Implications of the UK Legal Services Act 2007 for US Law Practice and Legal Ethics

By Myles V. Lynk

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I. Introduction

It is widely accepted today that the legal profession in the United States is in a state of flux as it perceives and responds to changes in the demand for and provision of legal services. These changes, as they develop, will inevitably affect the way in which the profession is regulated and the ethics rules that guide and govern the practice of lawyers. As one commentator has observed, the law governing lawyers is fragmenting. There is pressure on the profession to move away from self-regulation, as historically embodied in state supreme court disciplinary authorities, the adoption by the states of the American Bar Association’s Model Rules of Professional Conduct, and moral suasion as the primary sources of authority, toward regulation through ‘hard law’ and distinctive, legally enforceable rules governing particular subject areas of practice.

Jamie Gorelick, former US deputy attorney general and co-chair of the ABA Commission on Ethics 20/20, remarked in a 2009 interview on the effect of globalization on the practice of law that the “place-based” ethics system is under siege in “a world in which borders are disappearing.” The pressure to eliminate jurisdictional borders as demarcators of autonomous legal ethics regimes arises in part from the distinct lack of consistency in the various state approaches to lawyer conduct rules. In characterizing the fragmentation of lawyer regulation, Professor John Leubsdorf wrote:

More and more regulators have sought to regulate the bar. If once the American Bar Association’s codes dominated the field, now courts have become increasingly unwilling to defer to them, and legislators and administrators have become increasingly unwilling to defer to either bar associations or courts. We are witnessing the decline of the ideal of professional self-regulation at the same time that the ideal has been almost entirely demolished in England. (Citations omitted.)

This is a compelling thesis, but one that has yet to be fully realized in the United States, where powerful institutional forces at work within the legal system, including state supreme courts and state and national bar associations, have kept the “place-based” system of state-by-state self-regulation of the profession by the courts and the bar pretty much in place, at least for now.
In the United Kingdom, however, the legal profession has undergone a period of reform that is far more comprehensive and profound than recent efforts in the United States. These UK reforms culminated in the Legal Services Act 2007. Among its major provisions are the following:

This Act implemented a single regulatory oversight entity with authority over all categories of legal service providers. Three driving forces lay behind the eventual legislation: (1) competition policy to improve the availability and quality of legal services; (2) elimination of trade barriers that restricted innovative forms of practice, making way for ‘alternative business structures’; and (3) consumer protection concerns with the existing discipline and complaint handling systems run by the respective professional associations.

The adoption of the Legal Services Act 2007 has dramatically changed the way in which lawyers – barristers and solicitors – and others who provide what are deemed to be legal services are regulated in England and Wales.

As discussed below, developments in the United Kingdom in regulation of legal services providers since the 2007 reform legislation suggest that the following novel possibilities in US lawyer regulation will receive greater scrutiny than might otherwise have been the case:

(i) Should consideration be given to establishing a national regulatory oversight body authorized to introduce some measure of uniformity to the balkanized and highly variable approach of US jurisdictions to the regulation of both lawyers and nonlawyer providers of legal services?

(ii) Would the introduction of overarching Regulatory Objectives applicable to all providers of legal services within a jurisdiction, and prefacing lawyer ethical codes of professional conduct, serve both to recognize and articulate a fundamental consumer interest in accessible, effective legal services, and articulate a regulatory mission encompassing nonlawyer providers of legal services as well as lawyers?

(iii) If American jurisdictions authorize “Alternative Business Structures” – where nonlawyers hold ownership interests and participate in the management of a firm providing legal services – will such entities provide greater access to legal services to more consumers, bring together a broad range of professional services under one management, or primarily be the preserve of large multinational firms, as many have presumed would be the case?

While to outside observers the change wrought by the Legal Services Act in the United Kingdom may have seemed sudden, this seminal legislation did not, like Athena, spring fully armored from the brow of Zeus. It was preceded by, and to a large extent based upon, the findings of four reports on the legal profession in England and Wales. The first two reports – the 2000 Report for the Office of Fair Trading by LEGG Ltd., entitled “Restrictions on Competition in the Provision of Professional Services,” and a 2001 report by John Vickers, the Director General of Fair Trading, “Competition in the Professions,” – noted the restraints on competition imposed by professional “self-regulatory” rules and tradition in the market for legal services, particularly as compared with other professions in the United Kingdom.
They were followed in 2004 by the very influential report by Sir David Clementi, a former deputy governor of the Bank of England who was appointed in 2003 to independently review the regulatory structure for legal services in England and Wales. He concluded that the then current system of regulation of the legal profession was too complex and divided among too many overseers, and had no clear objectives, as well as insufficient regard for the interests of consumers. He also noted a broad dissatisfaction with how consumer complaints about lawyers were handled and the restrictive nature of the then current business structures through which legal services were delivered. The Clementi Report recommended those changes in this regulatory framework that would soon be largely adopted in the UK government’s 2005 White Paper, “The Future of Legal Services: Putting Consumers First,” from which the 2006 draft legislation emerged. The draft evolved into the Legal Services Act 2007. One common theme in these reviews was that the regulatory system then in effect had insufficient regard for the interests of consumers and too great a regard for protecting the interests of the providers of legal services. As the title of the government’s 2005 White Paper made manifest, one goal of these reforms was “putting consumers first.”

The impact of the Legal Services Act in the United Kingdom has been the subject of much comment by legal academics in the United States. In the following sections of this paper, I will briefly discuss three of the reforms instituted by the Act that may be of particular relevance to legal ethics and the regulation of lawyers in the United States. These are (i) the authorization by the Legal Services Act of one independent authority to oversee the regulation of all providers of legal services, including but not limited to barristers and solicitors; (ii) the development of “regulatory objectives” to guide the regulation of all providers of legal services; and (iii) the authorization of “alternative business structures” through which non-lawyers can have an ownership interest in law firms and work with lawyers in the management and operation of those firms.

II. A New Legal Services Board Oversees the Regulation of All Providers of Legal Services in the United Kingdom

The Legal Services Act established as the new regulator of all UK legal service providers a Legal Services Board that is independent of both government control and the legal profession itself. In fact, the Act requires that the chairman of the Board and a majority of its members not be lawyers. The Board oversees “approved regulators” that conduct the hands-on regulation of the various components of the legal profession in England and Wales. Thus, the Board is an example of what in the United States would be an independent statutorily authorized body regulating a profession, such as, for example, a state medical licensing and disciplinary board. As an independent regulator, the UK Legal Services Board stands in sharp contrast to the system of the self-regulation of the legal profession in the United States by state supreme courts with the support and assistance of state bar associations or the members of the bar as a whole. As an entity national in scope, at least with respect to England and Wales, the Legal Services Board represents a uniformity of approach that is largely lacking in the United States, where more than fifty-one different jurisdictions oversee the licensing and regulation of lawyers.

The Legal Services Board does not, however, directly regulate the bar. Rather, it is the oversight regulator of the “approved regulators.” These regulators include the “representative bodies,” akin to US bar associations, to which each jurisdiction’s lawyers belong, and the “independent regulatory bodies” over
each group of lawyers, separate from the representative bodies. For example, the Law Society is the representative body for solicitors while the Solicitors Regulation Authority is the independent regulatory body for solicitors, and the Bar Council is the representative body for barristers, while the Bar Standards Board is the independent regulatory authority for barristers. Although to an American audience, barristers and solicitors are the more familiar divisions of the English bar, they are not the only ones. (See the attached chart from the Legal Services Board identifying each of the different professions that provide legal services in England and Wales, the “reserved legal activities” that each profession is authorized to provide, and the applicable representative body and independent regulatory authority for each profession.17)

In the United States, courts, lawyers, and legislators are considering whether and how to authorize and regulate professionals other than lawyers, such as the limited license legal technicians recently authorized in Washington State by the Washington Supreme Court, and other, nonlawyer legal service providers such as paralegals and document preparers, as well as commercial online providers such as LegalZoom.

At the same time, regulators must come to grips with fundamental changes in the practice of law, and indeed in defining the practice of law, by lawyers. Should lawyers who provide tax advice while employed as principals or employees of accounting firms be subject to regulation as members of the bar if their advice is not characterized as legal advice? Should they be able to characterize their advice as legal advice despite the fact they are working in a company that is not owned and controlled by lawyers? Such changes would require a major change in how we view the regulation of lawyers. A new regulatory model might well include a national oversight body in the United States to oversee and harmonize the regulation of attorneys and others in the different jurisdictions within the United States.

III. Regulatory Objectives for the Legal Profession in the United Kingdom

The Legal Services Act sets forth the following “regulatory objectives” and “professional principles” for the legal profession:

**The regulatory objectives**

(1) In this Act a reference to ‘the regulatory objectives’ is a reference to the objectives of—

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) The professional principles” are—

(a) that authorised persons should act with independence and integrity,
(b) that authorised persons should maintain proper standards of work,
(c) that authorised persons should act in the best interests of their clients,
(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
(e) that the affairs of clients should be kept confidential.

(4) In this section ‘authorised persons’ means authorised persons in relation to activities which are reserved legal activities.¹⁸

To an American lawyer, some of these objectives and principles will look very familiar, inasmuch as they are consistent with the ABA Model Rules of Professional Conduct and the rules of professional conduct in effect in many of the states. For example, Regulatory Objectives (1)(a) through (c) and (g) – protecting the public interest, supporting the constitutional principle of the rule of law, improving access to justice and increasing public understanding of the citizen’s legal rights and duties – are similar to provisions in paragraph [6] of the Preamble to the ABA Model Rules, which states, in relevant part:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain the authority. . . . Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford to secure adequate legal counsel.¹⁹
The Preamble to the ABA Model Rules can also be read as speaking generally to the need for an independent, strong, and effective legal profession. It does not, however, explicitly address the need for diversity in the profession. Regulatory Objective (1)(f) does speak to the need for diversity as a regulatory objective. The Legal Services Board has interpreted this reference, and its a responsibility under it, as follows:

A diverse legal profession is one that reflects and is representative of the full spectrum of the population it serves so as to harness the broadest possible range of talent in the meeting of the regulatory objectives. We consider that for public interest reasons and good business sense as much as for meeting this regulatory objective that the legal industry should reflect the population it serves. . . . We will promote equality and diversity through our regulatory framework and we expect approved regulators to do the same.\textsuperscript{20}

In addition, the following Model Rules contain provisions similar to the five provisions in the Professional Principles, (3)(a) through (e), and to Regulatory Objective (1)(h), regarding promoting and maintaining adherence to the Professional Principles:

- Model Rule 1.1 (“Competence”);
- Model Rule 1.3 (“Diligence”);
- Model Rule 1.6 (“Confidentiality”);
- Model Rule 3.1 (“Meritorious Claims and Contentions”);
- Model Rule 3.3 (“Candor Towards the Tribunal”);
- Model Rule 5.4 (“Professional Independence”);
- Model Rule 8.3 (“Reporting Professional Misconduct”); and
- Model Rule 8.4 (“Misconduct”) \textsuperscript{21}

These provisions represent core values of the legal profession in most jurisdictions that license and regulate lawyers.

On the other hand, the ABA Model Rules of Professional Conduct do not include provisions that explicitly recognize, or call on lawyers to promote and protect, the interests of clients as “consumers” of legal services, or to promote competition in the provision of legal services, as do Regulatory Objectives (1)(d) and (e). While the US Consumer Financial Protection Bureau commended the American Bar Association for taking a major step in support of consumer protection in February 2015 when the ABA House of Delegates adopted Resolution 111c, calling on state supreme courts, bar disciplinary authorities, and bar associations to address deceptive and fraudulent loan foreclosure rescue practices involving lawyers,\textsuperscript{22} state supreme courts and the organized bar in the United States by and large have not focused on consumer protection issues. As Professor Schneyer has noted:
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.23

By contrast, Regulatory Objectives (1)(d) and (e) represent a recognition and acceptance of the economic dimension of the provision of legal services and that clients, as consumers, have important interests with respect to the availability and cost of such services.

The UK Legal Services Board has interpreted its mandate and the mandate of the approved regulators under these provisions very broadly:

“[T]o ensure that the legal services market offers consumers the opportunity to make informed choices about quality, access and value,” [and to insure that] “individual providers of legal services should compete for capital and consumers, so as to drive better performance for both sides. . . . A rigorous and robustly competitive market will encourage legal service providers to respond to consumer demands by providing new and innovative services and mechanisms for delivery and access.”24

Such explicit recognition that the economics of the provision of legal services should be a subject of regulation has not been the norm in the United States.25 Moreover, whether jurisdictions in the United States that license and regulate lawyers and other providers of legal services should adopt regulatory objectives has been a subject of intense discussion among legal academics.26 One reason, perhaps, for US jurisdictions to consider adopting such objectives would be to provide a consistent and overarching framework for the regulation of not just lawyers, but of all providers of legal services and law-related services in the jurisdiction.

IV. Alternative Business Structures in the United Kingdom for the Operation of Businesses That Provide Reserved Legal Activities

In the United States, the consideration of “alternative business structures” in law firm ownership and management – whereby non-lawyers could own a financial stake in and participate in the management of a law firm – has been a fiercely debated issue.27 Many traditionalist members of the bar28 who do not want to see any dilution of the prohibition against lawyers sharing legal fees with nonlawyers as set forth in Rule 5.4(a) of the Model Rules, against modernists who argue that, in an increasingly borderless world for the provision of legal services to some clients, such practices are common in foreign jurisdictions and should be permitted and regulated in the United States.29

As Laura Snyder, writing in the ABA Journal, has noted, this debate raises questions about the ethics rules under which lawyers operate in the United States:

Should ethics rules blocking non lawyer ownership of law firms be lifted? Is the current definition of unlicensed law practice harming rather than protecting clients? What about the restrictions on multidisciplinary practices?
And those debates are by no means ending: Witness the newly created **ABA Commission on the Future of Legal Services**. Though ABA President William C. Hubbard does not mention ethics rule changes in the commission’s primary task of identifying the most innovative practices being used in the U.S. to deliver legal services, some of those practices have been questioned as possible ethical breaches. Meanwhile, the rules and restrictions stay in place. The situation in the United Kingdom couldn’t be more different: Such restrictions have largely been lifted, and under the Legal Services Act the creation of new ways of providing legal services—including through alternative business structures—is more than simply permitted; it is actively encouraged.”

The Legal Services Act devotes some forty pages to defining and authorizing “alternative business structures,” and the “ownership of licensed bodies,” for the practice of law. Alternative business structures are defined as business entities that provide “reserved activities” (legal services), in which nonlawyers have an equity ownership investment in the firm and lawyers and nonlawyers can share in the management and control of the business. It appears that at least one reason for permitting nonlawyers to participate in the management and ownership of law firms was to respond to a perception of “lack of client care by lawyers,” relating as much to the quality of business services being provided as to the quality of legal advice. This is consistent with the overarching theme of the Clementi Report and UK government’s own reports, which viewed the client as a consumer of legal services and set, as a primary goal of the organization and regulation of legal services, putting the interests of consumers first. Of course, this does raise another question: If expanding access to legal services is the goal, could this to some extent overshadow maintaining the quality of legal services as another necessary goal of any regulatory scheme?

Four of the regulatory bodies identified in Chart 1 are also licensing authorities authorized to license alternative business structures: the Solicitors Regulatory Authority (SRA), the Council for Licensed Conveyancers, the Intellectual Property Regulation Board, and the Institute of Chartered Accountants in England and Wales. Each is authorized to license ABSs only for the provision of legal services over which it exercises regulatory authority.

Most if not all ABSs currently licensed in the United Kingdom have been licensed by the SRA. The SRA began issuing licenses for ABS firms in March 2012. As of the end of 2014, two percent of the providers of legal services in the United Kingdom were licensed as ABS firms. Of these, 33.5% of the total revenue earned by ABS firms was earned by firms that specialized in personal injury cases; 23.5% by firms engaged in mental health law practice and services; and 19.8% by firms that specialize in consumer law. While there is not yet enough data to establish what impact having nonlawyers participate in the ownership and management of a law practice will have on the quality of services being provided by that practice, in a survey conducted by the Solicitors Regulation Authority between October and December 2013, two thirds of the respondent firms that had successfully completed the ABS licensing process stated that they had provided or attracted new investment into the firm, just over one quarter stated that they now offered different and/or additional services to their clients.

As of December 2014,
339 organizations have been licensed as an ABS by the Solicitors Regulatory Authority. While over 200 of these are law firms, this figure masks the diversity of ABS businesses and also some important indicators. ABS entities include six top-fifty law firms (Kennedys, Parabis, Keoghs, Gately, Weightmans and Irwin Mitchell), big four accountants ((PwC, Ernst & Young, and KPMG), a listed telecommunications provider (BT), a legal publisher (Jordans), an online legal service provider (LegalZoom), an insurer (Allianz), an outsourcer (Capita), and a motoring service business (the AA), with a number of public sector legal teams also reported to have applications that are being processed.39

In reporting on the broad diversity of firms seeking ABS status, the SRA noted:

In exploring the impact of ABSs on the legal services market, it is important to note the diversity of the ABSs licensed so far. These firms range from previously SRA regulated law firms that have formally included an existing non-solicitor in their ownership structure, to large conglomerates providing legal services alongside other professional services.

In many cases, the one common characteristic shared by these businesses is their legal status as an ABS. Attempting to treat them as a homogenous group is, therefore, often unhelpful. Genuine comparative analysis of different ‘subgroups’ of ABSs will become more viable as the population of these firms increases.”40

This suggests that the ABS form not only is suitable for large law firms with an international clientele, which some in the United States have argued is its sole justification and use, but may also be useful for enabling smaller firms to provide a greater variety and a higher quality of service to their clients. Nonetheless, it seems that the legal profession in England and Wales is proceeding cautiously in deciding whether law firms should adopt the ABS model. Thus, it is not yet clear whether law firms licensed to operate as alternative business structures will become a major factor in the provision of legal services to a wide array of clients in the United Kingdom, or whether they will be only a relatively minor presence in the larger landscape of legal service providers.

V. Conclusion

The Legal Services Act 2007 has already changed the way the legal profession in England and Wales is regulated. Among its most important provisions, it established a national body, the Legal Services Board, independent of the courts and the bar, to exercise regulatory oversight of the profession and of the approved regulators that directly regulate the practice of law in England and Wales. The Act established Regulatory Objectives and Professional Principles intended to guide the regulatory process and decisions of the Legal Services Board and the regulatory authorities under its jurisdiction. And it has authorized new business management and capital structures through which legal services can be offered to the public as a way of improving consumer access to legal services.

These changes will certainly inform the ongoing discussion in the United States as to whether and how the legal profession should adapt to changing circumstances in both the conduct of the profession of law and the provision of legal services.
Endnotes

1. Adapted with permission from a paper submitted by the author for a CLE program of the “ABA London Sessions,” on June 12, 2015.


7. The Legal Services Act 2007 governs regulation of the profession in England and Wales, but not in Scotland and Northern Ireland. For economy of language purposes, in this article the term “United Kingdom” or “UK” refers to England and Wales.

8. LEGAL SERVICES ACT 2007 (Eng.), “An Act to make provision for the establishment of the Legal Services Board and in respect of its functions; to make provision for, and in connection with, the regulation of persons who carry on certain legal activities; to make provision for the establishment of the Office for Legal Complaints and for a scheme to consider and determine legal complaints; to make provision about claims management services and about immigration advice and immigration services; to make provision in respect of legal representation provided free of charge; to make provision about the application of the Legal Profession and Legal Aid (Scotland) Act 2007; to make provision about the Scottish legal services ombudsman; and for connected purposes.”, available at http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf.


12. Id. at 1-2.

13. Id. at 2-7, 51-75, 105-139.

15. LEGAL SERVICES ACT, supra note 8, at Ch. 29 § 1.

16. LEGAL SERVICES BOARD, OVERSEEING REGULATION 2 (June 2013).


18. LEGAL SERVICES ACT, supra note 8, at Ch. 29, Pt. 1 § 1.

19. MODEL RULES OF PROF’L CONDUCT, Preamble, Para. [6] (2015). The Preamble to the ABA Model Rules can also be read as speaking generally about the need for an independent, strong and defective legal profession, but it does not explicitly address the need for diversity in the profession, as is set forth in Regulatory Objective (1)(f).

20. LEGAL SERVICES BOARD, THE REGULATORY OBJECTIVES: LEGAL SERVICES ACT 2007, 12, para. 43 (2012). In the U.S., Comment [3] to Model Rule 8.4 does state that in the course of representing a client a lawyer shall not manifest bias or prejudice based upon race, gender, religion, sexual orientation or other specified characteristics, but it does not speak to diversity within the profession.


23. Ted Schneyer, supra note 14, at 30. One form of consumer protection which has been adopted by virtually all state bar associations in the United States is the establishment of Client Security Trust Funds to reimburse clients up to a specified amount for funds which were unlawfully converted by their lawyers to the lawyers’ use.

24. LEGAL SERVICES BOARD, THE REGULATORY OBJECTIVES: LEGAL SERVICES ACT 2007, 8-10 paras. 26, 33 & 35.

25. Professor Judith Maute has thoughtfully articulated why the legal profession in the United States and the state supreme courts that regulate the profession should adopt more pro-consumer policies. See Judith L. Maute, supra note 14, at 53.


28. See MODEL RULES OF PROF’L CONDUCT, R. 5.4 cmts. [1] & [2] (2015) (“[1] The provisions of this Rule express traditional limitations on sharing fees . . . [2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment on rendering legal services to another.”).

29. See ABA COMMISSION ON ETHICS 20/20 WORKING GROUP ON ALTERNATIVE BUSINESS STRUCTURES, ISSUES PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES (Apr. 5, 2011).


31. LEGAL SERVICES ACT 2007, supra note 8, at Ch. 29, Pt. 5.


33. Cone, supra note 14, at 424.

34. Id.

35. The Bar Standards Board for barristers will soon be added to this list.


37. The UK’s Alternative Firms are Reshaping Legal Services, A.B.A. J. (Jan. 1, 2015), available at http://www.abajournal.com/magazine/article/abs_delivery/. As noted earlier, “reserved activities” under the Act are legal services that can only be provided by authorized lawyers. These include, appearing as an advocate before a court of law (right of audience); conducting litigation; certifying documents and transactions; probating estates; administering oaths; and transferring the ownership of real property. See also, SOLICITORS REGULATION AUTHORITY, RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES (ABSS): FINDINGS FROM SURVEYS WITH ABSS AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS 9 (May 2014) [hereinafter FINDINGS FROM SURVEYS WITH ABSS AND APPLICANTS THAT WITHDREW].

38. FINDINGS FROM SURVEYS WITH ABSS AND APPLICANTS THAT WITHDREW, supra note 37, at 4.


40. FINDINGS FROM SURVEYS WITH ABSS AND APPLICANTS THAT WITHDREW, supra note 37, at 7.