

ABA Center for Professional Responsibility
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Regulatory Innovation in Australia, Canada, and England and Wales:
What's in it for Us?
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**AN INTRODUCTION TO RECENT INTERNATIONAL
LAWYER REGULATION DEVELOPMENTS**

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I. Plenary Session Purpose

The goal of the Plenary Session on Regulatory Innovation is *not* to simply recount the regulatory innovations that have taken place in Australia, Canada, and England and Wales. Many, if not all of you, in this audience are familiar with at least some of the changes because they have been referenced in a number of the Discussion Papers distributed by the ABA Commission on Ethics 20/20, in law review articles, online, and in legal profession news stories, including those appearing in the ABA Journal, the National Law Journal, and the ABA/BNA Lawyers' Manual on Professional Conduct.

The goal of this Plenary Session is to provide additional information to U.S. jurisdictions that might be willing to consider adopting some or all of these innovations. We have assumed that Justice Louis D. Brandeis' observation is still accurate and that there might be states that are willing to serve as "laboratories" for policy experiments. We have also assumed that the individuals and entities that are most likely to take the lead with respect to regulatory innovation are the regulators and thought leaders found at this conference. This session is directed towards those regulators and thought leaders.

II. Plenary Session Structure

This session will examine four of the regulatory innovations that have taken place in Australia and the UK and that currently are in the process of being implemented in Nova Scotia. These four innovations include the use of:

- 1) regulatory objectives;
- 2) entity or firm-based regulation, as a supplement to regulation of individual lawyers;
- 3) proactive or management-based regulation that attempts to preempt rather than respond to problems; and
- 4) outcomes-focused regulation, including risk-based regulation.

Because the topic of alternative business structures [ABS] appears to be a "third rail" in US ethics discussions, this panel will focus on the four developments identified above, rather than ABS, even though ABS is used in both Australia and the UK and is under consideration in several Canadian provinces.

Although the four innovations listed above are interrelated and although Australia, Nova Scotia and the UK have adopted all four of these regulatory approaches, any one of these innovations could be adopted on its own. Development #1 involves ***why*** we regulate; development #2 involves ***who or what is regulated***; development #3 involves ***how*** we regulate; and development #4 involves ***when*** regulation occurs.¹

For each of the four developments identified above, the panelists will explain:

- 1) why their jurisdiction adopted this innovation;
- 2) the types of resources that were (or for Canada – seem to be) required in order to implement this innovation;
- 3) any research or data that addresses the impact of this regulatory innovation; and
- 4) whether the speaker would recommend this innovation to U.S. jurisdictions and if so, what advice the speaker would offer to a U.S. jurisdiction considering this development.

By the end of this Plenary Session, U.S. regulators and thought leaders will have heard about the experiences of jurisdictions that have lived with these reforms for a while and a jurisdiction that is in the process of implementing these types of reforms. Professor Ted Schneyer, who has been a leading U.S. commentator with respect to many of these types of reforms, will offer his perspectives about whether these innovations are suitable for adoption in the U.S. and how an innovative U.S. state regulator might go about doing so. Audience members will be encouraged to ask panelists questions, including identifying any data that a U.S. jurisdiction would like these jurisdictions or an experimenting U.S. jurisdiction to collect.

III. Country-Specific Changes, Including Research Sources

This section provides a brief recap of the regulatory developments in Australia, Canada, and England and Wales for those who may not be familiar with them. The Conference Materials contain additional information and detail.

A. Australia

1. An Overview of Regulatory Changes

Australia, like the U.S., has a federal system in which lawyers are primarily regulated by individual Australian states and territories. For over a decade, however, Australia has been engaged in a “National Legal Profession” project in which efforts have been made to reach national agreement on lawyer regulation, which would then be adopted and implemented by individual Australian states. At least some of the impetus for the National Profession Project can be attributed to the antitrust authorities in Australia which strongly encouraged the removal of barriers to free movement of lawyers. Steve Mark’s paper, which was prepared for this Conference, provides information on Australia’s regulatory developments, including the

¹ Laurel S. Terry, Steve Mark, Tahlia Gordon, [*Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*](#), 80 Fordham L. Rev. 2661 (2012).

December 2013 *Bilateral Agreement on the Legal Profession Uniform Framework* which New South Wales and Victoria have agreed to implement.

Panelist Steve Mark is the former Legal Services Commissioner for New South Wales, Australia. NSW is the home of Sydney and is Australia's most populous state. As his paper explains, NSW adopted an "entity" based approach to regulation to supplement individual regulation for those who chose to practice in an incorporated legal practice or ILP. Using the legislative requirement that ILPs have "appropriate management systems," NSW regulators instituted proactive risk-management systems that required ILPs to evaluate their compliance level with respect to ten commonly-occurring problem areas. Regulators provided resources to ILPs to help them become better understand the issues and become fully compliant with their obligations with respect to these problem areas. According to several empirical studies, this proactive, entity-based approach to lawyer regulation has resulted in a two-thirds reduction in client complaints.

Australia currently is in the process of making changes beyond the issues identified in the prior paragraph. For example, the proposed NSW legislation, which will implement the December 2013 Uniform Framework includes an Objectives section. It states, among other things, that the objectives of the Law are to promote the administration of justice and an efficient and effective Australian legal profession by "promoting regulation of the legal profession that is efficient, effective, targeted and proportionate."

2. Data Sources about Australia

Some of the most useful data on the success of Australia's proactive entity-based regulation is found in articles that have been a result of collaboration among Australian regulators and legal academics. These articles include: 1) Christine Parker, Tahlia Gordon, & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 3 J.L. & SOC'Y 466 (2010); 2) Susan Saab Fortney and Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. St. Thomas L. J. 152 (2012); and 3) Susan Saab Fortney, *The Role of Ethics Audits in Improving Ethical Conduct: An Empirical Study on Management-Based Regulation of Law Firms*, St. Mary's L. Rev. (2014)(forthcoming). These articles are available in the Conference materials, along the publications page of the New South Wales Office of the Legal Services Commissioner, which has a wealth of additional information. See also Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 Fordham Urban L. J. 177 (2012); Christine Parker & Lyn Aitken, [*The Queensland "Workplace Culture Check": Learning from Reflection on Ethics Inside Law Firms*](#), 24 Georgetown J. Legal Ethics 399 (2011).

B. England and Wales

1. An Overview of Regulatory Changes

The Conference materials include a number of items related to the 2007 UK Legal Services Act and the four regulatory innovations that are the focus of the Plenary Session. The

2007 Act had three primary aspects. **First**, it changed the system of lawyer regulation in England and Wales. **Second**, it revised the system of handling complaints against lawyers and lawyer discipline and created different paths for dealing with complaints about service and complaints about conduct. **Third**, it created a framework to allow alternative business structures or ABS. Each of these developments is briefly described below.

With respect to the first change, the 2007 Act established the Legal Services Board (LSB) as the oversight regulator for all of the many different kinds of regulated legal professionals in England and Wales. The 2007 Act gave the LSB the power to approve the “front-line” regulators. Among others, the LSB approved the *Solicitors Regulation Authority* or SRA as the front-line regulator for Solicitors in England & Wales and the *Bar Standards Board* or BSB as the front-line regulator for barristers. (The SRA is technically the independent regulatory body of the Law Society of England and Wales.) The Legal Services Act also sets forth regulatory objectives and professional principles for regulators to use when regulating legal professionals. The Conference Materials include a handout from Robert Heslett that diagrams the regulatory landscape and that identifies the front-line regulators that have been approved by the LSB.

The SRA has taken a number of actions as part of its efforts to implement the new regulatory system, including steps related to the four innovations that are the focus of the Plenary Session. As noted earlier, it operates pursuant to the regulatory objectives found in the Legal Services Act. The SRA uses an entity or firm-based approach to lawyer regulation, including for solo practitioners.² It requires each registered body to designate a Compliance Officer for Legal Practice (COLP) and a Compliance Office for Finance and Administration (COFA). It has adopted (and updated several times) its “Solicitors Handbook” which contains the ethics rules for solicitors in England and Wales. This Handbook uses an outcomes focused approach to regulation (OFR). The SRA has developed an elaborate system for evaluating risk and is using this risk-based approach to regulation.³³ The Conference Materials include a number of documents related to these developments.

As noted earlier, the 2007 Act changed the way in which complaints against lawyers are handled and has different paths for handling “service” complaints and “conduct” complaints. The Act created the Office for Legal Complaints, which in turn created the Legal Ombudsman. The Legal Ombudsman provides a free complaints resolution service to members of the public, very small businesses, charities and trusts. The Legal Ombudsman’s office focuses on “service” complaints, including fees disputes and “failure to advise.” The Legal Ombudsman initially acts as a mediator, but can order a lawyer to make specified amends.⁴⁴ Discipline for rules violations is handled by entities other than the Legal Ombudsman. For example, the SRA has the responsibility for disciplining solicitors. The Legal Ombudsman publicizes data about its activities. For example, in 2013, the Legal Ombudsman resolved approximately 7,500

² See SRA, Firm-based authorization, <http://www.sra.org.uk/solicitors/firm-based-authorisation.page>

³ See <http://www.legalombudsman.org.uk/research-decisions/complaints-data.html> (“We prefer to resolve complaints by making an agreement between the lawyer and the person that complained. Where this is not possible we ask an ombudsman to make a final decision on the matter.”)

⁴ See <http://www.legalombudsman.org.uk/research-decisions/complaints-data.html> (“We prefer to resolve complaints by making an agreement between the lawyer and the person that complained. Where this is not possible we ask an ombudsman to make a final decision on the matter.”)

complaints about lawyers in England and Wales.⁵

The third aspect of the 2007 Legal Services Act was its adoption of a framework that allows the front-line regulators to permit lawyers to use alternative business structures, including partnerships with non-lawyers and outside investment. The SRA has been approved to issue ABS licenses. It began accepting ABS applications in January 2012, awarded the first licenses in March 2012, and had approved more than 200 ABS's by January 2014.⁶⁶ As noted earlier, however, this change is not the focus of this Plenary Session.

2. UK Data Sources

As a result of the 2007 UK Legal Services Act, there is a significant amount of research and data about legal services regulation that didn't exist previously. First, a number of the new UK entities, such as the Legal Ombudsman, are collecting data and posting it on their webpages. Second, the new regulators have research budgets and have commissioned academic and empirical papers. These papers can be found on the "Consultations" or "Research" webpages of the Legal Services Board, the SRA, and the Bar Standards Board. They include papers in which the regulators have shared empirical data with academicians. Finally, it is worth noting the "baseline" report the LSB issued. A number of these items are found in your Conference Materials.

C. Canada

1. An Overview of Regulatory Changes

Similar to the U.S. and Australia, Canada is a federal system in which lawyers are primarily regulated by individual provinces and territories. The Federation of Law Societies of Canada (FLSC) is the coordinating body for Canada's primary regulators, who are the law societies in each Canadian jurisdiction. The FLSC has a wealth of resources on its webpage.⁷ Although the FLSC does not itself make binding decisions, it provides a forum in which the regulators can – and do – agree upon a model approach, which is then enacted or implemented in the individual provinces and territories. As a result, in some ways there is much more uniformity in Canadian regulation of lawyers than there is in U.S. regulation of lawyers.

Canadian regulators are grappling with issues that are similar to those that confront regulators elsewhere in the world.⁸ A number of Canadian regulators are considering whether to adopt some or all of the regulatory innovations found in Australian and the UK. The Law Society of Upper Canada, for example, recently voted to initiate a member-wide consultation on the topic of alternative business structures. The vote occurred after the LSUC held two Symposia (in Oct. 2013 and January 2014) to consider issues related to alternative business

⁵ Legal Ombudsman, What Were the Complaints About? 2012-2013, http://www.legalombudsman.org.uk/research-decisions/Complaints%20data/2012-13-pdf-versions/What_were_the_complaints_about.pdf ; Legal Ombudsman, Research and Data, <http://www.legalombudsman.org.uk/research-decisions/>.

⁶ See SRA, News release: ABS - two years of applications (Jan. 3, 2014), <http://www.sra.org.uk/sra/news/press/two-years-abs-applications.page>.

⁷ See Federation of Law Societies of Canada, <http://www.flsc.ca/en/>.

⁸ See Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 Saskatchewan L. Rev. 145 (2013).

structures and after its ABS Working Group issued a report recommending that the Law Society continue to move forward on the issue. Access to justice has been one of the primary factors cited in support of ABS reforms. Other provinces are also considering ABS issues, along with some or all of the other regulatory innovations that are the focus of the Plenary Session.

One of the most interesting current developments is unfolding in Nova Scotia under the auspices of its regulator the Nova Scotia Barristers Society. Nova Scotia decided that it would reconsider lawyer regulation from the ground up and asked what an ideal regulatory system would look like if one could design it from scratch. Victoria Rees, who is the Director of Professional Responsibility for the NSBS and one of our panelists, conducted extensive research on the innovations that had taken place elsewhere in the world. She wrote a lengthy report that was discussed in October 2013, after which the NSBS voted to proceed with developing the four innovations that are the subject of this panel. She will be able to share the experiences of Nova Scotia as it develops a process for implementing these changes. The conference materials include the paper she prepared, along with a shorter consultation document prepared for members and a survey for members. (The Conference Materials also include documents related to the LSUC ABS initiative and its five year experience regulating paralegals).

2. Data Sources about Canada

While the Canadian regulators are not far enough along to have data about the results of the regulatory changes they are contemplating (other than the 5-year report on paralegal regulation), my sense is that they would be willing to consider the same type of data-sharing and collaboration among regulators and academics that has occurred in Australia and the UK. Thus, to the extent that there is specific data or results that U.S. regulators and thought leaders would be interested in learning, I urge them to share those requests and ideas because there may be academics and regulators who are willing and able to work together to develop and share data.

IV. U.S. Consideration of these Four Regulatory Innovations

Professor Ted Schneyer was one of first commentators to address some of the innovations that have now been implemented in jurisdictions around the world. His influential 1991 article on *Professional Discipline for Law Firms* undoubtedly has contributed to some of the innovations discussed in this panel.⁹ One of his most recent articles is a 2013 article arguing in favor of proactive management-based regulation in the U.S.¹⁰ (This article is included in the Conference Materials). He brings to the panel not only his perspective as a long time commentator on regulatory innovations, but his experience as a member of the ABA Commission on Ethics 20/20.¹¹ His insights may help interested U.S. regulators and thought leaders consider how best to consider the developments discussed in the Plenary Session.

⁹ Ted Schneyer, *Professional Discipline for Law Firms?* 77 Cornell L. Rev. 1 (1991).

¹⁰ Ted Schneyer, [The Case For Proactive Management-Based Regulation To Improve Professional Self-Regulation For U.S. Lawyers](#), 42 Hofstra L. Rev. 232 (2013).

¹¹ The ABA has archived the materials from the ABA Commission on Ethics 20/20. These materials may be useful to jurisdictions considering regulatory innovations. See, e.g., ABA Commission on Ethics 20/20, Work Product, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.ht ml.