

Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?

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Lawyers in the United States have long enjoyed robust privileges of self-regulation in proposing and implementing standards of admission, conduct, and discipline, subject to final approval and oversight by the highest state court exercising its inherent authority to regulate the practice of law.¹ The American Bar Association's leadership in crafting four permutations of lawyer codes and rules of professional conduct (1908, 1969, 1982, and 2002) has been well-received by state courts and bar associations. Local variations evoked by isolated controversies in the original Model Rules are subsiding to calls for national uniformity, except when justified by local policy differences. To date, thirty-four states and the District of Columbia have adopted revised rules, based in large part on the 2002 revisions to the Model Rules.² Recent debates about authorizing legal practice anywhere in the

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1. See, e.g., Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 4 GEO. J. LEGAL ETHICS 911, 918, 928-32 (1994). See also, CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986) 33-34 (stating that "[i]n fact, courts serve as the largely passive sounding boards or disapprovers of initiatives that are taken by lawyers operating through bar associations" and that regardless of functional differences between mandatory and voluntary bars, "bar associations exercise pervasive influence over bar admission and discipline[.]"). Reforms after the McKay Report, *infra* note 6, may have lessened the extent to which lawyers' involvement in the regulatory process was "merely as representatives of the profession"; "[i]n recent years . . . there has been noticeable movement toward lessening the self-regulation features . . . [with] the bodies making disciplinary recommendations through appointment by the state courts . . . [while references to passive supervision by supreme court courts remain accurate, one] should not infer that the task of supervision is always being exercised by lawyers acting solely in their private capacity." ANDREW L. KAUFMAN & DAVID B. WILKINS, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* 697 (4th ed. Carolina Academic Press 2002).

2. Eleven additional states have circulated proposed rules, and four states have committees which have not yet issued a report. ABA Center for Professional Responsibility, Policy Implementation Committee, Status of State Review of Professional Conduct Rules (July 23, 2008), *available at* http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last visited August 12, 2008). Alabama's newly-revised rules include few of the Ethics 2000 recommended changes. *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 390 (July 23, 2008).

country based on a single admission to practice in any state and creating a uniform definition of the practice of law both founded in local turf protection.³

U.S. state courts have jealously guarded their authority to discipline lawyers and to define and regulate the practice of law. Some supreme courts have delegated to the unified state bar association administrative authority to investigate and prosecute alleged misconduct, and authorized hearing tribunals to recommend findings of fact, conclusions of law and disciplinary sanctions.⁴ In any event, such delegation to the bar is non-binding and advisory, with the high court retaining final and exclusive authority.⁵

3. See work of the ABA Commission on Multijurisdictional Practice, available at <http://www.abanet.org/cpr/mjp/home.html> (last visited May 26, 2008) and the ABA Task Force on the Model Definition of the Practice of Law, available at <http://www.abanet.org/cpr/model-def/home.html> (last visited May 26, 2008).

4. Approximately two-thirds of U.S. jurisdictions require membership in the state bar association as a condition of licensure. See LISA LERMAN & PHILIP SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 25-26 (2d ed. Aspen 2008); ABA Div. for Bar Servs., <http://www.abanet.org/barserv/stlobar.html> (last visited May 24, 2008) (U.S. map showing 18 states with voluntary state bars, and all remaining jurisdictions with unified bars); American Bar Ass'n Chart on Unified Bars (listing 32 Unified Bar States plus the unified District of Columbia Bar, and 18 non-unified Bar States) (Sept. 17, 2007). E-mail from Mary M. Devlin, ABA Regulation Counsel, to author (Feb. 14, 2008) (on file with author). See also, Devlin, *supra* note 1 at 933-34 (stating that of the 33 unified bar jurisdictions, twelve maintain a separate lawyer disciplinary agency; in the 18 non-unified, or voluntary bar states, lawyers are regulated by the highest state court, administered through an agency of the court).

5. A fundamental constitutional tenet of separation of powers, inherent authority doctrine is often invoked by state supreme courts to invalidate legislation purporting to regulate the legal profession. See, e.g., *Petition of New Hampshire Bar Ass'n*, 855 A.2d 450 (N.H. 2004) (finding unconstitutional state statute requiring bar association to conduct and be bound by membership referendum on unification; statute directly conflicts with long-standing court ordered unification); *In re Examination of the Washington State Bar Ass'n*, 548 P.2d 310 (Wash. 1976) (reaffirming exclusive and inherent power of state supreme court to admit, enroll, disbar and discipline attorneys; holding that unified bar was not state agency or department subject to audit of revenues pursuant to legislative authority granted state auditor). The inherent power doctrine has also been invoked to support the integration—now called unification—of state bars, requiring membership in the unified state bar as a condition of license to practice law in the state. See *In re Integration of State Bar of Oklahoma*, 95 P.2d 113, 115 (Okla. 1939) (granting petition to integrate, or unify, Oklahoma State Bar Association, pursuant to inherent power and exclusive final authority of court, which included “inherent right of the court to surround itself with honest assistants who are sympathetic and will unite with it in the proper administration of justice . . .”); *In re Integration of the Nebraska State Bar Ass'n*, 275 N.W. 265 (Neb. 1937) (exercising sound discretion of inherent power to approve formation of integrated (unified) bar association; more effective and efficient regulation would result from cooperating bench and bar, provided that court retains final and exclusive authority over admission and discipline of lawyers. 275 N.W. at 269). See also, *ABA/BNA Lawyers' Manual on Professional Conduct* §§ 201:101-104 (July 24, 1996).

Although most states retain the unified bar, their role in the regulation and discipline of lawyers has undergone major changes since the late 1960s. See Peter A. Joy, *Making Ethics Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 *GEO. J. LEGAL ETHICS* 313, 326-28 (2002) (discussing pressures for change and movement for more precise articulation of ethical rules); Devlin, *supra* note 1, at 928-939 (concluding that emerging model of lawyer regulation rationally

Although consumer redress falls outside the usual scope of lawyer discipline, recommendations for expanding lawyer regulation to increase mechanisms designed to resolve consumer complaints that fall outside the purview of the disciplinary agency have reached new levels. The 1992 ABA McKay Report recognized the significant gap between client expectations and existing regulations, and recommended that state courts should develop systems of regulation that bridge the gap with component agencies to address efficiently and effectively the wide range of complaints about lawyers' conduct.⁶ Across the Atlantic Ocean, British Lord Chancellor Mackay's 1989 Green Paper proposed major regulatory reforms to the United Kingdom legal professions, including creation of a legal services ombudsman to investigate handling of disciplinary complaints by the relevant professional bodies.⁷ Since then, and culminating in the 2007 Legal Services Act (which currently applies only to England and Wales), the reforms in the United Kingdom (U.K.) give unprecedented focus on consumer protection and redress to clients outside of or overlapping with revamped disciplinary schemes. Meanwhile, Parliaments in Australia, Scotland and New Zealand enacted ombudsman systems authorizing varying levels of intervention for consumer redress. Legal Services Commissioners in some Australian states have operated for over a decade. As this article goes to press late summer of 2008, Commissioners in New Zealand and Scotland prepare to start operations. Implementation in the U.K. will take some time. Procedural and substantive standards for redress under the new schemes have yet to be defined. In any event, expanding the scope of professional regulation to provide greater consumer protection has taken hold in other westernized legal markets. U.S. state courts that have not yet done so should take heed of these international developments and create mechanisms to address client complaints for redress outside the disciplinary process.

Lawyers in the U.K. have nowhere near the extent of self-regulation enjoyed by the U.S. bar.⁸ Since the thirteenth century, the British Parliament has enacted

allocates roles and responsibilities, with the control over disciplinary process by the judicial branch, public input and involvement and support of the bar).

6. AMERICAN BAR ASSOCIATION 1992, *LAWYER REGULATION FOR A NEW CENTURY, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT*, at 18 [hereinafter "McKay Report," named after its initial chair, Professor Robert B. McKay, until his death in 1990; he was succeeded by Raymond R. Trombadore]. *Id.* at Appendix C, available at http://www.abanet.org/cpr/reports/mckay_report.html.

7. LORD CHANCELLOR'S DEPARTMENT, *THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION*, 1989, CM 570 at 4.31.

8. European lawyers, by further contrast, may enjoy more complete authority to regulate themselves. See Council of Bars and Law Societies of Europe (CCBE) Position on Regulatory and Representative Functions of Bars 5 (June 2005) (stating that in most European democratic countries, "it has been traditional for the Bar to represent the interests of the legal profession and to be entrusted by the State with a leading role in the regulation of the profession in the public interest including the enforcement of ethical rules.") available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf (last visited May 27, 2008). Penn State Dickinson School of Law Professor Laurel S. Terry asserts that "As a general matter, European lawyers don't

laws regulating issues of licensure, turf protection and details of permissible conduct.⁹ Historically, most legislation focused on the lower tiers of legal professionals rather than the elite barristers, who had close ties to the upper house of Parliament. Until 2007 there was no generally applicable law of unauthorized practice; unless Parliament specifically reserved certain tasks to a category of licensed professionals, any person could offer to sell law-related services providing no false or deceptive statements were made about the services.¹⁰ Competition law actively encouraged access to consumer information and competition from different types of consumer providers, challenging the legitimacy of anticompetitive ethical restrictions.¹¹

Parts I and II of this article address the United States, looking first at lawyer regulatory mechanisms and then at legal malpractice claims and other types of

consider regulation by the courts to be self-regulation.” E-mail from Professor Terry to author (May 28, 2008) (on file with author).

9. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800 Year Evolution*, 57 SMU L. REV. 1385, 1389-1409 (2004) (detailing history, in which formal articulation made distinctions between the different types of lawyers, with much closer regulation imposed on the lower ranks. The Statute of Westminster in 1275 addressed champerty, maintenance, court delays, pleading deceit and more general regulation of lawyer conduct. *Id.* at 1394-95. An act of 1402 regulated standards for admission of lawyers, and maintenance of a roll. *Id.* at 1403-04. In 1605 another Parliamentary act addressed excessive fees and collective actions, imposed general standards of competence and honesty for admission to practice, and provided for disbarment and treble damages for certain violations. *Id.* at 1406. The 1729 Act for the Better Regulation of Attorneys and Solicitors again addressed admissions standards, barred assisting in the unauthorized practice of law, and set licensing fees and procedures. *Id.* at 1407). See also, Judith L. Maute, *Alice’s Adventures in Wonderland: Preliminary Reflections on the History of the Split Legal Profession and the Fusion Debate (1000-1900 A.D.)*, 71 FORDHAM L. REV. 1357, 1361-64, 1369 (2003) (discussing Parliamentary regulation of lower branch of attorneys and solicitors, and solicitors’ resentment of favoritism shown to barristers by Parliament). See also, Judith L. Maute, *Revolutionary Changes to the English Legal Profession or Much Ado About Nothing?*, 17 THE PROF. LAWYER 4 at 1, 5-8 (2006) (discussing Parliament’s long-standing involvement with drawing professional boundaries and regulating the conduct of English lawyers, including 1990 Courts and Legal Services Act and 1999 Access to Justice Act; doctrine of Parliamentary sovereignty recognizes the legislative branch’s superiority over all, including the judiciary and government).

10. For example, between 1985 and 1999, Parliamentary actions eroded solicitors’ statutory monopoly over conveyancing services, and barristers’ monopoly over rights of audience in higher courts. Competition law and actions of the Office of Fair Trading further challenged ethical restrictions and traditions impeding open competition. See Maute, *supra* note 9, at 6, 8; MICHAEL ZANDER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 742-750, 777-779 (9th ed. Lexis Nexis 2003).

11. See, e.g., Letter of Richard Collins, Executive Director, Policy Division of Legal Services Commission, a governmental entity, to Tim Dutton QC, Chairman of The Bar Council, reminding that collusion among professionals is both civil and criminal offense, under Competition Act 1998 and Enterprise Act 2002 (Jan. 17, 2008) (*available at* <http://www.barcouncil.org.uk>, last accessed Feb. 1, 2008). See also, Competition in Professions: A Report by the Director General of Fair Trading, OFT328 (March 2001) (*available at* http://www.offt.gov.uk/shared_offt/reports/professional_bodies/offt328.pdf) (last accessed June 3, 2008); Competition in Professions: Progress Statement, OFT385 (April 2002) (*available at* http://www.offt.gov.uk/shared_offt/reports/professional_bodies/offt385.pdf) (last accessed June 3, 2008).

redress for dissatisfied clients. The traditional U.S. model draws a distinct line between complaints giving rise to discipline (there must be a violation of an applicable rule of professional conduct) and non-disciplinable client grievances about other matters. The purpose of discipline, it is commonly said, is to “protect the public, the bar, and legal institutions against lawyers who have demonstrated an unwillingness to comply with minimal professional standards.”¹² Absent dispute resolution forums sponsored by bar organizations or pre-dispute arbitration clauses in retainer agreements, the only recourse for dissatisfied clients of U.S. lawyers is a civil lawsuit for malpractice. Part II considers the limited availability of civil redress for dissatisfied clients of U.S. lawyers.¹³ Parts I and II provide a basis to contrast pending developments in the U.K. and creation of an Office of Legal Complaints, which will have binding authority to handle all non-disciplinary consumer complaints against legal service providers.

Part III discusses the evolution of complaints handling in the U.K., some form of which has been required outside the disciplinary process since the Courts and Legal Services Act 1990.¹⁴ The Ombudsman designated by Parliament to provide government oversight of this system repeatedly criticized the professional bodies (especially the Law Society) for what were considered unacceptable delays and poor resolutions of the non-disciplinary complaints for redress. These criticisms, along with the pressure of competition law, prompted the government of then British Prime Minister Tony Blair to consider major overhaul of the structure used to regulate the legal professions. Protecting and promoting the public interest and the interests of consumers are key regulatory objectives of the Legal Services Act 2007.¹⁵ Part III focuses on the statutory provisions of the new complaints handling scheme, creation of the Legal Services Board and Office for Legal Complaints and ombudsmen system, which are expected to be operational by 2010.¹⁶ As with any new statutory scheme, the “devil is in the details,” with much to be determined in the way of staffing, procedural and substantive standards, administrative structure and assessment after operations begin. The article concludes to argue in Part IV that to be competitive in the globalized legal profession, the U.S. organized bar and state courts must join the international trend

12. WOLFRAM, *supra* note 1, at 79. Fred Zacharias asserts that the orientation of disciplinary agencies (as client-centered; lawyer-centered; profession-centered; or process-centered) impacts its choice of goals (for example, remedy for private or public harms; punishment; deterrence) and the need to assess and prioritize their goals. Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 681, 693-98, 742 (2003).

13. See *infra* text accompanying notes 50-82.

14. Courts and Legal Services Act 1990, Ch. 41, § 22(1).

15. Legal Services Act 2007, Ch. 29, Part 1.

16. Legal Service Board, *available* at http://www.tribalmicrosites.co.uk/lbmembers/index.cfm?page=About_the_Legal_Services_Board. Knowledgeable observers speculate that it will take much longer to become operational. (Oral comment by Professor Alan Paterson and appointee as one of Scotland’s new Legal Services Commissioners, at 3rd International Legal Ethics Conference (July 14, 2008)).

underway in Australia, New Zealand, England, Wales, and Scotland, and develop viable mechanisms to consider consumer claims for redress beyond the realm of discipline or malpractice.

I. Lawyer Discipline in the United States

The manner in which the legal profession is regulated in the U.S. is often referred to as self-regulation. In reality it is regulation under the purview of the judicial branch of government, with bar involvement that varies in degree from state to state. In each state and the District of Columbia, the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law.¹⁷

State supreme courts' regulatory authority includes power to adopt rules for admission to the bar, rules of professional conduct, and rules and procedures for disciplinary enforcement to fulfill the primary purpose of professional regulation—protection of the public. The organized bar may propose rules and policies to the courts for adoption. And, although a state legislature may, under its police power, act to protect the interests of the public, with respect to the practice of law it does so in aid of the courts—its actions do not supersede or detract from the courts' powers to regulate the bar.¹⁸

Location of the lawyer disciplinary function in each jurisdiction varies. In voluntary bar states the courts have created stand-alone disciplinary agencies. In unified bar states the courts have either delegated disciplinary duties to an agency within the state bar association or created a separate disciplinary agency.¹⁹

The extent to which the disciplinary function resides within a state bar association reinforces the perception that the system is purely self-policing. Further, the participation in the disciplinary process by members of the legal profession, whether as initial adjudicators or disciplinary board members, enhances the public perception that in the United States lawyers are regulated by solely their professional colleagues. However, as described above, the reality is different.

Notwithstanding major reforms to the lawyer discipline entities in many jurisdictions, criticisms remain that the lawyer disciplinary agencies of some states are inadequately funded and therefore lack sufficient resources to focus adequately on consumer protection and the public interest. Commentators maintain that

17. See, e.g., Devlin, *supra* note 1; *In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998); *In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is universally accepted and dates back to the thirteenth century). See also, McKay Report, *supra* note 6, at 2. http://www.abanet.org/cpr/reports/mckay_report.html.

18. See, e.g., *People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E. 2d 941, *cert. den.* 302 U.S. 728, *reh. den.* 302 U.S. 777; *In re Integration of Nebraska State Bar Association*, 275 N.W. 265 (Neb. S. Ct. 1937); *Washington State Bar Ass'n v. State*, 890 P. 2d 1047 (Wash. 1995); *In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998).

19. See *supra* note 4.

disciplinary agencies give insufficient attention to individual consumer complaints about the quality of services, reasonableness of fees and appropriate client communication.²⁰

While judicial regulation protects the disciplinary process from undue political influence by the legislative and executive branches of government, delegation of regulatory functions to the state bar association risks under-regulation due to actual or perceived conflicts of interest and self-protection.²¹ Bar associations also pursue representative functions in advancing the political, ideological or trade interests of their general membership that are not directly germane to the regulatory functions and contribute to the public's perception of the system as protectionist.²² Despite calls for reforms to the disciplinary process, such as improved transparency, increased resources and broadened scope to provide redress for dissatisfied clients, some states have not yet meaningfully altered their systems to become more responsive to consumer complaints. That said, many jurisdictions have created worthwhile client protection programs.²³

Because state courts maintain steadfast control over bar admissions and discipline, it has been difficult in the past to make generalized observations about the state of discipline in the U.S. The 1970 "Clark Report" found the state of existing disciplinary systems "scandalous," with lawyers' prevailing attitudes ranging from "apathy to outright hostility" and disciplinary enforcement "practically

20. See, e.g., Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1512 (2002) (discussing differences in professional and public perceptions on disciplinary process; public perception that it is "[t]oo slow, too secret, too soft, and too regulated" contrasted with surveyed lawyers seeing process "as too severe and too responsive to frivolous complaints."); Stephen Schemenauer, Comment, *What We've Got Here... is a Failure... to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 640, 665-681 (2007) (citing extreme criticism by HALT of nation's lawyer disciplinary systems as "irresponsible at best—and in some cases downright antagonistic—toward consumers, and providing detailed state-by-state survey results on client grievances based on communication failures."). Since the 1992 McKay Report, discussed in text accompanying note 6, *supra*, many unified bars have developed a range of consumer assistance programs which operate outside the lawyer disciplinary process. See, e.g., those operated by the state bar associations in Georgia, Florida, Arizona and Texas, available at http://www.gabar.org/public_information/; http://www.floridabar.org/_852567090070C998.nsf/0A92A6DC28E76AE58525700A005D0D53/37E34BBB81F1EE4E85256C0D00703FF4; <http://www.azbar.org/WorkingWithLawyers/ACAP.cfm>; http://www.texasbar.com/Template.cfm?Section=Client_Assistance_and_Grievance&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=51&ContentID=7034 (last accessed May 25, 2008).

21. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. d (2000).

22. Dissenting members may have limited claim to refunded bar dues. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

23. See, e.g., ABA Standing Committee on Client Protection, Chart on State by State Adoption of ABA Client Protection Programs (June 11, 2007) (indicating 37 states provide for trust account overdraft notification; 20 provide for disclosure of insurance; 12 have programs for mandatory fee arbitration and 23 have mediation programs for non-fee disputes) available at http://www.abanet.org/cpr/clientpro/statebystate_cp_programs.pdf (last accessed May 24, 2008).

nonexistent in many jurisdictions.”²⁴ The Clark Report prompted important but uneven reforms.²⁵ Steele & Nimmer’s 1976 empirical study found that most disciplinary entities focused on lawyer deviance in which the offending lawyer “is defined as unfit, a malefactor” warranting removal by suspension or disbarment in order to purify the profession while disregarding more pervasive client complaints about fees, delays and quality of performance.²⁶ Scholars continued to question the effectiveness of professional self-regulation, with particular focus on the bar’s inattention to competence and consumer protection.²⁷

In 1989 the ABA undertook to evaluate progress since the Clark Report and to make further recommendations for improving disciplinary enforcement.²⁸ As did the Clark Committee, the ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission) considered whether the legal profession

24. American Bar Association Special Committee on Evaluation of Disciplinary Enforcement (Tom C. Clark, Chairman), *Problems and Recommendations in Disciplinary Enforcement* (Final Draft, June 1970) at 1. *See also*, Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33 (2004-2005) (discussing substantial advances in legal ethics and professionalism over the last 35 years).

25. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 942 (1976) (reporting 203% increase in rate of disciplinary expenditures, from 1968-69 rate of \$5.85 per lawyer, to 1974-75 rate of \$17.73 per lawyer; consumer price index increased by 43% during that period).

26. *Id.* at 925, 946-962, 1009-1013 (discussing client complaints and limited bar response at creating dispute resolution formats).

27. *See, e.g.*, Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J. OF L. & PUB. POLICY 6 (1993-94); Marks & Cathcart, *Discipline Within the Legal Profession, Is it Self Regulation?*, 1974 U. ILL. L. F. 193; Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L. J. 705 (1980-81); Bryant G. Garth, *Rethinking the Legal Profession’s Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639 (1983). *See also*, Paula L. Hannaford, *What Complainants Really Expect of Lawyer Disciplinary Agencies: Lessons from the Virginia State Bar Complainant Satisfaction Survey*, 7 PROF. LAW. 3, at 1, 1-7 (1996) (most disciplinary complaints concern “the fundamentals of human relationships: communication, courtesy and forthright dealings with one’s clients, the courts and opposing counsel.” *Quoting* Michael Rigsby, Bar Counsel for Virginia State Bar; empirical survey of complainants revealed that those who viewed the process as “a means to prompt respondents to react” to their demands were “quite satisfied,” yielding 3.82 average on 5 point scale; complainants who expected the agency “to investigate suspected lawyer misconduct” were least satisfied, with an average rating of 2.09, perhaps reflecting their perspective that the process does not treat “both the complainant and the respondent in a manner that is objectively fair”; those complainants who expected the agency “to impose sanctions on respondents” ranked overall satisfaction as 2.46, with differences based on the severity of sanction imposed; 3.52 average for those resulting in mild sanctions and 3.13 for severe sanctions, likely influenced by other factors, such as thoroughness of investigation and overall fairness of outcome).

28. McKay Report, *supra* note 6, Appendix B. *See generally*, Devlin, *supra* note 1, at 931-933 (discussing the history of lawyer discipline and highlighting key recommendations of McKay Commission: recommending the highest level judiciary’s control rather than elected bar officials; central intake, random audits of trust accounts, and “perhaps the most controversial . . . to make disciplinary matters public from the time of the complainant’s initial contact with the agency.”). *Id.* at 931.

should be regulated by the judiciary or the legislature.²⁹ The McKay Report also focused on expanding the professional regulatory structure beyond discipline, to encompass expanded components to be operated by the bar.³⁰ These components included mechanisms such as mediation, mandatory fee arbitration, voluntary arbitration of lawyer malpractice claims and law practice management assistance allowing the bar to engage in “peer-to-peer assistance.”³¹ In February 1992, the ABA House of Delegates adopted, with some modifications, the McKay Report’s 21 recommendations.³²

The current system of state by state lawyer regulation is best described as “fractionalized,” with great variances in how jurisdictions responded to the McKay Report, or other calls for reform.³³ Since 1992 some of the recommendations have been widely implemented, including expedited procedures in lieu of discipline for minor misconduct,³⁴ programs for law practice management assistance, substance abuse counseling³⁵ and interim suspensions where a lawyer’s conduct poses a substantial threat of serious harm to the public.³⁶ Numerous jurisdictions have adopted some form of centralized intake, to facilitate efficient screening of complaints and referral of grievances to the appropriate entity for handling.³⁷ Other more visionary

29. McKay Report, *supra* note 6, at 1-8.

30. *Id.* at 16.

31. *Id.* at 16. *See also*, Devlin, *supra* note 1, at 931-932.

32. McKay Report, *supra* note 6, at Appendix D, Complete Text of Recommendations as Adopted by the House of Delegates [hereinafter ABA McKay Recommendations].

33. Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 896 (2006) [hereinafter cited as Lerman, Hofstra Symposium] (comments of Professor Burnele Powell)

34. ABA McKay Recommendations, *supra* note 32, Recommendations 9 and 10. *Cf.*, Brian Melendez, The Affiliate, YLD (2000-2001), *An Alternative to Traditional Discipline for Minor Misconduct: Disciplinary Diversion* (stating that about 1/3 of surveyed jurisdictions had adopted or were experimenting with diversion programs in the four years since ABA amendment to the ABA Model Rule for Disciplinary Enforcement, Model Rule 11(G) provided for alternatives to discipline). Available at <http://www.abanet.org/yld/affiliate/jan98/23-3-5.html> (last accessed June 3, 2008).

35. *Id.*, Recommendations 3.1(f),(g), and 4. *See* ABA Commission on Lawyer Assistance Programs, Directory of CoLAP Programs, available at <http://www.abanet.org/legalservices/colap/lapdirectory.html> (last accessed June 3, 2008).

36. McKay Recommendations, *supra* note 32, Recommendation 12. *See, e.g.*, 24 ABA/BNA *Lawyers' Manual on Professional Conduct* 10 Current Reports 244 (May 14, 2008) (reporting recent decisions upholding interim suspensions).

37. According to an informal survey by the National Organization of Bar Counsel (NOBC) conducted around 2003, at least 14 states self-reported as having some type of central intake system. *See* NOBC Chart, Survey of States: Central Intake Systems (undated, copy on file) (including California, Colorado, Florida, Georgia, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, Ohio, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin). NOBC officer Donald R. Lundberg estimates the date as 2003. E-mail from Donald R. Lundberg to author (Aug. 1, 2008) (on file with author). Because the survey was informal, some states may not have responded. For example, Illinois had an Intake Division since about 1990, described at https://www.iardc.org/article_avoidanxiety.html (last accessed Aug. 13, 2008). E-mail from James Grogan to author (Aug. 18, 2008)(on file with author). It is likely that other jurisdictions have followed suit. *See, e.g.*, Montana,

recommendations to protect consumer interests have been met with resistance, such as mandatory fee arbitration and other dispute resolution mechanisms.³⁸ Major structural recommendations, to insure that disciplinary officials working in unified bar states where discipline is housed within the state bar association are independent and insulated from political influence, and to provide adequate funding of resources for a professional disciplinary staff, have met with less success.³⁹ Some

<http://www.courts.mt.gov/supreme/discipline.asp> and Arizona, <http://www.azbar.org/workingwithlawyers/unh.cfm>.

38. See, e.g., ABA Standing Committee on Client Protection, State by State Adoption of ABA Client Protection Programs (June 11, 2007) (indicating that 23 states provide mediation of non-fee disputes; 12 states have mandatory fee arbitration and 37 require notification of trust account overdrafts) available at http://www.abanet.org/cpr/clientpro/statebystate_cp_programs.pdf (last accessed June 3, 2008).

39. See, e.g., Chart on Unified Bars and Responsibility for Lawyer Discipline, *supra* note 4 (21 of 32 Unified Bar States and the District of Columbia oversee lawyer discipline). See also, Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 3 (finding states with unified bars slower than voluntary bar states to implement regulatory programs that benefited consumers); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35 (1994) (claiming that voluntary bar states are at “forefront of consumer oriented legal reform” and that compulsory membership is divisive to the profession). *Id.* at 37.

Questions of independence are further compounded by budgetary matters. In a unified bar, it is likely that the bar association will have to choose between adequately funding discipline or its other programs designed to benefit its members. Based on the author’s statistical analysis of the data contained in Charts I and VI of the 2006 ABA Survey on Lawyer Discipline Systems (SOLD), it appears that the disciplinary budgets of thirteen jurisdictions are less than \$100 per lawyer with active licenses; eleven of these jurisdictions have unified bar associations. Seven of these lower-funded disciplinary programs are run by the state bar and report significantly lower rates of filing charges after probable cause determination, as contrasted to the national average of .38 [hereinafter, “charge rate”]. Those seven states are designated by •. The author’s conversations with individuals involved in unified bar lawyer disciplinary systems cause her to believe that in some jurisdictions, low budgets may result in lengthy delays and continued harm to unsuspecting current and future clients. While no causal relationship has been empirically demonstrated, this issue warrants further study. *Cf.*, Oklahoma Bar Ass’n v. Maddox, 152 P.3d 204, 209-210 (Okla. 2006) (sharply criticizing state bar disciplinary authority for five-year delay in bringing charge to formal hearing. “Limbo does not maintain the integrity and confidence of the profession, it ignores it.”).

Jurisdiction [*Unified]	Bar Resp. for Disc.	Per Lawyer Disc.	Budget Per Lawyer Charge Rate
Alabama*	Yes	\$60.10	.25•
Arkansas	No	80.54	1.70
Dist. Of Columbia*	Yes	87.97	.06•
Georgia*	Yes	64.06	.83
Kentucky*	Yes	63.68	.31•
Mississippi*	Yes	45.15	.19•
Missouri*	No	76.07	.12•
North Carolina*	Yes	51.91	.17•
Oklahoma*	Yes	58.67	.07•
Wyoming*	Yes	49.11	.45

Analysis of national survey data from multiple sources is challenging. As stated by William P. Smith, III, General Counsel for the State Bar of Georgia, “[c]omparing jurisdictions is extremely difficult because each one differs in procedure, rules and terminology. The functioning of disciplinary systems seems to me to depend more on the culture of the legal community of the jurisdiction than on any one factor such as the amount of money spent per lawyer.” E-mail from William P. Smith, III to author (June 3, 2008) (on file with author). Yet, there may be “a perception by bar leadership that it is their responsibility to protect their membership from increased regulation. Increased funding is often perceived as synonymous with increased regulation.” E-mail from Maridee F. Edwards to author (June 25, 2008) (on file with author). Ms. Edwards was chief disciplinary counsel in Missouri from 2001-2006, and was a deputy trial counsel with the California discipline system for ten years). *Id.*

The composite figures for all jurisdictions include matters handled by central intake, private admonishments, and consumer assistance programs, so the figures do not provide a complete and accurate picture. That said, 2006 SOLD, Chart 1 figures indicate that of 1,363,537 active lawyer licenses, 5,186 were charged after probable cause determination, yielding a .38 charge rate. As lower-funded unified states with bar control over lawyer discipline, Georgia stands out for its higher charge rate and Missouri stands out for its lower charge rate. As a lower-funded voluntary state bar, Arkansas stands out for having the highest charge rate in the nation. Arkansas reported charges are based on number of cases, not lawyers; when its SOLD figures are adjusted to reflect only the number of different lawyers, it still ranks high with a 1.70 charge rate. Arkansas state court rules require that any written referral by a judge shall be treated as a formal complaint; of the 156 new complaints in 2006, 19 were from judges and 55 were referrals from the Supreme Court for missed appeal deadlines. E-mail from Michael Harmon, Senior Staff Attorney, Arkansas Office of Professional Conduct to author (June 3, 2008) (on file with author).

Alabama, the District of Columbia, Mississippi, Missouri, North Carolina and Oklahoma are what the author characterizes as lower-funded unified bar states with exceptionally low charge rates. Because of significant variations in state systems and how budgets are structured, numbers may not portray a complete picture. For example, Missouri frequently issues private admonitions as a case management tool to avoid use of substantial resources in a formal prosecution; the downside is that grieving clients may perceive this as a “slap on the wrist.” E-mail from Maridee F. Edwards to author (June 25, 2008) (on file with author). Nevertheless, objective observers might find troubling the numbers lower-funded disciplinary programs with low charge rates, suggesting that prosecutions may proceed only against the most serious charges or those unlikely to be defended rigorously. *See generally*, Lerman, *supra* note 33 (discussing specific cases from District of Columbia to demonstrate harshness towards solo and small firm practitioners charged with trust account violations, but leniency toward large firm lawyers charged with financial dishonesty involving billing misconduct. 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) (former disciplinary prosecutor from District of Columbia reported legion episodes of egregious delay, often attributable to volunteer system of staffing hearing committee, and outcomes “rife with favoritism and reflexively pro-lawyer” and urging District of Columbia Court of Appeals to limit role of bar association Board to approve disciplinary charges, with Court to reserve for itself authority to appoint and retain its own Bar Counsel and to create a system of independent administrative law judges to conduct hearings, find facts, and propose conclusions of law with respect to charges of ethical misconduct, . . . [reserving a single level of review by the] Court the decision as to the appropriate sanction.”). *Id.* at 325, 360-63. *See also*, 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 (1995) (relating Ohio’s contentious reform efforts and suggesting that it more “generally reflects a national reluctance on the part of the legal profession to initiate necessary reforms that are in the public interest.”). *Id.* at 69.

At least at the extremes, there would seem to be some correlation between disciplinary budget and staff and amount of enforcement activity. *See* E-mail from Judge Allen Welch to author (stating

states continue to increase funding and professionalize their programs, separating adjudicative and prosecutorial and advisory functions, protecting the independence of disciplinary counsel, providing greater responsiveness to client complaints, using diversion programs, and reducing backlogs.⁴⁰ Most states provide for disciplinary proceedings that are public upon a finding of probable cause and the filing of a

he had “not researched the correlation between disciplinary staff or budget but, I’d think to a degree, such would necessarily follow.”) (June 3, 2008) (on file with author). Oklahoma County Special District Judge Allen J. Welch, Jr. previously served ten years as First Assistant General Counsel of the Oklahoma Bar Association. <http://www.oklahomacounty.org/departments/LawLibrary/Judges/Special%20Judges/JUDGE%20ALLEN%20WELCH.htm> (last accessed June 4, 2008). Judge Welch cited to the 2000 NOBC survey:

STATE	# of Lawyers	Budget	# Disciplinary Lawyers	Author: Budget Per Lawyer	Author Calculation Charge Rate (Based on 2006 SOLD, Chart I)
Arizona	12,469	\$3,210,000	15	\$257.43	1.19
Indiana	14,495	1,215,712	9	83.87	.41
Oklahoma	14,742	733,712	5	49.77	.14
Tennessee	15,485	1,483,600	8	95.81	1.04

Charts VI and VIII of the 2000 SOLD contain identical data. Both Arizona and Oklahoma are unified bar states responsible for lawyer discipline. At least for these select states with comparable numbers of lawyers, there is a strong correlation at both the high and low ends of budgets and the per lawyer charge rates.

40. *Compare* budgetary and grievance statistics in 1980 and 2006 on sample of seven jurisdictions, using data from Michael Hoover, Report, Lawyers Professional Responsibility Board (September 1980), available at <http://www.mncourts.gov/lprb/80bbarts/bb0980.html> (last accessed Feb. 14, 2008) (comparing select jurisdictions with number of grievances per lawyer and per lawyer budget for discipline) and American Bar Association 2006 Survey on Lawyer Discipline Systems [hereinafter 2006 SOLD], available at <http://www.abanet.org/cpr/discipline/sold/home.html> (last accessed Feb. 14, 2008) (author calculated from raw data reported).

Jurisdiction	1980 Grievances Per Lawyer	2006 Grievances Per Lawyer	1980 Disciplinary Per Lawyer	Budget 2006 Disciplinary Budget Per Lawyer
Florida	.12	.77	\$61.48	\$130.17
Illinois	.07	.26	22.13	172.11
Maryland	.10	.43	37.20	120.37
Michigan	.17	.43	23.46	110.75
Minnesota	.06	.12	24.63	103.27
Pennsylvania	.09	.36	40.13	126.70
Wisconsin	.14	.27	27.76	108.57
Mean	.11	.38	\$33.83	\$124.56

These figures reflect a 268% per lawyer increase in disciplinary budgets between 1980-2006 as contrasted with a 91.5% increase in the U.S. Department of Labor Consumer Price Index. See <ftp://ftp.bls.gov/pub/special.requests/cpi/cpia.txt> (last accessed Feb. 15, 2008).

formal complaint⁴¹ although practically this has resulted in limited transparency.⁴² No jurisdiction has formally implemented what Professor Thomas Morgan has suggested would have been most visionary, to create “a professionally-staffed system within which a client could file a charge and get a decision *ordering payment of damages* as well as see traditional discipline imposed.”⁴³ Absent that type of system, Professor Morgan contends the legal profession lacks “the leverage with which to force our brothers and sisters at the bar to take professional obligations seriously.”⁴⁴

Repeatedly, when major scandals erupt involving the use of legal services the resulting public outcry prompts calls for external regulation.⁴⁵ If we lawyers in the U.S.

41. ABA MRLDE 16 and ABA McKay Recommendation 7, *supra* note 32, and ABA Center for Professional Responsibility Chart on Access to Disciplinary Proceedings (showing 36 jurisdictions allow public access after probable cause finding; only three jurisdictions allow public access either upon finding of probable cause or dismissal of probable cause; only Oregon provides that initial complaints are open to public inspection on request).

42. *See, e.g.*, Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 49-50 (Winter 2001) (arguing for earlier public access to information, after initial screening decision and shortly after complaint is docketed, and “to learn . . . that a lawyer had a complaint against him summarily dismissed (as well as the reasons for dismissal), that he received a minor sanction, that he agreed to diversion, or that there was a probable cause determination.”); Steven C. Krane, *Meet the Gundersons*, 73 Aug. N.Y. ST. B.J. 5 (2001) (stating that two-thirds of states open disciplinary proceedings, usually after probable cause determination, and criticizing continued secrecy in New York, as unnecessary to protect reputation of lawyers who are formally charged, but later cleared by dismissal or private censure).

43. Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409, 420 (2001) (emphasis added). Professor Morgan was apparently referring to a resolution by the ABA Standing Committee on Dispute Resolution, finding that lawyer discipline and client protection funds had limited ability to compensate clients or order restitution; lack of economically feasible remedy for most clients with legitimate fee disputes or other claims for redress. *See* McKay, *supra* note 6, at 18. In discussing idea for multi-door pilot program, the McKay Commission noted that most common law countries, including England, Wales and Australia had introduced systems of resolving less serious client complaints and opportunities for redress. *See also*, Blumenthal, *supra* note 27, 3 KAN. J. OF L. & PUB. POLICY 6 (1993-94) (discussing potential dramatic reform to “consumer-oriented disciplinary system” which might “change from self-regulation to government regulation [that] could have significant and dire consequences for the role of the attorney in our legal system and for our entire society.”). *Id.* at 11, 15.

44. Morgan, *supra* note 43, at 420. Some jurisdictions may have quietly moved to more of a consumer protection model that is not reflected in any official rules or court opinions. James Grogan, Chief Disciplinary Counsel in Illinois, recalls that in 1979 the Illinois Supreme Court had a clear demarcation between cases suitable for discipline and everything else, for which any relief to the client was a civil matter. He noted a sea change since then, with discipline on consent as a result of plea bargaining routinely including restitution of fees and other client-focused relief. Telephone Interview with James J. Grogan, Deputy Administrator and Chief Counsel, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois in Chicago, IL (Aug. 13, 2008).

45. *See, e.g.*, Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 603-608 (2005) (discussing unprecedented discipline of law firm by the Securities and Exchange Commission in *In re Keating, Muething & Klekamp*, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,981 (July 2, 1979) as example of increased focus by federal regulators on law firm infrastructure);

do not get our houses in order, we may find that others will wrest control from us, creating powerful external regulatory structures over which we have little control.⁴⁶ A modest step forward might be for states to place greater focus on ABA Model Rule 5.1(a), requiring that partners “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance” that the firm conforms with the rules. Rather than increasing disciplinary enforcement mechanisms, this proposal would encourage internal self-assessment by law firms of their own ethical infrastructure.⁴⁷

II. Legal Malpractice and Other Types of Redress for Dissatisfied American Clients

A. Statistical Evidence of Dramatic Increase in Malpractice Claims

Theoretically clients can obtain private redress for their lawyers’ poor performance through civil liability. The risk of malpractice liability has become a

James A. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 100-101 (2006) (discussing increased willingness of legislators to regulate lawyers, with the Enron and Worldcom debacles prompting enactment of the Sarbanes-Oxley Act, and revised rules promulgated by the Securities and Exchange Commission).

46. Schneyer, *supra* note 45 (discussing shifting influences in bar organizations, trend toward specialization, and accelerated expansion of federal regulation, “likely to gain momentum with further globalization of the legal services market.”) *Id.* at 566-67. *See also*, Blumenthal, *supra* note 27, at 15-16 (stating that lawyer self-regulation does not satisfy public’s expectations; before the current disciplinary system is scrapped or dramatically altered, legal profession should consider how the system can be improved to regain public trust, “to preserve lawyer independence and lawyer duties to their clients, the public, the courts and the legal system.”) *Id.* at 16. To stave off threats of external regulation, American lawyers and judges have adopted their own reforms. *See, e.g.*, HAZARD KONIAK, CRAMTON & COHEN, *THE LAW AND ETHICS OF LAWYERING* (4th. ed. 2005) at 252-54 (discussing Sarbanes-Oxley and pending SEC regulations prompting ABA to amend Model Rule 1.13); and the Rules for Judicial Conduct and Disability Proceedings adopted in March 2008 by the Judicial Conference of the United States after federal legislation was introduced to establish an office of inspector general for the federal judiciary. *See* News Release, National Rules Adopted for Judicial Conduct and Disability Proceedings (March 11, 2008) available at http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm (last accessed June 11, 2008) and “*Federal Judiciary Able to Handle Complaints About Judges’ Misconduct, Committee Says*,” 75 U. S. L.W. 2172 (Sept. 26, 2006). *See also*, John Flood, *Will there be Fallout from Clementi? The Global Repercussions for the Legal Profession after the UK Legal Services Act 2007*, 8 Jan Monet/Robert Schuman Paper Series (No. 6) (April 2008) (demise of long alliance between state and professions based on trust; “state no longer relies on or trusts these groups . . . [and] has shifted its allegiance to the corporate and managerial elements of society . . .” *Id.* at 8. The 2007 Act has potentially dire consequences for U.S. lawyers who will be “at a competitive disadvantage” in the global market place. *Id.* at 5).

47. “Should Rule 5.1 Be Used More Proactively?” Plenary presentation to the National Organization of Bar Counsel, August 9, 2008, and supporting materials prepared by Laurel Terry (on file with author). Professor Terry suggests this modest proposal consider the self-assessment mechanism being implemented in New South Wales for all incorporated legal practices, which must assess their internal structures relating to ten areas, including negligence, communication, delay, file transfers, billing practices, conflicts, record management, undertakings, supervision and trust accounts. *See also*, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives.

significant issue of concern for U.S. lawyers only since the 1970s.⁴⁸ It has been suggested that in the period from 1984 to 1995 there was a “startling growth in legal malpractice litigation, particularly in high profile cases involving large and prestigious firms.”⁴⁹ Reliable statistical data is scarce and its use “fraught with peril.”⁵⁰ Insurance carriers limit public availability of data on claims frequency, defense, and indemnity costs because they consider proprietary this data used in underwriting and rate-setting.⁵¹ Also, because of the secrecy of payouts, the consuming public is unaware that wronged clients may have civil recourse against malfeasant lawyers.⁵²

While the absolute frequency of claims made remained relatively constant (at least through 2003),⁵³ the severity of claims and indemnity payouts has increased.⁵⁴ Known risky practice areas involve plaintiffs’ personal injury, real estate, family law, estate, trust and probate. Insurance defense now ranks third among risky fields of practice and claims against insurance defense counsel comprise

48. RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 1.6 at 19 (2007 Ed.) [hereinafter MALLEN & SMITH].

49. Seth Rosner, *A Decade of Professionalism*, 6 *PROF. LAW.* 4 at 2 (1995), citing Robert A. Creamer, *Law Firm Limited Liability Entities*, APRL Midyear Meeting Materials (1995).

50. MALLEN & SMITH, *supra* note 48, at § 1.6, p. 23; American Bar Ass’n Standing Committee on Lawyers’ Professional Liability, *Profile of Legal Malpractice Claims 2000-2003* (2005) at 3 [hereinafter 2000-03 Profile] (explaining the limited utility of national malpractice claims data conducted by malpractice insurer group, including significant variations among states, numbers cover only lawyers who carry malpractice insurance with no information about claims against the significant number of uninsured lawyers, spotty response by some carriers about claims, and caveat that no conclusions were drawn about the relative riskiness of different practice areas). The Standing Committee issued prior studies in 1985, 1995 and 1999. *Id.* at 1. Data collection is underway for the next edition.

51. MALLEN & SMITH, *supra* note 48, at § 1.6, p. 23, Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 *TUL. L. REV.* 2583, 2584 n. 2 (quoting Robert O’Malley, of Attorneys’ Liability Assurance Society stating that in 1992, expenditures of \$3-4 billion a year for payouts, lost reserves, settlements, defense costs, which was “at least five or six times” the cost ten years earlier). *See also, id.* at 2589 (author admitting that during his extensive malpractice defense practice in California during the 1980s, he routinely “conspired with lawyer-clients, plaintiffs’ lawyers, plaintiffs, judges and insurance carriers by entering into confidential settlement agreements, so there was no public document available on fact of or terms of settlement.”).

52. *Cf.*, Manuel R. Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 *VAND. L. REV.* 1657 (1994) (discussing the explosion in legal malpractice since the 1980s, with increased numbers of claims and severity as tip of the iceberg). *Id.* at 1679-82.

53. 2000-03 Profile, *supra* note 50, at Table 1 (reporting 29,637 claims made in 2003 study, compared to 29,227 claims in 1985 study).

54. *Id.* at Tables 7 and 7A p. 12, and summary at 16 (showing 1995-2003 .14% increase in claims where over \$250,000 indemnity dollars paid to claimants, and a “slight increase” over a ten year period where claims settled for over two million indemnity dollars). *See also*, MALLEN & SMITH, *supra* note 48, at § 1.6 at p. 23; § 2.1 at 66 (suggesting 60% increase of claims exceeding \$2 million since 1996).

about 10% of all claims made in 2003.⁵⁵ Claims against firms of 40 or more lawyers constitute 15% of all claims, perhaps reflecting an overall growth in firm size⁵⁶ and the likelihood of malpractice insurance. Most claims allege substantive errors of law (47%) or administrative error (28%).⁵⁷ An alleged conflict of interest arising during a representation often colors and makes more difficult to defend a garden variety negligence case.⁵⁸

B. Possible Reasons for Explosion in Malpractice Claims

Multiple factors account for this expansion. The consumer movement that started to take hold in the 1970s coincided with an increased number of lawyers in the population, and with increased competition among lawyers, partly fueled by *Bates v. Arizona* and its progeny.⁵⁹ Perhaps related to those events, public opinion polls in the last decades reveal significant drops in the profession's reputation for honesty, veracity and ethics.⁶⁰ Previously, lawyers benefited from a collegial "conspiracy of silence" in which it was very difficult to find a lawyer to represent a legal malpractice plaintiff—one of those "unpopular causes" that lawyers shied away from—and making it nearly impossible to find a qualified plaintiff's expert to testify against a fellow lawyer. Even when a prospective client was able to locate a lawyer willing to consider undertaking a malpractice prosecution, matters frequently had to be dropped when it appeared the malfeasant lawyer carried no malpractice insurance and was effectively judgment proof. Appellate judicial decisions, made by judges who came up through the ranks of local practitioners and were selected with their political and financial support, perpetuated protectionist doctrines that created difficult barriers to recovery.⁶¹

55. 2000-03 Profile, *supra* note 50, at 16 (summarizing Table 1, showing 5.86% increase in claims against personal injury defense lawyers). *See also*, *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 114 (March 5, 2008) (panelists noted "mushrooming" claims against insurance defense counsel, with actions by insured that often reveal "shocking neglect... perhaps stemming from a basic misunderstanding of client identity" and other suits lodged by insurers, excess insurers and reissuers).

56. 2000-03 Profile, *supra* note 50, at 6.

57. *Id.* at Table 5 at 10 and at 17.

58. *Id.* at 17. *See also*, comments made by Oklahoma Attorneys Mutual Insurance Vice-President and Legal Counsel William R. Bandi, to author's class January 30, 2007.

59. *See* Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrines*, 13 HASTINGS CONST. L.Q. 487-535 (1986); MALLEN & SMITH, *supra* note 48, at § 1.6 p. 22.

60. MALLEN & SMITH, *supra* note 48, at § 2.1 pp. 54-55.

61. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?* 37 GA. L. REV. 1167, 1178-82, 1185-1204, 1209, 1246-47 (2003) (discussing preferential treatment given to lawyers by judges who came from their ranks; high risk of industry capture, underfunding of disciplinary discipline, with institutional analysis leading "inexorably to the conclusion that state supreme courts should not be in charge. These justices are too busy, too connected and sympathetic to lawyers, and too inaccessible to the public to do any more than allow bar associations and lawyers almost total control of the system.

Times have changed, at least in some jurisdictions. Evolutionary development of the law governing lawyers—with successive drafts of the Model Rules of Professional Conduct, the Restatement (Third) of the Law Governing Lawyers and a cadre of lawyers dedicating their practice to this area of law—has given wronged clients a better opportunity to locate counsel willing to represent them, if the damages are significant and the prospective defendant lawyer or law firm maintains adequate malpractice insurance.⁶² Significant scholarly work has supported further expansion in theories of liability.⁶³ Economic downturns prompt disappointed clients and nonclients to search for deep pockets to cover their losses from high risk matters.⁶⁴

C. Focus on Client Protection in Regulation by Malpractice Carriers

Professor Deborah Rhode noted a serious mismatch between client needs and the regulatory response by lawyer discipline agencies. She asserts that, even where

Legislative control, whether by state legislatures or Congress, will not eliminate the powerful influence of lawyers, but it will allow a healthy dose of public influence to enter the picture and may begin to reform the system.” *Id.* at 1246.

62. See SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* (West 2008) at 8-9 (discussing various reasons for expansion) [hereinafter FORTNEY & JOHNSON, *MALPRACTICE CASEBOOK*]; Ramos, *supra* note 51, at 2602 (stating that smaller claims, under \$100,000, fall through the cracks because of inability to find a lawyer to represent and lacking sophistication to deal directly with insurance carriers, or because underinsured or uninsured lawyers leave former clients with good liability claims without meaningful remedy); Rosner, *supra* note 49, at 16.

Whether arbitration of fee disputes and malpractice claims provide meaningful recourse to clients is beyond the scope of this work. Some scholars and courts have raised concerns about the fairness of pre-dispute arbitration clauses, and about whether the private forum may reflect industry bias. See, John Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 995-996 (1995); Louis A. Russo, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327 (2006); *In re Akin Gump Strauss Hauer & Feld, LLP*, 252 S.W.3d 480 (Tex. App.—Hous (14 Dist.) (Feb. 21, 2008) (upholding trial court confirmation of arbitration award between lawyers and sophisticated company, and denying lawyers’ petition for mandamus to remand back to original arbitration panel); *LaFleur v. Law Offices of Anthony G. Buzbee, P.C.*, 960 So.2d 105 (1st Cir. 2007) (holding unenforceable predispute mandatory arbitration provision in retainer agreement with injured maritime worker).

63. See, e.g., John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101 (1995) (urging further development of legal malpractice doctrine beyond negligence law, to become integral part of system of legal regulation); Nancy J. Moore, *Expanding Duties of Attorneys to “Non-Clients:” Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S. C. L. REV. 659 (1994); Deborah Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 695 (1995) (discussing “mismatch between client needs and regulatory responses”); ABA STANDING COMMITTEE ON LAWYERS’ PROFESSIONAL LIABILITY, *THE LAWYER’S DESK GUIDE TO LEGAL MALPRACTICE* viii (1992).

64. Katja Kunzke & Salley E. Anderson, *They Crash and You Burn: When the Stock Market Falls, You Can Count on Malpractice Risk to Rise* (May 2002), available at <http://www.abanet.org/legalservices/lpl/downloads/journalmay02.pdf> (last accessed Feb. 28, 2008).

conduct violates black letter provisions of an applicable rule and the unhappy client files a grievance, discipline seldom results, rarely producing some redress or compensation for the harmed client.⁶⁵ The traditional disciplinary model declines to act upon the vast majority of client grievances about isolated instances of neglect, inadequate services, and excessive fees.⁶⁶ The risk of malpractice liability, linked with law practice management advice and loss prevention guidance from malpractice carriers is the most effective means of regulating lawyers today.⁶⁷ Carriers educate and affect the behavior of those they cover: with the initial application and premium; renewals with rates based on claims history; with regular newsletters to educate about claims prevention; with guidance and assistance in attempting to cure a pending claim; and at the most difficult times, with defense of claims within the scope of coverage.⁶⁸

Available data on amounts paid to claimants against insured lawyers indicate that 78% of claims conclude with no payment and 6.35% with payment under \$10,000.⁶⁹ Various interpretations might explain these figures. Perhaps the carrier assisted with a non-monetary resolution through claims repair and improved client-lawyer relationship. Perhaps defense representatives persuaded the claimant that the claim lacked merit and was not worth pursuing. Or, perhaps unsophisticated and unrepresented claimants gave up in frustration because they were unable to resolve their claims with defense representatives.

Little reliable data exists on the number of uninsured or underinsured lawyers engaged in the practice of law involving conduct that could expose them to risk

65. Rhode, *supra* note 63 at 694-95 (besides resource constraints that lead agencies to decline jurisdiction over abuses for which there is theoretically a civil remedy available, "industry capture" of the process grants the profession almost exclusive control over the process).

66. *Id.*

67. See generally, Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95 (2008) (developing claim that law firm risk management enhances careful ethical deliberation by individual lawyers); ANTHONY E. DAVIS & PETER R. JARVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* (2d ed. 2007); ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE* 52-62 (2d ed. 1999) (discussing "top ten malpractice traps and how to avoid"); Susan Saab Fortney & Jett Hanna, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669 (2002); Mark Bassingthwaighe, *Keep Malpractice and Disciplinary Problems at Bay*, 44 TRIAL 34 (Jan. 2008). See also, Ramos, *supra* note 51 at 2601.

68. See Conference Report, 2008 Legal Malpractice & Risk Management Conference, reprinted in *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 118 (March 5, 2008) (speakers encouraging firms to state and implement core values; to have firm's risk managers annually review claims history, looking for common risk patterns; conduct in-house continuing education; involve top firm management, monitor signs of trouble including rogue or isolated lawyers, large outstanding receivables, conducting "due diligence" before bringing in lateral associates or partners; and encouraging periodic, random firm reviews); Michael Skolnick, *Lessons From Recent Utah Legal Malpractice Cases*, 21 UTAH B.J. 28 (Jan./Feb. 2008).

69. 2000-03 Profile, *supra* note 50, at Table 7, p. 12.

of malpractice liability.⁷⁰ The 1992 McKay Report recommended consideration of whether malpractice insurance should be made compulsory.⁷¹ That has evolved into a debate on whether lawyers must reveal whether or not they maintain a minimum level of liability coverage.⁷² The average consumer of legal services would likely expect some insurance protection for harm from a lawyer's malpractice; certainly the lack of coverage is a material fact that the client should be entitled to know in advance of retaining a given lawyer.⁷³ Five states now require disclosure directly to the client if the lawyer does not maintain malpractice coverage;⁷⁴ an additional eighteen jurisdictions require disclosure on the attorney's annual registration statement.⁷⁵

Oregon remains the only U.S. jurisdiction that compels malpractice coverage as a condition of licensure.⁷⁶ That stands in sharp contrast to other developed countries; lawyers and barristers in Canada, the United Kingdom, Europe and New

70. See, e.g., Debra Cassens Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 ABA J. 82 (Dec. 1, 1987) (reporting statewide surveys indicating that at least 20% of lawyers are uninsured, and many others "who don't go bare may be wearing only a bikini."). See also, James M. Fischer, *External Controls over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 64 n. 23 (reporting that 83% of Illinois lawyers in private practice are insured; about 60% of Pennsylvania lawyers are insured; about 90% of Virginia lawyers carry insurance; and in other states the range is from 50-70% private practitioners carry insurance). A knowledgeable observer put the number of Oklahoma uninsured lawyers at over 50%. E-mail from Steve Dobbs to author confirming results of unscientific, anecdotal survey) (March 7, 2008) (on file with author).

71. McKay Report, *supra* note 6, Recommendation 18.

72. In August 2004, the ABA House of Delegates adopted a Model Court Rule on Insurance Disclosure. See http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf. For the status of adoption by the states, see ABA Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure (as of May 22, 2008), available at http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf [hereinafter, ABA Chart, State Implementation on Insurance Disclosure] (last accessed June 3, 2008). See also, *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 300 (June 11, 2008)(reporting on panel program debating opposing views on insurance disclosure rules).

73. Farbod Solaimani, Note, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws*, 10 GEO. J. LEGAL ETHICS 963 (2006); James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, 29 VT. B.J. 35, 36 (2003); Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 1, 48 (2008).

74. ABA Chart, State Implementation on Insurance Disclosure, *supra* note 72 (listing Alaska, New Hampshire, Ohio, Pennsylvania, and South Dakota).

75. *Id.* Four other states are considering adoption of the ABA Model Rule on Insurance Disclosure. Fifteen jurisdictions allow public access to the disclosure of malpractice coverage contained in annual registration statement. See also, Wald, *supra* note 73, at 48, n. 212) (summarizing, 23 jurisdictions contemplated adopting ABA proposed revisions, resulting in a split, described above).

76. ABA Chart, State Implementation on Insurance Disclosure, *supra* note 72 (stating that Oregon requires all lawyers to maintain professional liability insurance). According to the ABA Standing Committee on Client Protection Survey of Lawyers' Funds for Client Protection, 2005-2007, six additional states (Indiana, Maine, Massachusetts, New York, Utah, Virginia and Wisconsin) were studying the issue. See <http://www.abanet.org/cpr/clientpro/2007-survey.pdf>.

South Wales must have minimum levels of insurance.⁷⁷ Other states should bite the bullet, requiring that any lawyer who provides direct legal services to clients must maintain a minimum amount of coverage, or post a bond or some other form of security.⁷⁸ Coverage levels could vary by the extent of practice engaged in, with special provisions for part-time or retired lawyers who limit their practice to a certain amount of time, or are engaged in a “second season of service,” delivering pro bono services to the underserved population.⁷⁹ The Oregon experience has achieved notable success at providing affordable coverage to lawyers and appropriate claims handling and resolution, reserving defense costs for significant claims warranting such expenditures. Its captive carrier starts out charging each lawyer the same annual premium, with later adjustments based on actual claims experience.⁸⁰

77. CCBE, Conference on professional indemnity insurance for European lawyers (Brussels, 18 Nov. 2002) at 43-45 available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/conference_report_in1_1203413954.pdf (last accessed March 8, 2008); CCBE Minimum Standards for European Lawyers' Professional Indemnity Insurance at 2, available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/minimum_standards_on1_1203412931.pdf (last accessed March 8, 2008). See also, Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN STATE INTERNATIONAL LAW REV. 671, 684-85 (2004) and ABA Standing Committee on Client Protection Survey of Lawyers' Funds for Client Protection, 2005-2007 at <http://www.abanet.org/cpr/clientpro/2007-survey.pdf>.

78. See, e.g., Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?* 8 GEO. J. LEGAL ETHICS 637 (1995), and MALLEN & SMITH, *supra* note 48, at § 5.6, pp. 593-95, nns. 49, 65 (listing examples of state laws permitting lawyers to form as limited liability partnership or limited liability corporation, providing minimum coverage).

79. ABA Standing Committee on Pro Bono and Public Service, Center for Pro Bono, Solutions to Perceived Barriers to Senior Lawyer Pro Bono Projects, available at http://www.abanet.org/legalservices/probono/senior_lawyers.html#insurance (stating that Delaware, Florida, Georgia, Idaho, Oregon, South Carolina, Texas and Washington have emeritus pro bono rules) (last accessed March 7, 2008).

80. See Ramos *supra* note 52, at 1728-30. It appears that Oregon's mandatory coverage through a state-administered fund works reasonably well. Non-practicing lawyers and patent attorneys are exempt from the requirement of at least \$300,000 in coverage. See Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO J. LEGAL ETHICS 637, 651 (1995) (stating that the fund had substantial reserves and that there was “no notable increase in the amount of claims.”).

Some time ago, Illinois considered whether to require practice coverage. Because substantial numbers of lawyers with active licenses worked for the government or as in-house corporate counsel or otherwise did not engage in practice, they did not need coverage. The Illinois Supreme Court declined to require mandatory coverage, but instead required that lawyers report annually their insurance status to the Attorney Registration and Disciplinary Commission, which posts such information on its website listing of Illinois lawyers and their licensure status. Telephone Interview with James J. Grogan, Deputy Administrator and Chief Counsel, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois in Chicago, IL (Aug. 13, 2008).

As this article went to press, the Virginia State Bar announced it was seeking public comment on a proposed rule requiring minimum levels of malpractice insurance for Virginia lawyers who are “regularly engaged in the private practice of law involving [individual clients or entities] drawn from

As a policy matter, mandatory malpractice coverage for all lawyers engaged in private practice would give clients financial redress for harm suffered because of their lawyers' neglect, incompetence or undue procrastination, even when the harm suffered is too small to entice a private practitioner to undertake expensive malpractice litigation on a contingent fee basis. Societally, is this an expectation we consider worthy, that every significant harm deserves compensation? While I would caution strongly against creating a claims-happy culture, legitimate consumer protection suggests the U.S. legal profession should do far more to provide meaningful dispute resolution and redress for harms suffered at the hands of lawyers. After all, drivers' insurance is compulsory in every state, with market adjustments available for uninsured motorists coverage and high risk pools. If lawyers and law firms are compelled to maintain some coverage, or have other resources to compensate losses, they will have stronger financial incentives to prevent harm through effective risk management, or to amicably resolve client complaints before they ripen into disciplinary grievances or formal complaints for redress. As demonstrated below, mandatory insurance and systems of redress in non-disciplinary complaints handling are part of an international trend in regulatory reforms.

III. "Guardian of the Guardians": The Establishment and Evolution of the United Kingdom's Legal Services Ombudsman⁸¹

Profound changes have occurred in the British regulatory state over the last thirty years, transforming professional regulation in which the central state plays

the public." *Mandatory Malpractice Insurance Rule is Released on Public Comment in Virginia*, *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 418 (Aug. 6, 2008).

81. This discussion narrowly focuses on regulatory changes in England and Wales. Other British Commonwealth nations are in different stages of regulatory reforms. Australia was at the forefront. See Leslie Levin, *Building a Better Lawyer Discipline System, The Queensland Experience*, 9 LEGAL ETHICS 187 (2007) (empirical research and historical evolution on complaints handling mechanism in Queensland, Australia, from 1970 to present); NSW Law Reform Commission, *SCRUTINY OF THE LEGAL PROFESSION—COMPLAINTS AGAINST LAWYERS* (1993) available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R70TOC>. Australian states and territories enacted local versions which include a complaints handling mechanism administered by a Legal Services Commissioner, and most recently, permitting incorporated legal services conditioned on annual self-audits to determine a firm's compliance with core ethical principles. See, Law Council of Australia Legal Profession Model Laws Project, Model Bill § (2d ed. Aug. 2006), available at <http://www.lawcouncil.asn.au/natpractice/home.html>; N.S.W. LEGAL PROFESSION ACT 2004, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/; VICTORIA LEGAL PROFESSION ACT 2004 (as amended July 1, 2008) available at [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/7C08CD5F6BF15320CA25747800096C30/\\$FILE/04-99a023.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/7C08CD5F6BF15320CA25747800096C30/$FILE/04-99a023.pdf). See also, Ross Ray, President, Law Council of Australia, Speaking Points: ABA Centennial of the Canons of Professional Ethics (Aug. 8, 2008)(on file with author); Mark & Cowdroy, *supra* note 77; N.S.W. Ten Objectives, assessment model available at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives. While Parliament in the U.K. debated the proposed Legal Services Bill for England and Wales, the Scottish Parliament passed the Legal Profession

“an increasingly active oversight role; within professions, disputes broke out about the organization of self-regulation, especially about the balance between different groups and interests in the governing structures.”⁸² The legal professions’ self-regulatory models have “been in more or less perpetual turmoil,” with vast changes in their economic and political setting, and closer integration between state agencies and the self-regulatory professional bodies “that is proving fatal to key components of self-regulation as traditionally balanced.”⁸³ In July 2003, the Blair administration called for an independent review of the legal profession’s regulatory framework, directed by Sir David Clementi.⁸⁴ After extensive consultation, Clementi’s Final Report recommended vesting regulatory authority over all legal professionals in a single oversight regulator, the Legal Services Board, which would then delegate front line regulatory functions to recognized professional bodies if they performed competently, with complete separation of their regulatory and trade functions.⁸⁵ He further proposed creation of the Office of Legal

and Legal Aid (Scotland) Act, 2007, (A.S.P. 5) *available at* http://www.opsi.gov.uk/legislation/scotland/acts2007/asp_20070005_en_1. The act establishes the Scottish Legal Complaints Commission (SLCC), authorized to address “services complaints” alleging unsatisfactory or inadequate professional conduct by “any person . . . directly affected by the suggested inadequate professional services.” The Scottish Commission, which begins to operate Oct. 1, 2008, may seek to conciliate or mediate settlements. If, after investigation the Commission makes a determination to uphold a complaint, it may take “such steps . . . as it considers fair and reasonable in the circumstances,” including to direct a fee adjustment, rectification of deficient services, or other forms of redress, including power to award up to £20,000 compensation for “loss, inconvenience or distress resulting from the inadequate professional services[.]” Professional conduct complaints alleging disciplinable violations will be referred to the front line regulators. *Id.* At § 1, 5-12; e-mail from Professor Alan Paterson to author (Aug. 14, 2009)(on file with author)(explaining overall structure for the new, co-regulatory ombudsman scheme). The Legal Services Ombudsman Bill (Eire) 2008, also creating a complaints handling ombudsman scheme, is pending before Parliament for the Republic of Ireland. *Available at* <http://www.oireachtas.ie/documents/bills28/bills/2008/2008/b2008d.pdf>. The New Zealand co-regulatory system creating a Legal Complaints Review Officer took effect August 1, 2008. *See* Lawyers and Conveyancers Act 2006, 2006 S.N.Z. 2006 No. 1, *available at* <http://www.adls.org.nz/informationforlawyers/lawyers-conveyancers-act-;> <http://www.legislation.govt.nz/act/public/2006/0001/latest/whole.html#DLM366157>; <http://www.lawyers.org.nz/lawtalk/711CRO%20appoint.htm> (last accessed Aug. 13, 2008).

82. MICHAEL MORAN, *THE BRITISH REGULATORY STATE: HIGH MODERNISM AND HYPER-INNOVATION* 31, 37, 79-80 (OXFORD UNIV. PRESS 2002).

83. *Id.* at 84-85.

84. Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation Paper 7.

85. The initial Clementi Review focused on the key architectural question: whether or not professional bodies that serve as representative and lobbying organizations could legitimately provide regulatory oversight on entry standards and training, rule making; monitoring and enforcement; complaints and discipline. By contrast, it identified key functions of a body with representative (or trade) powers include rates of pay for legal work; practicing rights internationally; policy issues for government and other interested groups; information provided to members, prospective members and clients. It perceived an obvious conflict between representative functions, (concerned with members’ trade interests) and regulatory functions (which properly should focus on the public good). *See*

Complaints as a single, independent complaints handling body for all consumers seeking redress from legal professionals.⁸⁶ The Government's proposed Legal Services Bill closely tracked Clementi's recommendations.⁸⁷ Parliament received further consultations from interested groups, resulting in significant revisions and final enactment of The Legal Services Act 2007, which received Royal Assent on October 30, 2007.⁸⁸ Two forces prompted the Clementi Review: 1) increased consumerism and widespread dissatisfaction with how lawyers and their professional bodies handled client complaints; and 2) competition law administered by the Office of Fair Trading, which investigated whether restrictive practices impeded professional competition.⁸⁹ Had lawyers—especially the solicitors—been able to clear up backlogs of consumer complaints and been responsive to designated consumer watchdogs, “they might have prevented or postponed what was to come.”⁹⁰ Instead, the Clementi Review produced “the most far-reaching analysis and set of proposals for reforming the legal profession that the UK, or indeed, the world, has seen.”⁹¹

The sweeping reforms establish the Legal Services Board (LSB) as the governmental entity charged with oversight of approved regulators—organizations of the professional bodies—which must perform their duties to the board's satisfaction, consistent with the Act's regulatory objectives.⁹² Future possibilities of outside ownership of law firms, legal and multidisciplinary practices have drawn headlines and new scholarship.⁹³ Part III examines what has transpired on complaints handling in the U.K. from 1990 to the present and forecasts what is to happen under the 2007 Act, in which the LSB Office of Legal Complaints will establish an ombudsman program with jurisdiction over all non-disciplinary complaints and

Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation Paper at 25-28 (March 2004); *see also*, Gary SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 486 (5th ed. 2001, Cavendish Press) (noting concern that Law Society's combined roles presented possible conflict of interest, in maintaining professional standards for public protection and serving as the primary professional association to promote solicitors' interests); Maute, *supra* note 9, 17 *THE PROF. LAW.* 4 at 1, 10, fns. 127-128 (2006).

86. Sir David Clementi, Review of the Regulatory Framework for Legal Services in England and Wales, Final Report, December 2004, at 8, 25, 32-34, 50, 64, 70, *available at* www.legal-services-review.org.uk (last accessed Feb. 2, 2008) (redress for high value negligence cases would still require civil litigation; separate disciplinary systems would continue operation).

87. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, DRAFT LEGAL SERVICES BILL, EXPLANATORY NOTES AND REGULATORY IMPACT ASSESSMENT, 2006, C.M. 6839, at 92, *available at* <http://www.official-documents.co.uk/document/cm68/6839/6839.pdf>.

88. Legal Services Act Explanatory Notes, *available at* http://www.opsi.gov.uk/acts/acts2007/en/ukpgaen_20070029_en.pdf.

89. Flood, *supra* note 46, at 2-5.

90. *Id.* at 2.

91. *Id.*

92. Maute, *supra* note 9, 17 *PROF. LAW.* 4 at 1, 13-14.

93. *Intendance Research, Brave New World: Impact of the Legal Services Act* *available at* http://www.legal-services-reform.co.uk/_data/assets/pdf_file/51647/Brave_New_World_report_overview.pdf (last accessed June 4, 2008); Milton C. Regan, Jr., Bruce Macewen, Larry E. Ribstein, 21 *GEO. J. LEG. ETHICS* 61 (2008).

authority to order compensation to complainants up to £30,000. Redress for dissatisfied clients is becoming a meaningful reality in the U.K. U.S. lawyers and regulators should take heed.

A. 1990 Courts and Legal Services Act: Establishment and Performance of the Legal Services Ombudsman

The Legal Services Ombudsman (LSO) was created by the 1990 Courts and Legal Services Act (CLSA).⁹⁴ The Act empowered the Lord Chancellor to appoint a non-lawyer to oversee the handling of legal complaints by the respective professional bodies.⁹⁵ Unlike most ombudsman schemes which deal directly with consumer complaints, the LSO could only investigate after clients have exhausted a lawyer's internal complaints handling system and that of the appropriate professional body.⁹⁶ In carrying out investigations, the LSO has the same power as the High Court in terms of requiring attendance, examining witnesses, ordering the production of documents and charging contempt.⁹⁷ The CLSA empowered the ombudsman to make recommendations about the professional bodies' complaints handling procedures and to suggest reconsideration of a complaint or payment of damages.⁹⁸

An ombudsman office was first proposed in Lord Chancellor Mackay's paradigm-shifting 1989 Green Paper, "The Work and Organization of the Legal Profession."⁹⁹ It was intended to replace the Lay Observer, an independent person who could investigate solicitors' procedures but who could not reexamine the substantive complaints.¹⁰⁰ When the LSO began work in January 1991, the Lay Observer, Lionel Lightman, transferred over 600 cases to the new office.¹⁰¹

The CLSA represented a significant intrusion on the legal profession's ability to self-regulate. Given the recognized need to improve legal services, "the mere assertion of the independence of the profession to run their own affairs [was] no longer enough."¹⁰² Besides reviewing client complaints, the LSO worked with professional bodies to improve their own complaints handling. In 1991, the Law Society adopted Practice Rule 15, which required all solicitors to have an in-house

94. Courts and Legal Services Act, 1990, c. 41, §§ 21-26 (Eng.).

95. *Id.* at § 21(5).

96. *Id.* at § 22(1).

97. *Id.* at § 25.

98. *Id.* at §§ 23-24.

99. LORD CHANCELLOR'S DEPARTMENT, *THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION*, 1989, Cm. 570, at 16.

100. Rhoda James & Mary Seneviratne, *The Legal Services Ombudsman: Form versus Function?*, 58 MOD. L. REV. 187, 189 n.12 (1995) (describing LSO's role as hybrid, with both public and private functions, "better seen as part of the regulatory framework of the legal profession, grafted on to the self-regulatory mechanisms rather than as principally a mechanism for the settlement of grievances for the clients of lawyers.>").

101. LSO ANN. REP. (2001).

102. Martin Partington, *Change or No Change: Reflections on the Courts and Legal Services Act 1990*, 54 MOD. L. REV. 702, 712 (1991).

complaints handling procedure and to ensure clients knew who to approach when dissatisfied with their legal service.¹⁰³

The LSO received 815 complaints about solicitors in 1991, most relating to poor communication, delay or a disregard for client instructions.¹⁰⁴ Complaints about costs were also common. Ombudsman Michael Barnes felt that many of these were related to poor communication, since clients uninformed about costs received unexpectedly large bills.¹⁰⁵ Complaints about barristers related primarily to their behavior “at the door of the court,” including “excessive zeal in procuring a last-minute settlement, apparent insensitivity and inattentiveness to the lay client’s concerns, [and] lack of confidentiality in negotiating with an opponent.”¹⁰⁶ In 1992, Barnes again criticized solicitors for failing to communicate with their clients about costs.¹⁰⁷ Although the Law Society’s written standards recommended that solicitors inform new clients about likely costs, updating them at least every six months, many ombudsman complaints indicated that the recommendation was not consistently followed. This constituted inadequate client service.¹⁰⁸ In all, the ombudsman received 923 new complaints about solicitors and 71 new complaints about barristers. His report made no substantive criticisms of the Bar Council.¹⁰⁹

In 1995, legal scholars Rhoda James and Mary Seneviratne [hereinafter James & Seneviratne] undertook a detailed five-year evaluation of the LSO operation using the criteria set forth by the British and Irish Ombudsman Association: independence of the ombudsman, effectiveness, fairness and public accountability.¹¹⁰ Conducted with the cooperation of the Ombudsman office, the evaluation included interviews with Ombudsman Michael Barnes and his staff, and James & Seneviratne’s observations of the office’s practices and procedures.¹¹¹ They determined the LSO was truly independent, both from the legal profession and from the government.¹¹² The Lord Chancellor, after appointing Barnes, left operations of the scheme largely to his discretion.¹¹³

Although the LSO was effective in investigating complaints, James & Seneviratne questioned its effectiveness as a mechanism to resolve grievances because

103. Law Society’s Practice Rule 15, *reprinted in* THE LAW SOCIETY, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS, Chapter 13, Client Care, § 13.01 (Practice Rule 15) (7th. ed. 1996).

104. *Id.* at 3.

105. *Id.*

106. *Id.* at 20. The complaints’ focus on settlement and negotiations was by necessity, since, at that time, the Courts and Legal Services Act expressly precluded the Ombudsman from investigating any aspect of a lawyer’s conduct in which he or she has immunity from an action in negligence or contract. This included courtroom advocacy.

107. LSO ANN. REP. 7 (1992).

108. *Id.*

109. *Id.* at 3.

110. James & Seneviratne, *supra* note 100 at 187-188.

111. *Id.*

112. *Id.* at 190.

113. *Id.*

the scheme was neither well-publicized nor widely used.¹¹⁴ The Solicitors Complaints Bureau reported that thirty percent of its complaints were not resolved to the consumer's satisfaction, but only about eight percent of those complainants contacted the LSO.¹¹⁵ The underutilization was attributed to the Bureau's procedures, which only notified clients of their right to complain to the ombudsman after losing an appeal within the internal complaints system.¹¹⁶ Clients who did not appeal might never learn of the ombudsman scheme.¹¹⁷ Under the authority given to the ombudsman in the CLSA, the professions need only "have regard" for his recommendations.¹¹⁸

It appeared that consumers had misconceptions and false expectations about the services the LSO offered.¹¹⁹ Ombudsman Michael Barnes described review as his primary function, to serve as "guardian of the guardians" and a "second port of call" for legal complaints.¹²⁰ The legal professions retained primary responsibility for complaints handling.¹²¹ Although he had authority to reconsider substantive complaints, he did so infrequently.¹²² Many consumers expected more frequent re-examination of complaints, based on their experiences with other ombudsman schemes.¹²³ James and Seneviratne questioned whether Parliament had given the ombudsman adequate powers to function as supervisor over the professional bodies and how they dealt with dissatisfied customers, and to impact professional standards.¹²⁴ Because "[t]he ombudsman only sees cases where complainants have the energy and commitment, often after many years, to put their cases before him," his knowledge about how the professional bodies operate was based on patchy experience from a small number of the total grievances they handled.¹²⁵ They urged Parliament to expand upon the powers conferred on the LSO, including authority to act on his own initiative, subjecting the professions to unannounced inspections and random file reviews¹²⁶ and the power to enforce opinions—to make orders, rather than recommendations.¹²⁷

114. *Id.* at 193-95.

115. *Id.* at 195.

116. *Id.*

117. *Id.*

118. *Id.* at 207.

119. *Id.* at 193 (citing interview with ombudsman and senior staff).

120. *Id.* at 190.

121. *Id.* at 198.

122. *Id.* (stating that discretionary investigation of original complaint exercised in 10-12% of cases, explaining the ombudsman's primary function is review, and reluctance to substitute his judgment for that of professional body absent conclusion the professional body reached the wrong substantive conclusion).

123. *Id.*

124. *Id.* at 206.

125. *Id.*

126. *Id.*

127. *Id.* at 206-07.

B. 1999 Access to Justice Act

Parliament responded, enacting sweeping reforms in the 1999 Access to Justice Act. It significantly expanded the LSO's regulatory powers, authorizing the ombudsman to issue binding orders, not just recommendations.¹²⁸ The Act also gave the Lord Chancellor the power to appoint a Legal Services Complaint Commissioner to take over complaints handling if the professional bodies were not doing so in a satisfactory manner.¹²⁹ The power was prospective, however, and the professions were first given the opportunity to "[put] their own houses in order."¹³⁰

Ombudsman Ann Abraham reflected in her 2001 Annual Report on the tenth anniversary of the office's founding.¹³¹ Since its inception, the LSO had undertaken 10,531 investigations, including 9,456 complaints about solicitors, 1,036 about barristers and 39 about licensed conveyancers¹³² and had recommended the payment of more than half a million pounds in compensation.¹³³ The state of legal complaints in 2001 was very different than in 1991, when "[l]ay involvement in the regulation of lawyers and the adjudication of complaints was unheard of."¹³⁴ Still, she saw little improvement in the professions' own complaints handling procedures, particularly those of the Law Society. While satisfied with ninety-four percent of the cases the LSO received from the Bar Council, Ms. Abraham approved of only fifty-seven percent of complaints handled by the Law Society.¹³⁵ She warned that significant improvement was needed if the profession hoped to retain any control over complaints handling, urging it to "take the lead in developing a system of professional self regulation and complaints handling which inspires client satisfaction and is seen to operate in the public interest. Unless it does so, it will continue to run the risk of losing the right to regulate itself."¹³⁶

Although she voiced some criticism for the Bar Council and other professional bodies, Abraham primarily focused on the Law Society, representing the largest and most visible branch of the legal professions, which had a long history of poorly handled complaints. "[S]olicitors, not barristers, . . . represent the most frequent interface between the providers and consumers of legal services. And it is the behaviour of solicitors that will, at the end of the day, determine public confidence in the legal profession and its ability to regulate itself."¹³⁷

In 2003, newly appointed ombudsman Zahida Manzoor noted that in fifteen years—as far back as the Lay Observer—very little progress had been made in the

128. MARTIN PARTINGTON, INTRODUCTION TO THE ENGLISH LEGAL SYSTEM, 256 (Oxford University Press 3rd ed. 2006) (2000).

129. *Id.*

130. *Id.*

131. LSO ANN. REP. (2000).

132. *Id.* at 6.

133. *Id.*

134. *Id.* at 4.

135. *Id.* at 6.

136. *Id.* at 5.

137. *Id.* at 6.

professions' complaints handling procedures.¹³⁸ The quality of service "failed to keep pace with consumer expectations or to reverse the decline in public confidence in lawyers."¹³⁹ Specifically, the Law Society was still failing, as its complaints then accounted for approximately ninety-five percent of the LSO's case load.¹⁴⁰ "[T]he professional bodies have been warned on countless occasions . . . self regulation is a privilege, not a right—and . . . can be taken away if it is no longer warranted."¹⁴¹ That summer the Blair administration turned up the heat, appointing Sir David Clementi to undertake comprehensive review of the legal professions' regulatory structure.

Still displeased with the Law Society's complaints handling, in 2004 the Lord Chancellor exercised the authority given him in the 1999 Access to Justice Act and appointed ombudsman Zahida Manzoor to the additional and separate position of Legal Services Complaints Commissioner [LSCC].¹⁴² The Complaints Commissioner is an independent regulator whose role is to work with consumers and solicitors to improve the Law Society's complaints handling system.¹⁴³ She can set performance targets for the Law Society, make recommendations about complaints handling, and require the Law Society to submit improvement plans for her approval. She can also levy up to £1 million in fines.¹⁴⁴

In 2005, Manzoor, in her capacity as Complaints Commissioner, audited the Law Society's records.¹⁴⁵ She found that the Law Society's responses were delayed in seven out of ten audited complaints. In one case, the delay was more than two years.¹⁴⁶ She found this unacceptable, especially given that the complainants already felt they had been let down by the legal system.¹⁴⁷ "These are people who have turned to the Law Society because they already feel that their complaint has not been dealt with appropriately by their solicitor."¹⁴⁸ The Law Society's plans to improve consumer service were deemed "adequate" but only a "small step forward."¹⁴⁹

That next year Manzoor exercised her authority to fine the Law Society, imposing a £250,000 penalty for failing to implement the targets she set as Complaints Commissioner.¹⁵⁰ She insisted that the Law Society write complainants

138. LSO ANN. REP. 7 (2002).

139. *Id.* at 5.

140. *Id.*

141. *Id.* at 13.

142. PARTINGTON, *supra* note 128, at 256.

143. *Id.*

144. *Id.*

145. *Solicitors Attacked On Complaints*, BBC News, May 17, 2005.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Frances Gibb, *Law Society Fined £250,000 Over Complaints Procedure*, Times Online, May 17, 2006.

within two months, summarizing their understanding of the complaint.¹⁵¹ The Law Society believed that three months was a more reasonable response time and refused to comply with Manzoor's order.¹⁵² Professor Shamit Saggan, Chair of the Law Society's Consumer Complaints Board found the fine "outrageously disproportionate" to what he saw as a minor disagreement.¹⁵³

Manzoor's 2005-2006 Annual Report voiced support for the "radical reforms," proposed in the Government's White Paper, "The Future of Legal Services: Putting the Consumer First" which adopted many of the Clementi Report recommendations.¹⁵⁴ Manzoor considered the proposal "a once in a lifetime opportunity to put things right for consumers and professionals who have laboured for too long under an archaic system of regulation which has lacked transparency or consumer focus."¹⁵⁵ She urged for real reform and warned against merely "tweaking" what already existed while removing the independent tier of regulation provided by the LSO.¹⁵⁶ Despite more than fifteen years of legislation and attempted reform, the ombudsman was still dissatisfied with the Law Society's complaints handling, finding "repeated instances of basic errors, poor administration, poor decision making and poor service on the Law Society's part."¹⁵⁷ Some thought that she hoped for appointment to head the new governmental entity to be created by the Legal Services Bill.

C. Clementi Review and Report Culminate in 2007 Legal Services Act

In July 2003, Lord Falconer, the Secretary of State, appointed Sir David Clementi to undertake an independent review of the legal profession's regulatory framework.¹⁵⁸ Clementi's appointment followed a Scoping Study conducted by the Department for Constitutional Affairs (DCA), which found the existing framework "outdated, inflexible, over complex, and insufficiently accountable or transparent," concluding that "the status quo [was] not an option."¹⁵⁹ Clementi was charged to consider "what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector."¹⁶⁰

151. *Id.*

152. *Id.*

153. *Id.*

154. LSO ANN. REP. (2005).

155. *Id.* at 19.

156. *Id.* at 12.

157. *Id.* at 14.

158. Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation Paper*, 7, (March 2004) [hereinafter, Clementi Consultation].

159. Robert Baldwin at al., *Scoping Study for the Regulatory Review of Legal Services*, March 2003 at 85.

160. From Legal Services Review website, www.legal-services-review.org.uk.

The Clementi Review consultation paper, released March 8, 2004, discussed three main issues: the architectural framework of a more rational regulatory system; a better system to regulate complaints handling and discipline issues; and the possibility of alternative business models for legal practices.¹⁶¹ In considering complaints handling, Clementi questioned whether professional bodies that serve as representative lobbying organizations could legitimately provide regulatory oversight.¹⁶² He suggested that the lack of uniformity in the approaches taken by the professional bodies confused consumers.¹⁶³ Clementi considered three regulatory models, ranging from complete separation of trade and regulatory functions with all regulation controlled by an independent body, to simply introducing an oversight agency that would monitor self-regulation.¹⁶⁴ He ultimately recommended creation of a new, oversight regulator and a single independent body for considering all consumer complaints.¹⁶⁵ The Office of Legal Complaints (OLC) would be under the authority of the oversight regulator, the Legal Services Board (LSB), but would be independent in its handling of complaints.¹⁶⁶ It would also play a strategic role in setting targets for practitioners' in-house complaints handling and monitoring indemnity insurance schemes and compensation funds controlled by the front line bodies.¹⁶⁷

In May 2006, the Government published and introduced to Parliament its draft Legal Services Bill.¹⁶⁸ The Bill mostly followed Clementi's Final Report, proposing the LSB to oversee front line regulators (now called "approved regulators") who must perform their duties in a manner compatible with stated regulatory objectives.¹⁶⁹ It also followed his proposals for the OLC, creating an office

161. Clementi Consultation, *supra* note 158, at 2-5.

162. *Id.* at 25. *See also*, CCBE Response to Clementi Consultation Document [2004-06-04] available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_response_clemen1_1183706107.pdf (last accessed March 7, 2008); CCBE Position on Regulatory and Representative Functions of Bars [2005-06] available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf (last accessed March 7, 2008).

163. Clementi Consultation, *supra* note 158, at 36-42.

164. *Id.* Chapter B.

165. Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales, Final Report*, December 2004 at 8-10, available at www.legal-services-review.org.uk.

166. *Id.* at 66-67.

167. *Id.* at 67.

168. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, DRAFT LEGAL SERVICES BILL, EXPLANATORY NOTES AND REGULATORY IMPACT ASSESSMENT, 2006, Cm. 6839 [hereinafter DLSB] available at <http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf> (last accessed June 4, 2008).

169. *Id.* at Part 1 (regulatory objectives), Part 2 (creating Legal Services Board), Part 3 (Reserved Legal Activities) clauses 15-16 (regulatory functions defined to include setting qualification regulations, licensing rules and arrangements to authorize persons to carry out reserved legal activities, establish practice, conduct and discipline rules, disciplinary arrangements over regulated persons), Part 4 (Regulation of Approved Regulators), clauses 22-23.

with exclusive authority over complaints for redress up to £20,000.¹⁷⁰ The Bill prohibited approved regulators from providing redress as part of their regulatory arrangements¹⁷¹ and prevented them from contractually limiting or excluding a person's right to seek relief through the OLC ombudsman scheme.¹⁷² It addressed other far-reaching proposals, including one to permit outside ownership of law firms; those issues are beyond the scope of this paper. In anticipation of the Bill's final enactment, the Law Society and Bar Council segregated their regulatory and representative functions, delegating the regulatory functions to new, independent entities.¹⁷³

The 2007 Legal Services Act established the Office of Legal Complaints (OLC)—a single, independent body to investigate and determine all consumer complaints against legal service providers.¹⁷⁴ Like the original LSO scheme, the Act requires practitioners to maintain in-house procedures that serve as the first port of call for clients' complaints.¹⁷⁵ Unlike the original scheme, those who are unhappy with the practitioner's handling of their complaints proceed directly to the ombudsman (OLC), bypassing the Law Society or Bar Council.¹⁷⁶ The ombudsman may direct the respondent to apologize, reimburse fees, pay compensation,¹⁷⁷ rectify the error at the practitioner's own expense, or take other actions in the interest of the complainant.¹⁷⁸ The ombudsman can provide redress but not discipline, which remains under the professional bodies' jurisdiction.¹⁷⁹ The ombudsman also may dismiss a complaint without consideration of the merits if the complaint is "frivolous or vexatious," would be better dealt with under another ombudsman scheme, has already been dealt with (under another ombudsman scheme, arbitration or legal proceedings) or if there was undue delay in making the complaint or providing evidence.¹⁸⁰

170. *Id.* at Part 6, clause 92 *et seq.* See also, clause 127 (excluding approved regulators from making provision for redress); clause 128 (abolishing the office of Legal Services Complaints Commissioner and Legal Services Ombudsman).

171. *Id.* at cl. 127.

172. *Id.* at cl. 102(4).

173. See, e.g., website of the Solicitors Regulation Authority, the new, independent regulatory body of the Law Society which handles all complaints about solicitors, with separate units over complaints seeking redress and those alleging professional misconduct subject to discipline. Available at: <http://www.sra.org.uk/consumers/consumers.page>.

174. Legal Services Act 2007, Ch. 29 § 113. An official summary of the Act prepared by the new Ministry of Justice is available at: <http://www.justice.gov.uk/docs/legal-services-reform-update.pdf> (last visited Aug. 12, 2008) (published June 9, 2008).

175. *Id.* at § 126(1).

176. *Id.*

177. *Id.* at 138(1). Total value not to exceed £30,000.

178. *Id.* at § 137.

179. *Id.* at § 113(2) (b).

180. *Id.* at § 133(4).

Once the ombudsman has decided a complaint, he or she must prepare a written statement, including the reasons for the decision.¹⁸¹ The ombudsman must give a copy of the statement to the complainant, respondent, and any relevant professional body. If the complainant accepts the determination, it becomes final and binding on both parties.¹⁸² The Act does not address what happens if the determination is rejected, but presumably allows the complainant to pursue legal remedies. The Act creates a “polluter pays” system, requiring respondents to pay charges to the OLC unless the complaint is resolved in their favor and the ombudsman is satisfied that the respondent took all reasonable steps to resolve the issue through in-house procedures.¹⁸³ The Legal Services Board is now fully constituted and its Chief Executive in post.¹⁸⁴ Much remains to be determined on the details of the new process, which is expected to be operational by 2010.¹⁸⁵ It will likely take a few years to develop workable procedures and define appropriate standards for recovery. Meanwhile, the Legal Services Complaints Commissioner continues to monitor and press the Law Society to improve its complaints handling arms.¹⁸⁶

IV. Conclusion

The fractionalized system of lawyer regulation in America is “poorly-positioned to withstand increased assaults on its...prerogative of self-regulation.”¹⁸⁷ Some jurisdictions made vast improvements in response to the Clark and McKay Reports, while others tinkered at the margins. If there is not a concerted, across the board effort to implement meaningful reforms to the disciplinary systems, with expanded responsiveness to legitimate consumer complaints about the quality of services, the United States legal profession could encounter the threat of losing much control to an external, governmental regulator like the Legal Services Board under construction in the United Kingdom and elsewhere. U.S. export of legal services has increased dramatically in recent years.¹⁸⁸ That presents new challenges for the U.S. firms forming partnership with foreign lawyers, for the arrangement must “ensure that the arrangement complies with the law of the jurisdictions

181. *Id.* at § 140.

182. *Id.* at § 140. A complainant’s failure to respond is treated as a rejection.

183. *Id.* at § 136.

184. Legal Services Act 2007, Ch. 29 § 113. An official summary of the Act prepared by the new Ministry of Justice is *available at*: <http://www.justice.gov.uk/docs/legal-services-reform-update.pdf> (last visited Aug. 12, 2008) (published June 9, 2008).

185. *Id.*

186. Because the Commissioner found improvements in the Law Society’s two complaints handling arms (the Legal Complaints Service and the new disciplinary branch, the Solicitors Regulation Authority) she decided not to impose a financial penalty. Press notice (June 23, 2008) *available at* <http://www.olscc.gov.uk/docs/pressnotice0708.pdf> (last accessed June 29, 2008).

187. Fischer, *supra* note 45, at 108.

188. Mark I. Harrison & Mary Gray Davidson, *The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 PENN. ST. INT’L L. REV. 639 (2004).

where the firm practices.”¹⁸⁹ If the U.S. legal profession wants to improve consumer confidence, stave off threats of external regulation, and further expand its global competitiveness, it should create workable systems to improve the quality of discipline and complaints handling, following examples from other countries.¹⁹⁰ This centennial celebration of American legal ethics gives us the opportunity to pause and consider, “what next?”

639 (2004) (reporting that in 2002, U.S. lawyers exported nearly \$3.3 billion in legal services, a two and one-half times the dollar value exported in 1992).

189. *Id.* at 648 (discussing ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 423).

190. *See generally*, Leslie C. Levin, *supra* note 81.

