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Regulation of the Legal Profession in the United States and the Future of Global Law Practice

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This paper will address three questions:

1. What are the underlying goals and distinctive features of the new regulatory schemes in England and Australia and how are they similar or dissimilar to the regulatory goals in the United States?
2. How might U.S.-based global law firms respond if lawyer regulation in the United States does not change in ways that can accommodate the new English and Australian regimes?
3. What are the implications of these developments for the U.S. regulatory environment and are there ways in which U.S. lawyer regulation could adapt to these new developments?

What are the underlying goals and distinctive features of the new regulatory schemes in England and Australia and how are they similar or dissimilar to the regulatory goals in the United States?

"Regulatory Objectives" is a defined term in the first section of the English Legal Services Act 2007. The objectives listed are:

(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 with 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.

Seven of these nine principles are entirely consistent with those to which every regulator of lawyers in the U.S. would aspire for their individual jurisdictions (even if the language used is slightly unfamiliar).

The two goals that need to be specially identified and understood because the English and Australian regulators relied heavily on these concepts are: "*(d) protecting and promoting the interests of consumers;* and *(e) promoting competition in the provision of services* …" It is important to realize that even though the approach of the new English and Australian regulatory systems in connection with these two principles is very different from the approach used in the U.S.—and may even seem shocking—in the whole, these regulators have similar underlying goals, including, inter alia, protecting clients and the public and improving access to justice.

What is the significance of (d) *protecting and promoting the interests of consumers*? The English legislators who established these principles were interested in providing consumers with two distinct benefits: increasing their options, especially if doing so might reduce their costs, and seeing to it that the disciplinary structure was focused on redressing consumer complaints against lawyers. This principle is designed in part to insure that regulators oversee the profession's level of service, primarily to give clients redress when their lawyers fall short—and only secondarily to discipline lawyers for violating rules.

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(Continued on page 8)

(Continued from page 1)

The English legislators, following the lead of the Australian regulators, also relied heavily on goal *(e),* which recognizes that competition is a *positive* value within the regulatory scheme. While there are precedents within the U.S. lawyer regulatory structure for adopting this goal, as evidenced by the fact that the U.S. was one of the first jurisdictions to strike down mandatory minimum fee schedules and lawyer advertising bans, this has not been a primary objective of lawyer regulation in the U.S. Indeed, without in any way wishing to give offense, it might be persuasively argued that much of the last hundred years of lawyer regulation in the U.S. has had as a significant objective the preservation and protection of lawyers' *monopoly* over the provision of legal services. As others at this conference have explained already, there are two ways in which the English are beginning to, and the Australians already promote competition, by permitting outside, non-lawyer investment in law firms, and by permitting—subject to regulation—the establishment of *Alternative Business Structures*, what we in the U.S. have hitherto referred to as Multidisciplinary Practices.

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By *encouraging* the delivery of legal services in new ways, the English and Australians are recognizing that clients need a regulatory system that does not merely mete out sanctions, but also provides remedies and provides the clients—as well as the lawyers themselves—with a broader array of choices when seeking to receive—or provide—legal or law related services. There are many classes of clients who believe they will benefit, because they will be able to receive specialized services from providers structured to cater to their specific needs, and will receive those services more cheaply and more efficiently than if offered by traditionally structured law firms operating separately from other service providers. Where more than one discipline or activity is involved—whether, for example, in real estate construction or highly complex financial transactions—the traditional model invariably has required two or more providers operating and billing independently. The question ultimately is not whether these clients are right or wrong, but whether the client protection and public interest goals justify rules that override client autonomy and client choice. Although the English and Australian rules are very foreign to the U.S. legal profession, it is important to realize that the goals underlying these reforms are the same goals shared by the U.S. legal profession.

How might U.S.-based global law firms respond if lawyer regulation in the United States does not change in ways that can accommodate the new English and Australian regimes?

Based on my years as an advisor to lawyers and law firms, I can tell you that many U.S. clients and U.S. lawyers are likely to find the English and Australian changes attractive. This is true of both large firms and small firms. Many firms will like these rules because of the ways in which they can share the firm's risks and rewards with key participants like the office manager and other high-level non-legal employees. The law firms in Australia that have taken advantage of the new regulatory possibilities have not primarily been the global law firms in the large cities, but have been small and medium- sized firms that see advantages in the new regulatory structure. Indeed, the first publicly-traded law firm in Australia was a personal injury firm and the second, also not a global firm, was a firm that wanted to acquire other law firms with weak management but good practice structures that could benefit from centralization of some functions. The regulatory changes in England were also seen as important for smaller firms. Indeed, those responsible for the English changes hoped that outside investment (and the accompanying accountability) might professionalize the services offered by solo practitioners.

Some of the larger firms, however, may decide to do much more than make their office manager a partner. The idea of "one stop shopping" is not just about putting legal services for individuals in supermarkets, it's also about simplifying, speeding up and reducing the expense to clients in highly complex matters. Most of that work is, and will continue to be done by large firms and entities, not solo or small firm practitioners. And it is those firms—*and their corporate clients*—that are going to watch what their English competitors can do and that will be prevented from providing (or, from the clients' perspective, from receiving) those same cost-efficient and client-driven services, so long as the present regulatory scheme remains in place in the U.S. It is also vital to understand that this is not just about law firms in New York and Los Angeles. It is about the large local and regional firms operating in every significant city and state in the United States—and the large corporations operating in every city and state in the United States—being placed at a growing global competitive disadvantage. And this is coming about because our current structure of lawyer regulation is an outmoded and often client hostile foundation on which to regulate lawyers, or at the very least large law firms serving sophisticated clients.

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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. It is possible to conceive many scenarios whereby English firms, in conjunction with banks, insurers, private investors, or Internet service providers, will be able to offer legal services in conjunction with the services provided by those other entities in ways that will make transactions utilizing lawyers in London faster, more efficient and cheaper than equivalent arrangements anywhere else—including the U.S. To take one possible example, imagine the merger and acquisitions practice or the capital markets practice of a major London firm establishing a joint venture with a London-based investment bank to provide "one stop shopping" for clients. This jointly owned and operated entity will, under the new regulatory structure in England, be able to offer clients one-stop—and one-fee—access to the negotiation and closing of every possible kind of deal, loan or investment transaction. In a broader context, if we compare the Sarbanes-Oxley regulatory structure that governs corporations capitalized in the United States with the much more streamlined financial services regulatory scheme in effect in London, it is not hard to imagine (even in these bleak recessionary times) that in the long run London will far outpace New York as the principal capital market in the 21st Century. Within the confines of the legal profession thus reorganized, the English law firms (alongside their non-lawyer owners or partners) will thrive in that marketplace.

How will the powerhouse firms presently based in the United States react to this situation? These firms are likely to think that they are at a competitive disadvantage as a result of being constrained from taking advantage of the new scheme in effect in London. If the American legal profession (or at least the large firms) continues to be regulated on a 50-state basis, and if those state-based regulations continue to prohibit effective multidisciplinary arrangements and outside investments in law firms, how will the American firms be able to compete internationally? Even the relaxation of rules in one or two jurisdictions within the U.S. would be of no avail. If New York, for example, were to adopt a structure equivalent to that established in England, a New York-based firm with offices in multiple other states would still be hamstrung by the rules that prohibit lawyers in those states from being partners of or joint venturing with non-lawyers. In effect, those multinational law firms that have hitherto been viewed as U.S.- centered firms (White & Case, Cleary Gottlieb, DLA Piper, etc.) may well end up having to separate themselves from their London offices because the lawyers in London will demand the freedom to compete on equal terms with their local competitors and will decline to be restrained by the outmoded requirements of the American regulatory system. To put it most simply, under the existing rules in every jurisdiction except the District of Columbia, the individual lawyers in those firms sitting in their offices around the United States would be in violation of their home states' rules against fee sharing with non-lawyers, and against any arrangements where non-lawyers may be seen as controlling or having an interest in the delivery of legal services, by virtue of arrangements between their London partners permitted by the Legal Services Act.

No doubt when the new London marketplace starts to operate in ways that include such ventures as I have postulated—or any other new alternative business structure permitted under the new regulatory system—the U.S. firms will look for ways to join in reaping the same benefits. But if the regulatory scheme at home continues to prohibit their individual lawyers from sharing profits from such ventures, how will the lawyers actually be able to establish those ventures or, therefore, to compete? Some of the large American-based global firms are likely to see themselves as hamstrung by the regulations under which they operate and their inability to join the party.

How will these firms respond? It is unrealistic to expect that all of the large U.S.-based firms (and their clients) are going to be willing to sit quietly on the sidelines and watch their predominance in the global marketplace evaporate before their eyes and in their financial statements. What, then, are they likely to do here in the United States to level the global playing field?

First, the large law firms might approach the courts in all of the states (or, initially, in the states where the principal commercial centers are located), and seek agreement that they and their constituent individual lawyers should be separately regulated, on some form of national basis, outside the existing structure. Notably, England, the European Union and the Organization of Economic Cooperation and Development (OECD) have all suggested that more regulation is needed for individual clients who have a one-time matter, than for sophisticated, repeat-player clients who are better able to protect themselves.

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It is not completely out of the question that this approach would be productive (although it must be said that the author, coming from one of the most conservative states when it comes to modernizing its rules, New York, is skeptical that this is realistic). The Conference of Chief Justices was supportive of the move towards the adoption of Rule 5.5 of the ABA Model Rules of Professional Conduct regarding "multijurisdictional practice." That rule, while in no way sanctioning the establishment by lawyers of offices in states

where they are not admitted, does permit lawyers to cross state lines temporarily in order to practice law involving transactional matters (i.e., not involving litigation before a state court) that are incidental to the lawyers' practices in the jurisdiction where they are admitted. Since the initial promulgation of Model Rule 5.5 in 2002, 40 states' courts (and the District of Columbia) have adopted Model Rule 5.5 or a rule similar to it. Accordingly, it is possible to imagine that the state courts might agree to loosen their hold on the large firms that represent sophisticated clients in order to permit the kinds of business structures and arrangements that the English Legal Services Act is intended to foster.

However, if the development of Model Rule 5.5 through its current level of adoption is any guide, this would take a decade to accomplish—and this assumes that the opposition, which would muster the same objections that were successful in quashing the movement towards "multidisciplinary practice" in the 1990's, could be overcome this time around. That this approach would face enormous hurdles can hardly be debatable. And the battle to create a new regulatory structure for the large law firms would have to be fought in all fifty states in the context of a lack of familiarity of the issues and instinctive resistance to any radical change.

Second, perhaps in tandem with the first approach, global U.S.-based law firms that see themselves at a competitive disadvantage with London firms might ask state legislatures to enact laws that would permit the kinds of business structures that will arise under the Legal Services Act. This approach would be modeled on the successful lobbying that led to the wave of legislation that swept across the states in the mid-1990's adopting limited liability for law firms. The problem with this scenario is the constitutional struggle between the courts and the legislatures over which has the right and authority to regulate lawyers that this kind of legislation would likely engender within at least some of the states.

Third, the large U.S.-based firms might decide that it would be much simpler to go to Congress and demand legislation that would create a national or federal regulatory structure, at least of the large firms, if not the legal profession as a whole. Notably, the large corporations that constitute the client base of the larger law firms would likely support such an initiative (or might even initiate it). Together, the large firms and their clients might be able to justify this dramatic change based on the same anti-trust premises that underlie the English Legal Service Act. If successful, such an approach would enable the large U.S.-based law firms to operate in the same manner as will be permitted in London under that law. (The likely challenges to these laws are discussed below.)

Fourth, some firms with offices in the U.S. and London may decide to "restructure" themselves so that they can say that they are (technically) in compliance with U.S. laws, even though their London office has taken advantage of the English changes. Or, as a variation on this approach, they may decide to simply flaunt the U.S. rules, with the expectation that if their lawyers are disciplined or challenged, they will argue that the current U.S. regulatory rules are invalid. Those arguing in favor of the existing state laws will rely on the Tenth Amendment and Separation of Powers arguments. But it is possible to imagine that the United States Supreme Court might sweep aside the existing regulatory structure as anti-competitive insofar as it discriminates among lawyers licensed in the states, under the authority of the dormant Commerce Clause of the United States Constitution. (Modern dormant Commerce Clause law is the constitutional principle which provides that discriminatory laws enacted by individual states that are motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity." *See, e.g., Department of Revenue of Ky. v. Davis,* 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)). Such a ruling would, hopefully, force the states to address the global concerns raised by the English and Australian models. This litigation might also come about in the form of a state-based challenge to federal legislation of the kind described in my second scenario, or in a freestanding test case suit brought against a state and challenging the existing regulatory structure. It also bears noting that although immunity for state government action has generally protected state lawyer regulatory structures from ant-trust challenges, the US Supreme Court has, in *Goldfarb v. Virginia State Bar*, 421 US 773 (1975), enforced the ant-trust laws against a state bar regulator.

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In sum, I stand by my premise, stated in the subtitle of this paper, that in significant part because of the changes that are likely to flow in the way legal services are delivered in England under the purview of the new regulatory system, within the next decade the large U.S.-based law firms, and their corporate clients, are going to be at a growing competitive disadvantage. They are likely to believe that unless a satisfactory way is found to permit innovative—*competitive*—business models for the U.S.-based firms, *London may replace New York as the world headquarters for legal services.* They will not be happy about this fact and some of these firms are likely to take some sort of action.

What are the implications of these developments for the U.S. regulatory environment and are there ways in which U.S. lawyer regulation could adapt to these new developments?

As discussed above, some global law firms with U.S. offices might respond to the English developments in a way that could affect lawyer regulation throughout the U.S. The more radical solutions would affect lawyer regulation throughout the entire U.S. Even the more modest responses, however, have the potential to be far-ranging and to go well beyond the cities and jurisdictions that might come to mind immediately. There are more than 80 U.S. law firms—including many law firms with offices in state capitols throughout the U.S.—that have offices in London. Each of these 80 law firms has offices in cities throughout the U.S. Because of the current regulatory structure, they are likely to want changes in each of the jurisdictions in which they have offices or in which their lawyers are licensed. The new English and Australian regulatory developments thus have the potential to affect the U.S. regulatory environment.

Based on history, it is hard to imagine consensus within and among the courts of all 50 states that would permit U.S. firms to take advantage of the recent English changes. On the other hand, the failure to respond to these developments may contribute to demands for changes to state judicial regulation of lawyers and changes in courts' historic regulatory function. The real question, therefore, is whether there might be changes that could be made that will allow the courts to continue their efforts to protect clients and the public, while giving U.S. firms the ability to compete in the new global environment in which they operate. This will be a time-consuming and difficult process. However, history has taught us that institutions that do not respond to changed circumstances face obsolescence. It is worth asking whether the time has arrived to have a serious discussion about whether and how to design and establish a new regulatory system either for the profession as a whole or, perhaps more likely, for the large law firms—one that protects clients and the public, but acknowledges, in a realistic fashion, the environment in which law firms now operate, including the global needs of clients, their expectations and demands and the global environment in which U.S. law firms must now compete ands sets appropriate but realistic limits.

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