

Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice

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Introduction

For most of the Twentieth Century, law practice in the United States was primarily regulated by the state supreme courts working in tandem with the ABA and state and local bar associations¹ in a regime lawyers call “professional self-regulation.”² But changes in law practice and its regulation since the 1970s have

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1. I will refer to these associations as the “mainstream bar” to distinguish them from the many associations that are now organized by specialty field rather than locale.

2. Court-adopted legal ethics codes based heavily on rules formulated by the ABA, and a court-supervised disciplinary process in which some administrative responsibilities may be delegated to the bar, are central features of the regime. Although it is a misnomer, lawyers presumably call the regime “self-regulation” because the courts that oversee it (here referred to collectively as “state supreme courts”) consist solely of lawyers and have relied heavily over the years on the mainstream bar’s support and regulatory assistance. But even in common law countries where legislatures rather than courts hold sway, the bar has traditionally played a substantial role. By legislative delegation in Ontario, for example, the Law Society of Upper Canada (LSUC) for many years played the primary role in setting standards for law practice, bar admission, and legal education, administered the bar admissions and disciplinary processes, and ran its own law school. Interestingly, when Herbert Harley of the American Judicature Society began in the 1910s to promote state bar unification (i.e., official mandatory-membership associations) as a device for placing regulatory authority in the hands of the bar, he touted the LSUC as a model. *See* Herbert Harley, *A Lawyer’s Trust*, 29 J. AM. JUDICATURE Soc’y 50, 52–54 (1945) (reprinting a speech Harley delivered to a county bar association in 1914).

put the primacy of the self-regulatory system in doubt. A more complex regulatory “mix” has emerged, with considerable involvement by Congress and certain federal agencies but no central coordination.³ Meanwhile, the regulation of law practice abroad is also changing. Of particular interest are the far-reaching reforms recently adopted in the United Kingdom and Australia. Like the state supreme courts in the U.S., the legislatures in those countries traditionally delegated a substantial regulatory role to the organized bar. But the recent reforms sharply alter the regulatory picture. In a time of regulatory flux, the question arises whether comparable reforms could and should be adopted in the U.S. and, if so, by whom and with what implications for our regulatory framework.

Given the rapid diffusion of regulatory ideas in today’s world and the legal and political similarities between the U.S., the U.K., and Australia, this question is likely to be debated for some time to come.⁴ This article tries to move the debate

And from 1921 to 1934, when more than fifteen state bars were unified, every one was created by legislation, with no judicial involvement. See JEFFREY A. PARNES, CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES 3–4 (1973).

3. See generally James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59 (2006); John Leubsdorf, *Legal Ethics Falls Apart*, Rutgers School of Law-Newark Research Papers No. 029 (Dec. 24, 2008), available at <http://ssrn.com/abstract=1320302>; Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005); Fred Zacharias *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

4. In August 2009, incoming ABA President Carolyn Lamm announced the creation of the ABA Commission on Ethics 20/20 to review the ABA Model Rules of Professional Conduct (Model Rules) and other aspects of the regulation of law practice in the U.S. in light of globalization, changes in technology, international trade agreements, and regulatory changes in other countries. President Lamm stated at the time that she does not think the U.S. legal profession “can ignore what’s going on worldwide.” See James Podgers, *Firm Hand for Firm Times*, A.B.A. J., Aug. 2009, at 63, 64. See also Laurel Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUDIED L. REV. 463, 526–28 (2005) (discussing how globalization has changed the manner in which legal services regulators and experts operate). Judging by ABA policy debates in the fairly recent past, however, traditionalists in the U.S. legal profession are likely to find some of the reforms underway in the U.K. and Australia quite alien. For example, Australia now permits, and the U.K. will shortly permit, lawyers to practice law in multidisciplinary practices (MDPs)—i.e., firms in which nonlawyers such as accountants may also be principals and provide their professional services—as well as in law firms that have nonlawyer owners. The ABA House of Delegates deferred consideration of a proposal to permit practice in MDPs in 1999, and rejected the proposal in 2000 by a 3–1 margin on the ground that MDPs were inconsistent with lawyers’ core professional values. See Commission on Multidisciplinary Practice, American Bar Ass’n, Report to the House of Delegates (Aug. 1999), available at <http://abanet.org/cpr/mdp/mdpreport/html> [hereinafter referred to as the 1999 MDP Report]; Commission on Multidisciplinary Practice, American Bar Ass’n, Report to the House of Delegates (July 2000), available at <http://abanet.org/cpr/mdp/mdpfinalrep2000.html>. And in 1983, the ABA House rejected a proposal to permit lawyers to practice in law firms whose owners include nonlawyers. See STEPHEN GILLERS et al, REGULATION OF LAWYERS: STATUTES AND STANDARDS 351–52 (2009).

Thoughtful appeals to tradition in bar debates concerning the regulation of law practice can serve as a valuable counterweight to calls for major reforms. But respect for traditions grounded in hard-won wisdom is one thing; unreflective opposition to change is another. Like judges working

forward through comparative analysis. Focusing on regulatory themes rather than institutional details, the article discusses several reforms that have been adopted or proposed in the U.K. and Australia.⁵ My treatment of these reforms is more sympathetic than critical, but my aim here is only to promote debate, not to convince readers that any of the reforms should be adopted in the U.S. The article focuses on one issue that could strongly influence how the reforms are received here, namely, whether they would be compatible with U.S. regulatory traditions. Since those traditions are embedded in the self-regulatory system, which is still the most comprehensive feature of our regulatory framework, the topic boils down to the “goodness of fit” between those reforms and that system.

Insofar as state supreme courts and mainstream bar leaders regard themselves as stewards of the self-regulatory system, they have good reasons to familiarize themselves now with the recent or impending reforms in the U.K. and Australia. By doing so, they can gain new perspective on the strengths and limitations of the self-regulatory system under today’s circumstances, encounter ideas about how to improve the system, and prepare themselves to respond if the reforms spark proposals for federal action that would preempt state ethics rules or alter or supplant the system in other ways.

Anthony Davis has suggested one way in which such proposals could arise.⁶ Under the U.K.’s Legal Services Act of 2007, lawyers in England and Wales will soon be able to practice in firms with “alternative business structures” (ABSs), including MDPs, law firms in which lawyers and other personnel who assist in providing legal services are principals, law firms with outside equity investors, and law firms wholly owned by other businesses.⁷ Currently, law firms with offices in the U.S. and (say) London presumably could not restructure their London operations in any of these ways without putting their U.S. lawyers in violation of state ethics rules that bar lawyers from sharing legal fees with nonlawyers or practicing in a law firm whose owners are not all lawyers.⁸ Consequently, if the state supreme courts did not amend their rules to remove these obstacles, firms with offices in the U.S. and London that wanted to adopt an ABS for the London operation (without

with precedent, good policymakers must *interpret* traditions broadly enough to accommodate new circumstances. For a critique of the appeals to tradition that opponents made in ABA debates in the early 1990s concerning proposals to allow lawyers to offer “law-related” services such as lobbying in consulting firms whose principals include nonlawyers, see Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 385–86 (1993).

5. Only some of the important reforms will be discussed here. I will take up the reforms that permit lawyers to practice in firms with “alternative business structures” in a forthcoming article in the *Georgetown Journal of Legal Ethics*.

6. Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law*, PROF’L. LAW. 1 (V. 19 No. 2, 2009).

7. Legal Services Act 2007, Ch. 29, Part 5 (2007).

8. These state bans are generally patterned after ABA Model Rules of Prof’l Conduct, R. 5.4 (a), (b).

spinning it off as a wholly separate entity) might go to Congress for relief. Moreover, with the support of influential corporate clients and their general counsel, the large U.S.-based firms that compete in the global legal services market with the “Magic Circle” firms (their counterparts headquartered in London) might ask Congress for the same restructuring options the Magic Circle firms will have.⁹

I. Some Context for the Comparative Analysis that Follows

For comparative analysis to have any real bite, the regulatory processes and institutions being compared must be viewed in their national contexts. Accordingly, Part I of this article provides context for the analysis that follows in Part II. Part I.A. identifies some developments in U.S. law practice and its regulation that should inform any debate about the current and future role of the self-regulatory system. Part I.B. identifies some respects in which the regulatory and political environment that has fostered fundamental reforms in the U.K. and Australia differs from ours.

A. Developments that are Reshaping Law Practice and its Regulation in the U.S.

1. As mentioned above, Congress and certain federal agencies have become active in regulating law practice though, so far, only in piecemeal fashion and without supplanting core features of the self-regulatory system. The notable federal initiatives fall into two overlapping categories. Some address lawyers in fields of special federal interest, as in the case of Section 307 of the Sarbanes-Oxley Act¹⁰ and the Securities and Exchange Commission’s (SEC’s) implementing rules for lawyers who “appear or practice”

9. Davis, *supra* note 6, at 8–10. On the other hand, if the U.S. bans are *not* relaxed, a Magic Circle firm that wished to adopt an ABS for its London operation but keep its U.S. offices might *forgo* restructuring for that very reason. Also, Davis’s congressional scenario is unlikely to materialize if Magic Circle firms do not want to adopt an ABS for their non-U.S. operations. For reasons to doubt that they will want to do so in the foreseeable future, see Christopher H. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN. ST. L. REV. 465, 483–89 (2009). Davis’s scenario is also unlikely to materialize if global law firms with offices in the U.S. find ways to restructure their non-U.S. operations without running afoul of the U.S. ethical restrictions. Two strategies for doing so have been discussed but are untested. The first is to structure a global firm as a Swiss *verein*, i.e., a business association whose “member” organizations have formally distinct legal identities. Reportedly, Baker, McKenzie and DLA Piper now have this structure. See Press Release: Baker & McKenzie Adopts New Legal Structure (July 2, 2004); Claire Ruckin, *DLA Piper Backtracks on Financial Integration*, THE LEGAL INTELLIGENCER, (V. 237, No. 116, June 16, 2008). For a firm hoping to tap into capital markets to improve or broaden its operations, a second strategy might be to create a “non-equity derivative” that is based on the firm’s revenue and ongoing enterprise value” and is “traded independently by nonlawyers” but does not give derivative holders an ownership interest in the firm. Bruce MacEwan, Milton C. Regan, Jr., and Larry Ribstein, *Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61 (2008).

10. 15 U.S.C. sec. 7245 (2002).

before the SEC on behalf of public companies.¹¹ Some lump lawyers with other service providers in order to regulate a broader class such as banks' "institution-affiliated parties"(IAPs)¹² or "debt relief agencies" (DRAs).¹³ The hierarchy of values reflected in these initiatives often appears to differ from the hierarchy of values traditionally reflected in the prevailing rules of legal ethics. In particular, the federal initiatives often enlist lawyers to serve as "gatekeepers," monitoring their own clients for the protection of others, such as the investing public.¹⁴ Federal courts rarely strike down these initiatives because, unlike the state supreme courts, they have never claimed on separation-of-powers grounds to have "exclusive" authority to regulate law practice.¹⁵

11. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. sec. 205 (2003).

12. See 12 U.S.C. sec. 1813(u)(3,4) (classifying as IAPs for purposes of the Financial Institution Reform Recovery and Enforcement Act of 1989 (FIRREA) lawyers, accountants, and others who participate in the affairs of a federally insured banking institution and knowingly participate in violating banking laws or regulations); *id.* sec. 1818(b)-(n) (empowering a federal agency to enforce FIRREA provisions against IAPs). For discussion of the increasing regulation of lawyers together with other "service providers," see Laurel Terry, *The Future Regulation of the Legal Profession: The Impact of Treating The Legal Profession as "Service Providers,"* 2008 J. PROF'L LAWYER 189 (2008).

13. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) defines a DRA as anyone who provides bankruptcy assistance for money or is a bankruptcy petition preparer, 11 U.S.C. sec. 101 (12A), and defines "bankruptcy assistance" to include "legal representation." *Id.* sec. 101(4A).

14. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1409-27 (1992) (arguing that the "bar's law" exalts the lawyer's duties of confidentiality and loyalty (or zealous advocacy), which run to clients, over duties to the public or third-parties, but the "state's law"—i.e., external law created by legislatures and administrative agencies—does not). See also JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006) (defending the use of lawyer as gatekeepers in the field of securities law). Bar leaders sometimes think (and hope) that ethics rules will influence or forestall the development of the "state" or "external" law of lawyering. See Schneyer, *supra* note 3, at 597 & n.154 (referring to the strategy of an ABA section in attempting to shape the Model Rules as they were being drafted, which emphasized that ABA ethics rules had become "the basic source of law" from which "courts and agencies draw the responsibility of lawyers"). But the beefing up of lawyers' gatekeeper duties under the Sarbanes-Oxley Act, which requires lawyers for public corporations who encounter material evidence of misconduct by corporate officers to "climb the corporate ladder" to resolve the matter, reversed the "causal arrow" by leading the ABA to insert a similar duty into its ethics rules. ABA MODEL R. PROF'L CONDUCT R. 1.13(c).

15. But federal courts do occasionally strike down on other constitutional grounds federal laws governing lawyers, see, e.g., *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 541 F.3d 785, 793-94 (8th Cir. 2008) (on First Amendment grounds striking down as applied to lawyers a bankruptcy law provision barring DRAs from advising clients to incur more debt in contemplation of filing for bankruptcy), *cert. granted*, 129 S. Ct. 2766 (June 8, 2009)), and they sometimes uphold challenges to a federal agency's claim that lawyers fall within a federally regulated class. See, e.g., *Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 471 (2005) (upholding an ABA challenge to the FTC's claim

2. Trade and other multinational agreements negotiated by the federal government are becoming an increasingly important feature of the regulatory framework, with uncertain implications for the future role of traditional self-regulation.¹⁶
3. A growing percentage of U.S. lawyers now practice in only one field and many belong to professional associations that are organized by specialty rather than locale and may therefore have a weaker commitment than the mainstream bar to preserving the primacy of state court regulation.¹⁷ Many specialty bars also issue nonbinding practice guidelines for their

that the Gramm-Leach-Bliley Act of 1999 authorized the agency to regulate law firms as “financial institutions”). For their part, state courts now appear to be limiting their claims to “exclusive” authority to regulate law practice. Charles Wolfram argues that their unwillingness to strike down state laws permitting lawyers to practice in limited liability partnerships signals a new era in which law practice will be “more thoroughly regulated by external law,” Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II the Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 208 (2002).

16. On the potential impact of U.S. trade agreements on state regulation, see Laurel S. Terry, *GATS’ Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT’L L. 988 (2001). As for non-trade agreements, the U.S. is a member state in the multinational Financial Action Task Force on Money Laundering (FATF), which develops protocols for members to adopt in order to counteract money laundering and the financing of terrorist activity. Thanks to the efforts of the ABA, the American College of Trust and Estate Counsel, and certain foreign bar associations, the Lawyer Guidance protocols that the FATF adopted in 2008 do not, as originally proposed, require lawyers to report to authorities even clients whom they merely “suspect” of involvement in such activities and to avoid “tipping off” any clients they do report. Such requirements would have been in tension with the prevailing rules of legal ethics. See Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk Based Approach for Transactional Lawyers*, 43 REAL PROP. TR. & ESTATE L.J. (forthcoming 2009). More generally, the ABA now exerts considerable effort to shape multinational agreements in order to avoid further federal inroads on the primacy of the self-regulatory system. For example, the House of Delegates has expressed support for the U.S. Trade Representative’s efforts to negotiate agreements that do not “unreasonably impinge on the regulatory authority of the states’ highest courts over the U.S. legal profession.” ABA House of Delegates, Report and Recommendation 105 (Annual Mtg. Aug. 2006).

17. See Judith Kilpatrick, *Specialty Lawyer Association: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 508 (1997/98) (estimating that by the mid-1990s there were more than 1,000 specialty bars in the U.S. and observing that the number was growing rapidly). One such group, the Association of Corporate Counsel (ACC), consists of in-house corporate lawyers from many jurisdictions. Founded in 1982, the ACC frequently participates in regulatory policy debates at the federal level. See Schneyer, *supra* note 3, at 562 & n.15. A related phenomenon is the growing number of specialized *interprofessional* associations whose members participate in the same legal process and whose professional outlooks may be converging as a result. Examples include the National Association of Drug Court Professionals and the International Academy of Collaborative Professionals. See Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 329–36 (2008). On the growing percentage of lawyers who practice in a single field, see JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 37 (2005) (reporting that one-third of the Chicago lawyers surveyed in 1995 practiced in only one of 42 narrowly defined fields, while just 25% of those surveyed in 1975 practiced in only one of the fields in a more broadly defined set).

members. Within their ambit, these guidelines often offer more concrete guidance than the more comprehensive legal ethics codes that the state supreme courts adopt. But they are sometimes in tension with those codes as well.¹⁸

4. For some time, the distribution of legal services has been shifting sharply toward business clients, many of which are sophisticated users of legal services with little need for paternalistic ethics rules to protect them from possible lawyer overreaching. From 1967 to 1992, business spending on legal services rose by 555%, while individual spending grew by less than half that amount.¹⁹
5. A considerable number of U.S. lawyers now work with other professionals such as accountants and lobbyists in consulting firms that chiefly advise businesses. These lawyers, who may or may not have active licenses to practice law, offer advice that is typically based at least in part on their legal training and expertise. But they do not hold themselves out as practicing law,²⁰ and for that reason may not be bound by most rules of legal ethics or as broadly accountable as other lawyers in the lawyer disciplinary process.²¹ In 1999, when the ABA Commission on Multidisciplinary Practice proposed that the ABA Model Rules of Professional Conduct be amended to permit lawyers to practice with other professionals in MDPs, one of its aims was to keep these lawyer-“consultants” in the professional fold for regulatory purposes.²² But the Commission’s proposals were rejected.
6. Responding to market demand, many U.S. law firms now have offices in more than one state, and many lawyers have regional or national practices.

18. See Schneyer, *supra* note 3, at 563 & n.16 (citing examples).

19. See Marc Galanter, *Old and in the Way”: The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1088–89.

20. See Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397 (2006); Michael Sullivan & Carrie Garcia, *Under a Different Shingle: There’s a New Breed of Employment Lawyer in the Market—The Employment Law Consultant*, HR MAGAZINE, Mar. 2005, at 119.

21. This would most clearly be the case in states that have in substance adopted Rule 5.7 of the ABA’s *Model Rules of Professional Conduct*, which concerns “responsibilities regarding law-related services.” If licensed, of course, these lawyers can still be disciplined for violating “catch-all” provisions that reach lawyer conduct outside the scope of law practice. *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (prohibiting lawyers from engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation”).

22. See 1999 MDP Report, *supra* note 4, App. A, Illustrative Rule 5.8 cmt. [3] (treating as law practice a lawyer’s “provision of [any] services that would be considered the practice of law if offered by a lawyer in a law firm). See also Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1487–88 (2000) (discussing this test); John S. Dzienkowski & Robert J. Peroni, *MDP Commission Opts for Expanded Regulation and Economic Protectionism*, PROF’L RESPONSIBILITY NEWS, Summer 1999, at 5, 20–21 (criticizing the test as overly broad).

This poses obvious problems for state-based licensing and regulation. In the last decade, many state supreme courts, following the ABA's lead, have eased these problems somewhat by relaxing restrictions on multijurisdictional practice (MJP).²³ While the changes are not uniform, they do show that the courts have some capacity to coordinate their rulemaking efforts and move toward uniformity if circumstances dictate. In view of practice trends, this capacity will only become more important.²⁴ Australia also relies heavily on state (and territorial) regulation, and states there are finding ways to promote the uniformity necessary to support regional and national practice without treading unduly on state sovereignty. Under an accord hammered out by the states' attorneys general with bar support, a license to practice law in one Australian state now permits the licensee to practice in others as well,²⁵ just as a New York driver's license permits the licensee to drive throughout the U.S. But such coordination may be much harder to achieve in the U.S., which has many more jurisdictions.

7. Risk management techniques have become a vital tool in preventing malpractice in law firms. Given their broad exposure to malpractice liability today,²⁶ law firms, sometimes with advice or prodding from their malpractice insurers, have adopted policies, procedures, and management systems to prevent claims.²⁷ Yet the overlap between unethical conduct and professional malpractice is far from complete²⁸ and law firms are now expected to employ internal measures to promote ethical compliance as well. Under current Rule 5.1(a) of the ABA Model Rules of Professional Conduct, a

23. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (as amended in Aug. 2002 on the recommendation of the ABA Commission on the Multijurisdictional Practice of Law.) Since 2002, more than half of all U.S. jurisdictions have adopted new MJP practice rules. For current adoption information see http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf. Despite the recent liberalization, it appears that more than a few lawyers continue to practice across state lines without authority but with impunity. Any pattern of lawyers acting as scofflaws is worrisome.

24. At the same time, it is a virtue of state regulation that individual states can be "first movers" in adopting new rules, thereby serving as "laboratories" for other states to study.

25. See Conference of Regulatory Officers (Australia), Welcome, available at <http://www.coro.com.au/>, (last visited July 17, 2009).

26. See Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF'L LAW. 53, 67-68 & nn.48-58 (citing data).

27. See Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996).

28. Government regulators of law practice in Queensland, Australia have emphasized this point. "A firm's management systems," they write, "might be designed to achieve... any number of worthy purposes such as enabling the firm to be more profitable or to reduce its exposure to [malpractice claims]. We can assume that the systems that are appropriate to enable a firm to achieve those other worthy purposes will overlap with... systems that are appropriate to achieve [ethical compliance] but we should not assume that the systems will be the same or co-extensive." John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241, 245 (2008).

partner, or any lawyer “who individually or together with other lawyers possesses comparable managerial authority in a law firm, [must] make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”²⁹ Many state ethics codes contain similar provisions,³⁰ but what might be called the “second-order” ethical duty they impose on lawyers with “managerial authority” is rarely enforced in disciplinary proceedings.³¹ The lack of enforcement may in part reflect the difficulty of determining which “measures” suffice in a particular firm or law office, which lawyers other than firm principals have “managerial authority,” or which of those who have managerial authority to hold responsible when controls are inadequate. And it very likely reflects the highly reactive nature of the traditional disciplinary process, which almost never swings into action unless and until someone files a grievance alleging that a specific lawyer has committed the sort of “first-order” misconduct that has traditionally been the ethics codes’ stock-in-trade

8. With this in mind, I argued in a 1991 article³² that the second-order or managerial ethical duty might more effectively promote the development and use of sound controls (which I called a firm’s “ethical infrastructure”) if law *firms*, not just individual lawyers, were subject to professional discipline. Since then, the New York and New Jersey courts have asserted disciplinary jurisdiction over law firms and addressed ethics rules much like Model Rule 5.1(a) to them.³³ As in the case of partners and other lawyers

29. MODEL RULES OF PROF’L CONDUCT R. 5.1(a). Lawyers with managerial authority must also make reasonable efforts to ensure that the conduct of their firm’s nonlawyer personnel is compatible with lawyers’ ethical obligations. *Id.* R. 5.3(a). The “measures” called for under these rules include, for example, policies and procedures designed to detect and resolve conflicts of interest, keep track of deadlines, protect client funds and property, and provide adequate supervision. *id.* Rule 5.1 cmt.[2], and may depend on the firm’s size and structure and the nature of its practice. *Id.* cmt. [3].

30. See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 775–79 (2005) (reporting that of the twenty-four jurisdictions that had reviewed the ABA’s 2002 revisions to the Model Rules as of July 2006, all but two “closely followed” the amendments to Rules 5.1 and 5.3, and eighteen adopted the amendments almost verbatim).

31. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 426 (6th ed. 2007) (identifying only a handful of reported cases since 1995 in which law firm partners were disciplined for failing to take reasonable measures to ensure that firm lawyers complied with ethics rules). The managerial duty to make reasonable efforts to establish appropriate internal controls is a “second-order” duty in that it is designed to promote compliance with fundamental or “first-order” duties such as competence, loyalty, and confidentiality.

32. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991).

33. *E.g.*, N.J. RULES OF PROF’L CONDUCT R. 5.1, N.Y. JUDICIARY LAW, RULES OF PROF’L CONDUCT R. 5.1, 5.3. New York’s Rule 5.1(a) provides that “a law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to” their other ethical duties, and Rule 5.1(c) requires a law firm to ensure that the work of its partners and associates is adequately supervised. *Id.*

with managerial authority, very few firms have reportedly been disciplined under these rules.³⁴ Nevertheless, imposing the second-order duty on firms (not just on lawyers with managerial authority) is bearing some fruit. New York bar associations have issued a series of ethics opinions that identify *firm* responsibilities and suggest how they can be met.³⁵ Through the information and guidance provided in such opinions, ethics rules addressed to firms may help to promote sound law firm infrastructure even if law firm discipline remains rare. Still, to limit the role of professional self-regulation in promoting sound law-firm and law-office infrastructure to the writing of occasional ethics opinions is to leave the pursuit of that goal largely to external forces—malpractice liability, litigation sanctions, the practice regulations of government agencies, and the marketplace.³⁶ Professors

34. See Elizabeth Chambliss and David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 340 & nn.35, 36 (2003) (noting that as of 2003 there were only three reported cases of law firm discipline in New Jersey and two private admonitions of firms in New York).

35. See, e.g., N.Y. City Formal Op. 2006–3 (including among a law firm’s supervisory duties a duty to check for conflicts and obtain advance client consent when outsourcing legal support services to sites overseas); N.Y. City Formal Op. 2003–3 (outlining minimum requirements for a firm’s conflicts-checking system); N.Y. City Formal Op. 1989–2 (advising firms to make it their policy to disclose to clients in advance that a temporary or contract lawyer will be working on their matters); N.Y. St. B. Op. 720 (Aug. 1999) (stating that in order to identify and resolve conflicts of interest, a law firm intending to hire a lawyer from another firm should, absent special circumstances, request, and the moving lawyer may disclose, the names of clients the lawyer represented at the other firm); N.Y. St. B. Op. 762 (Mar. 2003) (discussing the duty of a New York law firm to supervise affiliated lawyers licensed in foreign countries to ensure that they comply with ethical standards in their home countries and do not put the firm and its lawyers in violation of the New York Rules of Professional Conduct); and N.Y. St. B. Op. 774 (Mar. 2004) (spelling out a law firm’s due diligence duties when hiring a nonlawyer who previously worked at another firm). Most importantly, N.Y. St. B. Op. 789 (Dec. 2005) concludes, in view of the fact that New York rules now expressly impose duties on “a law firm as an institution,” that a firm may form an attorney-client relationship with one or more of its own lawyers in order to receive advice on matters of professional responsibility, including matters implicating a client’s interests, without thereby creating a conflict of interest between the firm and the affected client.

36. In issuing its Sarbanes-Oxley-mandated rules governing attorney conduct, for example, the SEC declared that it expects law firms to “put in place procedures to comply with [its] requirements,” but established no process for disciplining firms that fail to do so. Press Release, Securities and Exchange Commission 2003–13 (Jan. 23, 2003). See also *In re Keating, Muething & Klekamp*, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Dec. L. Rep. (CCH) para. 82,124 at 81,981 (July 2, 1979) (disciplining a law firm for its lack of policies promoting adequate internal communication between its lawyers, which could have prevented the omission of material information in disclosure filings with the SEC). The IRS’s Office of Professional Responsibility has shown some interest in disciplining law firms and other employers for failing to take appropriate measures to prevent violations of the IRS’s Circular 230 provisions governing the professional conduct of their tax practitioners. See Evan B. Hofmann, Comment, *IRS Circular 230 and Professional Discipline for Firms*, 43 HOUS. L. REV. 1241 (2006.). Congress has given the Treasury Department the authority to do so. *Id.* at 1273.

Elizabeth Chambliss and David Wilkins consider this quite unfortunate for a profession that has long prided itself on the centrality of self-regulation. They “subscribe to a . . . vision of professional self-regulation that demands that the profession offer its own regulatory strategy” for pursuing sound infrastructure.³⁷ Ironically, the recent reforms in the U.K. and Australia, though clearly at odds with traditional self-regulation in the U.S. in important respects, may have something to contribute to such a strategy.

9. Finally, a substantial percentage of American lawyers now work in firms whose size and market span were virtually inconceivable as recently as 1970. From 1975 to 1995 the percentage of Chicago lawyers working in firms with 100+ lawyers more than tripled from 8% to 25%.³⁸ Fueled in part by mergers, the trend toward large firm practice has continued, although it appears to be (at a minimum) stalled in the current economic downturn.³⁹ By 2006, twenty American law firms had passed the 1,000-lawyer mark,⁴⁰ and *The American Lawyer* reported in 2008 that no fewer than 77 U.S. firms, many of which operate in multiple U.S. jurisdictions and abroad, had gross annual revenues exceeding \$349 million.⁴¹ The regulatory implications? Although every licensed attorney is subject to professional discipline, large-firm lawyers have always been unlikely disciplinary targets compared to sole practitioners and small-firm lawyers, even in jurisdictions where large firms are prominent.⁴² Where today’s behemoths are concerned,

37. Chambliss & Wilkins, *supra* note 34, at 341. For brief discussion of the key feature of the self-regulatory strategy they propose, see *infra* notes 83–84 and accompanying text.

38. HEINZ et al, *supra* note 17, at 99–100. In 2000, a report by the New York State Bar Association acknowledged the trend, asserting that the lawyers working in the 700 largest U.S. law firms had become the “most prominent sector” of the American legal profession. N.Y. State Bar Ass’n, *Preserving the Core Values of the American Legal Profession* (Apr. 2000), *quoted in* ANDREW L. KAUFMAN & DAVID B. WILKINS, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* 757–58 (4th ed. 2002).

39. See Alan Feuer, *Bleak Day at the Bar: Major Law Firms Are Forced to Shrink*, *NYT*, June 7, 2009, at 25.

40. *The NLJ 250*, *NATIONAL L.J.*, Nov. 13, 2006, at S-18.

41. Seventy-seven of the top 100 law firms in the world (by gross revenues in their most recent fiscal year) were U.S. firms and 17 were British. *The Global 100: Most Revenues*, *THE AMERICAN LAWYER*, Oct. 2008, available at <http://www.law.com/jsp/article.jsp?id=1202424832628>. Gross revenues for the top 100 firms ranged from \$349 million to a high of \$2.66 billion. Not all of the 77 U.S. firms on the list may have international offices, but a recent study focused on 64 large U.S.-based firms that do. Carole Silver et al, *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, 22 *GEO. J. LEGAL ETHICS* (forthcoming 2009).

42. In the early 1980s more than 80% of the lawyers disciplined in California, Illinois, and the District of Columbia were sole practitioners, and none practiced in firms with more than seven lawyers. See RICHARD ABEL, *AMERICAN LAWYERS* 145 (1989) (citing sources). Yet large firms and their lawyers are frequently sued for malpractice, disqualified from litigation on conflict-of-interest grounds, and sanctioned by courts for procedural violations, suggesting that ethical breaches in large firms are by no means rare. The disciplinary process does play an important role by removing from practice large-firm

it seems quite implausible to suppose that state disciplinary authorities (as presently structured) do play—or could play—a significant role in policing practice. For that reason and because federal and multinational initiatives increasingly define the regulatory environment for large corporate firms in the U.S., that environment may now diverge very sharply from the one in which solo and smaller-firm lawyers practice.⁴³ State supreme courts and mainstream bar leaders who cling to the idea of a unified—and uniformly regulated—legal profession may be reluctant to entertain this hypothesis, but recent reform proposals calling for an entirely separate regulatory track for the largest corporate firms in the U.K. are grounded on it.⁴⁴

B. Factors that Fostered the Recent Reforms in the U.K. and Australia

Before moving on to consider some of the regulatory reforms in the U.K. and Australia, three aspects of the regulatory and political environment that shaped the reforms but differ from circumstances in the U.S. should also be noted. First, the reforms owe their existence in large part to antitrust regulators and to powerful consumer groups with allies in government agencies. Antitrust regulators sought reform on the ground that longtime restrictions on law firm structure were preventing firms from exploiting economies of scale and scope that could reduce the cost of legal services and, by limiting competition, were keeping legal fees artificially high and hindering access to legal services. Consumer groups sought reform because they considered the self-regulatory professional associations that received complaints about lawyers and conducted disciplinary proceedings to be chronically slow in responding to complaints, unduly protective of the lawyers against whom complaints were filed, and unwilling or unable to provide any redress for those with legitimate complaints. Two express objectives of the Legal Services Act of 2007 reflect these concerns—“protecting and promoting the interests of consumers” and “promoting competition in the provision of legal services.”⁴⁵ In

lawyers who commit serious crimes or frauds that come to light in the press or through indictments or civil claims. But those disciplinary cases often piggyback on others' investigations.

43. But although the enforcement component of the self-regulatory system does not play a significant role in policing large firm practice, the impact of the ethics rulemaking component on large firms is far from trivial, in part because ethics rules, though designed to serve as a basis for discipline, also influence the standards applied to lawyers in other forums, including malpractice suits and disqualification cases. *See* Schneyer, *supra* note 3, at 597–99 (discussing the Office of Thrift Supervision's invocation of prevailing ethics rules as a basis for its claims against the Kaye Scholer firm in the wake of the savings-and-loan crisis); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 260–63 (1998) (discussing judicial use of ethics rules in ruling on motions to disqualify a law firm from litigation).

44. *See infra* notes 94–98 and accompanying text.

45. Legal Services Act of 2007, ch. 29, Pt. 1, sec. 1. The Act also requires the new Legal Services Board that will oversee the regulation of legal services to consult with a consumer panel and the Office of Fair Trading (the antitrust agency), as well as the Lord Chief Justice, who is the administrative head of the judiciary, before taking important regulatory policy decisions. *Id.*, Pt. 2. The Act is only in force in England and Wales but similar reform efforts are underway in Scotland.

the U.S., by contrast these influences are muted. Neither consumer groups nor the Federal Trade Commission have had much impact on lawyer regulation, not even in Ralph Nader's heyday. Moreover, the "state action" doctrine in federal antitrust law immunizes state court rules governing law practice and firm structure from antitrust scrutiny⁴⁶ and there are no signs that that will change. Consequently, if similar reforms are ever adopted in the U.S., they are unlikely to be a product of the same political dynamics.

Second, the reforms in the U.K. and Australia were adopted in legislation and administrative regulations rather than rules of court. In the U.K., where law practice is regulated nationally, the key legislation is the Legal Services Act of 2007, which represents the culmination of reform efforts that began in the late 1980s. The Australian reforms are embodied in state legislation and regulations that began to appear in the 1990s. Those state statutes and regulations are relatively uniform thanks to a Model Bill, hammered out in a national project, that balances "uniform 'core' provisions" with "the rights of individual jurisdictions to maintain certain local standards."⁴⁷ There is no inherent reason why legislative reforms in the U.K. or Australia could not serve as templates for state supreme court rulemaking in the U.S. but that will presumably not happen if the reforms are fundamentally inconsistent with the regulatory philosophy of the courts and mainstream bar or could not as a practical matter be implemented in the U.S. on a state-by-state basis.

Finally, the long preoccupation in the U.S. with policing the unauthorized practice of law is only a peripheral concern in the U.K. Instead of taking an expansive view of the services one needs a law license to provide, Parliament reserves relatively few fields for licensed practitioners, including advocacy before courts and certain other tribunals, some additional litigation-related services, conveyancing, and probate, notarial, patent and trademark work. These areas aside, anyone may provide legal advice or services.

II. The Compatibility of Some Recent British and Australian Reforms with the Traditional Self-Regulatory System in the U.S.

I will discuss four sets of reforms that have been adopted in the U.K. and/or Australia and a fifth that is under consideration in the U.K. In each case, I describe

46. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

47. AINSLIE LAMB & JOHN LITRICH, *LAWYERS IN AUSTRALIA* 6–7 (2007). State legislation based on the Model Bill is ordinarily initiated by the state attorney general. The state supreme courts control bar admissions. The Model Bill was produced through a National Practice Model Laws Project initiated by the Standing Committee of Attorneys-General in conjunction with the Law Council of Australia (LCA). The Bill (June 2007 version) is *available at*, www.lawcouncil.asn.au/initiatives/national-practice.cfm. The LCA is the "peak body" of the Australian legal profession. It is a federation consisting of each state or territory's law society and bar association *plus* the Large Law Firm Group, which represents the nine largest Australian law firms. See John Corcoran, *Law: A Global Perspective on the Internationalisation of Legal Services Markets* 3 (speech by the President of the LCA (June 16, 2009), *available at* <http://www.lawcouncil.asn.au> (last visited Aug. 26, 2009)).

the pertinent reforms and then note whether our state court systems already have a functional equivalent. If they do not, I consider whether the reforms could plausibly be integrated with the states' current systems. When prospects for integration seem dim, I will also consider whether the courts, if so disposed, could modify their systems in order to incorporate the reforms in question.

A. Separating Regulation from Bar Representation of the Profession

In England and Wales, the lawyers licensed to practice in each reserved field are represented by an officially recognized association. The largest association, the Law Society of England and Wales, represents solicitors. Until fairly recently, Parliament gave the associations substantial authority, and autonomy, to regulate their members through a complaint-handling and disciplinary process. But the Legal Services Act of 2007, acting on the widespread view that the associations' representative function created a conflict of interest that was impairing their regulatory work, now requires each body to delegate its regulatory authority to a largely independent arm, which the Law Society has done by establishing the Solicitors Regulation Authority (SRA).⁴⁸

Until the 1970s, most state supreme courts in the U.S. also delegated a substantial role in the disciplinary process to state (and some local) bar associations and the regulatory performance of these associations was similarly criticized.⁴⁹ By and large, however, the courts that once assigned a substantial role to the bar have already taken measures to narrow the bar's role or turn the administration of the disciplinary process over to an independent judicial agency.⁵⁰ If anything, this U.K.

48. The new board that will oversee the regulation of legal services in England and Wales must be satisfied that these regulatory bodies are sufficiently independent of the associations that created and fund them. Legal Services Act of 2007, Part 4. In the U.K. the representative function of the professional associations is often referred to as their "trade function," a label that seems to liken the associations to trade unions. Reforms in Australia have not focused on separating the representative functions of the state law societies and bar councils from what remains of their regulatory function.

49. Complaints-handling and disciplinary enforcement began to improve after 1970, when an ABA commission concluded that the state disciplinary systems were "scandalous[ly]" ineffective and underfunded. ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 1 (Final Draft, June 1970). But sharp criticism is not entirely a thing of the past. See 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) (criticizing the D.C. Bar's management of the disciplinary process and calling upon the District of Columbia Court of Appeals to limit the bar's role).

50. Of the 33 jurisdictions with mandatory membership state bars, twelve now maintain a separate lawyer disciplinary agency, as do all the jurisdictions with voluntary state bar associations. See Maute, *supra* note 2, at 54 & n.5 (citing an e-mail dated Feb. 14, 2008 from ABA Regulation Counsel Mary Devlin to Maute). One impetus for these changes came in 1992, when an ABA commission strongly recommended separation. Report of the Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century, Recommendation 4 ("Direct and Exclusive Control of Lawyer Discipline"), Recommendation 5 ("Independence of Disciplinary Officials"), Recommendation 6 ("Independence of Disciplinary Counsel") (Feb. 1992) [hereinafter referred to as the McKay Report].

reform, unlike the reforms discussed below, lags behind reforms that have been instituted in the U.S.

B. Establishing Co-Regulatory Regimes in Which External Regulators Oversee the Bar's "Frontline Regulators"

Much more fundamental legislative reforms in the U.K. and Australia establish new government agencies, independent of the bar and outside the direct control of the courts, to perform important regulatory functions. Among other things, these "external" regulators are expected to oversee the remaining complaint handling and disciplinary responsibilities of the "frontline regulators" (i.e., state law societies and bar associations in Australia, and the SRA and analogous bodies in England and Wales). Under the U.K.'s Legal Services Act of 2007, the new Legal Services Board (LSB) will oversee all aspects of the regulation of legal services in England and Wales. The LSB approves a "frontline regulator" for each class of licensed lawyers. Approved regulators (e.g., the Law Society acting through the SRA) retain responsibility for the day-to-day processing of complaints that allege serious professional misconduct and for prosecuting disciplinary cases before a specialized tribunal. But the LSB may set performance targets for approved regulators and if an approved regulator is too slow in processing complaints or abuses its authority, the LSB may fine the regulator, make remedial orders, or in an extreme case withdraw its approval.⁵¹

In Australia, legislation in every state or territory has established or soon will establish an Office of the Legal Services Commissioner (OLSC). Like the LSB in the U.K., these Offices are expected to oversee the complaint handling and disciplinary work of the law society and bar association in their jurisdiction. The balance between the OLSCs' powers, on one hand, and those of the "self-regulating" law societies and bar associations, on the other, varies somewhat from state to state, but the well-established system in New South Wales (NSW), often described as "co-regulation," is representative. There, all complaints against barristers or solicitors go first to the OLSC, which refers complaints alleging serious professional misconduct by solicitors or barristers to the Law Society or Bar respectively for investigation and possible prosecution. The OLSC may also recall matters it referred to those bodies and conduct its own investigation, and it reviews all the complaints they summarily dismiss.⁵²

In the U.S., we already have a form of "co-regulation," with the state supreme courts overseeing the bar's disciplinary work in states where the bar still has a significant role in the field and, elsewhere, overseeing the independent agencies the

51. Legal Services Act of 2007 ch. 29, Pt. 4, secs. 31–48.

52. See CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS' ETHICS* 54 (2007). In one instance, when the NSW Commissioner thought the Bar was too reluctant to remove from practice senior barristers who had attracted news stories for failing to pay taxes for years and then trying to use bankruptcy to avoid their tax debts, he required the Bar to initiate public disciplinary proceedings against the barristers though no one had filed a formal complaint against them *Id.* at 55.

courts have created to process complaints and to conduct disciplinary proceedings. If a state legislature tried to create its own external overseer, the supreme court would presumably strike down the legislation on separation-of-powers grounds.⁵³ Unless the courts decide to cede their disciplinary authority to state legislatures and administrative agencies or there are federal initiatives to take over traditional state supreme court responsibilities, neither of which seems likely for the foreseeable future,⁵⁴ the only question raised for the courts by the co-regulation reforms in the U.K. and Australia will be whether the courts can and should beef up their own regulatory programs by adopting some of the regulatory techniques, discussed below, that the co-regulators in the U.K. and Australia are developing.

C. More Robust Responses to Complaints that Charge Lawyers with “Unsatisfactory Professional Conduct”

The U.K.’s Legal Services Act of 2007 and Australia’s Model Bill treat complaints charging lawyers with “unsatisfactory professional conduct” (UPC) differently from complaints alleging serious “professional misconduct.” UPC is conduct that “falls short of the standard of competence and diligence that a member of the public is entitled to expect.”⁵⁵ Examples include delays in handling client matters, shoddy service, failure to clarify fee terms for clients, and careless mistakes. Many UPC complaints are filed by clients who use legal services rarely if at all and lack the sophistication to monitor or negotiate effectively with their lawyers. Moreover, even when UPC demonstrably harms a client, the harm is typically too modest to make a suit for damages worthwhile.

53. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 27–31 (1986) (analyzing the scope of the state courts’ “negative” inherent power to strike down legislation that infringes on their state constitutional authority to regulate law practice). On the unusual extent to which the California legislature has sought (and been permitted by the state supreme court) to oversee the operations of the California State Bar, including the funding of the disciplinary process, see Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RESEARCH J. 1, 69–75. See also Gail D. Cox, *Latest in Calif. Bar Saga: A \$396 Bar Bill*, NAT’L L.J., Jan. 18, 1999, at A8 (reporting on the political crisis in 1997–98, when Governor Pete Wilson attacked the California State Bar for spending too much money on political and ideological activities as well as discipline, and left the State Bar temporarily unfunded, monitored by a Wilson appointee, and barely functional).

54. Any federal legislation that purported broadly to take over lawyer licensing and regulation from the states could encounter a constitutional challenge in light of the U.S. Supreme Court’s pronouncement that “[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left *exclusively* to the States and the District of Columbia within their respective jurisdictions. *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam) (emphasis added). *But see* WOLFRAM, *supra* note 53, at 112–13 (demonstrating that the statement is an exaggeration). The constitutionality of any federal takeover that went so far as to oust the state supreme courts of disciplinary authority over lawyers for misconduct in the state courts themselves would be particularly doubtful.

55. Model Bill, *supra* note 47, sec. 4.2.1. Some allegedly unsatisfactory conduct that constitutes a violation of the rules of professional conduct is nonetheless treated as UPC if it is not considered serious enough to merit formal discipline. In other cases the alleged UPC may not violate those rules, but is thought nonetheless to justify a consumer complaint.

Under reforms in New South Wales, the OLSC investigates and resolves UPC complaints on its own rather than forwarding them to the Bar or Law Society, which were particularly criticized in the past for being unresponsive to such complaints.⁵⁶ In the U.K., the Legal Services Act of 2007 goes farther. It requires legal service providers to maintain an in-house complaints-handling process that responds in the first instance to consumer complaints. The in-house process will have to meet any standards the LSB sets in consultation with a consumer panel. When a complaint cannot be resolved in-house, it will not go to an approved regulator, but rather to the new Office for Legal Complaints (OLC), whose board will be controlled by non-lawyers. Overseen by the LSB, the OLC will operate through ombudsmen with considerable power. When a UPC complaint is found to have merit, the OLC may direct the respondent lawyer to apologize, disgorge fees, rectify an error at the lawyer's expense, or even *compensate* the complainant in an amount up to 30,000 pounds.⁵⁷

These reforms provide much greater support for UPC victims than one finds in the U.S., where disciplinary authorities have frequently declined to consider complaints that allege what amounts to UPC. In 1992, The ABA's McKay Commission found that "tens of thousands of clients alleging legitimate grounds for dissatisfaction with their lawyer's conduct are being turned away because the conduct alleged would not be a violation of disciplinary rules. . . . Yet in all but a few states [the disciplinary process] is the only regulatory [recourse] available to complainants."⁵⁸ Finding the situation unacceptable, the McKay Commission called for expanding regulatory programs to include mediation services, mandatory arbitration of fee disputes, and programs designed to help lawyers avoid unsatisfactory conduct. State supreme courts have taken steps in this direction, but none has adopted client protection measures that match those prescribed in the U.K.'s Legal Services Act.⁵⁹ Nor has any court answered Professor Tom Morgan's call for "a professionally-staffed system in which a client could file a charge and get a decision ordering payment of damages."⁶⁰

56. See PARKER & EVANS, *supra* note 52, at 54; Steve Mark, "Technology and Compliance Auditing—The Future of Legal Regulation" 7 (paper presented at the Third International Legal Ethics Conference, Gold Coast Australia in July 2008) (stating that prior to the NSW reforms, "in the 95 per cent of [UPC] cases where there was insufficient evidence that a genuine breach of duty of the conduct rules had occurred, the complaint was dismissed without any real attempt at problem solving or systemic improvement").

57. Legal Services Act of 2007, Ch. 29 secs. 113, 126(1), 138(1). Moreover, the respondent will be required to pay costs to the OLC unless the complaint is resolved in his or her favor *and* the OLC is satisfied that the respondent made a reasonable effort to resolve the matter in-house. *Id.* sec. 136. It is unclear whether the OLC process for determining whether such a directive is warranted in any given case affords complainants and respondents the procedural protections that might be considered essential in the U.S.

58. McKay Report, *supra* note 50, Recommendation 3 ("Expanding Regulation to Protect the Public and Assist Lawyers").

59. Maute, *supra* note 26, at 61–65.

60. Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409, 420 (2001). Without such a system, Morgan contends, the legal profession lacks "the leverage

Why have state supreme courts in the U.S. not done more in the area of consumer protection? Perhaps they sense that lawyers would be intensely hostile to the idea and would resist any additional regulatory levies the courts might impose on them in order to fund a stronger consumer protection program.⁶¹ In that case, there is an alternative. Several courts have construed their state's Deceptive Trade Practices Act to permit clients who are misled by a lawyer's ads or statements regarding fees to sue the lawyer.⁶² Perhaps more courts will follow suit in the spirit of coordinating judicial and legislative efforts to provide consumer protection, and will no longer construe the statutes as inapplicable to lawyers on the ground that law is not a "trade" or insist on the courts' *exclusive* authority to regulate law practice—even when they are not interested in using that authority.

D. Proactive, Firm-Based Regulation

As Legal Services Commissioner Steve Mark reports,⁶³ legislation and regulations adopted in NSW in 2001 permitted lawyers for the first time to work in "incorporated legal practices" (ILPs), including firms organized as limited liabil-

with which to force our brothers and sisters at the bar to take professional obligations seriously." *Id.* The state supreme courts recognize restitution but not compensation as an appropriate disciplinary sanction. *See* ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 (2002). Very few authorize the imposition of fines, in contrast to the Law Society of England and Wales, which has long used fines as the sanction of choice for violations that do not warrant disbarment. *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS 141 (1986). Fines have traditionally been rejected as a sanction in the U.S. on the grounds that they are "punitive and criminal in nature" and "would erroneously imply that [disciplinary] proceedings are criminal" as well. ABA Standards for Lawyer Disciplinary and Disability Proceedings sec.6.14 & cmt. (1979). Since courts commonly impose civil fines on lawyers for violating rules of procedure, this rationale makes little sense.

61. A former chief disciplinary counsel in Missouri who also served for ten years as a deputy trial counsel with the California disciplinary system observes that there "may be a perception by bar leadership that it is their responsibility to protect their membership from increased regulation" and that "[i]ncreased funding [is] synonymous with increased regulation." E-mail from Maridee F. Edwards to Professor Judith Maute, *quoted in* Maute, *supra* note 26, at 62–63 n.39.

62. *See, e.g.,* Crowe v. Tull, 126 P.3d 196 (Colo. 2006); Short v. Demopolis, 691 P.2d 163 (Wash. 1984) (finding statute applicable but only as applied to legal fees or the manner in which a law firm obtains, retains, and dismisses clients). *Contra*, Cripe v. Leiter, 703 N.E.2d 100 (Ill. 1998) (inferring that the legislature must not have had lawyers in mind because clients are already protected by ethics rules governing lawyers' fees and advertising). *See also* James M. Fischer, *supra* note 3, at 97–98 (discussing cases). While lawyer conduct that is actionable under these Acts may often violate ethics rules governing lawyers' fees and advertising and could result in discipline, the Acts provide redress that is unavailable in the disciplinary process, provide for fee-shifting, and, in egregious cases, provide for multiple damages as well. *See, e.g.,* TEX. BUS. & COM. CODE sec. 17.49 (Westlaw 2007).

63. *See* Steve Mark, "The Future Is Here: Globalization and the Regulation of the Legal Profession, Views from an Australian Regulator," *available at* <http://www.law.georgetown.edu/legal-profession/documents/May27-2009> (paper presented at Conference: The Future Is Here: Globalization and the Regulation of the Legal Profession: Recent Global Practice Developments Impacting State Supreme Courts' Regulatory Authority Over the U.S. Legal Profession). The next paragraphs draw heavily on that paper.

ity partnerships.⁶⁴ There are now roughly 900 ILPs in the state. So far, most are solo practices or small firms. Sixty or so have what is now called an “alternative business structure” (ABS); fifty-eight are MDPs and at least two issue stock and are listed on the Australian Stock Exchange.⁶⁵ To allay concerns that the limited liability that comes with incorporation or LLP status would encourage misconduct, especially perhaps in the ILPs with an ABS, Commissioner Mark’s Office has required ILPs to develop an “ethical infrastructure”—i.e., formal and informal management policies, procedures and controls, work-team cultures, and habits of interaction . . . that support and encourage ethical behavior.”⁶⁶ The aim here is to reduce the risk of misconduct by motivating and helping firms to learn *how* best to do so. This program has developed into a proactive system of firm-based regulation.

Further NSW legislation in 2004⁶⁷ provided a mechanism for *enforcing* an ILP’s duty to maintain a satisfactory ethical infrastructure. Every ILP must appoint at least one licensed NSW solicitor as a “legal practitioner director” (LPD). An ILP without an LPD for more than seven days (perhaps due to departure or removal for misconduct) may be forced into receivership and shut down. LPDs are not only generally responsible, like all lawyer principals, for managing their firm’s delivery of legal services,⁶⁸ but also personally responsible for the implementation and maintenance of “appropriate management systems.”⁶⁹ Failure to meet that personal responsibility is professional misconduct for which an LPD may be sanctioned and, in serious cases, disqualified from further service as an LPD.⁷⁰

64. Firms may incorporate by registering a company with the Australian equivalent of the SEC.

65. In May 2007, Slater & Gordon Ltd, an Australian firm specializing in plaintiffs’ personal injury and commercial litigation, became the first law firm in the world to make a public offering of stock to outside investors. *See* Slater & Gordon: Our History, at <http://www.slatergordon.com.au/pages/history.aspx> (last visited Jan.8, 2008).

66. Mark, *supra* note 63, at 2–3. *See also* Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the US and Australia: Client Protection and Risk Management Lessons*, 11 LEGAL ETHICS 230 (2008)

67. Legal Profession Act of 2004 (NSW) sec. 143. [hereinafter LPA 2004].

68. When an ILP is also an MDP, not all the services it provides will be legal services.

69. LPA 2004 sec. 141. LPDs must also take all steps reasonably necessary to respond to professional misconduct or unsatisfactory professional conduct by a solicitor working at the firm. *Id.*

70. Ethics rules in the U.S. began to acknowledge the responsibility of firm management for promoting ethical compliance in 1983, when the ABA adopted the *Model Rules of Professional Conduct*, but the pertinent rules have rarely been enforced, in part perhaps because it is difficult to determine which “managers” to hold responsible without one or a few managers being designated as having primary responsibility. *See supra* notes 29, 33 and accompanying text. But in 2003, the Delaware Supreme Court, in a “case of first impression,” treated *the* managing partner of a law firm in a manner that could lay the groundwork for treating managing partners or designated in-house compliance experts much as an LPD is now treated in NSW. The court suspended the partner for six months for what was “at least reckless misconduct” in the management of the firm’s books and records, and held that a *managing* partner “has enhanced duties, vis-à-vis other lawyers and employees of the firm, to ensure the law firm’s compliance with its recordkeeping . . . obligations.” *In re Bailey*, 821 A.2d 851, 853 (2003).

Although the 2004 legislation does not define “appropriate management systems,” the OLSC, collaborating with the NSW Law Society, a malpractice insurance firm, and knowledgeable academics and practitioners, has developed a test for deciding whether an ILP has “appropriate systems” in place. The test is whether the firm has and utilizes procedures that “evidence compliance” with 10 designated objectives. Those objectives include timely provision of services, avoidance of careless errors, adequate documentation of fee terms and billing, timely recognition and resolution of conflicts of interest, sound records management, adequate supervision of practitioners and staff, and prevention of trust account violations.

But that’s not all. LPDs must *assess* their firm’s management systems, and the OLSC has developed a self-assessment instrument for that purpose. Customized for an ILP’s size, field(s) of practice, and operations, the instrument suggests criteria for the LPD(s) to use in determining whether—or to what extent—the firm is “in compliance” with each of the ten objectives.⁷¹ LPDs fill out the instrument, stating for each objective whether the firm is “fully compliant,” “compliant,” “partially compliant” or “noncompliant.” After the Commissioner’s Office receives the completed form and prepares a report, there may be follow-up discussions and—if subsequent complaints, adverse publicity, or other events warrant—further review and possibly a formal audit to check on the reliability of the self-assessment.⁷² Self-assessments are likely to be reliable because they are intended—and presumably understood by the ILPs—as a tool to educate firms *toward* compliance, not to detect ethics violations.⁷³ Rule violations and objectives as yet unmet are two different things.

Although firm-based regulation in NSW is clearly a work-in-progress, Commissioner Mark and others have begun rigorously to assess the impact of the

71. For example, the instrument suggests the following two criteria, among others, for determining whether a firm is adequately pursuing the objective of maintaining “competent work practices to avoid negligence”—whether “fee earners practice only in areas where they have appropriate competence and expertise” and whether the firm has a “written statement setting out the types of matters in which the practice will accept” engagements. Mark, *supra* note 63, at 11.

72. From January through June 2008 the OLSC conducted four formal reviews. *Id.* at 17. Commissioner Mark describes one practice review that was performed after the OLSC had received complaints about an LPD, including complaints about a lack of supervision at the LPD’s firm. Concerned that appropriate management systems were not being maintained, the OLSC had the LPD reassess the firm’s systems. When the new self-assessment form was returned with 8 of 10 objectives assessed as only “partially compliant,” a “compliance audit” was conducted. The audit report noted several areas for improvement, prompting the LPD to implement new systems. Mark, *supra* note 63, at 7.

73. Readers familiar with the social science literature on regulation will recognize Commissioner Mark’s program as an example of “audited self-regulation,” a technique that leaves regulatees with considerable discretion to self-regulate but requires periodic reports to (and possible review by) an agency, and has come into vogue in the last twenty years or so. For a helpful introduction, see Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMINISTRATIVE L. REV. 171 (1995). The reforms adopted in the U.K. and Australia, as well as the reports supporting those reforms, suggest that policy makers in both countries have given considerable attention to scholarly literature on regulatory theory in general.

program,⁷⁴ with promising results.⁷⁵ Though originally designed solely for ILPs, Mark believes the program will be just as useful in regulating partnerships and unincorporated solo practices. OLSCs in other Australian jurisdictions are developing similar programs,⁷⁶ and in the U.K. the Legal Services Act of 2007 charges the approved regulators to do so as well.⁷⁷

Several regulatory themes, in addition to the focus on practice *entities*, are implicit in the NSW program. One is the conception of professional regulation as, in significant part, a species of risk management.⁷⁸ A related theme is an emphasis on ex ante regulation as a vital complement to ex post regulation. Discipline and civil liability are ex post techniques; they respond to misconduct or negligence after it occurs. Imposing discipline or civil liability on firms and individual lawyers can only deter future misconduct if firms recognize the specific risks they face of unethical or unsatisfactory conduct occurring within their walls, understand the sources of those risks, and identify and adopt appropriate measures to reduce or avoid them. Engaging firms in the enterprise of developing sound management systems promotes ethics compliance by helping firms learn for themselves how best to reduce or avoid risks before they materialize.

74. Christine Parker, Steven Mark, & Tahlia Gordon, Research Report: Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Services (Sept. 25, 2008), available at http://www.lawlink.nsw.gov.au/lawlink/olsc/11_olsc.nsf/pages/OLSC-speeches.

75. Mark, *supra* note 63, at 8 (noting that the average number of complaints per practitioner per year for ILPs after self-assessment was well under half the complaint rate before self-assessment).

76. See Briton & McLean, *supra* note 28, at 244–54 (describing the Queensland program).

77. Under the Legal Services Act of 2007, approved regulators such as the SRA must develop a system of firm-based regulation for firms of all sizes and structures. In order to practice, each firm must be “recognized” by its regulator as an authorized service provider. Solicitors’ firms, for example, must be “recognized” by the SRA and will have to renew their status annually. They will also have to submit information about their practices to enable the SRA to develop a “risk-based” approach to regulation—i.e., to proportion its activities to the noncompliance risks that particular firms, practitioners, and practice fields actually pose for clients and others. The hope is that risk-based regulation, so understood, can conserve the resources of firms and regulators alike with no loss of regulatory effectiveness. Moreover, when firms with ABSs come into service in 2011 or 2012, the firms and their principals will have to satisfy certain “fitness” requirements in order for the firms to obtain a *license* from an LSB-approved licensing body (perhaps the SRA, for example). See, e.g., Solicitors Regulation Authority, Legal Services Act: New Forms of Practice and Regulation, Consultation Paper 8: Changes in Regulatory Processes for Firms and Individuals (Mar. 3, 2008), available at <http://www.consultations.sra.org>.

78. Some observers think that an emphasis on risk management threatens to deaden the individual lawyer’s ethical faculties. See Anthony Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1939 (2006) (arguing that risk management systems shift a lawyer’s responsibility to make hard moral judgments to others, such as committees or experts). For a contrary view, see Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95 (2008). Given the centrifugal forces and perverse incentives that plague poorly managed firms, I believe, like Davis, that sound risk management systems are much more likely to enable lawyers to exercise their best judgment than to stunt their ethical faculties.

A third theme in the firm-based regulatory program might be termed “the regulator as consultant.” The frequency and depth of the interactions between Commissioner Mark’s Office and the many ILPs in New South Wales have no analogue in the U.S., where regulation has largely been reactive. Many U.S. lawyers (and perhaps state supreme court justices), when told about the proactive firm-based regulatory program that is evolving in Australia, would probably view it as a highly intrusive scheme administered by an alien agency to pursue speculative gains at undue expense. Over time, however, a similar program adopted by the state supreme courts might be perceived quite differently.

The Australian experience suggests that such programs could be implemented in the U.S. as a complement to the reactive disciplinary process. An advantage of establishing the program under state supreme court auspices is that the American legal profession is much more amenable to judicial than to “external” regulation.⁷⁹ And although the traditional disciplinary systems have been largely reactive, proactive regulation on a small scale already exists in the U.S. In a number of states, for example, authorities conduct random audits of client trust accounts,⁸⁰ a technique more reminiscent of early OSHA practices than of proactive firm-based regulation in NSW.

The reception that proactive firm-based regulation would receive from American lawyers would probably depend heavily on the mind-set of program administrators. Commissioner Mark reports that a number of ILPs were nervous at first about the self-assessment process, but felt differently once they experienced it; some found the process quite helpful in improving the quality of their services and avoiding complaints. He attributes this response to an emphasis on “assisting and working with” the ILPs.⁸¹ Indeed, the attitude of his Office in administering its program seems closer to that of a *consultant* than an enforcer, although the Office is of course an enforcer as well. How well the roles of consultant and enforcer can be reconciled remains to be seen. But the emphasis on firm *self*-assessment and the concept of “working toward compliance” suggests that the program is truly collaborative and that role conflict need not transform it into something else. Commissioner Mark sees his firm-based program as a move “away from sole reliance on complaints-based regulation to[ward] compliance-based regulation.”⁸²

79. See, e.g., ABA Center for Prof’l Responsibility, Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice 1 (2002), available at <http://www.abanet.org/cpr/mjp/home.html> (urging the ABA to reaffirm its longstanding support for “the principle of state judicial regulation of the practice of law”).

80. See, e.g., *In re Warhaftig*, 524 A.2d 398 (N.J. 1987).

81. Mark, *supra* note 63, at 8. It may be important that in NSW lawyer discipline for serious misconduct is still largely in the hands of the bar, so that the OLSC is not so deeply regarded as an enforcer that lawyers cannot appreciate its potential contribution as a “consultant.”

82. *Id.* at 3. Professor Laurel Terry has suggested that it would not be administratively difficult or unduly intrusive for state supreme courts to require firms practicing in their jurisdictions to file periodic reports on their management systems as an elaboration of the “second order” duty already

One might argue, however, that even if state supreme courts in the U.S. came to regard Australian-style proactive firm-based regulation as desirable in principle, such programs could not be implemented under current circumstances because the court or bar personnel who administer our complaints-based disciplinary process presumably possess much less expertise in matters of law-firm ethical infrastructure than Commissioner Mark and his staff possess. Yet the difference may not be as stark as one might suppose. The regulatory system that Commissioner Mark encountered when he became the NSW Commissioner in 1994 was essentially the complaint-based system we still rely on.⁸³ His Office has surely developed much of its expertise since 2001, while interacting with many ILPs and consulting with malpractice insurers and with academics who study organizations and their governance.

Moreover, in the 1970s and 1980s, the disciplinary process in the U.S. changed greatly. Funding improved, and full-time disciplinary counsel and staff were hired in most states, became highly professionalized, and formed the National Organization of Bar Counsel, an association capable of rapidly disseminating new regulatory ideas.⁸⁴ Moreover, sanctioning philosophy in the field has shifted away from what was once a near-exclusive focus on removing “bad apples” from practice and toward attending to less serious misconduct in order to educate or rehabilitate wayward lawyers. The fact that non-consensual disbarments increased nationally by only about 100% from 1979 to 1988, while probation sanctions grew by 450% is some evidence of this shift.⁸⁵ Probation is often the sanction of choice for solo practitioners and small-firm lawyers who neglect client files or maintain inadequate books or records. In such cases, poor office management skills are often the problem.⁸⁶ Three decades or more of dealing with such cases have surely given disciplinary counsel substantial insight into the practices that can help keep solo practitioners and small firms in compliance with the managerial duties the Model Rules have recognized since 1983. The main benefits of more proactive firm-based regulation in the U.S. may be achieved in those sorts of firms, which constitute the large majority of the ILPs currently operating in NSW.⁸⁷

imposed on firm lawyers with managerial authority under Model Rule 5.1(a). Laurel Terry, “Should Rule 5.1 Be Used More Proactively?,” (Plenary presentation to the National Organization of Bar Counsel (Aug. 9, 2008), *available at* <http://www.personal.psu.edu/faculty/l/s/1st3/presentations.htm>; Maute, *supra* note 26, at 66 (calling Terry’s proposal “a modest step forward”). A duty to file such reports, which might resemble the self-assessments now required of ILPs in NSW, could, if nothing else, motivate firm leaders to think more productively about the strengths and weaknesses of their firm’s ethical infrastructure.

83. See Mark, *supra* note 63, at 6.

84. See Maute, *supra* note 26, at 58–66.

85. See Schneyer, *supra* note 32, at 22 n.129. In the 1980s, probation became a common sanction, especially in cases where lawyers neglected files or maintained inadequate books and records.

86. See William J. Wernz, *Probation as a Disciplinary Disposition . . .*, BENCH & BAR (Minn.), Apr. 1987, at 9. Besides probation, some states deal with such cases through non-disciplinary diversion programs.

87. See Mark, *supra* note 63, at 2.

Finally, a key element in NSW's firm-based regulatory program may make it a better fit with U.S. regulatory traditions than the regime of "law firm discipline" I proposed in 1991.⁸⁸ At the time, the only way I saw to motivate firms to take further steps to promote ethical compliance within their walls was to address disciplinary rules to firms themselves and hold them accountable in the disciplinary process for what I considered largely collective responsibilities (e.g., to maintain a satisfactory conflicts-checking system).⁸⁹

But so far, the idea of disciplining firms has not caught on. One possible reason for this is that until very recently disciplinary jurisdiction was widely thought to depend on licensing and it is lawyers, not firms, who have licenses.⁹⁰ Another is that the disciplinary process took shape when most private lawyers were solo practitioners, a fact that continues to this day to make individual discipline seem like the natural order of things. Still another is the common claim that law firm discipline would soon become a substitute for individual accountability rather than a complement to it.⁹¹ And nagging questions were raised about the administrability of a disciplinary rule that is addressed to firms. As one wag asked me, "[i]f I move to State X and its application for bar admission asks whether I have ever been disciplined, do I have to disclose that my former firm in State Y was disciplined while I worked there?"

Moreover, although the term "ethical infrastructure"⁹² has caught on, it now seems to me to have been little more than a slogan until others began to focus on the elements of an effective infrastructure and on how such an infrastructure gets built. In particular, a series of articles by Elizabeth Chambliss and David Wilkins have stressed the importance of requiring firms to designate one (or more) of their partners as their ethics counsel or compliance experts.⁹³ It takes no great leap to

88. Schneyer, *supra* note 32, at 6, 11, 38–40.

89. *Id.* at 27–31.

90. Now, with many state supreme courts asserting disciplinary jurisdiction over lawyers who are licensed elsewhere but have allegedly violated the courts rules of professional conduct in the courts' states, the link between licensing and disciplinary jurisdiction is more tenuous. See MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (as amended in August 2002 to state that "[a] lawyer not admitted in this jurisdiction is . . . subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction"). As of July 1, 2006, fourteen states had adopted this amendment, at least in substance. See Pera, *supra* note 30, at 638 n.1, 810.

91. See Chambliss and Wilkins, *supra* note 34, at 340 n.31 (citing such claims).

92. Schneyer, *supra* note 32, at 10.

93. See, e.g., Elizabeth Chambliss and David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 561 (2002) (stressing the potential importance of in-house ethics counsel and compliance specialists in shaping the "future of law firm regulation"). In a subsequent article, Chambliss and Wilkins argued that "the design and monitoring of structural controls within firms should be recognized and regulated as a *specialized* duty of management," and they proposed that "all law firms be required to designate at least one partner as the firm's compliance *specialist*." Chambliss and Wilkins, *supra* note 34, at 336.

get from that idea to the NSW requirement that ILPs designate LPDs who will be subject to disciplinary sanctions for failing to implement and maintain appropriate management systems. And that requirement makes it possible to have firm-based *regulation* without firm *discipline* (except for the ultimate sanction of putting a firm in receivership if it loses its LPD(s)). Disciplining the American equivalent of an LPD for knowingly failing to maintain appropriate management systems was apparently consistent enough with the “natural order of things” for the Delaware Supreme Court to do so in a “case of first impression” in 2003.⁹⁴

E. A Separate Regulatory Track for Large Corporate Law Firms?

The Law Society of England and Wales is undergoing an independent review of the regulation of solicitors—and their firms—in light of the Legal Services Act of 2007.⁹⁵ The review is expected to culminate in a report in Fall 2009. One issue under review is whether solicitors’ firms that predominantly serve corporate clients should be separately regulated and, if so, how and by whom. Nick Smedley reviewed the issue and filed a report with recommendations in March 2009.⁹⁶ The report is addressed to the Law Society and to Lord Hunt, the director of the broader review, for him to consider in preparing his report.

Large corporate law firms have expressed great dissatisfaction with the manner in which the Law Society and more recently the SRA have regulated the corporate practice sector. That was presumably the impetus for Smedley’s review. The firms claim that the regulator has so far taken a “one size fits all” approach, that the corporate practice sector has distinctive features that require tailored regulation, that this calls for specialized expertise that the SRA currently lacks, and that the mismatch has caused a breakdown in trust between the regulator and the firms.⁹⁷ Smedley has concurred, finding that the “historic detachment” of the SRA (and

94. See note 70 *supra*.

95. The project, directed by the Rt. Honorable Lord Hunt of Wirral MBE, is “designed to ensure a thorough and detailed review of the current arrangements, full consideration of possible changes and a thoroughgoing assessment of approaches taken in other professions, regulatory regimes and jurisdictions.” Letter from Lord Hunt to members of the Law Society dated Mar. 11, 2009, available at <http://www.legalregulationreview.com>. For Lord Hunt’s interim thoughts, see Initial Response to Evidence (May 2009), available at <http://legalregulationreview.com>. His final report is expected in Fall 2009.

96. Nick Smedley, Review of the Regulation of Corporate Legal Work (Mar. 2009) [hereinafter referred to as the Smedley Report], available at http://www.legalregulationreview.com/files/report_Smedleyfinal.pdf. Mr. Smedley was formerly a senior civil servant at the Ministry of Justice.

97. *Id.* at iii–iv. The firms assert that the SRA does not adequately address the true risks their work poses and focuses instead on minor matters unrelated to those risks. *Id.* at iv. They have been critical, for example, of the SRA’s insistence that they comply with a rule requiring solicitors to send clients a detailed engagement letter for each new matter. They recognize the value of such letters in the case of solicitors with unsophisticated “one-off” clients, but consider the letters undesirable in their case since they have ongoing relations with sophisticated clients that may be irritated rather than pleased to repeatedly receive letters that cover much the same ground. *Id.* at 30–31.

Law Society) from the corporate law firms means that the SRA, as currently constituted, would be “starting from a very low base” in regulating them.⁹⁸ He calls for the creation of a separate regulatory track for large corporate firms.

Although skeptical about the current SRA’s suitability for the task, Smedley would be willing to have the new track administered within the SRA, but only by a semi-autonomous Corporate Regulation Group (CRG).⁹⁹ At least initially, he would place on that track only firms that (a) are the largest in the country by staff size and revenues, (b) have clients 70% or more of which are corporations, and (c) already have high-level compliance and risk management systems in place as well as a designated Senior Risk and Compliance Partner.¹⁰⁰ Other features of the firms Smedley has in mind include a roster of legally sophisticated clients (which typically have in-house counsel), a practice that is international in scope, and a record of few if any client complaints.¹⁰¹ The handful of “Magic Circle” firms headquartered in the City of London meet these criteria, but it is unlikely today that many others do. Thus, if Smedley’s proposal is adopted, it may serve chiefly as a pilot program.

The CRG would be headed by a Director who is either a very senior and experienced lawyer with a strong background in corporate and commercial practice or someone with strong experience in a comparable regulatory field such as securities regulation. The Director would have direct access to the SRA Board and substantial autonomy to choose staff members and set their compensation. In view of the expertise Smedley thinks the staff will need, that compensation would have to be substantially higher than the salaries the SRA currently pays its staff. The CRG’s staff would include several “account managers” who hold a personal portfolio of several firms and build “regulatory relations” with those firms. The account managers would regularly visit the firms, study their management systems, review their operations with the Senior Risk and Compliance Partner, and discuss issues with the partnership collectively. The Director would also appoint consultative panels of corporate practitioners and clients, drawing, for example, on an organization of general counsel at major companies. The panels would participate in an ongoing three-way dialogue with the CRG and the firms on the track.¹⁰²

98. *Id.* at iv. A negligible share of the complaints filed against solicitors concerns those who practice in large corporate firms, but those firms pay a disproportionately large share of the regulatory costs. *Id.* at 28. The corporate firms also claim that they rarely receive useful, timely, and consistent advice from the SRA in response to their inquiries. Whether the separate regulatory track should be funded by levies solely on the large firms on that track or by all solicitors and solicitors firms is likely to be a contested issue in deciding whether to create the track. See Joshua Rosenberg, *Solicitors’ Watchdog Lacking Bark and Bite*, LONDON EVENING STANDARD, Mar. 3, 2009, available at <http://www.thisislondon.co.uk/standard-business/article-23669102-details/Solicitors'+wate...>

99. *Id.* (Recommendation 9).

100. *Id.* (Recommendation 1). The Designate Senior Risk and Compliance Partners would in many respects be analogous to the LPPD’s that ILPs in Australia must designate.

101. *Id.* at 3 (para 1.4).

102. *Id.* at 44–49.

The CRG's role would be "as much, if not more, educative than punitive."¹⁰³ It would render expert advice to firms, possibly including opinions that firms could rely on for safe harbor; serve as a repository of information about "best practices"; recommend certain rule variances for corporate practice to the SRA Board; and refer potential disciplinary cases to the SRA's investigative unit or disciplinary tribunal.¹⁰⁴ But the CRG's primary mission would be to ensure that the firms on its track are themselves expert in matters of risk management, rather than dictate how risks should be managed; to encourage firms to invest in state-of-the-art management systems; and to exhort firms to maintain good governance—in short, to serve as a "critical friend."¹⁰⁵ As with NSW's proactive, firm-based regulatory program, then, the themes stressed in Smedley's proposals are risk management, proactive firm-based regulation, and the regulator as consultant.¹⁰⁶ Yet the large corporate firms Smedley has in mind seem very different from the typically small ILPs in NSW.

Smedley's proposals appear to match up well with the wishes of the Magic Circle firms,¹⁰⁷ which are *not* simply to "get regulators off their backs" but instead to be supervised in a manner that helps to maintain their reputations in the global legal services market (as well as London's reputation as a financial hub). This appears to be a particular concern for the Magic Circle firms for a surprising reason, namely, the possibility that the provisions in the Legal Services Act of 2007 permitting lawyers to practice in MDPs or law firms with nonlawyer owners will be viewed unfavorably in countries that still ban those structures. Even if the Magic Circle firms themselves do not take on an alternative business structure, their fear is that regulators and potential clients in those countries will regard these provisions as evidence that the vaunted independence of the U.K.'s law firms from "outside interference" is in decline.¹⁰⁸ Smedley himself is keen to maintain the contribution

103. *Id.* at iii.

104. *Id.* at 44–49. The Solicitors Disciplinary Tribunal, a statutory body independent of (but funded by) the Law Society, adjudicates charges of professional misconduct against solicitors.

105. *Id.* at 43.

106. Smedley consulted NSW Commissioner Steve Mark on several occasions while conducting his review. *Id.* at 20. Elsewhere Smedley sums up his proposal as "a move towards a more strategic, outcome-based supervisory regime aimed at raising standards and spreading best practice to avoid problems occurring, rather than an emphasis on . . . conducting post-hoc examinations of alleged failures." *Id.* at 6.

107. See Joshua Rozenberg, Business Column, London Evening Standard, Mar. 31, 2009 (discussing the dissatisfaction of the large corporate firms that act for sophisticated commercial clients with the SRA's current regulatory program), available at <http://thisislondon.co.uk/standard-business/article-23669102-details/Solicitors'+watc>. Smedley claims that in preparing his report he was "alive to the dangers of 'regulatory capture'" but believed that "the concerns of an important sector of the regulated community should [not] be ignored or downplayed." Smedley Report, *supra* note 96, at 28.

108. See Whelan, *supra* note 9, at 483 (stating that the lifting of bans on practicing law in MDPs or firms owned in whole or in part by nonlawyers "posed a threat rather than an opportunity for global law firms" based in the U.K.); *id.* at 486 (stating that "English global law firms could be excluded from operating in some countries on the ground that they lack some of the essential characteristics of professionalism," especially if they adopt an ABS).

the large corporate firms make to the U.K.'s gross domestic product and—by exporting high-value legal services—to the U.K.'s balance of trade.¹⁰⁹

Finally, Smedley insists that the separate regulatory track that he favors for large corporate firms would not amount to a “light touch”—i.e., a rejection of serious regulation.¹¹⁰ But he makes other statements that leave this proposition open to question. The two fundamental reasons for regulating law practice are to protect clients from lawyer overreaching *and* to protect the public and third parties from lawyer misconduct that assists clients in carrying out illegal schemes. Yet Smedley calls the clients of the large corporate firms “anything but vulnerable,” meaning that they have little need for regulatory protection. And, while acknowledging that corporate clients sometimes embroil their law firms in scandalous business collapses that are harmful to the *public* interest, he simply asserts that large corporate firms are unlikely to be the sort of “rogue” firms that get too close with overweening clients and “present a very high risk to the reputation of the profession at large.”¹¹¹ This will come as a surprise to those who know much about “Enron” and other corporate scandals in the U.S. in recent decades.

Tellingly, Smedley also asserts that the public interest in corporate legal services lies substantially in the “contribution to the UK economy of a successful and competitive legal sector.” He cautions against undue emphasis on the “natural” regulatory objective of “fettering firms’ freedom to act” at the expense of these economic benefits. He also emphasizes the latitude corporate law firms need to “move quickly in an environment of fierce global competition,” and stresses “the dangers of burdensome and costly regulation, which raises law firms’ overheads and makes them uncompetitive globally.”¹¹²

In short, when it comes to regulating the corporate practice sector, Smedley and the Magic Circle firms appear to define the U.K. public interest chiefly in macroeconomic terms.¹¹³ One may argue that regulation grounded in macroeconomic

109. See Smedley Report, *supra* note 96, at 6 (stating that Smedley’s recommendations will help corporate law firms compete in global markets); *id.* at 26 (reporting that corporate lawyers perceive the SRA as lacking in expertise “relating to international matters”). In 2008, Jack Straw, the Lord Chancellor and Secretary of State for Justice, noted the legal sector’s “great contribution to the British economy,” touted the U.K.’s status as the second biggest exporter of legal services in the world, and added that revenue from exported legal services grew to 2.6 billion pounds in 2006. Jack Straw, Speech to the Law Society of England and Wales (Mar. 6, 2008), available at <http://www.justice.gov.uk/news/sp060308a.htm>.

110. Smedley Report, *supra* note 96, at ii.

111. *Id.* at 16.

112. *Id.* at 14. The only “burdensome regulation” Smedley refers to is the Sarbanes-Oxley Act of 2002, which, according to him, introduced “complex and, some would argue, superfluous regulatory requirements” that “rapidly became barriers to winning new business.” *Id.*

113. Whelan, *supra* note 9, at 493. Australian bar leaders are also keen to increase the involvement of Australian firms in the global legal services market. See Corcoran, *supra* note 47, at 3–4 (pointing out that Australia’s export market for legal services grew from \$67 million (Australian) in 1989–90 to \$675 million in 2006–07, and that the Law Council of Australia, a national federation in which the Large Law Firm Group (which represents the nine largest Australian law firms) is a key

considerations would not constitute a “light touch,” but that emphasis would probably attract considerable criticism in the U.S.

Over the years, U.S. lawyers who practice in large corporate firms have been disciplined for professional misconduct no more frequently than solicitors in the U.K.’s large corporate firms.¹¹⁴ Judging, however, by the frequency with which those firms and their lawyers are sued, disqualified from litigation, and sanctioned for violating rules of procedure and agency regulations, disciplinable misconduct in those firms is far from rare. There are several plausible explanations for the infrequency of disciplinary proceedings against large firm lawyers. Unlike individual clients, for example, large corporate clients can generally monitor their lawyers and do not regard the disciplinary process as a useful tool for governing their relations with lawyers.¹¹⁵ It is also possible that the often resource-starved state disciplinary agencies feel overmatched when they attempt to investigate and prosecute large firm lawyers for ethical violations, and simply prefer to have those firms and their lawyers held accountable for misconduct through civil suits and other means.¹¹⁶ The Smedley report may therefore prompt policy makers in the U.S. to consider whether special techniques or programs should be deployed to regulate practice in large corporate firms.

Smedley’s proposals piggy-back on the recent introduction of firm-based regulation in Australia and the U.K., but the proactive nature of that program is unparalleled in the U.S. In the case of the largest corporate firms, which have offices around the country and abroad, it seems unlikely that the state supreme courts and their agencies, as presently constituted could develop and administer a coherent version of the program. Still, if proactive firm-based regulation coupled with a separate regulatory track for the largest firms in the U.K. proves to be effective from a regulatory standpoint and valuable to the firms on that track, one could imagine a coalition of the large U.S.-based corporate firms that compete in the global legal services market asking Congress to establish a similar federal program.¹¹⁷

constituent, considers itself “the voice” of the Australian legal profession on international matters affecting the profession.

114. *See supra* note 42 and accompanying text.

115. For additional reasons why this is so that are not discussed here, see Schneyer, *supra* note 32, at 7–8.

116. Consider an analogy. In 1997, the Texas Supreme Court’s unauthorized practice of law committee received a complaint that Arthur Andersen, then a “Big Five” accounting firm, was practicing law by preparing legal documents and forming new companies as well as rendering tax opinions for clients. When it became clear that Arthur Andersen had retained nationally prominent counsel and expert witnesses for its defense and that its defense expenditures would be substantial while the bar had to rely on pro bono legal services from in-state counsel, the committee abandoned an 11-month investigation and dismissed the complaint. *See Sheryl Stratton, The End of the Legal Profession?*, TAX NOTES, Feb. 15, 1998, at 948, 950.

117. Such a program would have the arguable attraction of not being administered by a federal regulatory agency with its own enforcement agenda, such as the IRS or SEC. Those agencies are tempted at times to deputize as “gatekeepers” the lawyers who appear and practice before them on

For now, however, the import of the Smedley Report for the U.S. probably has less to do with the merits of Smedley's regulatory proposals than with changes in the structure of the legal profession in both the U.S. and the U.K. and the impact of those changes on the ability of the profession's leading associations to forge a consensus on regulatory issues and maintain their influence on the regulatory framework. The Report strongly suggests that the largest corporate firms in Britain now see themselves as a distinct interest group within the solicitors' profession and are seeking a regulatory program dedicated to their distinctive problems and needs. In that sense, the Smedley Report may be the harbinger of a new and fateful form of professional fragmentation. England has long had separate legal professions, but Smedley's proposals appear to reflect—and may well increase—the distance that now exists *within* the solicitors' profession, the U.K.'s largest. Viewed this way, the Smedley Report is an invitation to reflect on the political and regulatory fragmentation of the U.S. legal profession and the organized bar.

Specialization and the growth of specialty bar associations in the U.S. have been a source of fragmentation for some time.¹¹⁸ But there are signs that our largest corporate firms, like their counterparts in the U.K., increasingly believe they share distinctive professional interests and might be well served by collectively “going their own way.” Professor Tom Morgan has suggested that “in many cases law firms have replaced bar associations as the principal intermediate institutions” for professional socialization.¹¹⁹ This may be especially true in the case of large firms.¹²⁰ Two otherwise minor developments may illustrate the point. First, during the notice-and-comment period in which the SEC was considering what rules to issue to implement Congress's mandate in the Sarbanes-Oxley Act that the agency regulate the lawyers who appear and practice before it, many bar associations and bar association sections submitted comments. But, in surprising numbers, large corporate firms individually, and ad hoc consortia of large firms, felt the need to

behalf of clients that the agencies regulate. See Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1133 (2004) (calling for Congress to create a new federal agency whose mission is to regulate professional practice in “key areas of federal interest, and arguing that such an agency would have greater expertise than the state supreme courts and be “independent of other regulatory agendas” such as the enforcement missions of tax, banking, or securities regulators and could be trusted to develop “nuanced contextual rules for lawyers in certain areas of practice”). Cf. Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125 (1991) (predicting that by 2050 American lawyers will be federally licensed and Congress will have created a National Disciplinary Commission for Lawyers and Allied Professionals).

118. See *supra* notes 17–18 and accompanying text. Among other things, specialization is making bar politics, including ABA debate on the Model Rules of Professional Conduct, more fractious than it once was. See Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 J. PROF'L LAWYER 161 (symposium issue).

119. Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 973 (2002).

120. This may also be true, however, of the separate practice groups within large firms. See MILTON C. REGAN, JR., *EAT WHAT YOU KILL* 291–368 (2004) (noting that the ethos or culture of practice groups within a large firm can vary significantly).

file comments of their own.¹²¹ Second, shortly after Section 402 of the Sarbanes-Oxley Act prohibited publicly traded corporations from making “loans” to their officers and directors, twenty-five prominent law firms collaborated on a joint “position paper” that analyzed several kinds of transactions between public companies and their officers or directors and concluded that none of them constituted loans within the meaning of that Section. Moreover, the participating firms all committed themselves to interpreting the Section accordingly when advising their clients. By agreeing on an interpretation, the firms could avoid being disadvantaged by competition from firms offering more “client-friendly” advice while at the same time making themselves less vulnerable to ex post second-guessing if their advice turned out to be wrong.¹²² It may also be relevant that fewer lawyers in large corporate firms appear to be seeking leadership positions in mainstream bar associations than was true in the past, though many of those lawyers remain active in bar sections devoted to certain fields of law.¹²³

If the U.S.’s largest corporate firms—particularly those that compete in the global legal services market—increasingly regard themselves as a distinct interest group within the profession, their position vis-a-vis the mainstream bar could go in either of two directions. On the one hand, they could more or less withdraw from the mainstream bar and form groups of their own that might have little interest in working to preserve the primacy of the traditional self-regulatory system. There was some precedent for this in the early 1980s, when general counsel and other in-house lawyers, increasingly conscious that they shared concerns and interests distinct from those of business lawyers generally, “broke away” from what is now the ABA Section of Business Law to form their own association.¹²⁴ Known today as the Association of Corporate Counsel, that body is very active in policy debates of special interest to its members and their clients, chiefly at the federal and transnational levels.¹²⁵

121. See especially Comments of 77 Law Firms on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/77lawfirm.html>.

122. Less vulnerable because, if sued, they could argue that their interpretation was consistent with the standard of care. Mark R. Patterson, “Law-Fixing: Should Lawyers Agree How to Interpret Statutes?” (unpublished manuscript, May 5, 2004) (on file with the author). Patterson distinguishes this position paper from bar association reports that analyze proposed legislation but do not commit members to follow their conclusions when advising their clients.

123. See Sara Parikh and Bryant Garth, *Philip Corboy and the Construction of the Plaintiff’s Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269, 296–301 (2005) (discussing the growing prominence of “non-elite” and small-firm lawyers in leadership positions in the mainstream bar since the 1970s).

124. For a brief account of the break, see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 716–17. (1989).

125. For example, the ACC filed its own comments on the proposed SEC rules implementing section 307 of the Sarbanes-Oxley Act. See Letter from Barry Nagler, Chair of the ACC’s Advocacy

On the other hand, the largest corporate firms could press for a “division of their own” within the ABA, much like the General Practice, Solo & Small Firm Division that the ABA agreed to establish not long ago. The mission of that Division is to “secure our constituency the highest levels of fulfillment in the legal profession, in the justice system and in the American Bar Association.”¹²⁶ Like that Division, a “large firm division” might have a substantial but parochial influence on ABA policymaking. It might also gain considerable authority to assert positions of its own in external forums.

In short, one might see developments in the U.S. that parallel the emerging position of the Magic Circle firms in the Law Society of England and Wales and the position of the Large Law Firm Group in the Law Council of Australia.¹²⁷ In view of such possibilities, it seems worth thinking now about how changes in the structure of the profession and the place of the largest corporate firms within that structure might affect the fate of professional self-regulation in the U.S., the bar’s role in the processes by which American lawyers are regulated, and the bar’s ability to respond effectively to federal and multinational regulatory initiatives that may pose a threat to the independence of the profession and, ultimately, to the rule of law.

Committee to the SEC (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s/74502/bnagler1.htm>.

126. ABA General Practice, Solo and Small Firm Division, Vision, Mission and Goals, *available at* http://www.abanet.org/genpractice/vision_mission_goals.html.

127. *See* notes 47, 113 *supra*.