

Alternative Perspectives on Lawyers and Legal Ethics

Reimagining the Profession

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2 Global continental shifts to a new governance paradigm in lawyer regulation and consumer protection: riding the wave

Judith L. Maute

2.1 Introduction

The legal profession in the United Kingdom is undergoing a period of regulatory and constitutional reforms. These reforms have culminated in the passage of the Legal Services Act 2007. 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.

This chapter compares the progressive reforms in the United Kingdom with the balkanized state-based lawyer regulation in the United States. The UK reforms should not be viewed in isolation, but as possible byproducts of earlier reforms in Australia. While reforms in Australia and the United Kingdom can be seen as a global trend in the regulation of lawyers, the reform efforts also reflect contextual differences among each nation's history, demographics and policies of market regulation. These differences affect whether the legal professions maintain primary control over regulatory enforcement.

Lawyers, like other service providers, operate in a competitive and increasingly global market.¹ Advancements in Internet and communications technology facilitate innovative delivery systems, including outsourcing, commoditization of legal products and affiliations with non-lawyers.²

In a global sense, these regulatory reforms reflect a sea change in the worldwide legal market. Some commentators use dramatic geological terms to describe the enormity of these changes – as 'seismic' or the regulatory counterpart of a 'tsunami'³ – terms aptly used because the innovations occurred on different continents, triggering further reforms elsewhere. However, the regulatory reforms taking hold in other countries are unlikely to cut the destructive path of a tsunami.

Instead, they may take the form of a big wave, savoured by surfers, beachcombers and those who appreciate the cleansing effect brought in by a new current.

As we learn from the ongoing international economic crisis, no nation is an island unto itself: what happens in one nation impacts what happens in the others. Lawyer regulators and trade representatives have strong incentives to participate in ongoing regulatory discourse within the international trading community.⁴ Lawyers in the United States must take heed, initiating local reforms that respond to the seismic shift that is under way. If they do not, they risk both external governmental regulation and impaired competitiveness in the globalized legal marketplace.⁵

This chapter contains four parts. The first part discusses the trailblazing efforts by Australian lawyer regulators in the states of New South Wales and Queensland. The Australian co-regulatory model engages cooperatively with the professional associations as well as the individual lawyers or firms with which it interacts. It places much regulatory authority with an independent Legal Services Commissioner, giving the public greater confidence in the regulator's integrity and independence. While the Commissioners lack binding authority to order that a lawyer make redress to a dissatisfied former client in the non-disciplinary complaint handling scheme, they have achieved remarkable success resolving complaints. Recent amendments allow incorporation by firms after the firm has undergone a self-audit process that focuses on management-based regulation, helping it incorporate best practices and thus minimizing the risk of commonplace ethical violations. By stressing 'compliance through education', this approach engages in positive, preventative interaction with those regulated, in contrast to reactively addressing ethical problems only in the disciplinary context. These localized experiments hold great potential for developing ethical infrastructures appropriate to specific firms, rejecting a 'one size fits all' template. The Australian Model Law looks to build further, aiming for some national uniformity. These innovations have influenced regulatory reform efforts in the United Kingdom and elsewhere.

The second part surveys developments in the United Kingdom since 1990, in which the public interest, consumer protection and market competition play key roles in the massive regulatory reforms contained in the Legal Services Act 2007, now in the early stages of implementation. UK reformers apparently learned from their Australian regulatory counterparts and have gone even further. The 2007 law creates the Legal Services Board, an independent oversight entity with regulatory authority over all UK legal professionals, which will work in collaboration with approved regulators formed by existing professional bodies. Part of the board infrastructure, a new Office of Legal Complaints ombudsman scheme, will serve as a single point of entry for all consumer complaints seeking redress from legal professionals with the authority to issue legally binding directives.

The third part considers lawyer regulation in the United States by the state disciplinary entities, together with the limited available redress for dissatisfied clients through civil liability for legal malpractice or dispute-resolution programmes. It

suggests that malpractice carriers may provide ongoing regulation of insured lawyers through education, rate-setting and both claim prevention and cure. The traditional US model draws a distinct line between complaints giving rise to discipline (there must be a violation of an applicable rule of professional conduct) and non-disciplinable client grievances about other matters. This dichotomy leaves a huge gap when it comes to dissatisfied consumers of legal services with no meaningful recourse in either forum. This part looks back at the reform processes in Australia and the United Kingdom and suggests ways in which the United States can learn from them as it develops its own strategy for reform.

The fourth part argues that these global changes represent changing views in professionalism, in which lawyers are service providers who must be open to innovations in delivery of legal services, both to ordinary consumers and to large corporate clients. The reforms in Australia and the United Kingdom provide useful templates that can be adapted to fit the legal framework in the United States, with cooperation between the federal and state regulatory structures. Both nations embrace a co-regulatory model that works in partnership with approved regulators, focusing on management-based regulation that aims for compliance through education. By taking a proactive approach to identify best practices, they seek to improve the quality of legal services and reduce the need for punishment through the disciplinary process. The regulatory innovations are endorsed by theoretical scholarship articulating a 'new governance' paradigm that uses collaborative organizational networks to set and enforce standards; no one set of actors is vested with 'command and control' authority.⁶ If successful, these reforms will dramatically improve regulation. Only time will tell whether the law as written and practised will have such positive long-term effects. Finally, this chapter cautions the United States and other nations that want to be competitive in the globalized legal marketplace: their regulatory systems must function well, enforce professional conduct standards, provide meaningful redress to persons injured by inadequate professional services and remain open to market changes that enhance affordable access to legal services. If they have not yet undertaken such modernization, entrepreneurial nations are advised to join the continental shifts in regulation so their lawyers are not left adrift, excluded from the international currents of regulatory reform.

2.2 Australia's regulatory reforms: a continuing work in progress

From a comparative perspective, the Commonwealth of Australia has pioneered important regulatory reforms. Although it inherited much of its legal culture and structure from the United Kingdom, the federation's relative youth, demographics and global entrepreneurial aspirations have freed it to move beyond the hidebound constraints of England's regulatory structure. Unlike that of the United Kingdom, the Australian Parliament lacks plenary constitutional power to regulate the legal professions. Regulation is done through the individual states and territories, both through legislation and the Supreme Courts' inherent

powers.⁷ The six states and two self-governing territories maintain their own regulatory structures, resulting in a balkanized system akin to, but far smaller than, that of the United States. New South Wales, Queensland and Victoria have co-regulatory systems in which an independent Legal Services Commissioner (LSC) oversees enforcement activities, which may be delegated to the relevant professional bodies.

Among the Australian co-regulatory states, the independent LSCs in Queensland and New South Wales have achieved notable success at consumer protection, notwithstanding limited statutory powers to intervene and order redress. Discussion of the many subtle variations among the regulatory regimes would more confuse than clarify and hence is beyond the scope of this work. The present focus is on New South Wales, which started the progressive innovations and on Queensland, which joined in collaborative efforts to modernize lawyer regulation.

2.2.1 Trailblazing in New South Wales

In 1993, the NSW Law Reform Commission reported on complaint handling administered by the professional bodies, finding that the disciplinary approach to ‘get rid of the bad apples’ was ‘too static and ... gives pitifully little value directly to the consumer’.⁸ Legal commentators and consumers had become increasingly dissatisfied with what they saw as ‘an undue emphasis on economic factors [which] ha[d] led, in recent times, to a lessening of sensitivity to, and the importance of, the old ethic and culture of professional service’.⁹ They saw a profession that had worked to ‘exclude the public from any real role in the regulation of the profession’ in the Legal Profession Act 1987.¹⁰

As a result, the New South Wales Office of the Legal Services Commissioner (OLSC) was created in 1994 by amendments to the Legal Profession Act 1987. It is an independent statutory body reporting directly to state Parliament through the Attorney-General.¹¹ Comprehensive reviews of the revised complaint handling system occurred in 2001–02, when Parliament replaced the earlier statute with the Legal Profession Act 2004.¹² The newer law clarifies the statutory purposes and objectives – ensuring that laypersons have readily available information about the means of redress, and promoting transparency and openness about how the complaints scheme operates.¹³ It also improves the complaint handling procedure, facilitating dispute resolution at various stages of the process. The OLSC may refer to voluntary mediation of both consumer disputes not involving misconduct and hybrid complaints alleging professional conduct issues.¹⁴ The OLSC identifies as consumer disputes not involving misconduct complaints about communication, mistakes, delays and poor service.¹⁵ The Commissioner is authorized to give notice of compulsory mediation of consumer disputes. The practitioner who fails to comply is susceptible to discipline.¹⁶ Mediation outcomes can range from an apology or explanation from the practitioner, additional work performed without charge to correct a mistake or a fee adjustment.¹⁷ An alternative mechanism provides for binding cost assessment of fee disputes not through the OLSC, but via an independent court-appointed system.¹⁸

The Commissioner's office provides a single point of entry for all complaints about lawyers. It makes a preliminary assessment whether to dismiss a complaint as non-meritorious, refer it to mediation as a consumer dispute, or exercise its co-regulatory authority to refer for investigation by the Law Society or Bar Association allegations of unsatisfactory professional conduct or a more serious category of professional misconduct. Alternatively, the OLSC may retain jurisdiction to investigate and prosecute complaints presenting issues of public interest or conflicts of interest with the professional associations. The single gateway streamlines the process, avoiding the confusion on where to start and problems with the 'regulatory maze' encountered in more complex schemes.

Because of its independence from the professional associations, the OLSC's dismissal rate (15 per cent of complaints) carries greater legitimacy in the public perception, as contrasted with the high dismissal rate (90 per cent) under the prior scheme administered by the professional bodies. This also alleviates pressure on the associations to justify their inaction as something other than that of a self-protectionist 'fox guarding the henhouse'. By referring many complaints back to the professional associations for investigation and prosecution, Commissioner Steve Mark believes this co-regulatory regime 'encourages the profession to continue on its path of self-regulation and improvement, albeit with direction from my Office'.¹⁹

It remains to be seen whether this structure could be replicated elsewhere. In the view of Christine Parker and Adrian Evans, the New South Wales model of co-regulation is 'workable' perhaps because 'the current Commissioner's personal skills and powers of persuasion are, in practice, sufficient to discretely manage what could be described as a continuing conflict of interest in the involvement of the profession in its own disciplinary processes' and 'may not be sustainable with different personalities in key positions'.²⁰

Under the Legal Profession Reform Act 1993, the OLSC had no stand-alone authority to issue a binding compensation order.²¹ That has changed so that, where requested by a complainant, the Commissioner or relevant Council may order compensation in dismissing a complaint when 'it is in the public interest' – language suggesting possible settlement and no good reason to pursue prosecution.²² Similarly, compensation may be ordered when a complaint is brought to a summary conclusion where there is a reasonable likelihood the Tribunal would find the practitioner engaged in unsatisfactory professional conduct, but is otherwise generally competent and diligent.²³ Compensation orders by the Commissioner or Council are subject to review by the Tribunal.²⁴ Disciplinary matters are prosecuted before the Administrative Decisions Tribunal, which can issue binding compensation orders, up to \$25,000, whether as part of a consent agreement or after hearing on the merits.²⁵ Despite the statutory authority to award compensation to the aggrieved person, this power is rarely used.²⁶ As in the United States, claims for compensation for negligence are to be pursued through private litigation. In New South Wales, smaller claims can be brought in a special tribunal.²⁷

2.2.2 *New South Wales' regulatory reforms spread to Queensland*

The Legal Profession Act 2004 (Queensland) created an Office of Legal Services Commissioner (LSC), appointed by the Attorney-General, with exclusive authority to receive and administer complaints about lawyers. Although the LSC can refer matters for investigation and recommendation to the relevant professional bodies, prosecutorial authority remains with the LSC.²⁸ If, after preliminary review, the LSC characterizes the complaint as a 'consumer dispute', raising no issue of 'unsatisfactory professional conduct or unprofessional conduct', the statute only grants the discretion to suggest voluntary mediation or to refer to the relevant professional body for assistance in resolving the dispute.²⁹ As a practical matter, the Queensland LSC has limited authority to pursue dispute resolution unless a complaint can be termed subject to prosecution before a tribunal, as either unsatisfactory professional conduct or as professional misconduct.³⁰ Upon making this determination, the LSC has substantial latitude to facilitate a suitable resolution that is in the public interest, with redress for the complaint possibly including an apology, a fee refund or monetary compensation for harm caused by the professional failing.

Because the Act broadly defines 'unsatisfactory professional conduct' to include commonplace failures of competence and diligence, theoretically it gives the Commissioner leeway to obtain redress for complainants with small claims not worth the bother of civil litigation.³¹ Disciplinary powers can be reserved for more serious and persistent incompetence, in which the public interest warrants intervention, as well as individual redress.³² The Queensland LSC does not purport to be 'an alternative forum to the courts for hearing and deciding claims of negligence against lawyers'.³³ Thus the most common harms to clients from delays and incompetence go unremedied, risking criticism that the LSC may be an expensive bureaucracy that focuses too much on the 'small stuff', inadequately protecting the public interest.³⁴ When the Commissioner refers a matter for disciplinary action, the Tribunal or a committee of the professional body, upon finding of misconduct, can order compensation up to \$7,500 for pecuniary loss.³⁵ Unfortunately, the Act confers no such authority on the Commissioner. If the Commissioner had the power to order redress for ordinary negligence, this would give lawyers a stronger incentive to improve the quality of routine legal services, with 'claims prevention' assistance from malpractice carriers requiring sound office procedures.

2.2.3 *Progressive collaboration among regulatory stakeholders*

Discipline and complaint handling schemes are reactive, narrowly focused on whether an individual practitioner has failed to comply with minimum standards of conduct.³⁶ In 2001, New South Wales pioneered a more revolutionary, proactive reform requiring that any firm seeking to incorporate must conduct a

self-assessment on whether it has 'implemented and maintained' 'appropriate management systems' so that legal services are provided in accordance with professional obligations.³⁷ Using that statutory language as a base, the OLSC collaborated with stakeholders to identify 10 criteria relevant to whether that standard was met. The criteria included competence, communication, timeliness, conflicts, record-keeping, supervision and trust accounts.³⁸ Online self-assessment materials were developed for the incorporating firm to evaluate itself, reporting to the regulator whether it was fully, partially or non-compliant on each of the issues. When a firm self-assesses as fully compliant and the OLSC concurs, incorporation proceeds without further action. When the self-audit indicates partial or non-compliance, the OLSC enters into dialogue with the firm to help identify and implement mechanisms that will bring it into compliance.

'Management-based regulation' adopts the key strategy that 'education towards compliance' will deter future violations by helping firm management become aware of possible pitfalls and the type of systems that could avoid problems.³⁹ Recognizing that firms vary in size, locale and types of practice, there is no 'one size fits all' management system. The OLSC believes 'that if people build their own systems they usually own them more than if they are imposed. They are more appropriate to individual needs and requirements and more likely to be followed than just given lip service'.⁴⁰

The vast majority (74 per cent) of incorporated firms have five or fewer lawyers. Experience has shown that smaller firms are more likely to be the subject of complaints and thus stand to benefit most from going through the process of self-assessment.⁴¹ While relatively few larger firms have sought to incorporate and may already have in place formal risk-management mechanisms required by their mal-practice carriers, they too could benefit from going through the self-assessment process. Every firm can benefit from a period of deliberation about creating an ethical infrastructure that actively promotes a culture supporting ethical values.⁴² The self-assessment process allows firms autonomy in developing an ethical infrastructure suited to their particulars. Because the act allows both multidisciplinary practices and outside investment by non-lawyers, at least one legal practitioner director must be responsible for maintaining the appropriate management systems so that the non-lawyer providers or investors cannot override lawyers' ethical obligations. All lawyer partners share this responsibility and risk discipline for failing to do so.⁴³ Recent empirical research on the New South Wales management-based regulation found that incorporated legal practices (ILPs):

do in fact manage themselves better and have better behavior than before they self-assessed, as indicated by lower complaints rates. On average the complaint rate for each ILP *after* self-assessment was one third the complaint rate *before* self-assessment ... This is a huge drop in complaints, which is statistically significant at the highest level.⁴⁴

The proactive focus on deterrence through education has proved its effectiveness as a system of co-regulation. It starts with the proposition that lawyers and firms

aspire to comply with their ethical obligations, but may not know of mechanisms that can avoid common pitfalls, resulting in complaints, consumer disputes or negligence claims. The external regulator is not a threatening force to be avoided, but rather functions as an expert consultant in sound law practice management. Although it has the power to conduct external audits, this rarely occurs – and only after less drastic efforts to bring about compliance fail.

The United States' constitutional concept of 'cooperative federalism' recognized the right of individual states to experiment with novel ideas not pre-empted by federal law. If successful, such local activity serves as an incubator for ideas that may work nationally and elsewhere. It appears that New South Wales and Queensland have served such roles for the federation of Australia.

In 2006, a cooperative effort undertaken by the respective Attorneys-General and the Australian Law Council (the umbrella organization for the respective professional bodies) produced the Legal Profession – Model Laws Project Model Provisions ('Model Laws'), a nationally uniform structure for lawyer regulation, leaving to local control a wide range of issues relating to the standards and procedure for discipline and complaints.⁴⁵ The Model Laws identified 'core provisions' requiring textual uniformity: the definitions of 'unsatisfactory professional conduct'; the more serious 'professional misconduct' requiring disciplinary proceedings; and hybrid matters capable of treatment under either category.⁴⁶ Those responsible for implementing the local Legal Profession Acts report continuing frustration with the myriad variations and subtle differences, which limit the Commissioner's authority to mediate consumer claims that fall short of professional misconduct but confer no binding authority to order redress.⁴⁷ The many inconsistencies between local regulations have impaired the ability of Australian lawyers to practise nationwide and compete internationally. The Prime Minister recently announced that legal profession reform is part of the government's national economic reform agenda. Reform is needed to simplify and harmonize lawyer regulation, to reduce compliance costs and provide a consistent, transparent approach for consumers. The Law Council of Australia welcomes the prospect of a single piece of federal legislation and regulatory structures.⁴⁸

Because of the successful New South Wales approach, the 2006 Model Laws project adopted comparable language requiring 'appropriate management systems' and audits of ILPs. Every Australian state and territory is following suit, enacting almost identical statutory language. Queensland and Victoria have joined New South Wales in adopting the 'education towards compliance' strategy, and in developing a self-assessment audit form that can be completed online. Queensland is expanding the system to obtain information about a firm's non-legal directors, shareholders and their relationship to the practice, its non-legal services performed and its gross revenue.⁴⁹ Collaborative efforts are underway to draft audits on workplace culture and on billing practices – the latter being a prevalent cause of unethical behaviour, especially in medium and large firms.⁵⁰

Self-assessment confers significant benefits to both firms and regulators, with little downside risk. The required process gives firms the opportunity to address potential problems before they become serious. Increased awareness about their

own ethical infrastructure can only improve the quality of services to clients and lessen the likelihood of consumer disputes and conduct complaints. The additional information supplements existing complaint data, helping regulators set risk-management priorities and target resources where they are most needed. Regulators can also view the self-assessment data in evaluating complaints, to determine whether there might be a problem with the current management system.

Convinced that the benefits are well worth the effort, some regulators are considering whether to expand the requirement to all law firms, not just those seeking to incorporate.⁵¹ Ironically, US scholarship on ethical infrastructure of law firms has persuaded Australia's regulators and scholars of the wisdom of management-based regulation.⁵² Self-assessment reflects the normative position of Chambliss and Wilkins, that an ILP must 'designate at least one partner [to be] the firm's compliance specialist', who is 'personally liable for ensuring [his or her firm] maintain[s] the appropriate structural controls'.⁵³

2.3 The United Kingdom's regulatory reforms: past, present and future

Over the last 30 years, the UK government has increased pressure on the legal professions to improve the quality of self-regulation and responsiveness to consumer complaints over inadequate legal services. The legal professions' self-regulatory models have 'been in more or less perpetual turmoil', with vast changes in their economic and political setting and closer involvement with government agencies 'that is proving fatal to key components of self-regulation as traditionally balanced'.⁵⁴

Lord Mackay laid the groundwork for reform with the radical proposals in his 1989 Green Paper.⁵⁵ The resulting furor led to the somewhat modest reforms in the Courts and Legal Services Act 1990, which created a Legal Services Ombudsman (LSO) to oversee complaint handling by the professional bodies.⁵⁶ When problems continued, Parliament expanded the LSO's powers and authorized the Lord Chancellor to appoint a Legal Services Complaints Commissioner (LSCC), yet another independent regulator to improve complaint handling.⁵⁷ Continued criticism focused on the Law Society, which had regulatory authority over the solicitor branch. In her 2002 Annual Report, LSO Zahida Manzoor found it had achieved little progress in improving complaint handling over 15 years. The quality of service 'failed to keep pace with consumer expectations or to reverse the decline in public confidence in lawyers'⁵⁸ – 'the professional bodies have been warned on countless occasions ... self regulation is a privilege, not a right – and ... can be taken away if it is no longer warranted'.⁵⁹

The Blair administration turned up the heat that next summer, appointing Sir David Clementi to undertake a comprehensive review of the legal professions' regulatory structure.⁶⁰ Two strands of criticisms prompted the Clementi Review: (1) increased consumerism and widespread dissatisfaction with how lawyers and their professional bodies handled client complaints; and (2) competition law administered by the Office of Fair Trading, which investigated whether restrictive

practices impeded professional competition.⁶¹ Had lawyers – especially the solicitors – been able to clear up backlogs of complaints and been responsive to consumer watchdogs, ‘they might have prevented or postponed what was to come’.⁶² After extensive consultation among stakeholders, Clementi’s final report produced a comprehensive set of proposed regulatory reforms.⁶³ The Blair government fast-tracked proposed legislation incorporating Clementi’s proposals, which culminated in the Legal Services Act 2007.⁶⁴

The Legal Services Act includes three categories of reforms that will completely overhaul lawyer regulation, complaint handling and permissible forms of practice. First and foremost, it establishes the Legal Services Board (LSB or Board) as an independent, non-governmental entity charged with oversight of all approved regulators of legal professionals, which must perform their duties to the Board’s satisfaction. Approved regulators – for now, the existing professional bodies – must separate their regulatory functions from the politicized representative functions, to ensure regulatory independence. The Act envisions a co-regulatory model in which the board would only exercise its powers of intervention upon finding serious or persistent failures by the front-line approved regulators. Second, the Act creates an independent Office of Legal Complaints (OLC) as a single point of entry for all complaints seeking non-disciplinary redress for unsatisfactory services, and grants the Ombudsman authority to issue binding orders against practitioners. Third and potentially with greater future global impact, the Act authorizes alternative business structures – between legal service providers and non-lawyers, and with the possibility of outside investors. Each component of the Act requires ongoing consultation with multiple stakeholders, including the competition authority and consumer representatives. It appears that drafters of this multi-tiered, collaborative regulatory structure were in tune with other regulatory innovations, both actual and theoretical. The innovative work in Australia has likely gained the attention of those concerned with UK regulatory reforms.

The following discussion briefly summarizes the regulatory failings preceding the Clementi Review under the 1990 and 1999 Acts. It then focuses on the Legal Services Act 2007, with particular attention to the co-regulatory regime, complaint handling by the Legal Services Ombudsman and efforts at management-based regulation that are part of the new licensing system for Legal Disciplinary Practices (LDP). Finally, it identifies some of the many ongoing implementation activities. Because any reform project of this scope is a continuing work in progress, readers are advised to update information on developments occurring after 1 October 2009.

2.3.1 Regulatory failings preceding the Clementi Review

2.3.1.1 1989–98: Lord Mackay’s 1989 Green Paper and oversight entities authorized by courts and the Legal Services Act 1990

Before considering recent developments, discussion of lawyers in the United Kingdom requires note of what gave rise to the traditional distinctions between

barristers and solicitors. Those distinctions fostered a quasi-contractual division of territory, which gave each branch a monopoly over its respective field of trade.⁶⁵ Barristers, who had exclusive rights of audience to appear in court, were selected and instructed by the solicitors who maintained all client contact. Barristers had the technical legal knowledge, etiquette and advocacy skills required in court, but maintained a distance from the client. Solicitors involved in litigation would handle the paperwork, client interactions and financial matters. The solicitor branch also worked on a wide range of transactional matters and exercised its monopoly over conveyancing. These divisions evolved over time, and have, in recent decades, eroded incrementally under pressure from competition law and other efforts to ease artificial restrictions on delivery of legal services. Meanwhile, numerous other categories of legal professionals have proliferated.

Modern regulatory reforms go back to 1989. Prime Minister Margaret Thatcher's policies favoured open competition in the marketplace. Thatcher replaced then Lord Chancellor Hailsham, a staunch advocate for the bar, appointing Lord Chancellor Mackay of Clashfern, a Scotsman willing to make radical proposals that upset many in the stodgy English legal professions.

Mackay's 1989 Green Paper, 'The work and organization of the legal profession', aimed to create a system to provide the public with the most efficient, affordable and competent legal services, courtesy of market discipline.⁶⁶ Mackay proposed removing anti-competitive rules that restricted rights of advocacy, conveyancing and forms of practice between lawyers and non-lawyers. He sought to permit both barristers' direct access to clients and multidisciplinary practices, and to create extensive government control over professional regulation, including a Legal Services Ombudsman.⁶⁷ Not surprisingly, the Green Paper drew intense opposition, especially from the bar and judiciary. Michael Zander doubted that 'any single event in the long history of the English legal profession ever evoked so fierce and so broadly based a negative reaction'.⁶⁸ The Bar Council 'violently attacked' Mackay's proposals, and the then Lord Chief Justice, Lord Lane, called it 'one of the most sinister documents ever to emanate from government'.⁶⁹ In retrospect, Lord Mackay was ahead of his time; many of his proposals foreshadowed later reforms, including those in the Legal Services Act 2007 (LSA).

Overwhelming opposition to the Green Paper forced government retreat. Parliament enacted the Courts and Legal Services Act 1990 (CLSA), most of which made structural alterations to the complex English court system. Although some provisions opened the theoretical possibility for solicitors' rights of audience and repealed statutory bars to certain lawyer practices, the Act then authorized the relevant professional bodies to retain those trade restraints and most of their self-regulatory powers. Nevertheless, the CLSA represented a significant intrusion on the professional bodies' traditional prerogatives. The Act's stated objective sought to expand the range of eligible providers of advocacy, litigation, conveyancing and probate services, and to innovate the delivery of those services.⁷⁰

Among the various oversight entities established in the CLSA, two are relevant here. The Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) was to assist in developing and maintaining standards in the

education, training and conduct of those offering legal services, both for initial training and continuing education, and to 'have regard' to the practices of other members of the European Union and 'the desirability of equality of opportunity'.⁷¹ ACLEC also shared the broad oversight functions of the professional bodies: a body proposing changes to qualification standards and rules of conduct required ACLEC approval.⁷² The CLSA structured a cumbersome and time-consuming procedure for amending such standards or rules, routing the proposal through ACLEC, the Lord Chancellor or designated judges and the Office of Fair Trading.⁷³

The CLSA also created the Legal Services Ombudsman (LSO), a non-lawyer appointed by the Lord Chancellor to exercise oversight of complaint handling by the different professional bodies, to recommend improvements of their systems, with limited authority to investigate individual complaints and to suggest reconsideration of a complaint or redress for the complainant.⁷⁴

In 1995, Rhoda James and Mary Seneviratne conducted a comprehensive study on the LSO's operations. While they found that the LSO was truly independent from both government and the professions, they found it ineffective at resolving grievances and recommended that Parliament expand its powers to act on its own initiative, conduct unannounced inspections and random file reviews, and issue binding orders as opposed to recommendations.⁷⁵

The arduous route to get a matter considered by the LSO took several completed steps, available only to tenacious and knowledgeable complainants who did not drop out from frustration or fatigue. First, the complainant had to go through the lawyer or firm's internal complaint handling procedure. Although Law Society Practice Rule 15 required all solicitors to have an in-house procedure and to ensure clients knew how to access it, empirical research showed that many firms either had no procedure or failed to inform clients about it. Complainants who sought resolution through the in-house procedure were very dissatisfied.⁷⁶ Yet the Solicitors' Complaint Bureau (SCB) would not accept a complaint until exhaustion of the in-house procedure. Those who filed a written complaint with the SCB generally hoped it would contact the solicitor and help sort things out; fewer expected the solicitor be punished or made to pay compensation.⁷⁷ Survey respondents were also very dissatisfied with the SCB process and outcome, believing it was heavily influenced in favour of the solicitor and the legal profession and that it was rife with incompetence, delay and poor communication.⁷⁸ The SCB would only inform complainants of their right to seek assistance from the LSO if they lost an appeal of the SCB's determination. Because few dissatisfied complainants pursued an appeal, they never got notice that further recourse might be available through the LSO scheme.⁷⁹ Although 30 per cent of SCB complaints were not resolved to the consumer's satisfaction, only about 8 per cent contacted the LSO.⁸⁰

2.3.1.2 Access to Justice Act 1999

Parliament revisited some of those issues in the Access to Justice Act 1999 (ATJA), which more generally addressed legal aid in civil and criminal matters and

procedural court rules.⁸¹ The CLSA intended the ACLEC to be a lead policy-making body with a lay majority and designated judges to play a subsidiary monitoring role. That committee, perhaps stymied by the statute's carefully balanced representation of various interest groups, was unsuccessful at achieving the stated objectives. The new Act abolished the ACLEC and created the Legal Services Consultative Panel, charged with duties similar to those of the ACLEC but providing for appointments based on individual expertise instead of interest group representation.⁸² The Consultative Panel was smaller and more focused to provide specialist advice on proposed rule changes; the role of judicial members was demoted to a consultative role without their prior veto power.⁸³ The ATJA empowered the Lord Chancellor to set timetables on consultations about proposed rule changes and to make minor rule changes on his own, in order to expedite the amendment process.⁸⁴ Nevertheless, the consultation process required interaction between professional bodies and other interested persons who raised public and consumer interests. The Consultative Panel made recommendations to the Lord Chancellor, who had the final authority to approve any changes.

The ATJA expressly opened to solicitors the rights of audience and to conduct litigation in all courts, subject to their satisfying the qualification standards of the Law Society. This effectively broke the bar's gridlock resisting solicitors' efforts to obtain rights of audience in higher courts. The Act also eased the Bar Council's permissible restrictions on the rights of audience for employed advocates, such as barristers who worked for the Crown Prosecutor but who lacked the independence of sole practitioners practising in chambers.⁸⁵

The solicitor branch gained advocacy rights, but also became subject to much closer oversight on complaint handling. Solicitors, who are the primary point of contact for clients, outnumber barristers by a ratio of nine to one, so it is not surprising that most complaints pertained to solicitors.⁸⁶ The cumulative number of complaints brought to the LSO reflected the same ratio.⁸⁷ Nevertheless, the LSO was far more satisfied with the Bar Council's handling of complaints compared with that of the Law Society, which had a long history of poorly handled complaints and few indications of improvement over time.⁸⁸

The ATJA expanded the LSO's authority to issue binding orders against both individuals and professional bodies.⁸⁹ It also enhanced the Lord Chancellor's authority to assess professional bodies for expenses incurred by the LSO and to appoint an additional oversight authority, the Legal Services Complaints Commissioner (LSCC), vested with enforcement powers over professional bodies, and the ability to demand reports, conduct further investigation, audit, recommend specific improvements, set targets and require self-improvement plans. For failure to submit or implement an adequate plan for handling complaints effectively and efficiently, the LSCC may fine a professional body up to £1 million.⁹⁰ In 2004, the Lord Chancellor exercised that reserve authority to appoint LSO Zahida Manzoor to also act as LSCC.

Between 2003 and 2005, Manzoor's annual reports about the Law Society became increasingly strident, noting little improvement after 15 years of oversight

and repeated warnings about unacceptable delays, poor administration, decision-making, service and basic errors. Solicitors comprised 95 per cent of the LSO caseload. In 2005, she assessed a £250,000 penalty against the Law Society for failing to achieve the targets she previously had set.⁹¹ At the same time, she applauded the government's proposed radical reforms, which adopted many of the recommendations set forth in Clementi's final report, as a 'a once in a lifetime opportunity to put things right for consumers and professionals who have laboured for too long under an archaic system of regulation which has lacked transparency or consumer focus'.⁹²

2.3.2 The Clementi Review and Report lead to enactment of the Legal Services Act 2007

In July 2003, Secretary of State Lord Falconer appointed Sir David Clementi to undertake an independent review of the legal profession's regulatory framework.⁹³ Clementi's appointment followed a Scoping Study conducted by the Department for Constitutional Affairs (DCA), which found the existing framework 'outdated, inflexible, over complex, and insufficiently accountable or transparent', concluding that 'the status quo [was] not an option'.⁹⁴ Clementi was charged to consider 'what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector'.⁹⁵

The Clementi Review Consultation Paper, released on 8 March 2004, addressed three main issues: the architectural framework of a more rational regulatory system; a better system to regulate complaint handling and discipline issues; and the possibility of alternative business models for legal practices.⁹⁶ Clementi doubted that professional bodies, which serve as representative lobbying organizations, could also provide legitimate regulatory oversight.⁹⁷ Consumers were confused by the regulatory maze of the professional bodies' existing complaint systems.⁹⁸ Clementi presented for discussion three regulatory models, ranging from complete separation of trade and regulatory functions, with all regulation controlled by an independent government entity akin to the UK Financial Services Authority, to establishing a light-touch oversight agency to monitor self-regulatory conduct by the professional bodies.⁹⁹

Clementi's final report endorsed the B+ model, in which a new Legal Services Board would have overarching regulatory and oversight authority. If professional bodies wanted to become approved regulators, they must create new entities vested only with regulatory powers, subject to oversight by the LSB. Their representational activities could continue unfettered by government control. The Office of Legal Complaints (OLC) would consider all consumer complaints against legal professionals¹⁰⁰ – although, under the authority and general supervision of the LSB, complaint handling would function independently.¹⁰¹ The proposed OLC would play a strategic role in setting targets for practitioners' in-house complaint handling, monitoring indemnity insurance schemes and compensation funds controlled by the front-line bodies.¹⁰² The final report cautiously opened the

door to modern business structures for delivering legal services, including Legal Disciplinary Practices (LDPs), which would allow professional associations among all legal professionals comparable to US law firms, and Alternative Business Structures, which would allow partnerships between lawyers and non-lawyers with the possibility of outside investors.¹⁰³

In May 2006, the government introduced its draft Legal Services Bill into Parliament.¹⁰⁴ The Bill mostly followed Clementi's final report, proposing the LSB oversee front-line regulators (now called 'approved regulators'), who must perform their duties in a manner compatible with stated regulatory objectives.¹⁰⁵ It endorsed Clementi's OLC proposal for an office with exclusive authority over complaints for redress up to £20,000.¹⁰⁶ The Bill prohibited approved regulators from providing redress as part of their regulatory arrangements,¹⁰⁷ and prevented them from contractually limiting or excluding a person's right to seek relief through the OLC ombudsman scheme.¹⁰⁸ It advanced more controversial proposals to permit alternative business structures and outside ownership of law firms. In anticipation of eventual passage, the Law Society and Bar Council segregated their regulatory and representative functions, delegating the regulatory functions to new, independent entities.¹⁰⁹

No UK law reform occurs without extensive consultations open to all interested groups and individuals, from the initial proposals through to final enactment. The LSA 2007 was no exception. Objecting to the end of self-regulation and diminished core values of professional independence, UK professional bodies voiced concern that the reforms risked excluding them from practice in other European Union nations.¹¹⁰ Overseas bars also raised independence concerns.¹¹¹ Fearing the UK reforms would adversely impact their competitive standing, the Scottish and Irish legal professions sought local legislation to address consumer complaints against lawyers.¹¹²

These lobbying efforts proved successful, persuading the government that continued global competitiveness of UK firms required respect for professional independence. Amendments built in a co-regulatory regime that granted approved regulators primary frontline authority, subject to the board's oversight and limited intervention powers. Other amendments granted authority to appoint the Board chair and its members to the Lord Chancellor, head of the judiciary, in consultation with the Lord Chief Justice.¹¹³ Clementi had endorsed the B+ regulatory model, but these changes may have shifted the Board's oversight role closer to the B model, with light-touch authority to influence approved regulators. Only time will tell.

A brief description of the new regulatory oversight structure is in order, given its multi-tiered collaborative relationships and mechanisms for transparency and accountability. LSA 2007, s. 1(1) identifies regulatory objectives that the board, approved regulators and other stakeholders must promote, including public and consumer interests, competition, the constitutional rule of law and access to justice through a strong and diverse legal profession. The Board chair and a majority of its members must be laypersons, not authorized to engage in activities reserved to legal professionals.¹¹⁴ Board composition (seven to 10 members) should reflect knowledge in diverse areas, including legal, consumer and commercial

affairs, competence and complaint handling.¹¹⁵ Regulatory activities ‘should be transparent, accountable, proportionate, consistent and targeted’ only where action is needed.¹¹⁶ The Board’s internal governance rules should aim to protect the regulatory independence of approved regulators, including adequate resources, open communications among regulatory actors, the Board and the Office of Legal Complaints.¹¹⁷

For the first time, legislation articulates specific activities reserved to licensed legal professionals and defines the unauthorized practice of law. The LSA identifies types of reserved legal activities and sets criminal sanctions for persons not authorized by relevant approved regulators.¹¹⁸ Schedule 4 lists existing professional bodies that had served as regulators for subsets of legal professionals and authorizes their continued service as approved regulators. Approved regulators’ ‘regulatory arrangements’ concerning rules of conduct, discipline, education, licensure, indemnification and compensation for redress or misconduct must further the regulatory objectives. Acts or omissions that adversely affect those objectives are subject to dialogue and sanctions between the Board and a regulator, starting with target-setting and ending with cancellation of status.¹¹⁹ Under the statutory model, the Board’s progressive intervention powers are limited and may be exercised only as warranted by proof of serious ongoing failures.

The UK model of regulatory discourse through consultations among stakeholders is incorporated throughout. For example, policy statements on the Board’s planned oversight functions must allow time for comments and final publication, reflecting any interim changes.¹²⁰ Board oversight of approved regulators should attempt informal resolution before it invokes formal mechanisms, such as setting targets, giving directions or intervention.¹²¹ Under Board auspices, an independent Consumer Panel of non-lawyers may conduct research and advise the LSB about regulatory activities.¹²² The Office of Fair Trading (OFT) may issue a report opining that an approved regulator’s regulatory arrangements impede competition; after receiving input from the relevant regulator and the Consumer Panel, the Board gives notice of its proposed action, which is subject to further review by the Lord Chancellor and the European Union Competition Commission.¹²³ Principles of accountability and transparency require annual reports both from the Office of Legal Complaints (OLC) to the Board and from the Board to the Lord Chancellor, who presents them to Parliament.¹²⁴

The OLC is an independent body under Board oversight, which will administer an ombudsman scheme to investigate and determine all complaints seeking redress from legal service providers.¹²⁵ As a jurisdictional prerequisite, a complainant must first seek resolution using the practitioner’s in-house complaints procedures.¹²⁶ When operational, it will provide a single point of entry for all complaints from persons who received legal services from those authorized to engage in reserved legal activities (regulated persons), whether or not the alleged conduct related to legal services. Vicarious responsibility extends to the acts or omissions of employees and partners acting within the customary scope of their duties.¹²⁷ The ombudsman scheme has a broad remit to determine complaints and, where appropriate, to issue direction that the respondent apologize,

reimburse fees, pay up to £30,000 compensation, rectify the error at the practitioner's own expense or take other actions in the interest of the complainant.¹²⁸ Remedial authority is not limited 'to cases where the complainant may have a cause of action against the respondent for negligence', and 'may be available in cases of "simple" inadequate professional service'.¹²⁹

The ombudsman can provide redress but not discipline, which remains under the jurisdiction of the relevant approved regulator.¹³⁰ The ombudsman may dismiss a complaint without consideration of the merits if the complaint is 'frivolous or vexatious', would be better dealt with under another ombudsman scheme, has already been addressed under another ombudsman scheme, arbitration or legal proceedings, or if there was undue delay in making the complaint or providing evidence.¹³¹

When the OLC receives a complaint within its jurisdiction, it first is assigned to a non-ombudsman caseworker for investigation and attempted mediation. The caseworker may not summarily dismiss or issue a determination. If the parties do not accept the caseworker's proposed resolution, the complaint then proceeds to consideration and disposition by the Chief Ombudsman or is delegated to an assistant ombudsman.¹³² An ombudsman's determination of a complaint should have reference to what is 'fair and reasonable in all the circumstances of the case'. Upon making a determination, the ombudsman must prepare and provide a written statement of reasons to the complainant, respondent and relevant professional body. If the complainant accepts the determination or is deemed to have accepted because of failure to reject in a timely fashion, the ombudsman will issue a certificate of determination which has a binding and preclusive effect on both parties.¹³³ If a respondent does not comply with the Chief Ombudsman's binding directions, a court may order enforcement, notifying the OLC and approved regulator. The ombudsman may notify the Board, triggering possible intervention if an approved regulator 'persistently failed adequately to discharge its regulatory function'.¹³⁴ The Act creates a 'polluter pays' system, requiring the respondent to pay charges to the OLC unless the complaint is resolved in the respondent's favour and the ombudsman is satisfied that the respondent took all reasonable steps to resolve the issue through in-house procedures.¹³⁵

The Act does not expressly state what may happen if the complainant rejects the determination. If this new ombudsman scheme receives positive performance reviews after a few years of operation, civil action by dissatisfied complainants will face an uphill battle to establish liability. Because the Act requires larger liability claims to be brought in court, a well-functioning ombudsman system will provide clients of UK lawyers a meaningful opportunity to seek redress. The Chief Ombudsman's authority to issue binding and enforceable determinations is the envy of commissioners who administer complaint handling systems elsewhere. As the UK system comes into existence, perhaps it will trigger additional law reforms in those countries.

2.3.3 Implementation to date: the UK way ahead (as of 1 October 2009)

Lawyer regulation in the United Kingdom is in the middle of transition. Zahida Manzoor accepted terminal reappointment as LSO and LSCC, with limited transitional authority. The first LSB chair, nine board members and chief executive were appointed and began work in 2008. If their backgrounds and nine months of work in 2009 are predictive, the LSB has potential to be a very effective oversight regulator that communicates and collaborates well. Chair David Edmonds has an extensive background in senior management in both the public and private sectors, including regulatory work and oversight of the UK Legal Aid programme. The Board includes two lawyers with powerful backgrounds, as general counsel to Reuters and the Financial Services Agency Board. Lay members come with diverse expertise in executive, regulatory, administrative and consumer matters.

Since January 2009, the Board has issued its business plan, which sets forth a vision for a dynamic, modern and consumer-oriented organization that 'work[s] constructively with the (approved regulators) and all our other partners to . . . tackle the objectives systematically'.¹³⁶ After announcing it was 'open for business', the Board issued consultations on regulatory independence and developing a regulatory regime for alternative business structures. Since November 2008, the Board has appointed Elizabeth France as Chair of the OLC, six OLC board members and the Chief Ombudsman.¹³⁷ Each of the appointees has extensive expertise with Ombudsman, mediation or consumer protection matters.¹³⁸ As of 1 October 2009, the staff has grown to 35.¹³⁹ The Board published proposed rules on regulatory independence and is now evaluating the alternative business submissions and the construction of licensing rules.¹⁴⁰

Until the OLC becomes fully functional in 2011, the relevant approved regulators bear continued responsibility for complaint handling, besides licensure and discipline.¹⁴¹ The Law Society and Bar Council established separate regulatory entities, the Solicitors Regulation Authority (SRA) and Bar Standard Board (BSB) respectively. Positioned for future practice innovations, as of 31 March 2009, the SRA assumed responsibility for regulating Legal Disciplinary Practices and amended the Code of Conduct to introduce firm-based regulation similar to recent Australian innovations. Because membership in their representative components is now voluntary and other entities already cater to the interests of other legal professional subsets, there is some uncertainty about the future roles of the Law Society and Bar Council. The Law Society seeks to leave little to chance. It hired long-time Bar Council executive and founding LSB Director Mark Stobbs to head legal policy issues and commissioned additional independent regulatory reviews.¹⁴² Stay tuned. The question remains: what impact will the LSA 2007 have on regulation of lawyers elsewhere? Is it the regulatory equivalent of a tidal wave with global implications? Or will the new regulatory structure become yet another cumbersome bureaucracy resulting in limited meaningful change?

2.4 Lawyer regulation in the United States

The United States has been a strong international leader in the law and ethics of lawyering. At present, however, it appears to lag behind as Australia and the United Kingdom take the lead on regulatory reforms. US lawyers claim robust privileges of self-regulation are needed to uphold the rule of law, unfettered by partisan impulses that could influence executive or legislative action.¹⁴³ Lawyers exercise substantial regulatory authority over licensure, professional conduct standards and disciplinary enforcement, subject to final approval and oversight by the highest state court exercising its inherent authority to regulate the practice of law.¹⁴⁴

The American Bar Association's national leadership in crafting model lawyer codes has influenced state courts and bar associations, which exercise their prerogative to consider local modifications based on policy differences or sensibilities. Federal and state legislation has, to some extent, subjected lawyers to external regulation by governmental entities.¹⁴⁵ Consumer protection, in the form of redress to clients or third persons harmed by incompetent or dishonest lawyers, falls outside the usual scope of lawyer discipline. While some states provide for mediation of non-fee disputes or mandatory fee arbitration,¹⁴⁶ US lawyer disciplinary agencies typically do not obtain relief for injured clients as part of the discipline imposed. As a practical matter, most dissatisfied former clients can only wish for redress through civil litigation. Unless the lawyer carries malpractice insurance, liability is strong and damages large, recovery is unlikely.

The next section discusses lawyer regulatory systems in the United States, mostly controlled by local authorities with vast differences in their views on enforcement, dispute resolution and resource allocation. In recent decades, federal statutes imposed additional restrictions on lawyers in specialized practice areas. As contrasted to the balkanized state enforcement systems, the following section considers the expanding risks of civil liability with reference to limited available statistical evidence about malpractice claims, and the growing importance of malpractice carriers on the behaviour of those they cover. Given the prevalence of compulsory insurance and other types of consumer protection required in other developed countries, it criticizes states' failure to provide mechanisms for consumer protection, including minimum indemnity coverage by all lawyers who provide services to private clients.

2.4.1 Balkanized state-based regulation overlaid with pockets of federal law

Self-regulation of the American legal profession is something of a misnomer. More accurately, it is regulation and enforcement delegated to professional bodies and overseen by the judicial branch. In each state and the District of Columbia, the court of highest appellate jurisdiction has inherent authority to regulate the practice of law.¹⁴⁷ Because most regulatory authority resides in individual states, and because those states vary significantly in their standards, enforcement

mechanisms and general approach to ethical issues, lawyer regulation in the United States is considered 'balkanized' or 'fractionalized'.

State supreme courts' regulatory authority includes power to adopt rules for Licensure, rules of professional conduct, and rules and procedures for disciplinary enforcement to fulfil the primary purpose of professional regulation: protection of the public. The organized bar may formulate proposed rules for adoption by the state court. State legislative efforts to regulate lawyers have met with mixed success.¹⁴⁸ Courts invoke inherent authority doctrine as a fundamental tenet of separation of powers when invalidating such legislation.¹⁴⁹ When courts uphold state statutes or regulations based on their Tenth Amendment police power that incidentally affect the practice of law, they reiterate that such laws neither supersede nor detract from the judiciary's inherent authority to regulate the practice of law.¹⁵⁰

Location of the regulatory function varies among jurisdictions. Thirty-three US jurisdictions maintain unified (previously referred to as mandatory or integrated) bar associations, in which membership is required as a condition of licensure to practise law in the state.¹⁵¹ Compulsory state bar membership has been accomplished through court rule, inherent power doctrine, legislation or some combination thereof.¹⁵² In 21 states, the unified bars exercise both representative and regulatory functions within the same organization, reinforcing the perception that politics and collective self-interest taint regulatory decisions. Those states' supreme courts delegate to the state bar associations administrative authority to investigate and prosecute alleged misconduct and authorize hearing tribunals to recommend findings of fact, conclusions of law and disciplinary sanctions. Such delegation to the bar is non-binding and advisory, with the high court retaining final and exclusive authority. While judicial regulation aims to protect the disciplinary process from undue political influence by the legislative and executive branches of government, delegation of regulatory functions to the state bar association risks under-regulation due to actual or perceived conflicts of interest. The public often views as protectionist regulatory conduct that appears to benefit the profession's political, ideological or trade interests rather than being seen to advance legitimate public interest in the legal system.¹⁵³ Twelve of the 33 unified bar states maintain a separate lawyer admissions and discipline entity in order to isolate regulatory activities from those advancing the bar's business or professional interests.¹⁵⁴ This structural segregation of regulatory and trade functions alleviates public concerns about accountability.

In the 18 non-unified or voluntary bar states, lawyers are regulated by the highest state court, administered through a stand-alone agency of the court. Voluntary state bars are most firmly established in the North Atlantic and Midwestern states.¹⁵⁵ Voluntary bars function as trade associations representing the collective interests of their members; while they provide input on some regulatory questions, including changes to the rules governing ethical standards, their views lack official imprimatur and may or may not influence adoption by the state supreme court.

Over the last century, debates periodically have resurfaced about unification and whether compulsory state bars are sufficiently accountable to the public in their

regulatory actions, and whether the bar's political speech violates the First Amendment rights of dissenting members.¹⁵⁶ To date, efforts to force states' conversion from a unified to a voluntary bar have failed, although some challenges persist.¹⁵⁷

The purpose of discipline, it is commonly said, is to 'protect the public, the bar, and legal institutions against lawyers who have demonstrated an unwillingness to comply with minimal professional standards'.¹⁵⁸ While it is sound to involve lawyers in the disciplinary process as prosecutors, grand jurors, adjudicators, disciplinary board members and appellate judges, their dominant role in the process furthers the public perception that US lawyers are regulated exclusively by their professional colleagues.¹⁵⁹ Regulatory reforms throughout the United States now include lay representatives in the process. This is a step towards bringing the United States in line with the Australian and UK reforms, which both require significant participation by non-lawyers on all regulatory matters.

It is difficult to make generalized observations about lawyer discipline systems in the United States. The 1970 Clark Report declared that existing disciplinary systems were 'scandalous', with lawyers' prevailing attitudes ranging from 'apathy to outright hostility' and enforcement 'practically nonexistent in many jurisdictions'.¹⁶⁰ That scathing review prompted important but uneven reforms. Eric H. Steele's and Raymond T. Nimmer's 1976 empirical research concluded that most disciplinary entities focused on lawyer deviance in which the offending lawyer 'is defined as unfit, a malefactor', who warrants removal by suspension or disbarment in order to purify the profession, and disregarded more pervasive client complaints about fees, delays and quality of performance.¹⁶¹ Scholars continued to question the effectiveness of professional self-regulation, with particular focus on the bar's inattention to competence and consumer protection.¹⁶² Deborah Rhode noted the serious mismatch between client needs and the regulatory response by lawyer discipline agencies. Even where conduct violates black-letter provisions of an applicable rule and the unhappy client files a grievance, discipline seldom results and even more rarely provides any redress for the harmed client. The traditional disciplinary model declines to act upon the vast majority of client grievances about isolated instances of neglect, inadequate services and excessive fees.

In 1989, the ABA McKay Commission again studied US disciplinary systems, reaffirming that the judicial and not the legislative branch should have regulatory authority over the profession.¹⁶³ The commission report noted that most common law countries, including the United Kingdom and Australia, had mechanisms to address less serious client complaints, redress for consumers and other non-disciplinary mechanisms to bridge the gap between legitimate client expectations and existing regulations. It recommended that states consider expanding their regulatory structures to include multi-door pilot programmes, mediation, fee and malpractice arbitration and management assistance programmes.¹⁶⁴ The ABA House of Delegates adopted, with modifications, the report's 21 recommendations.¹⁶⁵

States widely implemented some recommendations, providing peer assistance and education, and expediting procedures for minor misconduct, substance abuse

counselling and interim suspensions where conduct poses a substantial threat of serious public harm.¹⁶⁶ Many adopted centralized intake systems to facilitate efficient screening and referral of grievances to the appropriate entity.¹⁶⁷ Some states resisted more visionary consumer protection recommendations to require fee arbitration or other dispute-resolution mechanisms.¹⁶⁸ Unified bar jurisdictions also resisted major structural recommendations that would ensure the independence and adequate funding of disciplinary entities housed within.¹⁶⁹

Many states have increased funding and hired professional staff to administer discipline, as opposed to relying on local volunteer committees that produced inconsistent outcomes reflecting political and personal connections. A majority of states (12 unified Bar states and the 18 voluntary Bar states) have established separate regulatory entities to protect their independence from political and trade interests. It is likely that most states now employ advisory ethics counsel carefully isolated from the disciplinary staff. Diversion programmes and attention to backlogs are common. Although most states now allow public access to disciplinary proceedings after a finding of probable cause and filing of a formal complaint, there is still limited public transparency.¹⁷⁰

No jurisdiction has formally implemented what Tom Morgan has suggested would have been most visionary: to create 'a professionally staffed system within which a client could file a charge and get a decision ordering payment of damages as well as see traditional discipline imposed'.¹⁷¹ In the absence of that type of system, Morgan contends the legal profession lacks 'the leverage with which to force our brothers and sisters at the bar to take professional obligations seriously'.¹⁷² It appears he was referring to a resolution by the ABA Standing Committee on Dispute Resolution, which found that lawyer discipline and client protection funds had limited ability to compensate clients or order restitution, denying a feasible remedy for most clients with legitimate claims for redress.

While the traditional discipline-malpractice dichotomy leaves a huge gap of viable complaints without recourse, some jurisdictions have quietly shifted to more of a consumer protection model not expressly addressed in the rules or court opinions. Chief counsel of an independent lawyer regulator observed a 'sea change' in which the state Supreme Court now routinely approves plea bargains for discipline that include fee restitution and other forms of client-focused relief.¹⁷³

Although sound analysis of comparative budget data on enforcement budgets in unified bar states is challenging, it may raise additional concerns about regulatory independence from bar politics and trade concerns. Inherent tension exists where bar administrators and elected leaders must allocate limited resources to both regulatory and membership service programmes.

The annual ABA Survey on Lawyer Discipline Systems (SOLD) presents quantified data, but carefully avoids any qualitative analysis. My preliminary statistical analysis of the 2006 survey indicates that the per-lawyer annual disciplinary budgets of 13 US jurisdictions are under \$100; 11 of these jurisdictions have unified bars. While the issue warrants further study, it also appears that seven of the 11 low-funded disciplinary programmes have significantly lower rates of filing charges against lawyers after probable cause determinations have been

made. Anecdotal information suggests a possible correlation between low disciplinary budgets for unified bars, lengthy delays and continued risk of harm to unsuspecting current and future clients. Focus on formal charge rates may overlook potential disciplinary matters that are resolved informally. Comparison among jurisdictions is difficult because of differences in local legal culture, procedure, rules, terminology and the possible perception that bar leaders owe members protection from increased regulation. There also may be jurisdictional differences in reporting rules, prosecutorial discretion or informal resolutions. Nevertheless, this unscientific study of available data suggests a strong correlation at both the high and low ends of budgets and per-lawyer charge rates.¹⁷⁴

When major financial scandals surface, external federal regulators become involved, whether through regulatory action to hold accountable professional advisers who facilitated the fraud, or through new legislation or rule-making to prevent recurrences. Federal intervention requires lawyers, along with other service providers, to impose gatekeeping duties 'to monitor their clients for the sake of other interests'. Each of these federal initiatives has 'been limited in scope and require[d] relatively rapid [defensive] responses from [the ABA, state and federal Bars]'. Ted Scheyer's survey of these skirmishes in the last 30 years contends that these federal regulators may no longer pay deference to the tandem professional regulatory programmes designed by the legal profession. Instead, 'the ABA must now be prepared to *shape, not merely oppose, external initiatives*'.¹⁷⁵

2.4.2 Expanded risk of civil liability and regulatory role of malpractice carriers

Risk of civil liability to both clients and non-clients has exploded over the last three decades, in terms of both the frequency and severity of claims.¹⁷⁶ Several factors may account for this, including heightened consumerism, developments in the underlying substantive law and the greater availability of lawyers to sue or testify against a professional colleague. Despite expansion of the substantive law, prospective claimants have little chance of recovery unless the offending lawyer is insured or has substantial personal assets vulnerable to collection.

Risk of malpractice liability has become a serious concern for US lawyers only recently. Reliable statistical data are scarce. In recent years, the frequency of 'claims made' has levelled, but the severity of claims and amounts of indemnity payouts have increased significantly.¹⁷⁷ The aftermath of huge financial failures has resulted in mega-claims, sometimes against large and prestigious firms.¹⁷⁸ Because settlements often condition payouts and other remedial terms subject to confidentiality provisions, the consuming public remains unaware that wronged clients may have civil recourse against malfeasant lawyers.¹⁷⁹

The datum identify known risky practice areas, including plaintiffs' personal injury, insurance defence, real estate, family law, estate, trust and probate.¹⁸⁰ Only 15 per cent of all claims are brought against larger firms – those with 40 or more lawyers – which may indicate that growth in firm size increases the likelihood of insurance coverage and an ethical infrastructure to prevent or cure potential

claims.¹⁸¹ Most claims allege substantive errors of law or administrative error.¹⁸² Viable allegations of conflict of interest in garden-variety negligence cases present major hurdles for effective defence.¹⁸³

Several factors may account for the expanded liability risks. The growing consumer movement corresponded with an increase in the number of lawyers and competition among them.¹⁸⁴ Public opinion polls in recent decades show sizeable drops in the profession's reputation for honesty, veracity and ethics.¹⁸⁵ When lawyers were fewer in number, fraternal collegiality viewed legal malpractice as an unpopular cause in which it was difficult to find a lawyer willing to bring a claim or to find an expert willing to testify that another lawyer had violated the accepted standard of care. Even today, when the prospective plaintiff can find a lawyer willing to take a case and break the 'conspiracy of silence', otherwise viable claims are dropped when it appears the malfeasant lawyer is uninsured and effectively judgment proof.¹⁸⁶ Smaller claims also fall through the cracks when a low likely recovery leaves little financial incentive to bring suit. Some observers assert that appellate judicial decisions by judges who rose through the ranks of local practitioners and selected with lawyers' political and financial support perpetuate protectionist doctrines, imposing difficult barriers to recovery.¹⁸⁷

The underlying substantive law in the United States has changed notably in recent decades. Evolutionary development of the law governing lawyers, including successive drafts of the Model Rules of Professional Conduct, the Restatement (Third) of the Law Governing Lawyers and expanded case law allowing potential recovery improves the likelihood prospective claimants can find a lawyer willing to sue – if the damages are large and the prospective defendant maintains adequate malpractice insurance.¹⁸⁸ Influential scholarship supports expanded theories of liability.¹⁸⁹ Breach of fiduciary duty and breach of contract claims are on the rise.¹⁹⁰ Economic downturns prompt disappointed clients and non-clients to search for deep pockets to cover their losses from high-risk matters.¹⁹¹

Knowledgeable observers maintain that malpractice carriers provide the most effective means of regulating US lawyers today.¹⁹² Carriers, who must indemnify for any claims within the scope of coverage, have first-hand ability to educate and affect the conduct of the lawyers they insure. They provide ongoing education on loss prevention through good management structure, starting with the initial application and premium and then repeated through annual renewals and rates based on a firm's claim history. They issue regular newsletters and consultations aimed to prevent claims, provide guidance and active assistance to cure a potential claim and further educate their insureds during the defence of claims brought.¹⁹³ Carriers have the greatest ability to interface with those they insure, to establish workable ethical infrastructures suitable for the firm's size and practice areas. Their enforcement mechanism is based on money and business models, not hortatory reference to high moral ethics.

There is little reliable data on the number of uninsured or under-insured practising lawyers whose conduct risks exposure to malpractice liability.¹⁹⁴ The 1992 McKay Report recommended that states consider whether to compel malpractice insurance.¹⁹⁵ Oregon remains the only US jurisdiction that compels malpractice

coverage as a condition of licensure.¹⁹⁶ The Oregon experience has achieved notable success at providing affordable coverage to lawyers and appropriate claims handling and resolution, reserving defence costs for significant claims warranting such expenditures. Its captive carrier starts out charging each lawyer the same annual premium, with later adjustments based on actual claims experience.¹⁹⁷

Present discussion of compulsory insurance has shifted to a debate on whether lawyers must reveal whether they maintain a minimum level of liability coverage and to whom that must be disclosed.¹⁹⁸ Twenty-five jurisdictions now require lawyers to disclose in some manner whether they maintain a minimum level of professional liability insurance, either on bar registration statements or directly to prospective clients. Five jurisdictions have rejected proposed compulsory disclosure rules.¹⁹⁹

In the aftermath of the current economic crisis, legal professionals worldwide can expect unprecedented liability claims against lawyers and other advisers connected to the massive frauds perpetrated on investors and home buyers. While actual recovery remains doubtful, to avoid future recurrences, regulators in the United States and elsewhere must provide better oversight, with fair and impartial mechanisms through which claimants can seek redress without expensive litigation costs. Liability must become recoverable through malpractice insurance.

2.5 Riding the wave of regulatory reforms

2.5.1 The importance of context

The dynamic process through which smaller-scale experiments in New South Wales and Queensland have taken hold has enjoyed proven success, inspiring nationwide reforms in the federation of Australia and elsewhere. Besides the United Kingdom, recent legislation in New Zealand, Scotland and the Republic of Ireland has also authorized the creation of a complaint handling structure. While there are significant differences among the new organizations, the local reforms indicate that the status quo is not an option: principles of consumer protection and competition have taken hold, indelibly changing traditional concepts of professionalism. Rather than resist change, to remain competitive in the global marketplace, the US legal profession must realize that these regulatory reforms do not conflict with core professional values. The pending changes encourage market innovations that allow new forms of practice, enhanced access to lower cost, competent services and improved consumer protection.²⁰⁰

Demographics and historical context affect a jurisdiction's ability to experiment. Experimentation is more feasible in newer jurisdictions with smaller numbers of affected persons.²⁰¹ If they are successful, localized experiments can be replicated elsewhere, with modifications to reflect differences in law, culture and political realities. Federalism principles in the United States have long respected the role of local jurisdictions to serve as 'incubators' for law reform efforts on matters not pre-empted by federal regulation. For example, federal environmental

law sets national standards, delegating to the states responsibility for more specific regulation and implementation.²⁰²

Compare the differing contexts of Australia, the United Kingdom and the United States. To some extent, each country has a public persona that also may be reflected in their legal professions. Australia's government is the youngest, with the country becoming a federation in 1901. Although its landmass is comparable in size to that of the United States, its population of 21 million includes about 6,600 barristers and solicitors concentrated in the more populous states of New South Wales, Victoria and Queensland.²⁰³ The Australian federal government has authority over national issues but respects the autonomy of states and territories on local matters. With its vast expanses of territory, Australian popular culture portrays images of adventurous explorers willing to try new things.²⁰⁴ Perceiving that Australia is 'over-lawyered', its top-tier firms reportedly have adopted entrepreneurial strategies to internationalize, forming strategic alliances or referral systems and considering outside investors. Changes in the federal and state regulatory structures discussed in the first section of this chapter have facilitated these efforts.²⁰⁵ Commissioner Steve Mark:

truly believe[s] that the legal ethics sky has not fallen in Australia. 'The NSW experience has clearly shown that the practice of law can be regarded as both a profession and a business and in ILPs we witness the overt merger of the two roles. I am convinced that in NSW, chicken little has survived!'²⁰⁶

In contrast to that of Australia, the UK legal system developed over 1,000 years, with incremental changes resulting from historical accidents and entrenched social stratification based on class, heritage and wealth.²⁰⁷ The United Kingdom's general population exceeds 60 million, with 140,000 legal professionals contained in a relatively small land mass. Parliament has long regulated some aspects of the legal professions, with input from the judicial branch. Parliamentary sovereignty confers unfettered legislative authority, not subject to an overriding power of judicial review. This could change dramatically with the new UK Supreme Court and other actions within the European Union to promote competition.

Finally, consider the United States, which declared independence from Britain in 1776. The young nation expanded westward, fostered by rugged individualism and entrepreneurial spirit. The Constitution established a federal government of limited powers; it reserved to the states or citizens all powers not specifically delegated.²⁰⁸ Because lawyer regulation is balkanized, significant local differences warrant criticism that some regulatory entities are ineffective, poorly funded, politicized or do not adequately protect legitimate consumer interests. Entry to the legal profession is open to all who qualify by education, bar examination and proof of character, regardless of class, family of origin or wealth. In practical terms, this means that over 1 million lawyers for its population of 300 million reflect great diversity in demographics, political and economic views. Licence to

practise in a jurisdiction permits one to engage in the full range of tasks broadly defined as the practice of law, without the need for specialist training, but only in that jurisdiction or as authorized for temporary practice under local rules. Although there have been some federal intrusions on the regulatory autonomy of individual jurisdictions, the organized bars and state judiciary have resisted any comprehensive federal reforms. In the globalized legal marketplace, this also has hampered the ability of US trade negotiators to speak collectively on behalf of the nation's lawyers.²⁰⁹

This discussion warrants a brief comment on the reciprocal perceptions of US and UK lawyers, as it were, across the pond. While broad generalizations are fraught with danger, it can be said there is some mutual ambivalence. US lawyers observe with bemusement barristers' stodgy rules of etiquette and court attire of wigs and robes. They respect the barrister's professional independence, unsullied by client contact or fee collection, but do not understand the sole practitioner model of barristers' chambers and trade restrictions that prohibit familiar US forms of practice among different categories of legal professionals. US lawyers probably relate better to the diverse legal tasks performed by solicitors, acknowledging the business aspects of their practice, but do not understand the complex rules limiting solicitors' rights of audience in all levels of courts. On the other hand, many UK lawyers perceive that the United States has too many generalist lawyers who are overzealous or motivated by greed, with great variance in their litigation skills and courtroom etiquette. UK law reform discussions often include statements wishing to avoid changes that could deteriorate into unruly American-style litigation and unprofessional conduct. Where US lawyers resoundingly rejected the concept of multi-disciplinary practices, professional regulators and many practitioners in Australia and the United Kingdom warmly embrace the economic benefits of allowing such innovations.

2.5.2 What drives regulatory reforms?

The UK Legal Services Act 2007 must be viewed in the greater context of social reforms geared to modernize and democratize the nation, to erode unwarranted distinctions based on heritage and social class and to streamline an unwieldy government bureaucracy. Competition law, consumer protection and meritocracy are core principles underlying the greater reform agenda. Since Lord Mackay's 1989 Green Paper, earlier attempts to achieve sweeping reforms have failed in the legislative process, thwarted by powerful segments of an entrenched profession. Viewed in context, some of the LSA 2007 reforms are nothing short of breathtaking, creating a streamlined co-regulatory structure that aims to modernize the profession, enhance affordable access to legal services and expand the scope of available services. Because oversight regulation will now reside in a single nationwide entity working in cooperation with other stakeholders, the Act holds great potential to accomplish sweeping reforms that will give UK lawyers a strong competitive edge in the globalized legal market. Some forecast that competitive advantages from the LSA will further enhance London's role in international legal practice.

The United Kingdom's membership in the European Union (EU) has provided additional impetus for change. Although traditional lawyer regulation has been within the province of individual European states, the EU has played an important role 'in shaping the contours of contemporary European legal practice', with some recent proposals 'nothing short of breath-taking'.²¹⁰ The EU aims to create a single market, facilitating circulation of goods and services among member states and limiting artificial trade restrictions. Its Parliament is authorized to enact legislative directives requiring member states to achieve a particular result, giving members flexibility on the choice of form and methods by which the directive should be accomplished.²¹¹ In areas outside its exclusive competence, the principle of subsidiarity limits its authority to take legal or regulatory action 'unless action at the EU level would be more effective than action at the national, regional or local level'.²¹² EU lawyers now have much greater cross-border mobility than those in the United States. Directive 77/249 generally allows EU lawyers to provide temporary services in other member states. Directive 98/5 more broadly permits EU lawyers to become permanently established in another state after three years of practice and compliance with minimal registration requirements.²¹³ In 2002, the European Court of Justice held that activities of a European bar association constitute economic activity subject to EU anti-trust law.²¹⁴ While the potential reach of EU competition law to the service professions remains uncertain, it further supports the new UK regulatory reforms.

2.5.3 Portability to the United States?

US federalism principles consistently resist comprehensive national regulation on matters traditionally reserved to the states.²¹⁵ Although the organized bar has managed to forestall the loss of state-based regulation, nationalized federal oversight remains a possibility if its leaders do not respond to the 'paradigm-shifting developments' concerning the increasingly international nature of the legal profession.²¹⁶ Since 1987, the number of US lawyers working in international offices of US firms increased tenfold, to 15,000. Between 1993 and 2003, the dollar value of US exported legal services rose by 134 per cent, but the value of legal services imported to the United States rose by 174 per cent.²¹⁷

Is portability to the United States of the international reforms feasible? Yes, especially considering the adverse effect of doing nothing. Besides disadvantaging US lawyers in the international marketplace, the balkanized status risks criticism as arcane, self-interested and disserving the public interest. Harvard Law School Professor Howell Jackson acknowledged envy of his:

academic and regulatory counterparts working in other jurisdictions. While the United States prides itself in having a dynamic economy that fosters innovation, the country's capacity to reform the structure of its regulatory institutions pales in comparison to the ability of [EU member states and Australia] ... to modernize their regulatory bodies ... [The US] national taste for federalism ... and aversion to concentrated sources of governmental

power ... [explains overlapping and fragmented systems of state and federal oversight of the financial services sector] ... On top of these latent political preferences and historical accidents, the political impediments inherent in our divided and increasingly partisan political system ... a national predilection to review any idiosyncratic aspect of governmental structure as a manifestation of American exceptionalism, and one can develop a relatively rich though not always inspiring explanation of why the American system of financial regulation has strayed so far from the models of supervisory oversight upon which the rest of the world is converging.²¹⁸

The Australian and UK reforms provide valuable templates adaptable to the US constitutional structure and commitment to state-based regulation. EU directives and principles of subsidiarity are analogous to US principles of federalism, encouraging local autonomy and experimentation to achieve particular nationalized results. Despite periodic threats to federalize lawyer regulation, most knowledgeable observers would concede a nationalized lawyer regulatory agency would be unwieldy and ineffective. In considering the way ahead, US regulators and state courts should look closely at the Australian and the UK reforms, and begin constructing independent state regulatory entities with collaborative, co-regulatory regime that aims at deterrence through education, management-based regulation and consumer protection backed by redress.

The United States has a strong federal interest in eliminating anti-competitive professional restrictions that interfere with access to competent legal services and in requiring that states provide reasonable consumer protection mechanisms. Congress should not try to nationalize lawyer regulation. Instead, this moment in history presents an excellent opportunity for Congress to enact legislation encouraging cooperative federalism, requiring that state regulatory entities satisfy specific minimum standards of independence, competence and access to justice. States should be encouraged to experiment with co-regulatory models designed to achieve those ends. As Congress addresses the financial difficulties made possible by regulatory lapses, it should enact a Legal Services Act requiring each local regulatory entity, at a minimum, to do the following:

- 1 Mandate separation of regulatory and trade functions of state-based lawyer entities. Unified bar states that maintain control over lawyer discipline should promptly implement McKay Recommendation 5, creating a separate, independent regulatory entity controlled and managed exclusively by the highest state court, with assurance of its economic and political independence.
- 2 Create national standards setting minimum levels of compulsory malpractice insurance for lawyers who deliver services to private clients.
- 3 Require local lawyer regulatory entities to establish workable, unbiased mechanisms to evaluate and issue binding orders for claims of redress against US lawyers with a stated minimum cap on recovery.
- 4 Encourage state regulatory entities to experiment with management-based regulation and compliance through education by using their version of ABA

Model Rule 5.1(a), to require that partners 'make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance' that the firm conforms with the rules. Internal audit procedures should be implemented, encouraging cooperative and collaborative relations between firms and state regulators.

- 5 Direct federal and state competition authorities to examine ethical restrictions that may present unreasonable restraints on trade and require that lawyer regulators provide justification on their necessity. Congress should consider narrowing permissible exemptions to anti-competitive regulations under the state action doctrine.

In view of the innovative reforms in Australia, the United Kingdom and elsewhere, leadership of the US legal profession must join the international movement to advance regulatory reforms that improve the quality of and access to legal services, relax unnecessary trade restrictions and provide meaningful consumer protection for clients falling within the huge gap left by the US discipline-civil liability dichotomy.²¹⁹ State-based lawyer regulators must move beyond a narrow focus on punishing miscreants, moving ahead to improve consumer protection with systems of redress. Those with authority over the leadership of US regulators may perceive broad-based reform as daunting and politically unfeasible. Australia's regulatory innovations have demonstrated the effect of deterrence through education, improving the quality of legal services. For years, the UK legal professions used political clout to forestall meaningful regulatory reforms. If the LSA 2007 fulfils its potential, it will be powerful proof that the status quo is not set in stone. In both Australia and the United Kingdom, reform continues to be a work in progress; more ambitious reforms are being realized only after it has become clear that incremental reforms have been ineffective. The legal profession can benefit greatly from the new governance paradigm, with multi-tiered co-regulation, collaboration and adaptability for future situations. That, indeed, can be the new wave of professionalism for lawyers.

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- 107 *ibid.*, cl. 127.
- 108 *ibid.*, cl. 102(4).
- 109 See, for example, ‘Law Society will keep place as top legal body, vows chief’, *Birmingham Post*, 27 May 2005 (stating that the Law Society pre-empted the Clementi Report recommendations, to provide for separate functions from 2008). ‘Solicitors Regulation Authority, newly created entity, describes its functions, focus group findings on consumers views of solicitor regulation, and announcing new consultations open for comments’, see Solicitor Regulation Authority website: <www.sra.org.uk/consumers/consumers.page> (accessed 20 November 2009).
- 110 C. Whelan, ‘The paradox of professionalism: Global law practice means business’, *Pennsylvania State International Law Review*, 2008, vol. 28, 486–87.
- 111 *ibid.*, p. 488 (discussing independence concerns of Flemish Bar and Law Society of Zimbabwe).
- 112 The Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) established a Scottish Legal Complaint Commission to deal with all service complaints starting 1 October 2008; all conduct complaints will be referred without investigation to the Bar or Law Society. The Legal Services Ombudsman (Eire) Act, enacted 10 March 2009, creates the office of the Legal Services Ombudsman charged with oversight of complaint handling by the Bar Council and Law Society and reporting annually on the adequacy of both professions’ admissions policies. The Irish statute appears to create a Legal Services Ombudsman similar to that repealed by the new Legal Services Act 2007 (UK).
- 113 Whelan, ‘The paradox of professionalism’, 488–91.

- 114 Legal Services Act 2007 (UK), Sch. 1, ss. 1–2.
- 115 *ibid.*, s. 3.
- 116 *ibid.*, Pt. 3, s. 3(3).
- 117 *ibid.*, s. 30.
- 118 *ibid.*, ss. 12–19.
- 119 *ibid.*, ss. 20–21, 27–45.
- 120 *ibid.*, ss. 49–50.
- 121 *ibid.*, ss. 32, 41, 49(1)–(4).
- 122 *ibid.*, ss. 8–11.
- 123 *ibid.*, ss. 57–61.
- 124 *ibid.*, ss. 6, 118–22 (Board oversight over OLC).
- 125 *ibid.*, Ch. 29, s 113.
- 126 *ibid.*, s 126(1).
- 127 *ibid.*, ss. 112, 128, 131.
- 128 *ibid.*, ss. 137, 138(1).
- 129 *ibid.*, s. 137(5).
- 130 *ibid.*, ss. 113(2)(b).
- 131 *ibid.*, ss. 133(4).
- 132 *ibid.*, s. 134.
- 133 *ibid.*, s. 140.
- 134 *ibid.*, ss. 141–42.
- 135 *ibid.*, s. 136.
- 136 Legal Services Board, *Business Plan 2009/10*. Available from: <www.legalservicesboard.org.uk/news_publications/publications/pdf/business_plan_2009_10.pdf> (accessed 20 November 2009).
- 137 Chief Ombudsman Adam Sampson and the new board members assumed responsibilities on 1 July 2009.
- 138 For example, Elizabeth France served as Chief Ombudsman and executive of Ombudsman Service Ltd (TOSL), providing an ombudsman service for telecommunications, energy and surveyors. See <www.legalservicesboard.org.uk/about_us/office_for_legal_complaints/olc_board/elizabeth_france.htm> (accessed 20 November 2009). Mary Seneviratne has published extensively about the ombudsman role and operations.
- 139 D. Edmonds, speech given at the Institute of Legal Cashiers and Administrators Annual Luncheon, 23 September 2009. Available from: <www.legalservicesboard.org.uk/news_publications/speeches_presentations/2009/pdf/speech230909.pdf> (accessed 20 November 2009).
- 140 *ibid.*
- 141 The Law Society has established an independent entity, the Legal Complaints Service for complaint handling in the interim until the OLC Ombudsman scheme takes over.
- 142 ‘New faces at Law Society to drive change’, media release, 4 December 2007. Available from: <www.epolitix.com/stakeholder-websites/press-releases/press-release-details/.newsarticle/new-faces-at-law-society-to-drive-change/sites/law-society> (accessed 20 November 2009); Legal Regulation Review. Available from: <www.legalregulationreview.com> (closed on 9 April 2009 with report to follow autumn 2009); Review of the Regulation of Corporate Legal Work. Available from: <www.legalregulationreview.com/files/report_smedleyfinal.pdf> (accessed 20 November 2009).
- 143 Model Rules of Professional Conduct, Preamble [11](ABA 2007).
- 144 See, for example, M. Devlin, ‘The development of lawyer disciplinary procedures in the United States’, *Georgetown Journal of Legal Ethics*, 1994, vol. 4, 918, 928–32. See also C. Wolfram, *Modern Legal Ethics*, St Paul, MN: West Publishing Co., 1986, pp. 33–34 (stating that: ‘In fact, courts serve as the largely passive sounding boards or disapprovers of initiatives that are taken by lawyers operating through bar associations’)

- and that, regardless of functional differences between mandatory and voluntary bars, 'bar associations exercise pervasive influence over bar admission and discipline'). Reforms after the American Bar Association 1992, *Lawyer Regulation For a New Century, Report of the Commission on Evaluation of Disciplinary Enforcement* (hereafter 'McKay Report'), Appendix B. Available from: <www.abanet.org/cpr/reports/mckay_report.html> (accessed 20 November 2009), note 23, may have lessened the extent to which lawyers' involvement in the regulatory process was 'merely as representatives of the profession'; '[i]n recent years ... there has been noticeable movement toward lessening the self-regulation features ... [with] the bodies making disciplinary recommendations through appointment by the state courts ... [while references to passive supervision by supreme court courts remain accurate, one] should not infer that the task of supervision is always being exercised by lawyers acting solely in their private capacity.' A. Kaufman and D. Wilkins, *Problems in Professional Responsibility for a Changing Profession*, Durham, NC: Carolina Academic Press, 2009, p. 631.
- 145 See generally, F. Zacharias, 'The "self-regulation" misnomer', in K. Tranter et al. (eds), *Reaffirming Legal Ethics*, London: Routledge, 2009 (arguing to replace misnomer with more accurate terms, distinguishing between self-regulation as individual self-restraint, collective self-monitoring or self-policing, external non-judicial institutions authorized by statute or administrative regulation, judicial implementation of civil (and criminal?) law). Notable examples of external agency regulation are the Internal Revenue Service, Office of Thrift Supervision, and Securities and Exchange Commission. See T. Schneyer, 'How things have changed: Contrasting the regulatory environments of the Canons and the Model Rules', *Journal of the Professional Lawyer*, 2008, vol. 18, 161.
- 146 See, for example, ABA Standing Committee on Client Protection, *State by State Adoption of ABA Client Protection Programs* (11 June 2007) (indicating that 23 states provide mediation of non-fee disputes, 12 states have mandatory fee arbitration and 37 require notification of trust account overdrafts). Available from: <www.abanet.org/cpr/clientpro/statebystate_cp_programs.pdf> (accessed 20 November 2009).
- 147 See, for example, Devlin, 'The development of lawyer disciplinary procedures', 918, 928–32. See also Wolfram, *Modern Legal Ethics*, pp. 33–34 (stating that '[i]n fact, courts serve as the largely passive sounding boards or disapprovers of initiatives that are taken by lawyers operating through bar associations' and that, regardless of functional differences between mandatory and voluntary bars, 'bar associations exercise pervasive influence over bar admission and discipline'); *In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998); *In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is universally accepted and dates back to the thirteenth century).
- 148 See *Restatement of the Law Governing Lawyers* s1 cmt.c. (noting that, while some state courts maintain their constitutional power, regulating lawyers is exclusive and required by separation of powers, some decisions invoke principles of comity in giving effect to legislation or regulations extending to lawyers).
- 149 See, for example, *Petition of New Hampshire Bar Ass'n*, 855 A.2d 450 (NH 2004) (finding unconstitutional a state statute requiring a bar association to conduct and be bound by membership referendum on unification; the statute directly conflicts with long-standing court ordered unification); *In re Examination of the Washington State Bar Ass'n*, 548 P.2d 310 (Wash. 1976) (reaffirming exclusive and inherent power of a state Supreme Court to admit, enrol, disbar and discipline attorneys; holding that the unified Bar was not a state agency or department subject to audit of revenues pursuant to legislative authority granted state auditor). See also Q. Johnstone, 'An overview of the legal profession in the United States, how that profession recently has been changing, and its future prospects', *Quinnipiac Law Review*, 2008, vol. 26, 749 at n. 40 (noting that many state courts claim superior regulatory authority over lawyers, either under inherent authority or as expressly conferred in the state constitution).

- 150 See, for example, *People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E. 2d 941, cert. den. 302 U.S. 728, reh. den. 302 U.S. 777; *In re Integration of Nebraska State Bar Association*, 275 N.W. 265 (Neb. S. Ct. 1937); *Washington State Bar Ass'n v. State*, 890 P. 2d 1047 (Wash. 1995).
- 151 See L. Lerman and P. Schrag, *Ethical Problems in the Practice of Law*, Aspen: Wolters Kluwer, 2008, pp. 25–26; American Bar Association, *Division for Bar Services*. Available from: <www.abanet.org/barserv/stlobar.html> (accessed 20 November 2009) (US map showing 18 states with voluntary state bars, and all remaining jurisdictions with unified bars); American Bar Association, *Chart on Unified Bars* (listing 32 unified bar states plus the unified District of Columbia Bar, and 18 non-unified bar states) (17 September 2007). See also Devlin, 'The development of lawyer disciplinary procedures', 933–34 (stating that, of the 33 unified bar jurisdictions, 12 maintain a separate lawyer disciplinary agency; in the 18 non-unified, or voluntary bar states, lawyers are regulated by the highest state court, administered through an agency of the court).
- 152 Q. Johnstone, 'Bar associations: policies and performance', *Yale Law and Policy Review*, 1996, vol. 15, 197; L. Rector, 'Compelled financial support of a Bar association and the Attorney's First Amendment rights: A theoretical analysis', *Nebraska Law Review*, 1996, vol. 66, 763–64 (indicating when various state Bar associations became unified and the type of authority invoked to accomplish this). For cases invoking inherent power doctrine, see *In re Integration of State Bar of Oklahoma*, 95 P.2d 113, 115 (Okla. 1939) (granting a petition to integrate, or unify, the Oklahoma State Bar Association, pursuant to the inherent power and exclusive final authority of the court, which included 'inherent right of the court to surround itself with honest assistants who are sympathetic and will unite with it in the proper administration of justice'); *In re Integration of the Nebraska State Bar Ass'n*, 275 NW 265 (Neb. 1937) (exercising sound discretion of inherent power to approve the formation of integrated (unified) bar association; more effective and efficient regulation would result from a cooperating bench and bar, provided that the court retains final and exclusive authority over the admission and discipline of lawyers). See also *ABA/BNA Lawyers' Manual on Professional Conduct* ss. 201: 101–4 (24 July 1996).
- 153 Dissenting members may have limited claim to refunded bar dues: *Keller v State Bar of California*, 496 US 1 (1990).
- 154 ABA, *Chart* (identifying the 12 unified bars that do not oversee lawyer discipline as Hawaii, Louisiana, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina and Wisconsin).
- 155 ABA, *Map* (identifying as regional cluster of voluntary bar states, including Maine, Vermont, Massachusetts, New York, New Jersey, Delaware, Pennsylvania, Ohio, Indiana, Illinois, Iowa and Minnesota, with non-contiguous Tennessee, Arkansas, Kansas and Colorado). Among the North Atlantic states, only New Hampshire and Rhode Island have unified bars. The historical and political reasons for this distribution are beyond the scope of this work.
- 156 T. Schneyer, 'The incoherence of the unified bar concept: generalizing from the Wisconsin case', *American Bar Foundation Research Journal*, 1983, vol. 1.
- 157 J. Pribek, 'Bar experts discuss merits of mandatory, voluntary bars', *Wisconsin Law Journal*, 13 July 2005 (discussing failed legislative efforts for moves to voluntary bar in Florida and New Hampshire, pending effort in Wisconsin); J. Zemlicka, 'Mandatory membership debate in Wisconsin heats up prior to committee meeting', *Wisconsin Law Journal*, 25 August 2008 (WLN 16671510). See also Oklahoma Bar Association, 'E-News special legislative edition', email (19 February 2009): email to members on proposed legislation that would (a) make bar membership voluntary, and (b) amend the state constitution requiring that the bar Association submit to legislature for approval any proposed rules of professional conduct, admission to practice, rules of judicial conduct and state court rules. Both measures died in committee without coming up for a vote.

- 158 Wolfram, *Modern Legal Ethics*, p. 79. Fred Zacharias asserts that the orientation of disciplinary agencies (as client-centred; lawyer-centred; profession-centred; or process-centred) impacts their choice of goals (for example, remedy for private or public harms, punishment, deterrence) and the need to assess and prioritize their goals. F. Zacharias, 'The purpose of lawyer discipline', *William and Mary Law Review*, 2003, vol. 45, 681, 693–98.
- 159 *Restatement (Third) of the Law Governing Lawyers* s 1 cmt. d (2000).
- 160 American Bar Association Special Committee on Evaluation of Disciplinary Enforcement (Tom C. Clark, Chairman), *Problems and Recommendations in Disciplinary Enforcement* (Final Draft, June 1970), p. 1. See also, V. Johnson, 'Justice Tom C. Clark's legacy in the field of legal ethics', *Journal of the Legal Profession*, 2004–5, vol. 29, 33 (discussing substantial advances in legal ethics and professionalism over the last 35 years).
- 161 E. Steele and R. Nimmer, 'Lawyers, clients, and professional regulation', *American Bar Foundation Research Journal*, 1976, 942 (reporting a 203 per cent increase in the rate of disciplinary expenditures, from the 1968–69 rate of \$5.85 per lawyer to the 1974–75 rate of \$17.73 per lawyer; the consumer price index increased by 43 per cent during that period). See also Steele and Nimmer, 'Lawyers', 925, 946–62, 1009–13 (discussing client complaints and limited Bar response in terms of creating dispute resolution formats).
- 162 See, for example, D. Rhode, *In the Interests of Justice: Reforming the Legal Profession*, Oxford: Oxford University Press, 2000, pp. 158–63; A. Blumenthal, 'Attorney self-regulation, consumer protection, and the future of the legal profession', *Kansas Journal of Law and Public Policy*, 1993–94, vol. 3, 6; F. Marks and D. Cathcart, 'Discipline within the legal profession: Is it self regulation?', *University of Illinois Law Forum*, 1974, 193; S. Martyn, 'Lawyer competence and lawyer discipline: Beyond the Bar?', *Georgetown Law Journal*, 1980–81, vol. 69, 705; B. Garth, 'Rethinking the legal profession's approach to collective self-improvement: Competence and the consumer perspective', *Wisconsin Law Review*, 1983, 639. See also, P. Hannaford, 'What complainants really expect of lawyer disciplinary agencies: Lessons from the Virginia State Bar Complainant Satisfaction Survey', *Journal of the Professional Lawyer*, 1996, vol. 3, 1–7 (most disciplinary complaints concern 'the fundamentals of human relationships: communication, courtesy and forthright dealings with one's clients, the courts and opposing counsel'. Quoting Michael Rigsby, Bar Counsel for Virginia State Bar; an empirical survey of complainants revealed that those who viewed the process as 'a means to prompt respondents to react' to their demands were 'quite satisfied', yielding 3.82 average on a five-point scale; complainants who expected the agency 'to investigate suspected lawyer misconduct' were least satisfied, with an average rating of 2.09, perhaps reflecting their perspective that the process does not treat 'both the complainant and the respondent in a manner that is objectively fair'; those complainants who expected the agency 'to impose sanctions on respondents' ranked overall satisfaction as 2.46, with differences based on the severity of sanction imposed; 3.52 average for those resulting in mild sanctions and 3.13 for severe sanctions, likely influenced by other factors, such as thoroughness of investigation and overall fairness of outcome). See also D. Rhode, 'Institutionalizing ethics', *Case Western Reserve Law Review*, 1995, 694–95. (Besides resource constraints that lead agencies to decline jurisdiction over abuses for which there is theoretically a civil remedy available, 'industry capture' of the process grants the profession almost exclusive control over the process.)
- 163 McKay Report, Appendix B. See generally, Devlin, 'The development of lawyer disciplinary procedures', 931–33 (discussing the history of lawyer discipline and highlighting key recommendations of the McKay Commission: recommending the highest level judiciary's control rather than that of elected Bar officials; central intake; random audits of trust accounts; and, 'perhaps the most controversial ... to make disciplinary matters public from the time of the complainant's initial contact with the agency'). Devlin, 'The development of lawyer disciplinary procedures', 931.

- 164 McKay Report, Appendix C.
- 165 *ibid.*, Appendix D, Complete Text of Recommendations as Adopted by the House of Delegates (February 1992) (hereafter ABA McKay Recommendations).
- 166 *ibid.*, including recommendations 3.1(f), (g), 4, 9, 10, 12. See ABA Commission on Lawyer Assistance Programs, *Directory of CoLAP Programs*. Available from: <www.abanet.org/legalservices/colap/lapdirectory.html> (accessed 20 November 2009); B. Melendez, *The Affiliate, YLD (2000–2001), An Alternative to Traditional Discipline for Minor Misconduct: Disciplinary Diversion* (stating that about one-third of surveyed jurisdictions had adopted or were experimenting with diversion programmes in the four years since the ABA amendment to the ABA Model Rule for Disciplinary Enforcement, Model Rule 11(G) provided for alternatives to discipline). Available from: <www.abanet.org/yld/affiliate/jan98/23-3-5.html> (accessed 20 November 2009).
- 167 Results of an informal survey in 2003 by the National Organization of Bar Counsel indicated that at least 14 states reported having some type of central intake system. See National Organization of Bar Counsel, *Chart, Survey of States: Central Intake Systems* (undated, copy with author).
- 168 See, for example, ABA Standing Committee on Client Protection, *State by State Adoption of ABA Client Protection Programs* (11 June 2007) (indicating that 23 states provided mediation of non-fee disputes; 12 states had mandatory fee arbitration and 37 required notification of trust account overdrafts). Available from: <www.abanet.org/cpr/clientpro/statebystate_cp_programs.pdf> (accessed 20 November 2009).
- 169 See, for example, National Organization of Bar Counsel, *Chart* (21 of 32 Unified Bar States and the District of Columbia oversee lawyer discipline). See also T. Schneyer, 'The incoherence of the unified bar concept: generalizing from the Wisconsin case', *American Bar Foundation Research Journal*, 1983, vol. 1 (finding states with unified bars slower than voluntary bar states to implement regulatory programmes benefiting consumers); B. Smith, 'The limits of compulsory professionalism: How the unified bar harms the legal profession', *Florida State University Law Review*, 1994, vol. 22, 35 (claiming that voluntary bar states are at the 'forefront of consumer oriented legal reform' and that compulsory membership is divisive to the profession). Smith, 'The limits', 37.
- 170 ABA MRLDE 16 and ABA McKay Recommendation 7, and ABA Center for Professional Responsibility Chart on Access to Disciplinary Proceedings (showing that 36 jurisdictions allow public access after probable cause finding; only three jurisdictions allow public access either upon finding of probable cause or dismissal of probable cause; only Oregon provides that initial complaints are open to public inspection on request). Cf. L. Levin, 'The case for less secrecy in lawyer discipline', *Georgetown Journal of Legal Ethics*, 2001, vol. 20, 1: 49–50 (arguing for earlier public access to information, after initial screening decision and shortly after complaint is docketed, and 'to learn ... that a lawyer had a complaint against him summarily dismissed (as well as the reasons for dismissal), that he received a minor sanction, that he agreed to diversion, or that there was a probable cause determination'); S. Krane, 'Meet the Gundersons', *New York State Bar Journal*, 2001, vol. 73, 5 (stating that two-thirds of states open disciplinary proceedings, usually after probable cause determination, and criticizing continued secrecy in New York as unnecessary to protect the reputation of lawyers who are formally charged, but later cleared by dismissal or private censure).
- 171 T. Morgan, 'Real world pressures on professionalism', *University of Arkansas at Little Rock Law Review*, 2001, vol. 23, 420. See McKay Report, p. 18. See also A. Blumenthal, 'Attorney self-regulation, consumer protection, and the future of the legal profession', *Kansas Journal of Law and Public Policy*, 1993–94, vol. 3, 6 (discussing potential dramatic reform to a 'consumer-oriented disciplinary system' that might 'change from self-regulation to government regulation [which] could have significant and dire consequences for the role of the attorney in our legal system and for our entire society'). Blumenthal, 'Attorney self-regulation', 11, 15.

- 172 Morgan, 'Real world', 420.
- 173 Telephone Interview with James J. Grogan, Deputy Administrator and Chief Counsel, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois in Chicago, IL, 13 August 2008.
- 174 See 2006 ABA Survey on Lawyer Discipline Systems (SOLD), Charts I, IV; M. Frisch, 'No stone left unturned: The failure of attorney self-regulation in the District of Columbia', *Georgetown Journal of Legal Ethics*, 2005, vol. 18, 325 (reporting egregious delays and outcomes 'rife with favoritism').
- 175 See T. Schneyer, 'How things have changed: Contrasting the regulatory environments of the canons and the model rules', *Journal of the Professional Lawyer*, 2008, vol. 18, 185–87 (author's emphasis added). See also Paton, 'Between a rock and a hard place', 89 (dramatic regulatory changes resulting from confluence of 'scandal, strong political leadership and intense public scrutiny of lawyer conduct').
- 176 R. Mallen and J. Smith, *Legal Malpractice Vol. 1*, St Paul: West Books, 2007, pp. 19, 23; S. Rosner, 'A decade of professionalism', *Journal of the Professional Lawyer*, 1995, vol. 6, 2, citing R. Creamer, *Law Firm Limited Liability Entities*, APRL Midyear Meeting Materials (1995).
- 177 American Bar Association Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims 2000–2003* (2005) (hereafter 2000–2003 Profile), at tables 7 and 7A, p. 12, and summary at p. 16 (showing an increase of 0.14 per cent in claims in the period 1995–2003 where over \$250,000 in indemnity was paid to claimants, and a 'slight increase' over a 10-year period where claims settled for over \$2 million in indemnity). See also Mallen and Smith, *Legal Malpractice*, pp. 23, 66 (suggesting a 60 per cent increase in claims exceeding \$2 million since 1996).
- 178 Mallen and Smith, *Legal Malpractice*, p. 23; 2000–2003 Profile, p. 3 (explaining the limited utility of national malpractice claims data conducted by malpractice insurer groups, including significant variations among states; numbers only address insured lawyers and lack of information on claims against uninsured lawyers; there is also a spotty response by some carriers about claims and a caveat that no conclusions were drawn about the relative riskiness of different practice areas). The Standing Committee issued prior studies in 1985, 1995 and 1999. *ibid.* at 1. Data collection is underway for the next edition. Insurance carriers limit public availability of data on claims frequency, defence and indemnity costs because they consider proprietary the data used in underwriting and rate-setting. See also M. Ramos, 'Legal malpractice: Reforming lawyers and law professors', *Tulane Law Review*, 1995–96, vol. 70, 2584 at n. 2 (quoting R. O'Malley, of the Attorneys' Liability Assurance Society stating that in 1992 there were expenditures of \$3–4 billion a year for payouts, lost reserves, settlements and defence costs; this was 'at least five or six times' the cost 10 years earlier; M. Ramos, 'Legal malpractice: the profession's dirty little secret', *Vanderbilt Law Review*, 1994, vol. 47, 1679–82 (discussing the explosion in legal malpractice since the 1980s, with increased numbers of claims and severity as tip of the iceberg).
- 179 Ramos, 'Legal malpractice: Reforming lawyers', 2589. (The author admits that, during his extensive malpractice defence practice in California during the 1980s, he routinely 'conspired with lawyer-clients, plaintiffs' lawyers, plaintiffs, judges and insurance carriers by entering into confidential settlement agreements', leaving no public document showing fact of claim or settlement terms.)
- 180 2000–2003 Profile, table 1, p. 6 (reporting 29,637 claims made in the 2003 study, compared with 29,227 claims in the 1985 study; textual summary showing 5.86 per cent increase in claims against personal injury defence lawyers). See also *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 114 (5 March 2008) (panelists noted 'mushrooming' claims against insurance defence counsel, with actions by insured that often revealed 'shocking neglect ... perhaps stemming from a basic

- misunderstanding of client identity' and other suits lodged by insurers, excess insurers and reinsurers).
- 181 2000–2003 Profile, at 6.
- 182 *ibid.*, table 5, pp. 10, 17 (47 per cent substantive legal errors; 28 per cent administrative errors).
- 183 *ibid.*, p. 17.
- 184 See J. Maute, 'Scrutinizing lawyer advertising and solicitation rules under commercial speech and antitrust doctrines', *Hastings Constitutional Law Quarterly*, 1985, vol. 13, 487–535; Mallen and Smith, *Legal Malpractice*, p. 22.
- 185 Mallen and Smith, *Legal Malpractice*, pp. 54–55.
- 186 Ramos, 'Legal malpractice: reforming lawyers', 2602.
- 187 See B. Barton, 'An institutional analysis of lawyer regulation: Who should control lawyer regulation – Courts, legislatures, or the market?', *Georgia Law Review*, 2003, vol. 37, 1178–82, 1185–1204, 1209, 1246–47 (discussing preferential treatment given to lawyers by judges who came from their ranks; the high risk of industry capture; under-funding of disciplinary discipline, with institutional analysis leading 'inexorably to the conclusion that state supreme courts should not be in charge. These justices are too busy, too connected and sympathetic to lawyers, and too inaccessible to the public to do any more than allow bar associations and lawyers almost total control of the system. Legislative control, whether by state legislatures or Congress, will not eliminate the powerful influence of lawyers, but it will allow a healthy dose of public influence to enter the picture and may begin to reform the system'), 1246.
- 188 See S. Fortney and V. Johnson, *Legal Malpractice Law: Problems and Prevention*, Minneapolis: Thompson West, 2008, pp. 8–9 (discussing various reasons for expansion). Whether arbitration of fee disputes and malpractice claims provide meaningful recourse to clients is beyond the scope of this work. Some scholars and courts have raised concerns about the fairness of pre-dispute arbitration clauses, and about whether the private forum may reflect industry bias. See J. Dzienkowski, 'Legal malpractice and the multistate law firm: Supervision of multistate offices; firms as limited liability partnerships; and pre-dispute agreements to arbitrate client malpractice claims', *South Texas Law Review*, 1995, vol. 36, 995–96; L. Russo, 'The consequences of arbitrating a legal malpractice claim: Rebuilding faith in the legal profession', *Hofstra Law Review*, 2006, vol. 35, 327; *In re Akin Gump Strauss Hauer & Feld, LLP*, 252 SW 3d 480 (Tex. App. – Hous (14 Dist.) (2008) (upholding trial court confirmation of arbitration award between lawyers and sophisticated company, and denying lawyers' petition for mandamus to remand back to original arbitration panel); *LaFleur v Law Offices of Anthony G. Buzbee, PC*, 960 So.2d 105 (1st Cir. 2007) (holding unenforceable pre-dispute mandatory arbitration provision in retainer agreement with injured maritime worker). Compare *Schatz v Allen Matkins Leck Gamble & Mallory LLP* (2009) 87 Cal. Rptr.3d 700 (Cal.) (upholding pre-dispute arbitration agreement in retainer).
- 189 See, for example, J. Leubsdorf, 'Legal malpractice and professional responsibility', *Rutgers Law Review*, 1995, vol. 48, 101 (urging further development of legal malpractice doctrine beyond negligence law, to become integral part of system of legal regulation); N. Moore, 'Expanding duties of attorneys to "non-clients": Reconceptualizing the attorney–client relationship in entity representation and other inherently ambiguous situations', *South Carolina Law Review*, 1994, vol. 45, 659; Rhode, 'Institutionalizing ethics', 665, 695 (discussing the 'mismatch between client needs and regulatory responses'); ABA Standing Committee on Lawyers' Professional Liability, *Lawyer's Desk Guide to Legal Malpractice VIII* (1992).
- 190 See, for example, *Abramson v Wildman* 184 Md. App. 189, 964A.26730 (allowing restitution for fees paid based on a provision in the retainer agreement promising to 'be both sensitive and professionally responsive' to the client's situation in a custody dispute).
- 191 K. Kunzke and S. Anderson, 'They crash and you burn: When the stock market

- falls, you can count on malpractice risk to rise' (May 2002). Available from: <www.abanet.org/legalservices/lpl/downloads/journalmay02.pdf> (accessed 20 November 2009).
- 192 See generally A. Davis, 'Legal ethics and risk management: Complementary visions of lawyer regulation', *Georgetown Journal of Legal Ethics*, 2008, vol. 21, 95 (developing the claim that law firm risk management enhances careful ethical deliberation by individual lawyers); S. Fortney and J. Hanna, 'Fortifying a law firm's ethical infrastructure: Avoiding legal malpractice claims based on conflicts of interest', *St Mary's Law Journal*, 2002, vol. 33, 669; M. Bassingthwaite, 'Keep malpractice and disciplinary problems at bay', *Trial*, 2008, vol. 44, 34. See also Ramos, 'Legal malpractice: Reforming lawyers', 2601.
- 193 See Conference Report, 2008 Legal Malpractice and Risk Management Conference, reprinted in *ABA/BNA Lawyers' Manual on Professional Conduct*, 24 Current Reports 118 (5 March 2008) (speakers encouraging firms to state and implement core values; have firm's risk managers annually review claims history and look for common risk patterns; conduct in-house continuing education; involve top firm management; monitor for signs of trouble, including rogue or isolated lawyers and large outstanding receivables; conduct 'due diligence' before bringing in lateral associates or partners; and encourage periodic, random firm reviews); M. Skolnick, 'Lessons from recent Utah legal malpractice cases', *Utah B7*, 21, 2008, 28.
- 194 See, for example, D. Moss, 'Going bare: Practicing without malpractice insurance', *ABA7*, 1987, vol. 73, 82 (reporting statewide surveys indicating that at least 20 per cent of lawyers are uninsured, and many others 'who don't go bare may be wearing only a bikini'). See also J. Fischer, 'External controls over the American Bar', *Georgetown Journal of Legal Ethics*, 2008, vol. 19, 59, 64 n. 23 (reporting that 83 per cent of Illinois lawyers in private practice are insured; about 60 per cent of Pennsylvania lawyers are insured; about 90 per cent of Virginia lawyers carry insurance; and in other states the range is from 50–70 per cent of private practitioners carrying insurance). A knowledgeable observer put the number of Oklahoma uninsured lawyers at over 50 per cent. Email from Steve Dobbs to author confirming results of unscientific, anecdotal survey (on file with author).
- 195 McKay Report, note 23 above, Recommendation 18.
- 196 ABA Chart, State Implementation on Insurance Disclosure (as of November 16, 2009). Available from: <www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf> (accessed 4 December 2009). (stating that Oregon requires all lawyers to maintain professional liability insurance).
- 197 See Ramos, 'Legal malpractice: The profession', 1728–30. It appears that Oregon's mandatory coverage through a state-administered fund works reasonably well. Non-practising lawyers and patent attorneys are exempt from the requirement of at least \$300,000 in coverage. See N. Cunitz, 'Mandatory malpractice insurance for lawyers: Is there a possibility of public protection without compulsion?', *Georgetown Journal of Legal Ethics*, 1995, vol. 8, 651 (stating that the fund had substantial reserves and that there was 'not a notable increase in claims').
- 198 In August 2004, the ABA House of Delegates adopted a 'Model Court Rule on Insurance Disclosure'. Available from <www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf> (accessed 29 November 2009). For the status of adoption by the states, see ABA Standing Committee on Client Protection, *State Implementation of ABA Model Court Rule on Insurance Disclosure (as of April 19, 2010)*. Available from: <www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf> (accessed June 21, 2010 (hereafter, ABA Chart, State Implementation on Insurance Disclosure). See also *ABA/BNA Lawyers' Manual on Professional Conduct*, 25 Current Reports 200 (15 April 2009) (discussing opposing views on insurance disclosure rules, and listing Connecticut, Arkansas, Florida and Kentucky as having rejected mandatory disclosure rules).
- 199 ABA Chart, State Implementation on Insurance Disclosure. Four additional states

- are considering adoption of the ABA Model Rule on Insurance Disclosure. Eighteen jurisdictions allow public access to the disclosure of malpractice coverage contained in annual registration statement; seven jurisdictions require disclosure directly to the client. See also, E. Wald, 'Taking attorney-client communications (and therefore clients) seriously', *University of San Francisco Law Review*, 2008, vol. 42, 791, n. 213 (23 jurisdictions contemplated adopting ABA proposed revisions, resulting in a split, described above).
- 200 See generally A. Paterson, 'Professionalism and the legal services market', *International Journal of Legal Profession*, 1996, vol. 3, 149–58 (discussing renegotiation in terms of professionalism); C. Whelan, 'The paradox of professionalism', 492 (concluding emerging UK view that legal services can be viewed more like a business than profession and better regulated by the market than self-regulation); R. Pearce, 'The professionalism paradigm shift: Why discarding professional ideology will improve the conduct and the reputation of the Bar', *New York University Law Review*, 1995, vol. 70, 1229: 1266 ('The reinterpretation of business as a worthy endeavour, together with the acknowledgment that law practice has the characteristics of a business, suggest a new understanding of the framework for the delivery of legal services').
- 201 For example, after Alaska became a state, Alaska courts had the freedom to decide cases on a clean slate, unimpaired by precedent from older states.
- 202 See, for example, B. Rabe, 'North American federalism and climate change policy: American state and Canadian provincial policy development', *Widener Law Journal*, 2004, vol. 14, 152, 164 (urging 'accountable devolution' of federal standards to states with measurable accountability); A. Harrell, 'Commentary: The case for nonuniformity in state law', *Consumer Finance Law Quarterly Report*, 1997, 322–26 (discussing the history of states' service as incubators for legal and financial reforms dating back to the beginning of the republic).
- 203 US Central Intelligence Agency, *The World Factbook 2007*, pp. 38–39; Law Council of Australia, *Snapshot of the Legal Profession*, September 2004.
- 204 See generally B. Bryson, *In a Sunburned Country*, New York: Broadway Books, 2000. See also S. Mark, 'Technology and compliance auditing – The future of legal regulation', paper presented at Third International Legal Ethics Conference, Gold Coast, Australia, (13–16 July 2008) (opening quote from Peter Drucker: 'The best way to predict the future is to invent it.').
- 205 A. Pinnington and J. Gray, 'The global restructuring of legal services work? A study of the internationalization of Australian law firms', *International Journal of the Legal Profession*, 2007, vol. 14, 150–53, 160–66.
- 206 S. Mark, 'Views from an Australian regulator', paper presented at Chicago conference 'The Future is Here: Globalisation and the Regulation of the Legal Profession', American Bar Association Center for Professional Responsibility and Standing Committee on Professional Discipline and Georgetown Center for the Study of the Legal Profession Present, Chicago, IL, 27 May 2009, pp. 1, 3. Available from: <www.law.georgetown.edu/news/documents/CCJ-2009-WebMaterials-final.doc> (accessed 20 November 2009).
- 207 See generally M. Schwarzschild, 'Class, national character, and the Bar reforms in Britain: Will there always be an England?', *Connecticut Journal of International Law*, 1994, vol. 9, 188–219 (discussing how 'class colors almost everything in England ... and [while] not completely interchangeable with wealth and power' is also reflected in the legal professions and views toward litigation).
- 208 US Constitution, Art. 1 s1, X Amendment.
- 209 See generally L. Terry, 'GATS applicability to transnational lawyering and its potential impact on US state regulation of lawyers', *Vanderbilt Journal of Transnational Law*, 2001, vol. 34, 989.
- 210 L. Terry, 'The European Commission project regarding competition in professional services', *Northwestern Journal of International Law and Business*, 2009, vol. 29, 1–2, 18.

- 211 Treaty Establishing the European Community art. 249 Mar. 25, 1957, 2002 OJ (C325) 249 (authorizing Parliament to issue binding directives ‘as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’).
- 212 See Treaty Establishing the European Community art. 5, Nov. 10, 1997, 1997 OJ (C 340) 5, discussed in K. Abbott and D. Snidal, ‘Strengthening international regulation through transnational new governance’, *Vanderbilt Journal of Transnational Law*, 2009, vol. 42, 538 at n. 166.
- 213 Terry, ‘The European Commission’, 17–18. See also Directive 98/5/EC (16 Feb. 1998), L77/36 Official Journal of the European Communities.
- 214 Terry, ‘The European Commission’, 18–26, discussing Case C-309/99, *Wouters v Nederlandse Orde van Advocaten*, 2002 ECR I-1577, 2002 ECJ CELEX LEXIS 681 (Feb. 19, 2002); Case C-35/99 *Arduino*, [2002] ECR I-1529 (2 February 2002).
- 215 See, for example, A. Hamilton, J. Madison and J. Jay, *The Federalist Papers, No. 46* (James Madison); E. Veasey, ‘What would Madison think? The irony of the twists and turns of federalism’, *Delaware Journal of Corporate Law*, 2009, vol. 34, 46–53 (discussing the Sarbanes–Oxley Act and other ‘federal incursions into the states’ traditional domain [in which] this division of responsibilities survived as a fragile ecosystem more or less intact for over seventy years’).
- 216 E. Cohen, ‘Chief Justices, Others, consider ideas on regulating lawyers in global setting’, *Lawyers Manual of Professional Conduct*, 25 June 2009, p. 300 (quoting remarks of Utah Supreme Court Chief Justice Christine M. Durham, president-elect of the Conference of Chief Justices).
- 217 *ibid.*
- 218 H. Jackson, ‘Learning from Eddy: A meditation upon organizational reform of financial supervision in Europe’, *Perspectives in Company Law and Financial Regulation* (Michel Tison, et al., eds), Cambridge: Cambridge University Press, 2009, pp. 523–39.
- 219 See Zacharias, ‘The self-regulation misnomer’; L. Terry, National Conference of Bar Counsel CLE materials, ‘Should Rule 5.1 be used more proactively?’ Plenary presentation to the National Organization of Bar Counsel (9 August 2008) (on file with author). Terry urged state regulators to implement this modest proposal based on the New South Wales and Queensland self-assessment mechanisms relating to 10 areas, including negligence, communication, delay, file transfers, billing practices, conflicts, record management, undertakings, supervision and trust accounts. See also: <www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives> (accessed 29 November 2009).