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Recommended Citation
28 Nw. J. Int'l L. & Bus. 415 (2007-2008)

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International Legal Practice Involving England and New York Following Adoption of the United Kingdom Legal Services Act 2007

Sydney M. Cone, III[*]

This article deals with the regulation of legal services in England and New York in the context of, first, multidisciplinary practice ("MDP")[1] and, second, permitted investment in legal practice. The article summarizes both the background of and potential differences between the regulations in those two jurisdictions, and comments on the possible reconciliation of those differences. Because, chronologically, New York was the first of the two jurisdictions under consideration to adopt rules on MDP, the New York rules will be considered first, and the more recent statute, known as the United Kingdom Legal Services Act 2007 (hereinafter "U.K. Act"), will then be considered as it applies to England.[2] The article will then analyze the implications of the New York and English rules for international legal practice involving the two jurisdictions.

I. NEW YORK AND MDP

In June 1999, a commission created by the American Bar Association recommended that lawyers in the United States be permitted to participate with non-lawyers in the creation of business entities owned or controlled by non-lawyers; the purpose of this recommendation was to permit U.S.

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[1] Depending on the context, as used herein "multidisciplinary practice" or "MDP" signifies either activities involving two or more disciplines, or an enterprise engaging in such activities.

[2] The U.K. Act generally applies only to England and Wales. Legal Services Act, 2007, c. 29, § 212 (Eng.). It is to "come into force on such day as may be appointed by order of the Lord Chancellor." *Id.* § 211.

lawyers to engage in multidisciplinary practice.[3] The following year, the ABA House of Delegates in effect rejected this recommendation.[4] Meanwhile, the New York State Bar Association had also been considering questions relating to MDP and investment by non-lawyers in law firms.[5] The result in New York was the coming into force on November 1, 2001 of two new Disciplinary Rules and eighteen related Ethical Considerations.

The first of New York's Disciplinary Rules on MDP deals with lawyers or law firms providing non-legal services to clients or other persons,[6] and the second of these Rules provides for contractual relationships between lawyers and non-legal professionals.[7] Briefly put, the reasons for these two rules were, respectively: to recognize that the practice of law involves not only legal services, but also services ancillary thereto as seen from the perspective of the client; and to recognize that clients can benefit from contractual relationships among professionals if the relationships are subject to appropriate ethical standards.

When these two rules were under consideration, a significant possibility existed that major accounting firms would enter into important categories of legal practice in the United States much as these firms had done outside the United States, a development that these firms likened to multidisciplinary practice.[8] Commentary on this development formed part of the background of the two New York rules mentioned above. A general comment was to the effect that a distinction should be recognized between, on the one hand, an MDP signifying professionals who are subject to codes of conduct and who work closely together, and, on the other hand, "giant business conglomerates that manage and market multiple product lines."[9] Particular comments dealt with MDP as it had developed in certain countries. It was noted, for example, that large accounting firms seemed to

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[3] NEW YORK STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS 1 (Apr. 2000) [hereinafter N.Y. REPORT], *available at* http://www.law.cornell.edu/ethics/mdp.htm. (The author of this Article was a Vice-Chairman of the Special Committee.)

[4] *See* John Gibeaut, *"It's a Done Deal": House of Delegates Vote Crushes Chances for MDP*, 86 A.B.A. J. 92 (Sept. 2000).

[5] *See generally* the N.Y. REPORT, *supra* note 3. Much of the drafting of New York's two new Disciplinary Rules and related Ethical Considerations mentioned in the next sentence of the text was based on pages 336–59 of the N.Y. REPORT.

[6] N.Y. JUD. LAW § 1200.5-b [DR 1-106] (McKinney 2008) [hereinafter DR 1-106]; N.Y. JUD. LAW app. EC 1-9–1-12 (McKinney Supp. 2008).

[7] N.Y. JUD. LAW § 1200.5-c [DR 1-107] (McKinney 2008) [hereinafter DR 1-107]; N.Y. JUD. LAW app. EC 1-13–1-18 (McKinney Supp. 2008).

[8] *See* Sydney M. Cone, III, *Views on Multidisciplinary Practice with Particular Reference to Law and Economics, New York and North Carolina*, 36 WAKE FOREST L. REV. 1, 3, 7–10 (Spring 2001).

[9] N.Y. REPORT, *supra* note 3, at 152.

have found France to be a favorable country in which to "experiment" with MDP, and that the preferred approach in France was for an accounting firm to enter into an "arrangement" with an "associated law firm" that remained nominally independent.[10]

The tenor of these comments seems to have informed the two rules that came into force in New York on November 1, 2001. First of all, New York seemingly intended to focus on the professional aspects of MDP, including the codes of conduct governing professional practice, and to eschew "MDP" that was not so much an exercise in professionalism as a mechanism for mass marketing. Secondly, New York, when it looked at MDP as it had evolved in, for example, France, seemingly took note of the realities of MDP where that term signified legal professionals who, rather than being merged into a conglomerate dominated by forces outside the legal profession, were allowed to retain a degree of independence when they affiliated with other professionals.

Against this background, the two New York rules adopted in 2001 will be analyzed in the dual context in which they were developed. At the level of ethical professional behavior, the crafting of these two rules could not avoid taking into account the overall pattern of professional rules, including commentary and decisions bearing thereon, applicable to the attorney-client relationship and the responsibilities of members of the legal profession.[11] At the level of the realities of legal practice, the drafters of the two rules used language that reflects awareness of, for example, the views of the recipients of legal and non-legal services, and the potential vulnerability of lawyers to being influenced on professional matters by persons not subject to rules governing the legal profession.[12]

The first of the two New York rules adopted in 2001 recognizes that, in the ordinary course of legal practice, lawyers and law firms will on occasion find it appropriate and even necessary to provide clients with services that are ancillary to the practice of law but that, strictly speaking, are not legal services. New York Disciplinary Rule ("DR") 1-106 and related Ethical Considerations[13] were added to the Code of Professional Responsibility in 2001 to take such ancillary services into account. Analyzed as a rule dealing with MDP, DR 1-106 can be said to govern an MDP controlled by lawyers.

Governing as it does an MDP controlled by lawyers and, perforce, by persons themselves subject to the lawyers' professional code, DR 1-106 sets out only the requirements deemed necessary under those circumstances.

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[10] *Id.* at 192–211.

[11] *See id.* at 309–24.

[12] *See, e.g.*, N.Y. JUD. LAW EC 1-10 (service recipients) and EC 1-13 (activities by non-lawyers) (McKinney Supp. 2008).

[13] DR 1-106, *supra* note 6; N.Y. JUD. LAW app. EC 1-9–1-12 (McKinney Supp. 2008).

Essentially, there are three requirements: first, that the recipient of the services be made aware of any services that are not legal services and hence are not the subject of an attorney-client relationship; second, that when the client cannot distinguish between legal services and services that are not legal services, the rendering of the entirety thereof shall be subject to legal disciplinary rules; and, third, that none of the lawyers in such an MDP shall permit the non-lawyers therein to affect the lawyer's professional judgment, or to compromise the lawyer's professional duties.

The second of the two New York rules adopted in 2001, DR 1-107, authorizes a lawyer or law firm to enter into and maintain "a contractual relationship" with a "professional" who is not a lawyer, or a "professional service firm" that is not a law firm,

> for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other nonlegal professional services.[14]

Three conditions are imposed as prerequisites for this authorization. First, the other "professional" or "professional service firm" must be in a profession jointly designated by four New York courts known as the Appellate Divisions of the Supreme Court, or jointly approved by them following an application for approval.[15] Five professions have been so designated or approved. They are: architecture; certified public accountancy; professional engineering; land surveying; and certified social work.[16]

The second condition imposed by DR 1-107 for authorization to enter into and maintain a contractual relationship with professionals who are not lawyers (professionals of one or more of the five types just mentioned) applies to the lawyer or law firm entering into the relationship. This second condition is in substance a prohibition applicable to the lawyer or law firm in question, and is in the form of the following proviso:

> provided that [t]he lawyer or law firm neither grants to the [other] professional or professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by the lawyer or law firm, nor, as provided in DR 2-103(D)(1), shares fees with a non-lawyer or receives or gives any monetary or other tangible

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[14] DR 1-107, *supra* note 7; N.Y. JUD. LAW app. EC 1-13–1-18 (McKinney Supp. 2008).

[15] DR 1-107, *supra* note 7 at (B) (requiring members of the profession to hold bachelors' degrees (or the equivalent), to have been licensed by the State of New York, and to be subject to a code of ethical conduct comparable to the disciplinary rules of the legal profession's Code of Professional Responsibility).

[16] N.Y. COMP. CODES R. & REGS. tit. 22, § 1205.5 (2008).

benefit for giving or receiving a referral[.][17]

For this purpose, "ownership or investment interest" is broadly defined to include "any form of debt or equity," as well as "any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor."[18]

The third condition relates to disclosure to clients of the existence of the contractual relationship. Such disclosure must occur before a client is referred to the professional service firm that is not a law firm, or before a client of that firm receives legal services from the lawyer or law firm in question. In addition, clients must give their "informed written consent" to the contractual relationship.[19]

Thus, the New York rules are stricter where the MDP involves more than lawyers or law firms providing non-legal services, that is, where the MDP is not completely under the control of lawyers. If the MDP involves non-legal professionals or non-legal professional firms not completely under the control of lawyers, the New York rules permit and require the MDP to take the form of an on-going contractual relationship. As agreed between the law firm and its contractual counter-party, namely, the professional firm that is not a law firm, they may co-ordinate the simultaneous offering of legal and non-legal services.

Regulatory permission to engage in such an undertaking is, however, as just discussed, subject to three conditions. The professional firm must be of a type appearing on a list approved by joint rule of the relevant New York courts, that is, must be composed of individuals belonging to one of the five professions mentioned above, and clients must consent to the arrangement. Most importantly, the lawyers in the MDP are forbidden in broad terms to permit non-lawyer professionals to have any ownership interest in the law firm, or to have any managerial or supervisory responsibilities or rights relating to the legal practice of the law firm. Specifically mentioned as outside the purview of the non-lawyers in such an MDP are the following:

- decisions to provide or cease providing legal services;
- the hiring, training and assignment of lawyers;
- pro bono and public interest work;
- financial and budgetary decisions relating to legal practice;
- the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.[20]

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[17] DR 1-107, *supra* note 7, at (A)(2).
[18] *Id.* at (B)(2).
[19] *Id.* at (A)(3).
[20] N.Y. JUD. LAW EC 1-13 (McKinney Supp. 2008).

In addition to these safeguards of the independence of the legal practice in a New York MDP involving non-lawyer professionals, New York mandates a further safeguard by requiring that costs and expenses be allocated between the legal practice, on the one hand, and the activities of non-lawyer professionals, on the other hand, on a basis that "reasonably reflects" their respective costs and expenses.[21] In short, the MDP here permitted by New York is of the "side-by-side" variety, where the law firm and the professional firm that is not a law firm must co-exist and co-operate in a manner that gives the law firm a high degree of independence in respect of the ownership, management, and supervision of its legal practice.

This form of the New York version of MDP not controlled by lawyers is a "contractual relationship." The "contractual relationship" must be "for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other nonlegal professional services . . . ."[22] This purpose has been described as "a very broad purpose [that] explains the route that New York has taken regarding multidisciplinary practice."[23] The contractual provisions spelling out the "contractual relationship" are largely left up to decisions arrived at by the parties thereto. Considerable flexibility is, therefore, available to the contracting parties in this New York version of MDP, as long as they respect the three requirements already mentioned: (1) the non-lawyers constituting one party must be members of an approved profession; (2) the lawyers constituting the other party must own and control the entity practicing law; and (3) clients must be given timely notice of the existence of, and must consent to, the "contractual relationship."

The New York "contractual relationship" version of MDP can also be analyzed in terms of the route not taken. The strategic alliances permitted by New York stop short of allowing the parties to a strategic alliance to enter into a relationship that would merge and unify the ownership of the alliance. New York also requires the legal-services party to an alliance to maintain exclusive managerial control of decision-making relating to the provision of legal services. (The scope of this managerial exclusivity has been broadly defined to include the five areas identified in the bullet-points found two paragraphs above.) Thus, this New York version of MDP does not encroach on New York's disciplinary rules that forbid lawyers and law firms to share legal fees with a person who is not a lawyer, and that forbid a lawyer to enter into a partnership with a person who is not a lawyer if any of the activities of the partnership consist of the practice of law.[24] In other

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[21] DR 1-107, *supra* note 7, at (D).

[22] DR 1-107, *supra* note 7.

[23] ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 140 (Thomson West 2007).

[24] NYCRR Title 22, §§ 1200.17, 1200.18 [DR 3-102(A), DR 3-103(A)]. For a

words, New York has not relaxed its rules that forbid both fee-sharing and partnerships between lawyers and non-lawyers, and has declined to take this step in order to provide the advantages of MDP without compromising the independence of the legal profession either in terms of professional activities or in terms of the financial and managerial control of those activities.[25]

II. NEW YORK AND INVESTMENT IN LEGAL PRACTICE

As has been seen, in New York an MDP that includes the practice of law either must be entirely owned and controlled by members of the legal profession, or must take the form of a contractual relationship in which the practice of law is entirely owned and controlled by members of the legal profession. As has also been seen, underlying this approach to MDP is the retention in New York of disciplinary rules that forbid lawyers to share fees with, or to enter into partnerships with, persons who are not members of the legal profession. The retention of these rules and the fact that they expressly received attention when New York's MDP rules were formulated, without more, indicates that New York has not taken an expansive view of eligibility to invest in the practice of law. Indeed, in its rules designed to ensure that lawyers exercise independent professional judgment, New York has retained a prohibition against legal practice in the form of a for-profit entity in which a non-lawyer has any ownership interest, or is a member, corporate director or officer, or otherwise "has the right to direct or control the professional judgment of a lawyer."[26]

The special committee of the New York State Bar Association that issued a report in April 2000 on MDP included in its report a section on non-lawyer investment in entities practicing law. Among the problems mentioned in that report were the risk of financial dominance, and hence operational control, of the practice of law by outside investors pursuing business objectives incompatible with the exercise of independent professional judgment by members of the legal profession owing undivided loyalty to clients and to the justice system. In particular, it was thought that such dominance and control could affect the selection of clients, the manner in which legal services were rendered to clients, and the allocation of resources to controversial public interest cases and to *pro bono publico* work.[27]

When the courts of New York adopted the New York rules on MDP (as set out above), they may have taken into account the report's concerns

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provocative discussion of this prohibition, see Bruce MacEwen et al., *Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61 (2008).

[25] *See* SIMON, *supra* note 23, at 140.

[26] N.Y. JUD. LAW § 1200.26 [DR 5-107(C)] (McKinney 2008).

[27] N.Y. REPORT, *supra* note 3, at 377–88.

about non-lawyer investment in entities practicing law. In fact, the courts themselves added to the New York MDP rules a preamble that begins as follows:

> The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it services. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed 'independent professional judgment and undivided loyalty uncompromised by conflicts of interest.' Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law.[28]

In light of this language and its judicial provenance, there would seem to be a substantial likelihood that any effort to permit non-lawyer investment in the practice of law in New York would encounter serious resistance.

III. ENGLAND AND MDP

Recent movement in England toward the authorization of multidisciplinary practice evolved from official dissatisfaction with the regulatory framework for legal services. This dissatisfaction underlay the Labour Government's request for, and is set out in, a report, dated December 15, 2004, addressed to the Lord Chancellor. The Report was prepared by Sir David Clementi as Independent Reviewer, and is known as the Clementi Report.[29] It begins with the U.K. Government's conclusion that the current regulatory framework for legal services is "outdated, inflexible, over-complex and insufficiently accountable or transparent"—followed by Sir David's observation that his review had turned up nothing to cause him "to doubt the broad validity of the Government's conclusion."[30]

A comparison with New York seems in order. The New York Report[31] was concerned with multidisciplinary practice and its place in the legal rules governing lawyers. American advocates of MDP, while seeking to legitimize the participation by lawyers in MDP, were not seeking a major structural modification in the several American states of the system for regulating and disciplining members of the legal profession. In contrast, the Clementi Report advocated measures to further such structural ambitions; they were to encompass the entire regulatory and disciplinary framework

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[28] DR 1-107, *supra* note 7, at (A); *see also* SIMON, *supra* note 23, at 139.

[29] David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales*, Final Report (2004) [hereinafter *Clementi Report*].

[30] *Id.* at 1.

[31] *See* N.Y. REPORT, supra note 3.

for legal services in England and Wales. Thus, the Clementi Report was to deal with MDP, if at all, as a topic germane to governmental dissatisfaction with this overarching framework. Having in fact been covered by the Clementi Report, MDP apparently was viewed by the Independent Reviewer either as a topic inherent in general governmental dissatisfaction with the legal services system, or as a topic ripe for reform in the context of reforming that system.

True to its mandate, the Clementi Report first advocated the creation of a new regulatory framework under a new governmental regulator to be called the Legal Services Board. This recommendation bore fruit in the U.K. Act, which placed the new Legal Services Board at the apex of a regulatory framework. Below the Legal Services Board, the Act includes eight "approved regulators"—notably, the Law Society or Solicitors Regulatory Authority for solicitors, and the General Council of the Bar for barristers, as well as six other "approved regulators" for professions like patent attorneys and trademark attorneys.[32]

Here, the Clementi Report seems mindful of the creation in the United Kingdom in the year 2001 of a Financial Services Authority ("FSA") with jurisdiction over banking, securities firms, and insurance firms, and with ultimate jurisdiction over so-called front-line regulators—the Bank of England (for banking), the Securities and Investments Board (for securities firms), and the Department of Trade and Industry (for insurance firms).[33] The analogy of regulatory reforms with respect to financial services seems apt in regard to governmental attitudes in respect of legal services. After the collapse of a major U.K. bank, Barings, in 1995 was attributed to inadequate regulation of financial services, the U.K. structure for the regulation of financial services was completely overhauled by passage of the Financial Services and Markets Act 2000 and the creation of the FSA.[34] Thus, the recent precedent of a two-tiered regulatory approach in the financial services industry seems to have been influential when the Clementi Report was drafted to deal with the regulation of legal services. It would seem reasonable to assume that this influence is traceable to the 2007 U.K. Legal Services Act itself, and helps to explain the detail and inclusiveness of that legislation.[35]

The second feature of the Clementi Report was to recommend a new system for handling complaints brought by consumers of legal services in

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[32] Legal Services Act, 2007, c. 29, pts. 2, 4, sched. 4 (Eng.).

[33] *Clementi Report*, *supra* note 29, at 35–36. Technically, the FSA was a continuation of the Securities and Investments Board.

[34] Ailbhe Edgar, *Battling the Rogue Trader*, LEGAL WEEK, July 10, 2003, *available at* http://www.legalweek.com/Articles/115559/Battling+the+rogue+trader.html.

[35] The U.K. Act is of considerable length: 399 single-spaced pages, comprising (by unofficial count) 157,649 words.

respect of one or more members of a legal profession. The Clementi Report proposed the creation of a new independent body—the Office for Legal Complaints—to deal with complaints involving practitioners regulated by the new Legal Services Board. The 2007 U.K. Act duly provides in detail for the creation and functioning of a new Office for Legal Complaints (this Office being separate from and in addition to the Board).[36]

Having called for a new Legal Services Board and a new Office for Legal Complaints, the Clementi Report turned to what it called "alternative business structures" for the practice of law.[37] The 2007 U.K. Act, giving heed to the Report, devotes some forty single-spaced pages to "alternative business structures" and "ownership of licensed bodies."[38] Here, one may perceive a degree of what might be called populist doctrine underlying the Clementi Report and the resulting legislation. The Report itself, in discussing MDP, makes reference to concerns of consumer organizations over "a perceived lack of client care by lawyers"—noting "that these concerns relate as much to the quality of business service that is provided, as to the quality of the legal advice itself."[39] MDP, then, was apparently viewed as part of a new approach to making legal services more responsive to the needs of consumers.

In this populist drive to assure responsiveness to the needs of consumers, attention to "the quality of legal advice" may have been overshadowed by the attention given to ease of access to legal services of any quality. The Labour Government's Minister for Constitutional Affairs, Bridget Prentice, received considerable attention when she announced: "I don't see why consumers should not be able to get legal services as easily as they can buy a can of beans."[40] This seemed to be an acknowledgment of the popular use of the term "Tesco Law" as an appellation for the proposed Legal Services Act—an appellation implying that supermarket chains would be selling legal services.[41] The minister was also quoted as saying, in reference to the Co-operative Group, which had shown an interest in the proposed Legal Services Act: "Perhaps we should call it [the proposed Act] the Co-op law instead. It sums up the ambition of the Bill quite well."[42]

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[36] Legal Services Act, 2007, c. 29, pt. 6, sched. 15 (Eng.).

[37] *Clementi Report*, *supra* note 29, at 105–139 (Ch. F).

[38] Legal Services Act, 2007, c. 29, pt. 5, sched. 13 (Eng.).

[39] *Clementi Report*, *supra* note 29, at 109.

[40] Frances Gibb, *Need Advice? Visit a Supermarket*, TIMES (U.K.), May 25, 2006, at 30; *see also Leading the Way with Legal Advice*, BRISTOL EVENING POST, Mar. 26, 2007, at 12 (quoting "Legal services minister Bridget Prentice" as saying of the proposed Legal Services Act: "This will put consumers at the heart of the system").

[41] *See, e.g.*, John Duckers, *Tesco Presents Threat to Lawyers*, BIRMINGHAM POST (U.K.), June 30, 2006, at 31.

[42] Joshua Rozenberg, *Putting Justice in the Shop Window*, DAILY TELEGRAPH (U.K.),

IV. ENGLAND AND INVESTMENT IN LEGAL PRACTICE

As mentioned above, the U.K. Legal Services Act 2007 devotes some forty single-spaced pages to "alternative business structures" and "ownership of licensed bodies."[43] It appears from these provisions of the U.K. Act that, to a significant extent, the Act conflates its treatment of MDP with its treatment of investment in legal practice. The term multidisciplinary practice (or MDP) is not of special significance in the Act. In this respect, the Act seems to adopt a premise that the pursuit of MDP will occur when an entity that is not a legal practice (an entity called "a non-authorized person") acquires a "material interest," directly or indirectly, in a legal practice (called a "licensed body"), if the purpose of the acquisition is to engage both in the practice of law and in the practice of some other discipline.

In order for the "non-authorized person" to acquire a material interest in the "licensed body," approval must be obtained from "the relevant licensing authority in accordance with the provisions of [Schedule 13 of the Act]."[44] At this point in the Act's early history, it is not clear how applications for such approval will in fact be dealt with. In due course, further regulations can be expected to be issued pursuant to the Act in order to clarify the procedures that will enable a legal practice in England to combine with "a non-authorized person" for the purpose of engaging in multidisciplinary practice. It seems likely that the rules are to be relatively less stringent for a "low risk body"—meaning a "licensed body" in which "non-authorized persons" hold less than ten percent of the total ownership interests.[45] In addition, it seems likely that regulation or precedent will clarify the requirement in the Act that, before the relevant authority grants approval to a "non-authorized person" to hold an interest in a "licensed body," the relevant authority must be satisfied, first, that neither the objectives of the Act nor the duties imposed by the Act will be compromised, and, second, that the "non-authorized person . . . is otherwise a fit and proper person to hold that interest."[46]

The U.K. Act seems to subsume its treatment of multidisciplinary practice under provisions dealing with the acquisition of a "material interest" in a legal practice, and these provisions seem to apply both to MDP and, more broadly, to investment by "non-authorized persons" in entities practicing law ("licensed bodies"). Does the U.K. Act cover MDP of the type permitted in New York, where a law firm and a firm in an approved profession enter into an on-going "contractual arrangement" in

May 25, 2006, at 14.

[43] *See* Legal Services Act, 2007, c. 29, pt 5, sched. 13 (Eng.).

[44] *Id.*, pt. 1, sched. 13.

[45] *Id.*, § 108.

[46] *Id.*, § 6(1), sched. 13.

the manner described above?[47] The answer under the U.K. Act would seem to be that its provisions do not apply unless the "contractual arrangement" is deemed to convey to the non-legal firm a material interest in the practice of law. In light of the New York prohibition against the non-legal firm having "any ownership or investment interest in, or managerial or supervisory right" in the law firm,[48] a New York-style "contractual arrangement" would not appear to require approval pursuant to the U.K. Act. Only an MDP in which a "non-authorized person" acquired a material interest in a legal practice would seem to require such approval. Put differently, MDP under the U.K. Act need not be limited to "side-by-side" arrangements or strategic alliances as in New York, but MDP that is not so limited will probably require approval by virtue of the material interest being acquired by a "non-authorized person" in a "licensed body."

The more serious import, then, of the provisions of the U.K. Act is that, if approval is granted, "non-authorized persons" may acquire material investment interests in legal practices ("licensed bodies"). There would seem to be two general categories of such investment interests. The first category comprises multidisciplinary practices in which lawyers and non-lawyers are partners in or co-owners of a legal practice. The second category does not involve MDP, but comprises legal practices in which non-lawyers pursuing essentially business or financial objectives become investors in the practice of law. In addition, one can conceive of a third category combining features of the first two—where the business or financial investor in a legal practice is also a partner therein. These three categories will be discussed as, respectively, Category I, Category II, and Category III investment interests.

The Category I investment interest resembles a departure from a New York-style "contractual arrangement"—a departure in which the MDP is not limited to a contractual understanding and is supplemented by non-lawyer ownership or non-lawyer managerial interests of a type forbidden by New York's Disciplinary Rule 1-107.[49] This category of investment interest might prove attractive for professionals seeking an arrangement comprising of legal practitioners plus practitioners from one or more other disciplines. Here, the structure of the arrangement would include profit sharing or co-ownership allocated to members of each of the disciplines. As discussed, New York forbids such profit sharing or co-ownership and does so lest the investment interests of non-legal professionals place them in a position to influence the practice of law by legal professionals. Because Category I investment interests could involve similar concerns in

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[47] *See* DR 1-107, *supra* note 7, at (A)(2); N.Y. JUD. LAW EC 1-13–1-18 (McKinney Supp. 2008).

[48] DR 1-107, *supra* note 7, at (A)(2).

[49] *See id.* The terms Category I, II, III are the author's.

England, it is conceivable that further regulations and decisions under the 2007 U.K. Act will include measures designed to safeguard the professional independence of lawyers practicing in a Category I context.

Category II is both radically different from Category I and a category that embraces a congeries of possibilities. Here, non-lawyers investing in legal practices are not seeking to practice a discipline in a multidisciplinary practice, but are, conceptually, seeking to cross the line from MDP into investment in legal practice as a means of furthering business or financial objectives. Such an objective may be to broaden the range of merchandise offered to customers—in the words of the Minister quoted above, to enable consumers "to get legal services as easily as they can buy a can of beans."[50] Thus, the Category II business objective could be to sell multiple lines of products and services, of which legal services would be but one.

The Category II objective could, however, be quite different from the one just described. For example, the objective could be to make a portfolio investment in a legal practice that is an ongoing concern, or to make a similar investment when a legal practice is being launched. The seller of the investment might be one or more current owners of a legal practice, and the buyer might be an outside investor hoping to achieve a good return on the investment. In some cases, the seller may be seeking to liquidate—to "cash out"—an interest (or a portion of an interest) in the legal practice. If the seller is a retired (or about-to-retire) member of the legal practice, the seller could be seeking to finance the seller's retirement from legal practice. In effect, the seller may seek a certain monetary amount for this purpose, and future generations of lawyers in the legal practice would have the burden of providing a return to the buyer who had made a corresponding investment in the legal practice.

If the Category II objective were to help launch a new legal practice or the expansion of an existing legal practice, with one or more outside investors providing capital for the new legal practice or the expansion, the portion of outside capital being provided would obviously be relevant to the degree of control exercisable by outsiders. The ratio of capital provided by outsiders as compared to the capital contributed by the legal practitioners themselves could be as agreed among the participants, and could vary from time to time as dictated by investor/practitioner decisions and by the success (or lack thereof) of the new or expanded practice itself over time. There has been considerable commentary on the types of legal practices that might seek outside investors.[51] These legal practices can be classified as three types of firms in England and Wales: (1) small firms; (2) "high street"

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[50] *See* text accompanying *supra* note 40.

[51] *See, e.g.*, SOLICITORS REGULATION AUTH., LEGAL SERVICES ACT: NEW FORMS OF PRACTICE AND REGULATION (2007), *available at* http://www.sra.org.uk/securedownload/file /350.

firms, meaning regional or moderate-sized firms; or (3) "magic circle" firms, meaning the largest London firms with both domestic and international practices. Until further regulations are issued and actual experience is had under the 2007 legislation, it may be too early to make useful predictions in this regard. Conceivably, the so-called "magic circle" firms will not want to be beholden to outside investors; some "high street" firms might find outside investment attractive; and small firms might find it relatively difficult to attract outside investment.[52]

Category III involves a non-lawyer professional participant in an MDP. Here, the non-lawyer participant is endeavoring, for marketing purposes, to turn its own professional organization into a more broadly based and, if possible, more profitable operation. Two examples are a bank or an accounting firm that seeks to add legal practice to the services that it can offer its clients. Conceptually, Category III has elements of both Category I and Category II. For this reason, the analysis of a given Category III investment interest can reveal not only professional features, but also motives arising from hoped-for market opportunities. An observer's reaction to a given Category III investment interest is likely to turn on which is emphasized—the professional features, or the search for marketing opportunities.[53] Balancing these aspects of a proposed Category III investment interest under the 2007 U.K. Act will be the province of implementing legislation and the domain of the regulators created by the Act and, as work progresses under the Act, the meaning of the statute in this area may be clarified. More particularly, as additional regulations and rulings become available in respect to any of the categories under discussion, it may become possible to answer with some certainty what types of investment interests in "licensed bodies" do not compromise the objectives of the Act or the duties imposed thereby, as well as the types of investors that will be deemed "fit and proper" to hold such investment interests.[54]

At this point, it seems appropriate to note an apparent difference between the Clementi Report and the 2007 U.K. Act with respect to alternative business structures for the practice of law. The Clementi Report introduced two terms:

- the Legal Disciplinary Practice ("LDP") that brings together legal practitioners from two or more legal disciplines, for example, an

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[52] *See* N.Y. REPORT, *supra* note 3, at 377–80. *See also* Michael Peel, *Slater & Gordon in A$35m Legal Listing First*, FIN. TIMES, May 21, 2007, at 20, *available at* http://search.ft.com/ftArticle?queryText=%22COMPANIES%3A+INTERNATIONAL%3A+Slater+%26+Gordon%22&y=0&aje=false&x=0&id=070521000747&ct=0&nclick_check=1 (listing by a "niche" Australian firm of A$35 million of its shares).

[53] *See* text accompanying *supra* note 11.

[54] *See* text accompanying *supra* note 46.

LDP comprising barristers and solicitors who provide legal services to third parties; and

- the Multi-Disciplinary Practice ("MDP") that brings together lawyers and other professionals to provide legal and other services to third parties.

The Clementi Report viewed authorizing the LDP as a step toward later authorizing MDP "if at some subsequent moment it were determined that there were appropriate safeguards to permit [Multi-Disciplinary Practice]."[55] Indeed, the Independent Reviewer reported the existence of an "overwhelming sentiment . . . that it would be a good start to get lawyers working together in LDPs, and to assess the regulatory consequences of that, before proceeding with MDPs."[56] This cautionary approach did not, however, find its way into the 2007 U.K. Act itself.

The Clementi Report's caution regarding MDP in England was complemented by the Report's cautious views expressed concerning conflicts of interest between non-lawyer investors, on the one hand, and the clients of lawyers conducting legal practice, on the other. The Clementi Report said that the regulators of legal practice should handle potential problems arising from such conflicts of interest, and warned against permitting a situation to arise "where an outside owner has an adverse interest [adverse to a client] in the legal outcome." Outside owners, the Report added, should not be allowed to "interfere in individual client cases or have access to client files or other information about individual cases." In short, according to the Report, "[o]utside owners . . . must be cleared by the regulatory authorities as 'fit to own.'"[57]

It remains to be seen how the "fit to own" standard will be developed and enforced in England. The standard seems to call for considerable regulatory attention. It will almost surely prove more complex to interpret and apply than the limited criteria applicable in New York, where only lawyer-controlled MDP or "contractual relationships" between lawyers and non-lawyers are permitted, where the non-lawyers must come from a few approved professions, and where the relevant lawyers and law firms are strictly prohibited from permitting any non-lawyer ownership interest or managerial role in the practice of law.

V. ENGLAND AND NEW YORK: CULTURAL DIFFERENCES

As discussed above, New York looked at MDP and the question of non-lawyer investment in legal practice as matters to be resolved within the

[55] *Clementi Report*, *supra* note 29, at 9–10.
[56] *Id.* at 137.
[57] *Id.* at 121, 124.

pre-existing basic framework of the law governing lawyers.[58] In New York, this law is the responsibility of the courts, including the four courts known as the Appellate Divisions of the Supreme Court,[59] and, as discussed above, these four courts have focused primarily on "an essential tradition of complete independence" of lawyers.[60]

The United Kingdom's Labour Government took a different approach. Its position was that the existing basic law governing the legal professions needed fundamental revision.[61] The U.K. Parliament gave expression to this position by enacting the 2007 Legal Services Act. These developments seem to suggest long-term popular dissatisfaction with major features of the English legal system, such as its lack of responsiveness to consumer complaints, and its need for changes designed to render it more accessible.[62]

England seems less inclined than New York to defer to the courts to oversee the legal system, and seems more inclined than New York to utilize extra-judicial governmental activism as a response to perceived shortcomings in the legal system. There is a clear contrast: New York's judiciary seems to attach substantial importance to maintaining the independence of the system, while the English attitude appears to be one of greater willingness to look to governmental reform in response to popular demand. As between the two jurisdictions, then, there may be cultural differences when it comes to demarking the proper sphere of government.

What has been viewed in England as the proper sphere of government in the context of the legal system? If one goes back to mid-nineteenth century England, one finds philosophical discussion of the question. In his *The Proper Sphere of Government*, Herbert Spencer rejected most arguments for governmental activism, but was quite outspoken on the need for governmental activism in respect to the legal system.[63] Admittedly, Herbert Spencer is a very special commentator, and is probably best-known in the United States for dictum in a dissent by Justice Holmes: "[t]he Fourteenth Amendment [to the federal Constitution] does not enact Mr. Herbert Spencer's Social Statics."[64] Even so, to have a commentator like

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[58] *See* text accompanying *supra* notes 4–8.

[59] *See, e.g.*, N.Y. RULES OF COURT, §§ 603, 691, 806, 1022 (McKinney 2007).

[60] *See* text accompanying *supra* note 29.

[61] *See* text accompanying *supra* note 31.

[62] *See* text accompanying *supra* notes 36 and 40.

[63] Herbert Spencer, *The Proper Sphere of Government*, THE NON-CONFORMIST (1842–43) (originally published as a series of twelve letters), *available at* www.econlib.org/library/LFBooks/Spencer/spnMvS6.html.

[64] Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting from the Court's 5-4 holding that a state could not constitutionally legislate maximum working hours). Although Spencer's treatise SOCIAL STATICS did not include his *The Proper Sphere of Government*, the latter resembled much of the former in arguing against governmental activism in such areas as public welfare and public education.

Herbert Spencer, who generally opposed governmental activism, call for governmental activism as regards to the legal system can be said to be a striking illustration of English willingness to consider extra-judicial reform of the legal system. In *The Proper Sphere of Government*, Herbert Spencer wrote as follows about the "the toiling artisan" and "the exercise of his rights and privileges":

> Does [the government] . . . fully and fairly administer the laws? Does it send forth its officers, commanding them diligently to secure to every one . . . that protection . . . which he has sacrificed so much to obtain? Does it take up the cause of the poor man, and defend him against the aggressions of his rich neighbour? No! [I]t does none of these things. It turns over the complainant to the tender mercies of solicitors, attorneys, barristers, and a whole legion of law officers. It drains his purse with charges for writs, briefs, affidavits, subpoenas, fees of all kinds, and expenses innumerable. It involves him in all the mazy intricacies of common courts, chancery courts, suits, counter-suits, and appeals; and thousands of times it has overwhelmed with irretrievable ruin, the man whose person and property it was bound to defend.[65]

If one makes suitable adjustment for nineteenth-century rhetorical flourishes, one sees but a short, incremental discursive distance between the foregoing exhortation by Herbert Spencer and the government-inspired introduction to the twenty-first-century Clementi Report decrying "the current regulatory framework" as "outdated, inflexible, over-complex and insufficiently accountable or transparent."[66] The cultural bias against the legal system in England may have been brewing for a very long time. The U.K. Parliament having enacted the Labour Government's proposed remedies for this state of affairs, this article will now turn to the implications for international legal practice of the different approaches in England and New York to questions bearing on multidisciplinary practice and outside investment in legal practice.

VI. INTERNATIONAL IMPLICATIONS OF DIFFERENT ENGLISH AND NEW YORK RULES

As discussed above, New York has had in place for several years its rules on multidisciplinary practice, and has left in place its long-standing rules prohibiting outside investment in legal practice. Also, as discussed above, the United Kingdom, in respect of England and Wales, adopted legislation in 2007 that now awaits regulatory implementation in order to provide for multidisciplinary practice and to deal with investment by non-

[65] Spencer, *supra* note 63, at 33–34 (Letter number X).
[66] *See* text accompanying *supra* note 31.

lawyers in legal practice. Once this process of implementation has been completed, the rules in England and New York are almost certain to be substantially different, and this factor of substantial regulatory differences could make for uncertainty in the arena of international legal practice. It does not seem too soon to inquire into the differences that may emerge, and the possibility of reconciling those differences.

For this purpose, the newly permitted categories of investment activity in England, as discussed above,[67] will be used.

> Category I is an MDP in which lawyers and non-lawyer professionals are partners or co-owners.
>
> Category II is a legal practice in which outside investors that are not professionals or are not acting as professionals invest in the legal practice to further investment or business objectives of the investors or of the legal practice or of both.
>
> Category III is an MDP in which non-lawyer professionals participate to further their own marketing objectives. Category III is permitted in New York only if the MDP is a New York-style strategic alliance in which the non-lawyer professionals are from one or more approved professions.[68]
>
> Category III *bis* refers to Category III investment activities that are not permitted in New York.

For purposes of this analysis, two geographical locations, England (called "Eng" in the table) and New York (called "NY" in the table), will be used. In addition, two types of legal practice will be used: a law firm based in London (called the "L firm" in the table) which also has a presence in New York; and a law firm based in Manhattan (called the "M firm" in the table) which also has a presence in England. In tabular form, the elements of this analysis can be outlined as indicated below. The purpose of the analysis is to indicate the rules appropriate for each of the sixteen situations indicated by the "L" and "M" boxes in the table. (To repeat—the analysis will deal with neither the London firm that is in England but not New York, nor the Manhattan firm that is in New York but not England, and will assume that the London firm also has a presence in New York, and that the Manhattan firm also has a presence in England.)

[67] *See* text accompanying *supra* notes 49–54.
[68] *See* text accompanying *supra* notes 15–20.

Category	L firm in Eng	M firm in NY	L firm in NY	M firm in Eng
I	Permitted if approved by Legal Services Board or front-line regulator	Not permitted	Not permitted	Probably not permitted [see discussion in text below]
II	Same as for **I** above	Not permitted	Not permitted	Probably not permitted
III	Same as for **I** above	Permitted if a "side-by-side" DR 1-107 relationship	Subject to discussion in text below, permitted if a "side-by-side" DR 1-107 relationship	Permitted if a "side-by-side" DR 1-107 relationship
III *bis*	Same as for **I** above	Not permitted	Not permitted	Probably not permitted

On the basis of the U.K. 2007 statute alone and in advance of implementing regulations becoming available thereunder, it seems clear that a London firm in England will be permitted to carry out in England the activities represented by all of Categories I, II, and III, including III *bis*, so long as the presence of the London firm in New York does not create a problem. Because, however, these are not permitted activities for a Manhattan firm in New York, they will in all likelihood not be permitted when undertaken by a New York branch or affiliate of the London firm. A more difficult question arises when the London firm's New York branch or affiliate does not itself engage in any of the Category I, II or III *bis* activities, and they are not undertaken by the London firm except in London. In this event, will the New York branch or affiliate be in violation of New York rules by virtue of the London firm engaging in those activities? Put differently—will the London firm be able to avoid attribution of its London activities to its New York branch or affiliate, inasmuch as those London activities would be violative of New York rules if they occurred in New York?

Here we have a key question that touches on all eight of the boxes in the two "L firm" columns—the boxes pertaining to the London firm—and that might touch on the other boxes (the Manhattan firm boxes) as well if the Manhattan firm had an English branch or affiliate engaged in Category I, II or III *bis* activities in England. The question turns on the extent to which, for New York regulatory purposes, a firm's legal practice can be compartmentalized as between England and New York. Regulators in New York might assert that, realistically, a law firm cannot be viewed as isolated compartments. So arguing, the New York regulators might take the position that a law firm with an establishment in London, be it a London firm or a Manhattan firm, must be viewed as the sum of all of its ostensible

geographical parts, because, in dealing with the public, the firm can be expected to hold itself out as a cohesive worldwide entity or group of entities, bringing to its legal practice its global resources as needed to deal with particular assignments from individual clients. If, at some point, the New York regulators were to adopt this reasoning for a London firm, they might then feel constrained to apply the same reasoning to a Manhattan firm that, through its establishment in England, engaged in any of the activities in Category I, II or III *bis*.

It is too soon to know if the relevant regulators will take the position just outlined, or if there are forms of affiliation that would produce a different result and avoid attribution of Category I, II or III *bis* activities from the London part of a legal practice to the Manhattan part. To the extent that analogous regulatory information is available, it suggests that such attribution is conceivable. For example, in New York, attorneys may be disciplined for misconduct in foreign jurisdictions, and the London activities just mentioned might be contrary to New York's disciplinary rules.[69]

Generally, regulatory authorities can be expected to look to their own domestic law to resolve domestic questions arising in respect of the 2007 U.K. Act. The German legal-services regulatory authority (the *Bundesrechtsanwaltskammer*) has announced that structures permitted under the U.K. 2007 legislation may be illegal under German law, and that a law firm that adopted such a structure might be prohibited from practicing in Germany.[70] Although the New York courts have not taken a position as to what they might do, the possibility exists that, faced with a concrete case involving a law practice that has a presence in both New York and England and that engages in Category I, II or III *bis* activities in England, a New York court would arrive at a result similar to the reported views of the *Bundesrechtsanwaltskammer*.

At this point, then, the prudent course would seem to be to assume that a London firm with operations in New York would run afoul of New York law if it took advantage of the outside investments permitted under the 2007 U.K. Act, or if it engaged in multidisciplinary practice other than as permitted under New York law. By analogy, in the case of a New York firm with an establishment in London, it would seem prudent to assume that its Manhattan establishment would be subject to discipline in New York if

[69] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 603.3 (2008) ("Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction").

[70] U.K. Parliament Joint Committee on the Draft Services Bill, Volume I: Report, 2005-2006, HC 1154-I (Memorandum by the President of the *Bundesrechtsanwaltskammer*). *See also German Regulator Threatens MDPs with Disbarment*, THE LAWYER (U.K.), Nov. 6, 2006, at 29, *available at* http://www.thelawyer.com/cgi-bin/item.cgi?id=122833&d=11&h=24&f=23.

the firm's London establishment engaged in investment or professional activities that would not be permitted in New York. As a consequence, it would seem that the New York firm's London establishment should conduct itself in London only as permitted by disciplinary rules applicable to the firm in New York.

Another reason for prudence might be a firm's potential liability in civil litigation in New York. For example, a client might claim injury resulting from a conflict of interest caused by an outside investment in a legal practice of a type not permitted in New York, or attributable to a form of MDP that was inconsistent with New York's disciplinary rules. In any event, until the regulatory groundwork has been completed pursuant to the 2007 U.K. Act, potential liability in New York for taking advantage of that law is likely to remain a matter of conjecture. Accordingly, while the sixteen regulatory boxes in the table six paragraphs above can be identified, it may be too early to complete them other than by indicating that activities inconsistent with New York's disciplinary rules may prove problematic.

Admittedly, it is not very helpful simply to use the word "problematic" when it comes to the regulation of MDP and rules relating to permissible outside investment in legal practice, and to leave the matter there. The conduct of a legal practice necessarily involves planning for the future and anticipating permissible and impermissible future activity. The practice of law is competitive, and the risk-reward aspects of different areas of legal practice, not to mention different potential sources of investment capital for legal practice, call for appraisal on an ongoing basis. When two international legal centers as important as England and New York become mutually "problematic" with respect to recent regulatory developments, the cross-border practice of law can be seriously inhibited or threatened. It therefore seems important to address as soon as possible the problematic areas that can now be identified, and to address them with a view to finding at an early date possible ways to reconcile the regulatory questions that have arisen. Unless this is done, the unresolved international aspects of the 2007 U.K. legislation may prove needlessly inhibitive, not to mention unhappily costly if they are left to the occurrence and outcome of public enforcement and private litigation.

VII. RECONCILING DIFFERENCES BETWEEN ENGLAND AND NEW YORK

One of the sections in the rules in the 2007 U.K. Act uses the term "foreign bodies." This section relates to "alternative business structures" and authorizes the Lord Chancellor "to make provision for the modification" of the rules as they apply to "a body of persons formed under

or . . . recognized by . . . law having effect outside England and Wales."[71] Presumably, this section has been included in the statute to deal with its possible extraterritorial application to entities that are not English "licensed bodies," that is, are law firms whose existence is based on non-U.K. law. The English establishments of New York law firms would thus seem to fall within this section. In addition, the provision would seem to apply to a New York establishment of an English law firm if that establishment is "formed under" or "recognized by" New York law. Accordingly, it seems conceivable that the Lord Chancellor might take into account extraterritorial establishments set up outside England by or on behalf of legal practices based in England, as well as establishments set up in England by legal practices based abroad.

One possible way the Lord Chancellor could deal with extraterritorial concerns would be to take cognizance of the New York rules on MDP and outside investment, and to issue a formal regulation to give effect to requests by English law firms having (or planning to have) establishments in New York. Thus, on proper application to the Lord Chancellor, such a firm would be in a position to seek to render inoperative as to that firm those provisions of the 2007 U.K. Act that could prove problematic in the context of the firm's New York establishment. More particularly, if an English firm elected to take advantage of such a regulation, the English firm would ask the Lord Chancellor to recognize the firm's formal renunciation of its U.K. statutory rights (1) to enter into multidisciplinary arrangements and (2) to secure investment by outside non-lawyer investors. Such an officially recognized renunciation might, in the case of the English firm in question, deal effectively with the matters mentioned under "L firm in NY" in the table found nine paragraphs above.

The approach here suggested would leave it up to each individual English firm to decide whether it wanted to cut itself off from certain types of MDP and/or certain types of outside investment available under the 2007 U.K. Act. By successful application to the Lord Chancellor, the English firm would simultaneously cut itself off from certain types of MDP and/or outside investment and, in so doing, would free itself to create or maintain an establishment in New York. If, on the other hand, the English firm was not inclined to take these steps, it—simply by doing nothing in the way of renunciation—would retain access under the U.K. Act to MDP and outside investment of the kinds violative of New York rules. The reciprocal effect could also be true, however: by doing nothing in the way of renunciation, the English firm might be electing to forego the creation or maintenance of a New York establishment. (As for New York firms with establishments in England, see the text three paragraphs below.)

A major factor driving the analysis is that, of the two jurisdictions,

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[71] U.K. Act § 109 ("Foreign bodies"), *supra* note 2.

England and New York, the latter has the stricter rules both on MDP and on outside, non-lawyer investment in legal practices. So long as an English firm with a New York establishment makes certain that its worldwide operations conform to New York rules on MDP and outside investment, it should not run afoul of those rules. The English firm, in conforming with New York rules by renouncing certain rights under U.K. law, will of course be applying the New York rules outside New York—in England and, possibly, in third countries. For the English firm, a solution that means giving extraterritorial application to New York rules might be deemed inappropriate as a matter of principle, but the consequence of having two sets of rules that might apply is, not surprisingly, that the stricter set of rules prevails. In addition, having the New York rules prevail in the sense just discussed does not seem unfair. They were in existence and well known when the 2007 U.K. Act was being debated, and they thus were part of the regulatory terrain that the U.K. legislators had fair opportunity to assess.

New York has the stricter set of rules because, regarding MDP, either the MDP must be controlled by lawyers, or it must be a "side-by-side" contractual arrangement between a legal practice and another professional practice, wherein the legal practice is prohibited from permitting any ownership interests or managerial rights to be acquired or exercised by non-lawyers. New York also has the stricter set of rules as regards outside investors, because lawyers in New York are forbidden to share fees or to enter into partnerships with non-lawyers. If the legal practice takes place in both England and New York, the English side of the practice either might engage in MDP that is not subject to prohibitions as strict as those in New York, or might have access to outside investment that is tantamount to fee-sharing or partnership of a type prohibited in New York. If such an event were to occur, the ownership or managerial or investment rights that are permitted in England but prohibited in New York might be attributed to the New York operation, on the theory that the English and New York legal practices were in key respects a single unified legal practice. The result would be a violation of New York rules arising because of MDP or outside investment authorized by the 2007 U.K. Act. This possible result explains the suggestion made above: to avoid such a result, an English firm should have the capacity to lodge with the Lord Chancellor a renunciation of some or all of the firm's rights under the 2007 U.K. Act to engage in MDP or to receive outside investment from non-lawyer sources.

A New York firm with an establishment in England would present problems mirroring those just discussed. The English establishment presumably would have the right to engage in English-style MDP or to receive investment from non-lawyer outside sources. The New York firm would thus be at risk of violating New York's rules on MDP and outside investment, because its English and New York entities could be deemed parts of a single unit or of a cohesive operational group. Accordingly, it is

suggested that the New York firm, on behalf of its English establishment, be given the same rights as those proposed in the preceding paragraphs for an English firm. Thus, the New York firm, on behalf of its English establishment, would have the right to lodge with the Lord Chancellor the same type of renunciation discussed above. In this manner, the New York firm would seek to avoid problems under the relevant New York rules that might arise by virtue of the existence of its English establishment. In the same manner, the matters mentioned under "M firm in Eng"[72] might be dealt with effectively.

Perhaps the provision for renunciations suggested above should provide that they will be effective for a substantial term of years, but need not be perpetual, to give the relevant legal practices an opportunity, on the basis of both their own experience and experience generally with the 2007 U.K. Act, to reconsider their options from time to time. At the present time, the lodging of renunciations does not seem unlikely in the case of large international law firms—that is, the so-called "magic circle" firms in England, as well as similar firms based in New York. A number of them might well be immediately willing to forego English-style MDP and to commit themselves to internal sources for financing their practices without having recourse to outside non-lawyer investors. While that could be the picture today, it might be unnecessary to tie the hands of any category of legal practices indefinitely, and it might be acceptable to allow every legal practice a chance to evaluate from time to time the feasibility and desirability of following the routes being charted under the 2007 U.K. Act. On the other hand, as mentioned, a renunciation might well have to be for a substantial term of years, in order to lend credibility to a claim that a firm was in compliance with the New York prohibitions relevant to MDP and outside financing.

The provision for renunciations suggested above rests on sound policy affecting the international practice of law. It would be unfortunate if the 2007 U.K. Act had the result of inhibiting English law firms from practicing in New York, or New York firms from practicing in England. Not only have the dynamics of cross-border practice been well developed in both jurisdictions, but also international legal centers and international legal practice all over the world have benefited from innovations developed by law firms with establishments in those two jurisdictions.

As mentioned above, the 2007 U.K. Act contains the concept of a "low risk body"—meaning a "licensed body" in which "non-authorized persons" hold less than 10% of the total ownership interests.[73] This suggests that some "low risk" concept might be used to reconcile the applicability of the new 2007 U.K. Act to the generally stricter New York approach to MDP

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[72] *See* Table, *supra* at 432–33.

[73] *See* text accompanying *supra* note 45.

and outside investment in legal practice. The concept of less than 10% being "low risk" seems open to question, however. In context, the meaning of "low risk" in the U.K. Act is that if one or more outside non-lawyer investors hold less than a 10% ownership interest in a legal practice, that outside ownership interest is "low risk" in terms of the ability of the legal practice to function in accordance with recognized professional norms.

Suppose, however, that there are 100 equal ownership interests in a legal practice, that nine of them are held by a financial institution with total assets in the billions of pounds sterling, and that the remaining ninety-one ownership interests are ninety-one individual interests, each held by one of the legal practitioners in the legal practice, none of whom has significant assets other than a one one-hundredth individual interest in the legal practice. Let us suppose further that the institutional holder of the 9% interest is a major client of the legal practice. If a dispute arises concerning another client of the firm in which, arguably, the institutional holder has a conflict of interest with that other client, it seems likely that the 9% interest of the institutional holder could weigh heavily in the resolution of the dispute, and it does not seem impossible that recognized professional norms might be bent to favor the holder of the 9% interest. However that may be, the point is that bright-line mathematical formulas are not easy to develop when it is a matter of individual legal practitioners competing with outside investors in reaching answers to difficult professional questions.

Furthermore, the more professional the question, the more risky the putative "low risk" outside interest may be. The legal practitioners may want to take on, for a non-paying client, a controversial public interest assignment of a type deemed important to the dispensing of legal justice. The outside investor in a legal practice may be concerned with the rate of return on its investment to the exclusion of considerations of legal justice for non-paying clients. Again, bright-line mathematical formulas may not prove helpful.

VIII. CONCLUSION

Adapting to the new 2007 U.K. Act and reconciling regulatory differences between England and New York are essentially dependent on the private practice of law in the international arena. It is the private practitioners who will have to deal with the regulatory landscape as it changes in light of legislative and other changes. In all likelihood, these practitioners will devise appropriate structures for engaging in complementary English and New York legal practices. As seen from England, the 2007 U.K. Act, by recognizing the need to make provisions for "foreign bodies," may inspire international practitioners to propose rules that will not put their overseas establishments at risk, be they in New York or elsewhere. As seen from New York, where the emphasis has been on

maintaining the independence of the practice of law, many firms are already familiar with pursuing both the objective of professional independence and the objective underlying the 2007 U.K. Act of assuring that the legal system is accessible to the consumers of legal services. These objectives need not be in conflict, and it will be the task of practicing legal professionals to avoid needless conflict and to find ways to advance both objectives harmoniously.