinated attorney registration system that would capture residence information and funnel it into a central repository.

In much the same way that U.S.-licensed lawyers may become involved in activities connected to globalization, discussed above, foreign-licensed lawyers may increasingly work in the U.S. and/or connect with U.S.-licensed lawyers in their representation of clients that work with U.S. nationals and participate in U.S. markets. The regulatory framework for foreign-licensed lawyers physically present in the U.S., described earlier in Subsection A, captures only those who decide to register because of a long-term presence (through FLC registration, for example) or who must represent a client in court (through *pro hac vice* records). But even lawyers physically present in the U.S. for long periods may escape record, if, for example, they work in support positions or as contract lawyers, or if they work in jurisdictions where FLC registration is either not available or interpreted as optional. We do not know how a decision is made

to apply for an FLC license or for bar admission or what factors are influential.

For inbound foreign lawyers, there is only anecdotal evidence of the extent of temporary practice in the U.S., much less whether problems are associated with it. The ABA has pressed states to adopt a Model Rule authorizing temporary practice.¹¹² But even in jurisdictions with this temporary practice rule in place, this activity is likely to go unnoticed. Without information on the scope of this activity or problems related to it, it may be difficult to convince states that rulemaking is necessary.

The role of technology in the work of lawyers is increasingly important.¹¹³ We may find that technology enables lawyers to avoid licensing challenges by delivering their advice through email and telephone with perhaps intermittent visits to the client. If the combination of regulation and advances in technology result in lawyers avoiding being physically present where their clients are working, we must question whether this serves the interests of clients and the public. A better understanding of the role of technology and its relationship, if any, to regulatory hurdles will further our awareness of the important interplay between these two influences in legal practice.

For individual lawyers, globalization brings a diverse set of challenges. These include developing solid and trusting client relationships despite distance, pressures to keep costs down, and the availability of technology that may result in limited opportunities for face-to-face encounters. The ambiguity surrounding advising in a context in which lawyers may not be admitted in each jurisdiction “touching” a transaction may influence the shape of client and lawyer-to-lawyer relationships. Finally, the way inexperienced lawyers are trained and exposed (or not) to clients also may shift under these pressures. These issues are among those that inform the questions below.

3) Individual lawyers

- a) Outbound (U.S.-licensed lawyers working overseas)
 - i) Long-term/permanently working overseas

112. American Bar Association, *Commission on Multijurisdictional Practice Report 2011, The Model Rule for Temporary Practice by Foreign Lawyers* (2002), available at <http://www.abanet.org/cpr/mjp/2011j.pdf>.

113. See generally RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2009).

- (1) Jurisdiction where working? *[state attorney registration forms]*
 - (2) For whom are they working?
 - (a) U.S. law firms? *[state attorney registration forms]*
 - (b) U.S.-based corporations? *[state attorney registration forms]*
 - (c) Foreign law firms or corporations? *[state attorney registration forms, law firms]*
 - (d) Other organizations? *[state attorney registration forms]*
 - (3) Clients
 - (a) Primarily U.S.-based organizations?
 - (b) Organizations based in the host country?
 - (c) What proportion of clients has corporate counsel? Based in the host country?
 - (4) What are they doing?
 - (a) Advising on U.S. law?
 - (b) Transactions?
 - (c) Litigation?
 - (d) Other?
 - (5) Are they licensed also in the host country? (information on licensing barriers)
 - (a) Host country registration requirements (if not licensed)?
 - (6) How long do they stay overseas? *[state attorney registration forms]*
- ii) Temporary outbound practice
- (1) Jurisdiction where working?
 - (2) For whom are they working?
 - (a) U.S. law firms?
 - (b) U.S.-based corporations?
 - (c) Foreign law firms or corporations?
 - (d) Other organizations?
 - (3) Clients
 - (a) U.S.-based organizations?
 - (b) Organizations based in the host country?
 - (c) Does the client have corporate counsel? Based in the host country?
 - (4) What are they doing?
 - (a) Advising on U.S. law?

- (b) Transactions?
 - (c) Litigation?
 - (d) Other?
- (5) Are they subject to any regulation (licensing or registration) in any of the host countries?
- (6) Duration and regularity of their work overseas?
- b) Inbound (foreign-licensed lawyers working in the U.S.)
 - i) Long-term/permanently working in the U.S.
 - (1) U.S. jurisdiction where working? *[state registration forms]*
 - (2) For whom are they working *[for FLCs, state attorney registration forms may include this information]*
 - (a) U.S. law firms?
 - (b) U.S.-based corporations?
 - (c) Foreign law firms or corporations?
 - (d) Other organizations?
 - (3) Clients
 - (a) U.S.-based organizations?
 - (b) Organizations based in the home country?
 - (c) Does the client have corporate counsel? Based in the U.S.?
 - (4) What are they doing?
 - (a) Advising on U.S. law?
 - (b) Advising on law of their home countries?
 - (c) Transactions?
 - (d) Litigation?
 - (e) Other?
 - (5) Are they licensed in the U.S.?
 - (a) Full admission? *[states]*
 - (b) FLC? *[states]*
 - (c) Corporate counsel *[states]*
 - (d) Other? *[states]*
 - (6) How long do they stay in the U.S.? *[states]*
 - (7) Do they regularly work with U.S.-licensed lawyers? U.S.-based law firms?
 - ii) Temporary practice in the U.S.
 - (1) Number of lawyers involved?
 - (2) U.S. jurisdictions where working?
 - (3) For whom are they working?
 - (a) U.S. law firms? *[law firms]*

- (b) U.S.-based corporations? [*corporate employers*]
- (c) Foreign law firms or corporations? [*employer organizations*]
- (d) Other organizations? [*employer organizations*]
- (4) Clients
 - (a) U.S.-based organizations?
 - (b) Organizations based in the home country?
 - (c) Does the client have corporate counsel? Based in the U.S.?
- (5) What are they doing?
 - (a) Advising on U.S. law?
 - (b) Advising on law of their home country?
 - (c) Transactions?
 - (d) Litigation?
 - (e) Other?
- (6) Are they subject to any regulation in the U.S. jurisdiction where they are working or to any federal regulation with regard to their practice?
- (7) Duration and regularity of their work in the U.S.?
- (8) Are they admitted in the U.S.? [*states*]
- (9) Are they licensed as FLCs in the U.S.? [*states*]
- (10) Do they hold another limited license or are they admitted *pro hac vice*?
- (11) Are they working in a U.S. jurisdiction that does not specifically authorize limited license or temporary practice?
- (12) Do they regularly work with U.S.-licensed lawyers? U.S.-based law firms?
- (13) Any challenges posed by immigration?

D. Law Firms

Law firms may participate in a global market for legal services in several ways. To the extent their lawyers work on matters involving foreign activities or actors, as described above in Subsection C, the firms also are involved. But in addition, many U.S. firms now have permanent offices outside of the U.S., and this means lawyers located abroad. Twelve of the largest law firms in terms of lawyer headcount in 2009 supported more than

half of their lawyers working outside of the firm's home country (up from ten firms in 2008).¹¹⁴ For these and other global firms, however, overseas office lawyers typically have earned their primary legal education in the same jurisdiction where they practice (and this also is where they are licensed to practice), rather than in the firm's home country.¹¹⁵ That is, for U.S.-based firms, the firms themselves have global footprints despite the fact that they do not rely on U.S.-licensed lawyers to staff their overseas offices. In this way, the firms may compete with host country law firms for talent, and possibly even for clients.¹¹⁶ These firms are truly multinational in their physical scope, their employee and partnership members, and with regard to their client rosters.

Smaller and medium-sized firms also may cross borders with permanent offices overseas but less is known about their activities, in part because they typically are not the focus of the legal press. In addition, firms of all sizes may participate in referral networks of independent local firms.¹¹⁷ Certain of the networks cooperate

114. Only three of the twelve firms are U.S.-based. See *The Global 100: Most Lawyers 2009*, AM. LAW. (2009), available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202433981635>; *The Global 100: Most Lawyers*, AM. LAW. 171 (Oct. 2008).

115. Carole Silver, Nicole De Bruin Phelan & Mikaela Rabinowitz, *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, 22 GEO. J. LEGAL ETHICS 1431, 1449 (2009).

116. See *id.* at 1466 (reporting that data on practice groups of lawyers working overseas for the U.S.-based law firms studied:

[R]eveals the substantial investment firms have made in those practice areas that are outside of the core corporate transactions areas. . . . [T]wo-thirds of the firms have invested in labor and employee-related issues, employee benefits and tax, and matters relating to local areas of practice identified by the firms in relation to a particular locale. This may reflect that firms add local lawyers with local practices when their cost to the firm is relatively marginal. The local lawyers come on after firms already have built their offices around high-end work (M&A, capital markets, banking and corporate), which explains the overwhelming investment in these high-fees practices in terms of number of lawyers.).

Id.

117. Lex Mundi is one of the older networks; see Lex Mundi, <http://www.lexmundi.com/lexmundi/Default.asp> (last visited Apr. 16, 2010) ("Whether your legal matter is in your backyard or half a world away, Lex Mundi is the mark of excellence for legal services globally. Lex Mundi, the world's leading association of independent law firms, provides you with access to more than 21,000 lawyers practicing in 160 elite law firms. These premier independent law firms provide legal representation and local market knowledge practically anywhere in the world."). A quick search on the Internet identified the following international networks of firms: ALFA International, <http://www.alfainternational.com/about/about.aspx> (last visited Apr. 16, 2010).

on training, too, and in this way offer the potential for more integration among member firms.¹¹⁸ Very little is known about the way clients perceive networks or even how member firms assess their effectiveness.

As with lawyers, there is an inbound component to law firm activity, too. But while foreign firms have supported offices in the

ALFA International is a global network of independent law firms. Founded in 1980, ALFA International is the oldest legal network and remains one of the largest and strongest. The ALFA organization is comprised of 132 member firms with 85 members in the United States and 47 members in Canada, Latin America, Europe, and the Pacific Rim. The ALFA reach is a broad one. In the United States, ALFA members maintain offices in 95 of the 100 largest metropolitan areas. ALFA's member firms endeavor to provide their regional, national, and international clients with outstanding legal services at reasonable costs. Member firms supplement their own expertise and resources with those of other members. ALFA clients have the benefit of a geographically comprehensive network of exceptional law firms, thereby avoiding the pitfalls of retaining counsel in unfamiliar jurisdictions. Clients also enjoy access to an unparalleled collection of seminars, reference materials, and other client-focused programs.

Id.; LEGUS, <http://www.leguslaw.com/> (last visited Apr. 10, 2010).

We are a network of small to mid-size law firms that reflects a vibrant worldwide range of work and client referrals between member firms. We build close relationships between our members through referrals, the legal and educational programming held at our meetings, and an exchange of information focusing on member law firm business operations. Together these create true and lasting friendships within an environment of trust and confidence, which enhances our lawyer members as people and thus improves the quality of their legal performance and their ability to service their clients' business needs.

Id.; International Network of Boutique Law Firms, <http://www.inblf.com/> (last visited Apr. 10, 2010) ("Headquartered in New York City, the International Network of Boutique Law Firms is a group of national and international law firms that provide a high level of service and experience to clients. Every member firm is thoroughly vetted to ensure the level of service and legal knowledge you will receive."); International Lawyer's Network, http://www.iln.com/about_iln.htm (last visited Apr. 10, 2010).

As a result of the increasingly global nature of our economy, many companies find that cross-border transactions and dispute resolution, along with international taxation and employment issues, are occupying an increasing amount of time and attention. To keep pace with this changing environment, they need quick and reliable advice on the laws, rules and regulations which affect their business dealings around the world. The International Lawyers Network provides a reliable framework for business people to find the help they need. The ILN is an association of 91 high-quality, full-service law firms with over 5,000 lawyers world-wide. The Network provides clients with easily accessible legal services in 66 countries on six continents.

Id. See generally, Ed Wesemann & Nick Jarrett-Kerr, *Taking Advantage of a Recession: Seven Strategies for Opportunistic Law Firms*, 3 KERMA PARTNERS Q. (2008), available at <http://www.kermapartners.com/Default.aspx?id=293>.

118. *Id.*

U.S. for many years, little aggregate information is available about these offices, the lawyers who work in them or the work the firms accomplish through them. Certain of these offices are staffed with foreign-licensed lawyers from the firm's home country,¹¹⁹ but others function as U.S. firms here by staffing principally with U.S.-licensed and educated lawyers focused on providing U.S.-law related services.¹²⁰ Some are more akin to representative offices that aim to solicit business performed elsewhere by others in the firm, while avoiding actually advising on law here. Foreign firms also may choose to avoid the branch office mechanism and nevertheless benefit from some physical presence by sending individual lawyers to the U.S. to work on secondment with U.S.-based firms, often "best friends" of the foreign firm, or with clients in their U.S. operations. Again, this activity simply may not show up on the radar screen of regulators, and may be gleaned only from biographies of individuals who have participated in these exchanges.

Law firms with multiple offices in different jurisdictions might arrange their work to capitalize on jurisdictional differences. I have elsewhere argued that the openness of New York's rules on admission of foreign law graduates, for example, encourages firms to situate their international practices in New York, where foreign law graduates may participate more easily in the work.¹²¹ To the extent other U.S. jurisdictions realize that their regulations may be pushing law firms to relocate important practices elsewhere, regulators will be able to balance interests at stake in the available range of regulatory options. By learning more about how firms adapt to regulation, particularly with existing technology that

119. See, e.g., the New York office of Cuatrecasas, staffed by one lawyer who was educated solely outside of the U.S., http://www.cuatrecasas.com/Web/en-ENG/abogado_AGA.asp (last visited Apr. 1, 2010).

120. One example is Lovell's Chicago office, recently closed in the context of the Lovells-Hogan merger. See Lovell, <http://careers.lovells.com/local/usa/Pages/default.aspx> (last visited Apr. 2, 2010) (describing the work of the office as "Our Chicago practice focuses on litigation and arbitration of commercial disputes venued both in the U.S. and elsewhere around the world. Our largest team specializes in handling insurance and reinsurance disputes for domestic and international companies. Our lawyers also are involved in complex and varied litigation relating to the financial services industry. More recently, we also have added an intellectual property practice, with a particular emphasis on trade secret litigation."). On the decision to close the office, see Martha Neil, *Lovells to Shutter 20-Lawyer Chicago Office*, ABA J. (Mar. 30, 2010), available at http://www.abajournal.com/news/article/lovells_to_shutter_20-lawyer_chicago_office.

121. See Carole Silver, *Globalization and the U.S. Market in Legal Services – Shifting Identities*, 31 J. LAW & POL'Y INT'L BUS. 1093, 1095 (2000).

allows virtual presence, regulators will have a better understanding of the potential consequences of their policies.

Technology also allows law firms to experiment with new ways to organize their work. This is occurring with regard to the use of contract lawyers, e-discovery providers, and legal process outsourcing firms, among others.¹²² Many of these uses are not clearly authorized and not clearly prohibited,¹²³ and this causes law firms and their lawyers to be wary of revealing their activities. Of course, there may also be competition or reputational concerns about disclosure.

While the legal press and law firm websites offer individual and anecdotal accounts about law firm overseas activities, there is little detail available about the relationship of U.S.-based firms to host country law firms and clients.¹²⁴ Perhaps the most important missing piece of information about law firms' overseas activity relates to revenue: do the firms make money from overseas offices?¹²⁵ The absence of standardized accounting practices

122. See *supra* note 47 and accompanying text.

123. Ethics opinions issued by bar associations and disciplinary authorities have authorized outsourcing, with certain limitations. See generally Daly & Silver, *supra* note 47.

124. But see generally Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771 (2007), for an excellent example of analysis of this relationship.

125. Possible sources of information about revenue, at least on an aggregate basis, include the USITC. "The United States International Trade Commission (Commission/ITC) is an independent, quasijudicial Federal agency with broad investigative responsibilities on matters of trade. The agency investigates the effects of dumped and subsidized imports on domestic industries and conducts global safeguard investigations. The Commission also adjudicates cases involving alleged infringement by imports of intellectual property rights." USITC, PERFORMANCE AND ACCOUNTABILITY REPORT 9 (2008), available at http://www.usitc.gov/press_room/documents/FinalPAR2008.pdf. It informs the USTR. In part, USITC relies the Datamonitor Group for statistics, which describes itself as "an independent, premium business information and market analysis company that assists clients with operational and strategic decision-making." See Datamonitor, <http://about.datamonitor.com> (last visited Apr. 14, 2010). A second source for USITC is IBISWorld, which describes itself as the "world's largest independent publisher of U.S. industry research, [with a] team of expert analysts cover[ing] 700 different market segments." See IBISWorld, <http://www.ibisworld.com/default.aspx> (last visited Apr. 14, 2010). USITC also relies on Hildebrandt and Citigroup data on law firms, both as to international expansion and scope of foreign operations. See, e.g., USITC, RECENT TRENDS REPORT, *supra* note 32, at 6-5. Finally, the Department of Commerce, through the Bureau of Economic Analysis, gathers and publishes data on cross border trade in services, including legal services; see Bureau of Economic Analysis, <http://www.bea.gov/international/intlserv.htm> (last visited Apr. 16, 2010). On the need for more systematic and comprehensive data, see Laurel Terry, *Issues Related to the Legal Profession*, Testimony Submitted to the United Nations Statistics Division (Oct. 18, 2004), available at http://www.personal.psu.edu/faculty/l/s/1st3/presentations%20for%20webpage/un_classification_terry.pdf. An important point made by Terry and emphasized in discussions with trade groups and

allocating work to particular locations, as well as the general reluctance to share financial details, challenges our understanding.

Substantially less is known about the global activities of mid-sized and small firms and sole practitioners, and yet these still comprise the work setting for most lawyers in the U.S.¹²⁶ It is clear that this is not about a lack of global connectedness but rather about these practices being outside the typical focus of the legal press. In order to consider the regulatory approach best suited to a global legal market, we must investigate whether small and medium-sized firms and sole practitioners experience similar challenges and rewards from globalization to those of the largest firms. We can do this by constructing the story of these smaller practice organizations and their overseas work, physical presence overseas, revenue generated from this, which countries they focus on for physical presence and temporary practice, among other issues.

The inbound side of the equation is less well-reported on than is the outbound; we have little information on the activities of foreign-based law firms from their work in the U.S. or related to the U.S., on behalf of U.S. or foreign clients. There is no definite listing even of which foreign law firms have offices in any U.S. jurisdiction, for example.¹²⁷ Among the information we might generate is which firms have offices in the U.S.; where the offices are located; how large they are in terms of number of lawyers; the credentials (education and license) of lawyers working there including whether the offices are staffed with U.S. lawyers or home country lawyers, both, FLCs or a third country lawyer; how long the office has been open in the U.S.; the kind of clients represented in terms of their nationality and the matter advised upon in terms of its relationship to the home country of the firm;

others is that the data that is available is uncoordinated, using different definitions. As a result, it is not clear that we know what we know.

126. See ABA Lawyer Demographics, http://www.abanet.org/marketresearch/Lawyer_Demographics.pdf (last visited Apr. 13, 2010); AMERICAN BAR FOUNDATION, LAWYER STATISTICAL REPORT: THE LEGAL PROFESSION IN 2000, 6-8 (2004), available at http://new.abanet.org/marketresearch/PublicDocuments/lawyer_statistical_report_2000.pdf. See also Laurel Terry, *The Legal World is Flat: Globalization and its Effect on Layers Practicing in Non-global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, fn.112 (describing an 11-person law firm specializing in "helping Scandinavian clients in the United States.").

127. The State Bar of NY formerly indicated foreign firms with offices in NY through its international committee. See Silver, *The Case of the Foreign Lawyer*, *supra* note 78, at 1062.

and the revenue received from the office's activities (again, accounting issues are challenging here). By separating regulation from information-gathering, we are more likely to obtain accuracy, because each of these categories may also carry the fear of violating an existing rule or enabling competitors.

Law firms are not specifically regulated in most U.S. jurisdictions,¹²⁸ apart from general business organization regulation that also may include the firms.¹²⁹ Instead, regulation is aimed at individual lawyers.¹³⁰ One consequence of this is that law firms need not regularly report their activities to a lawyer regulatory source. Nonetheless, most law firms want their work to be known for purposes of marketing themselves and their lawyers,

128. New York and New Jersey regulate law firms in addition to lawyers, through their disciplinary authorities. Compare MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009) (Responsibilities Of Partners, Managers, and Supervisory Lawyers), and N.J. RULES OF PROF'L CONDUCT R. 5.1. (2009) (Responsibilities of Partners, Supervisory Lawyers, and Law Firms) ("(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct."); N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2009) ("RULE 5.1 : Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers (a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules...."); MODEL RULES OF PROF'L CONDUCT R. 8.4 (2009) (Misconduct); and N.Y. RULES OF PROF'L CONDUCT R. 8.4 (2009) (Misconduct) ("A lawyer or law firm shall not: . . .").

129. Regulators of an entity in which lawyers practice also might be revealing. Law firms, traditionally organized as partnerships, are today often formed as limited liability partnerships. See, for example, notes of the website of Sidley Austin indicating that the firm is comprised of multiple LLCs, at least two of which are organized in Delaware ("Lawyers in the London office provide legal services through Sidley Austin LLP, a Delaware limited liability partnership. This is separate from the Delaware limited liability partnership of the same name which operates at the firm's offices other than Chicago, London, Hong Kong and Sydney." Sidley, *Our Firm*, London, <http://www.sidley.com/london/> (last visited Apr. 15, 2010)). Other firms organized as LLPs include Sullivan & Cromwell, <http://www.sullcrom.com/about/overview/> (last visited Apr. 12, 2010), Jenner & Block ("Jenner & Block LLP is an Illinois limited liability partnership including professional corporations and references in this website to "Jenner & Block" refer to that Illinois limited liability partnership, or as appropriate in the historical context, to a predecessor entity." Jenner & Block, *Legal Notices*, <http://www.jenner.com/legal.asp> (last visited Apr. 16, 2010)), and Dorsey & Whitney ("Dorsey & Whitney (Europe) LLP is a New York limited liability partnership regulated in England and Wales by the Solicitors Regulation Authority and affiliated with Dorsey & Whitney LLP." Dorsey, *Locations*, London, <http://www.dorsey.com/london/> (last visited Apr. 16, 2010)). The organizations themselves are governed by state business and professional organization law. In addition, certain federal agencies, such as the Securities and Exchange Commission, address conditions and responsibilities of lawyers practicing before them, including foreign lawyers. See Sarbanes-Oxley Act, Pub. L. 107-204, §307, 116 Stat. 745 (2002). At least two of the largest, most global firms are organized as Swiss vereins. See Megan E. Vetula, *From the Big Four to Big Law: The Swiss Verein and the Global Law Firm*, 22 GEO. J. LEGAL ETHICS 1177, 1179 (2009). See generally John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67 (2009).

130. See MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009).

and to this end they may cooperate in providing information to other sources or through Internet websites. The American Lawyer,¹³¹ the National Law Journal¹³² and Martindale-Hubbell¹³³ all gather and generate information about law firms and their global nexus as do international or foreign sources, including Legal Business¹³⁴ and the International Financial Law Review.¹³⁵ But accuracy is dependent upon self-reporting, and the fees charged by certain listing services means that not all firms will choose to participate. Martindale-Hubbell, for example, has suffered losses in firm listings since the Internet has become user-friendly and widely-used; firms invest in their own websites rather than in listings published by third parties.

As large law firms adjust to global influences, they have shifted from essentially single-nation entities to multinational entities with regard to the lawyers they hire and the law on which they advise. It is not clear that smaller or even mid-sized firms have followed this same path. To the extent regulation creates a barrier to the multinationality of firms, there is evidence that firms simply find collateral paths to similar ends.¹³⁶ It would be a shame to invest in a regulatory regime that encourages the system's irrelevance. To that end, the questions and issues identified below address the way firms approach mobility of their lawyers, the location-specificity of their practices (and lawyers), and relationships with foreign law firms. In addition, the role of technology as a mechanism for global expansion and capitalizing on opportunities - particularly those beyond the firm's existing borders - also raises issues integral to law firm practices, including supervision and training of new lawyers.

131. See AM. LAW., *Surveys and Rankings*, available at http://www.law.com/jsp/tal/surveys_rankings.jsp

132. See NAT'L L.J., *Sponsor Spotlight*, available at <http://www.law.com/jsp/nlj/index.jsp> (highlighting the NJL rankings of the nation's largest 250 law firms).

133. See Martindale, *Top 10 Lists*, <http://www.martindale.com/top-10-law-firm-lists/Top10Lists.aspx> (last visited Apr. 10, 2010).

134. See LEGAL BUS., *About Legal Business*, available at <http://www.legalbusiness.co.uk/content/view/40/31/>

135. See INT'L FIN. L. REV., *IFLR 1000: The Guide to the World's Leading Financial Law Firms*, available at <http://www.iflr1000.com/>.

136. See, e.g., *A&O Partner Joins Mumbai Office of Indian Alliance Firm*, LAW. (Aug. 18, 2009) ("Allen & Overy (A&O) announced that partner Srinivas Parthasarathy would leave the firm's Singapore office to take up partnership at the Mumbai office of A&O's Indian alliance firm Trilegal. In his new role Parthasarathy, who is qualified in the UK and India, will help develop the capital markets team at Trilegal, with which A&O has a non-exclusive referral relationship.").

- 4) Law firms
 - a) Outbound
 - i) Long-term/permanent¹³⁷
 - (1) Size of firm (number of partners, number of lawyers, personnel) [*law firms, National Association of Law Placement*(“NALP”), *Martindale-Hubbell*]
 - (2) Size of overseas office [*law firms, NALP, Martindale-Hubbell*]
 - (3) Revenue from overseas offices
 - (4) Location(s) overseas [*law firms, NALP, Martindale-Hubbell*]
 - (5) Duration of overseas location(s) [*law firms, NALP, Martindale-Hubbell*]
 - (6) Employment/partnership with host country lawyers (sensitivity required because of possible financial consequences based upon this information depending upon host country regulations) [*law firms*]
 - (7) Nature of practice or specialization of practitioners working overseas [*law firms, NALP, Martindale-Hubbell*]
 - (8) Challenges regarding mobility of overseas office lawyers
 - (9) Client information (jurisdiction? corporate counsel?) [*law firms, legal press*]
 - (10) Relationship with host country regulatory authorities
 - (11) History of development of the office (acquired as an office? Greenfield growth?) [*law firms and legal press*]
 - ii) Temporary practice outbound
 - (1) Regularity/schedule of this work
 - (2) Duration of work
 - (3) Client information (jurisdiction? corporate counsel?)

137. The nature of the relationship between offices of a single firm, and how external factors affect this structure, may be relevant. *See id.* This might include sharing of revenue, costs, personnel and business relationships/generation, among other things.

- (4) Interaction with host country lawyers, law firms, regulators?
- b) Inbound
 - i) Long-term/permanent
 - (1) Size of firm (number of partners, number of lawyers, personnel) [*law firm websites, Martindale-Hubbell, but both likely to be under-inclusive (non-reporting of non-partners, for example)*]
 - (2) Size of U.S. office [*law firm websites, Martindale-Hubbell*]
 - (3) Revenue from U.S. offices
 - (4) Location(s) in the U.S. [*law firm websites, Martindale-Hubbell*]
 - (5) Duration of U.S. location(s) [*this may be learned from Martindale-Hubbell listings, compared year-to-year*]
 - (6) Employment/partnership with U.S. lawyers [*law firm websites, Martindale-Hubbell*]
 - (7) Nature of practice or specialization of practitioners working in the U.S. [*law firm websites, Martindale-Hubbell, but difficult to compare across firms*]
 - (8) Challenges regarding mobility of U.S. office lawyers
 - (9) Client information (jurisdiction? corporate counsel?) [*legal press but sporadic*]
 - (10) Relationship with U.S. regulatory authorities
 - (11) History of development of the office (acquired as an office? Greenfield growth?) [*legal press*]
 - ii) Temporary practice inbound
 - (1) Regularity/schedule of this work
 - (2) Duration of work
 - (3) Client information (jurisdiction? corporate counsel?)
 - (4) Interaction with U.S. country lawyers, law firms, regulators?

E. Clients

Clients are significant drivers of globalization for lawyers and law firms, and their interests are touted as being critical in

statements of regulatory goals.¹³⁸ In discussions of reconsidering regulation in light of globalization, client interests often are identified as necessitating lawyer mobility. Clients want to take their lawyers with them when they travel or encounter problems overseas.

Despite their importance in generating global demand, there is no source of information that captures the broad picture of what sorts of individuals and organizations ask their lawyers to help them with their cross-border needs.¹³⁹ Still, law firms regularly report on client matters on their websites, and stories in the business and legal press provide accounts of particular representations. While these are by no means universal or representative, they may provide a nice snapshot of the breadth of

138. Of course, even without particular clients to drive global expansion, lawyers and law firms might well extend their activities in order to develop reputations to generate new sources of work for themselves and compete more effectively at home by touting their global and international prowess. See Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 741 (1994) (“Law firms sometimes appear to be seized by the adolescent angst that all your friends are at a party to which you haven’t been invited—it is unbearable not to be there, even if you know you would have a terrible time. For many American firms, the foreign office is a loss leader, an outpost to entertain visiting firemen, a way of showing the flag, an address to add to the letterhead and a discreet form of advertising.”). As mentioned above (Subsection C), the clients with global needs may be individuals or businesses. Their needs may range from criminal representation (particularly white-collar crime, but non-commercial criminal advice also may be required) to financings, and the role of U.S. lawyers in these matters will necessarily vary because of the problems as well as the particular jurisdictions where they arise, and their openness to foreign lawyers (in this case, the role of the U.S. lawyer). It is important to understand how clients with global problems choose lawyers, and how regulation might affect these choices. On clients and globalization generally, see Terry, *The Legal World is Flat*, *supra* note 126, at 549. (“As a result of globalization, more and more clients in this country will be involved in business interactions with individual suppliers, distributors or customers and businesses in other countries. Thus, even U.S. lawyers who do not practice in global law firms might consider whether they would like to work for such clients, what additional skills, contacts or expertise, if any, they need to work for such clients, and how to reach out to this potential client base.”).

139. For an example of a small business needing a lawyer with transnational skills, see Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, ADVOCATE (Oct. 2009).

The owner of a specialty plastics manufacturing business [in Ucon, Idaho (population 943)] called me. In just a few minutes, his story crossed many borders. The man needed help negotiating and finalizing a joint venture with a Canadian business. Part of the deal involved his consultation with the prospective purchaser during which the parties transfer production technology and know-how to manufacturers in a third country and import the popular products back into the United States. Demand also looked promising in numerous other countries, each market bringing with it advertising, tax, transportation, intellectual property protection, and other issues involving international and foreign domestic, as well as domestic law here in the States.

Id.

work that involves global issues and skills, particularly if gathered over the course of a specific period and perhaps with an eye to a certain focus. It would be useful to generate information about characteristics of clients and matters involving cross-border issues for various sorts of practitioners, including large firms (about which there may be the most available information), smaller and mid-sized firms, and even sole practitioners, inbound and outbound. In addition, there may be substantial differences in clients depending upon where in the U.S. the lawyer or law firm is located and on the home country of the foreign-licensed lawyers and law firms, and this also would help regulators think about how globalization matters in their jurisdiction, and how it affects lawyers differently in the diverse and large U.S. market. Globalization, like so many other influences, tends to be discussed as if it exerts a uniform and identical force on the work of quite diverse organizations and individuals.¹⁴⁰

An investigation into clients might take as its focus the issue of sophistication and the ability to protect their own interests.¹⁴¹ Are all clients with globally-connected problems savvy enough to fend for themselves, or must regulators addressing the global context continue in the role of protector? Do clients need regulatory protection from satisfying their legal needs in the most cost-efficient manner, even if that means hiring lawyers not licensed in the client's jurisdiction? And how does the availability of law-related information, and information about lawyers, affect the need for client protection? These are among the issues addressed below.

5) Clients

- a) Foreign-based clients with a presence/activities in the U.S.
 - i) Use of foreign-based law firms/foreign-licensed lawyers [*legal press and law firm websites*]
 - (1) From same home country? [*legal press and law firm websites*]
 - (2) History of representation in home country?
 - (3) Language familiarity?
 - (4) Size of client

140. The Association of Corporate Counsel may gather certain of this information. See Association of Corporate Counsel, <http://www.acc.com/> (last visited Apr. 15, 2010).

141. See Smedley report, *supra* note 4, at 5.

- (5) Does client have its own internal legal staff? Where located?
- (6) Challenges regarding licensing of lawyers?
- ii) Use of U.S.-based law firms/U.S.-licensed lawyers *[legal press and law firm websites]*
 - (1) How selected?
 - (2) Duration of relationship/breadth of relationship? *[legal press and law firm websites]*
 - (3) Does firm or lawyer have expertise in client's home country?
 - (4) Size of client
 - (5) Does client have its own internal legal staff?
 - (6) Challenges regarding licensing of lawyers?
- b) U.S.-based clients in overseas activities
 - i) Use of foreign-based law firms/foreign-licensed lawyers *[legal press and law firm websites]*
 - (1) From jurisdiction in which overseas activities occur?
 - (2) History of representation in that jurisdiction?
 - (3) Language issues?
 - (4) How selected/identified?
 - (5) Size of client
 - (6) Does client have its own internal legal staff? Where located?
 - (7) Challenges regarding licensing of lawyers?
 - ii) Use of U.S.-based firms/U.S.-licensed lawyers *[legal press and law firm websites]*
 - (1) Are lawyers in firm located in overseas jurisdiction where problem arose?
 - (2) Are lawyers host country lawyers?
 - (3) Other expertise in host country/country where problems arose?
 - (4) How selected?
 - (5) Duration and breadth of relationship?
 - (6) Size of client
 - (7) Does client have its own internal legal staff? Where located?
 - (8) Challenges regarding licensing of lawyers?

The questions outlined above in this Section III might be organized into broader groupings using the inbound and outbound

categories for the various actors and organizations considered. While this rubric does not work perfectly (clients, for example, are not easily categorized in this manner in a way that provides meaningful information), the more general divisions of information might be helpful in conceptualizing the research outlined. Figure 2 sets out the basic categories earlier addressed.

Figure 2: Simple inbound/outbound categories

	Inbound (long term)	Inbound (short term)	Outbound (long term)	Outbound (short term)
Regulation/admission	Bar exam, FLC, corporate counsel, waive in	Temporary practice, <i>pro hac vice</i>		
Regulation/discipline				
Law schools	Foreign nationals, foreign law graduates, foreign faculty	Exchange students (semester long)	LL.M. programs, faculty	Summer programs, semester programs, exchange programs, single courses
Lawyers	Foreign-licensed lawyers (may be admitted, licensed as FLC or other limited license)	Foreign-licensed lawyers	US-licensed lawyers working overseas, with US firms, foreign firms, corporations, other	US-licensed lawyers working overseas on limited assignments (not residing overseas)
Law firms	Foreign law firms establishing offices in the US; law firm network arrangements	Foreign firms sending individual lawyers to work in the US for brief periods (secondment)	US firms establishing offices overseas; law firm network arrangements	US firms sending individual lawyers to work for brief periods overseas
Clients				

IV. THE WAY FORWARD

The research suggested in this article relates to a diverse group of actors and activities, and involves nearly unlimited locations and multiple regulators in different jurisdictions and jurisdictional layers. Much of the relevant information is not yet available, much less in a form that allows for comparability and analysis. Existing sources of information begin with the states, where licensing and disciplinary regulators have access to detailed information about the lawyers in their domains, but also include law schools, other regulators (including, for example, federal regulators such as the Securities and Exchange Commission), quasi-regulators and policy-makers such as the ABA and state, local and specialty bar associations as well as the National Conference of Bar Examiners, the National Association of Law Placement, law firms and individual lawyers, insurers, clients, and private businesses that report on lawyers and law firms (including the legal and general business press and listing services). Coordination of these sources, alone, is a substantial task.

But coordination is not the most significant part of the project. Research design presents an even more serious challenge. The data gathered must be similar enough to provide comparability, representative with regard to the populations investigated, and broad enough in scope to identify those whose work we should attend to as particularly relevant for purposes of globalization and those whose work is quite far removed from a global nexus with regard to the fundamental question of the role of globalization in regulating participants in the legal profession. For these reasons, it is crucial to rely on experienced scholars who can guide the research design process and conduct of the work. Combined with the coordination complications of the project, it may make sense to house the research in a single organization that will serve as the bridge between scholars designing and implementing the research plans and regulators who will benefit from the story this research tells.

The research envisioned in this article also requires periodic updating. While the initial investigation may be the most challenging, establishing a system for maintaining current information is crucial. Significant changes in how legal services are delivered have and will continue to occur, and these require regulators to reconsider existing approaches. For example, twenty-five years ago, U.S. law firms with offices overseas

generally relied only on U.S.-educated and licensed lawyers as their overseas office partners and associates, and the firms generally limited their advising to U.S. law.¹⁴² This now is a nearly universal exception to the way U.S.-based firms operate overseas.¹⁴³ Of course, technology also plays an enormous role in innovations in law practice, and we cannot anticipate the changes that will occur in the short term, much less over the next few decades. Without current information, regulators soon may be stymied as new competitors appear, revised regulatory structures are implemented elsewhere (causing concern about interaction with U.S. entities), and old fears are raised again by those whose purpose is influenced more by concerns for protectionism than accuracy. The need to maintain current information will require us to think carefully about incentives for sources of information.

The obvious choice for housing the research role described here is the American Bar Foundation (“ABF”), a think tank populated by social scientists whose mission is to investigate the role of law and lawyers in society.¹⁴⁴ The ABF has extensive experience with projects similar in scope and complexity, including the Lawyer Statistical Report about the American legal profession based on data obtained from Martindale-Hubbell,¹⁴⁵ and the After-the-JD project,¹⁴⁶ a longitudinal study of lawyers’ careers in the years following their graduation (this project

142. Silver, De Bruin Phelan & Rabinowitz, *supra* note 115, at 1439.

143. *Id.* at 1445.

144. In full disclosure, I have worked at the ABF in the past and currently am an ABF-affiliated scholar.

145. See ABA, THE LAWYER STATISTICAL REPORT, *supra* note 126.

146. The After-the-JD project is:

[T]he first and most ambitious effort to gather systematic, detailed data about the careers and experiences of a national cross-section of law graduates. It was a concept first proffered by members of the National Association for Law Placement (NALP) more than 40 years ago. Legal career services and recruitment administrators in the mid-1970’s were hungry for information that would help them in their efforts to counsel, recruit, hire and develop young attorneys. They dreamed of a longitudinal study that would follow the careers of lawyers over time and identify the influences on their job choice decisions. So they sketched out the scope of a research study that might provide them with answers and submitted it for consideration to NALP’s leadership. Although it was a research project that was sorely needed, the magnitude and cost of implementing it far exceeded the capacity and resources of the organization at the time. Thus the research concept was relegated to a file folder and status as “wishful thinking” for many years.

For more information on the project, see <http://www.americanbarfoundation.org/publications/afterthejd.html>.

involves the domestic analog to many of the issues raised here with regard to individual lawyers).¹⁴⁷ Moreover, the ABF was founded by and is affiliated with the American Bar Association, which is the national body most closely associated with lawyer regulation and regulatory reform in the U.S.¹⁴⁸ The ABF receives much of its funding indirectly from the ABA through the American Bar Endowment.¹⁴⁹ This relationship supports an ABF role in coordinating the research that will inform lawyer regulation, both through ABA-level policy-making and rulemaking, and at the state level in implementation.

Alternatively, the research might be housed in the academy directly, either in a single law school or a consortium of schools with a commitment to studying the profession. These schools might work with the ABF, formally or informally, to form a working group on the legal profession and share research responsibility.¹⁵⁰ Several U.S. law schools support research centers focused on empirical study of the legal profession, including those at Georgetown¹⁵¹ Harvard,¹⁵² Indiana (Maurer)¹⁵³

147. The ABF also houses scholars who have undertaken ground-breaking studies of various aspects of the profession, including the Chicago Lawyers study (*See* HEINZ & LAUMANN, *supra* note 17), work focused on large law firms (*See, e.g.*, ROBERT NELSON, PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM xv (1988)) and an investigation of the way lawyers in a wide variety of work settings (large firms, small firms, sole practitioners, urban and rural settings) identify and resolve conflicts of interest (*See* SHAPIRO, *supra* note 17).

148. *See* American Bar Foundation, http://www.americanbarfoundation.org/about/ABF_Frequently_Asked_Questions.html (last visited Apr. 14, 2010) (“The American Bar Foundation was founded by the American Bar Association in 1952, and is affiliated with the ABA, but remains an independent research foundation, free to set its own research agenda.”).

149. *See id.* (“The ABF’s primary funding is provided by the American Bar Endowment, an organization established by the American Bar Association to advance research and education on the administration of justice. The ABF receives integral support from the Fellows of the American Bar Foundation. In addition to funding from many private foundations and individual benefactors, the ABF receives generous grants for individual research projects from national agencies such as the National Science Foundation, the National Endowment for the Humanities, and the Law School Admissions Council.”).

150. An alternative possibility to house this research effort is the Center for Professional Responsibility of the ABA. The Center’s mission is focused on “legal ethics, professional regulation, professionalism and client protection mechanisms,” and it is responsible for coordinating the ABA’s Ethics 20/20 Commission, which is charged with rethinking regulation in light of changes due to technology and globalization, among other things. *See* ABA Center for Professional Responsibility, About the Center, <http://www.abanet.org/cpr/about/home.html> (last visited Apr. 14, 2010).

151. For a description of Georgetown Law’s Center for the Study of the Legal Profession, *see* <http://www.law.georgetown.edu/LegalProfession/> (last visited Apr. 16, 2010).

and Stanford,¹⁵⁴ among others. These schools and others are poised to collaborate on the project; each has strong interests and expertise in empirical research on the profession, and there is some symbiosis in the substance of the work required by the project and knowledge housed within law schools. For example, much of the information on law schools and individual lawyers requires research on the careers and work of law school applicants, students and alumni. The schools might pursue this work through alumni surveys, and in doing this, they might utilize current students and recent graduates to help with research. This would have the additional benefit of helping students connect to alumni, to learn about career choices and consequences as well as simply deepening relationships around common experiences. The research also could be incorporated into seminars in which certain of the topics identified earlier would be appropriate for student research and writing projects. Moreover, in certain cases foreign law graduates enrolled as students in U.S. law schools would be valuable aides in conducting the research. For example, investigation into disciplinary processes in jurisdictions outside of the U.S. and licensing of U.S. lawyers practicing overseas might offer opportunities for foreign law graduates and U.S. students to work together. The research described here also might be useful to law schools in educating students about professional identity, as recommended in the Carnegie Report.¹⁵⁵ Students would have opportunities to learn about practitioners and practices, regulatory structures and their challenges.

The need for collaboration with bar regulators and other sources of information also is a potential benefit for law schools involved in the work. As law schools struggle with how and what to teach in order to produce productive and valued graduates, their exposure to various participants and analysts of the profession

152. For a description of the Harvard Law School Program on the Legal Profession, *see* <http://www.law.harvard.edu/programs/plp/pages/aboutus.php> (last visited Apr. 16, 2010).

153. For a description of the Indiana University Center on the Global Legal Profession, *see* <http://globalprofession.law.indiana.edu/> (last visited Apr. 16, 2010).

154. For a description of the Center on the Legal Profession at Stanford University, *see* <http://www.law.stanford.edu/program/centers/clp/> (last visited Apr. 16, 2010).

155. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

may fill in corners of their perception about their work as educators.¹⁵⁶

The research effort could be supported by increasing and adjusting the information gathered and reported by existing regulators, such as the annual registration information that individual lawyers must file with state authorities, as well as information reported by law schools to the ABA Section of Legal Education and Admissions to the Bar. The burden imposed on those who provide disclosure must be balanced against their existing obligations. Still, important groups are omitted from the scope of these regulators, including inbound lawyers, law firms, clients and other legal services organizations, such as outsourcing and e-discovery firms. One reason to pursue the investigation through a carefully designed research plan is to gain advice on how to investigate these activities and actors who typically escape the attention of existing regulators.

Finally, the matter of cost is important and perhaps determinative. Whether housed at the ABF, in a consortium of schools or elsewhere, the research envisioned here will require substantial financial support. The organizations identified as potential homes for the project are not immune to the effects of the financial crisis; indeed, almost no corner of the legal profession has been spared the effects of the economic downturn. Nevertheless, the project will benefit many, including those identified here as actors in the global market for legal services. This likely argues for sharing the responsibility of support for the project among regulators (states and also the ABA, particularly to the extent legal education is involved), who can pass along some of the cost to their regulated populations; global law firms that stand to gain from more informed regulation; and the federal government (particularly the Department of Commerce and the Office of the U.S. Trade Representative), which will be in a better bargaining position with regard to negotiations on trade and

156. See, e.g., the Future Ed Conference, organized by New York Law School and Harvard Law School, Apr. 9, 2010-Apr. 10, 2010, *available at* http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/future_ed/ (“There is no shortage of commentary about the challenges facing American law schools. Driven by the Carnegie Foundation’s highly critical 2007 report and the dramatic downturn in large firm associate hiring, law school deans and administrators are scrambling to predict the future and position themselves within a rapidly changing market. But what is the likely shape of the future market—or markets—for legal education? What are the most promising models for delivering education and training in those markets? And how do we get there from here?”).

liberalization because of being armed with relevant, current and complete data. Funding undoubtedly will present a challenge, but the profession cannot afford to fail to move forward. Without the sort of effectiveness and credibility offered by an empirical basis for rulemaking, existing regulators may lose their authority even as they identify globalization as an important influence that requires their attention.

Timing presents an equally important challenge for the project. Designing and implementing a plan to gather and analyze relevant data will require patience, coordination and planning. It will be particularly important to keep in mind the need for current information in designing a plan for regular updating. Timing and staffing might argue for sharing responsibility for the project on an ongoing basis among a variety of institutions.

Even without funding in place to conduct the research described, simply mapping out a research design for the project (initial and periodic reporting) would be useful. At a minimum, it would allow existing organizations that regularly gather data on various aspects of the profession to see where their efforts fit in the larger context. These organizations might work with scholars to refine their efforts so that the information gathered by them is clarified, focused, comparable and representative. Certainly, law schools, the ABA Section of Legal Education and Admissions to the Bar, the National Conference of Bar Examiners, state licensing and attorney registration authorities all might participate in the project in this way without increasing the costs of their current activities. By investing to create a comprehensive plan for the research, regulators may enlist the help of these organizations and others toward generating and collecting data. At the same time, the existence of a plan will help regulators keep their focus on data that is absent from current sources.

V. CONCLUSION

The call for rethinking regulation of lawyers and legal services in light of globalization offers an opportunity to move beyond regulating on the basis of speculation and responding only to those who want to be heard. Speculation is a particularly significant problem with regard to issues relating to global practice, because there is fear on the part of regulators about the motives and capabilities of foreign lawyers. Of course, U.S. lawyers also operate as “foreign lawyers,” and to the extent we

want them to be well-received abroad, we would be well-advised to be gracious hosts to inbound lawyers. This reasoning has not proven particularly persuasive to many U.S.-based regulators, however, and in order to allay or confirm the validity of these fears, a comprehensive foundation of information will help by informing regulators about the actual activities and experiences of actors connected to the global market for legal services.

At the same time, lawyer regulators have an opportunity to reach beyond their norm of limiting their vision to those within the regulatory audience who wish to be heard or who are clearly inside the scope of regulatory authority. Instead, regulators may investigate the activities of those whose work is not now captured by regulation, to determine whether they exert an influence that ought to be accounted for.

The best way to generate this information is to go to the experts, who can advise on research design, coordinate the use of diverse sources of information, and interpret data collected as well as research offered by other scholars. Their guidance will strengthen the credibility of the data, which will support responsible rulemaking. Policy decisions based on empirical evidence of activity, inactivity, problems and patterns of conduct will improve the effectiveness of the regulatory regime we have in place, which will, in turn, support its credibility. In doing so, the links between legal scholars, law schools, students, regulators and the practicing bar also will be reinforced. As the profession faces the challenges of globalization as well as those emerging in the wake of the financial crisis, these connections will strengthen its ability to act on the basis of a more comprehensive vision and coordinated approach.