

ADOPTING REGULATORY OBJECTIVES FOR THE LEGAL PROFESSION

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In 2007, the United Kingdom adopted a new law called the Legal Services Act. This Act radically changed certain aspects of U.K. lawyer regulation. Section 1 of that Act identified eight “regulatory objectives” that provide the basis for the regulation of the legal profession. The United Kingdom is not the only jurisdiction that has identified regulatory objectives. A number of Canadian provinces, for example, have provisions that are tantamount to regulatory objectives. Australia is also in the process of developing such objectives and routinely uses “purpose statements” when enacting legal profession regulation. However, many countries—including the United States—have not explicitly identified regulatory objectives and do not use purpose statements.

This Article analyzes various regulatory objectives that have been adopted or proposed. It places the use of regulatory objectives and purpose statements in lawyer regulation in a broader context by describing some of the recent profession-specific and non-profession-specific regulatory reform initiatives. The Article recommends that jurisdictions that have not yet adopted regulatory objectives for the legal profession do so. Finally, the Article concludes by offering recommended regulatory objective concepts for jurisdictions to consider.

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TABLE OF CONTENTS

INTRODUCTION.....	2687
I. PLACING THE LEGAL PROFESSION REGULATORY OBJECTIVES—	
PURPOSE MOVEMENT IN A LARGER CONTEXT	2688
A. <i>The “Regulatory Objectives” Trend Reflects Increased</i>	
<i>Interest in Regulatory Theory Generally</i>	2688
B. <i>The “Regulatory Objectives” Trend Reflects Increased</i>	
<i>Interest in Lawyer Regulation Specifically</i>	2692
II. EXAMPLES OF REGULATORY OBJECTIVES FOR THE LEGAL	
PROFESSION.....	2697
A. <i>Jurisdictions that Have Already Adopted Regulatory</i>	
<i>Objectives for the Legal Profession</i>	2697
1. England and Wales	2697
2. Scotland	2702
3. Canada	2703
4. New Zealand.....	2707
5. Denmark.....	2709
B. <i>Jurisdictions that Have Drafted but Have Not Yet Adopted</i>	
<i>Regulatory Objectives for the Legal Profession</i>	2710
1. Australia.....	2710
2. Ireland	2715
3. India	2717
C. <i>Regulatory Objectives in the United States and in Other</i>	
<i>Jurisdictions</i>	2719
1. The United States	2719
2. Other Jurisdictions	2723
D. <i>A Synthesis of Existing and Proposed Regulatory Objectives</i>	2725
III. GENERAL RECOMMENDATION: JURISDICTIONS THAT HAVE NOT	
ADOPTED REGULATORY OBJECTIVES FOR THE LEGAL	
PROFESSION SHOULD DO SO	2727
A. <i>The Benefits of Regulatory Objectives</i>	
<i>on Prospective Lawyer Regulation</i>	2727
B. <i>The Benefits of Regulatory Objectives After Lawyer</i>	
<i>Regulation Has Been Adopted</i>	2730
C. <i>The Collective Impact of Regulatory Objectives for the</i>	
<i>Legal Profession</i>	2732
IV. SPECIFIC RECOMMENDATIONS: CONCEPTS TO INCLUDE	
IN REGULATORY OBJECTIVES FOR THE LEGAL PROFESSION	2733
CONCLUSION	2742
APPENDIX 1: COMPARING OUR RECOMMENDED OBJECTIVES	
WITH EXISTING AND DRAFT REGULATORY OBJECTIVES.....	2744
APPENDIX 2: EXISTING AND DRAFT REGULATORY OBJECTIVES	2751

INTRODUCTION

In another article in this colloquium, we identify six trends in lawyer regulation that are due in part to the impact of globalization on the legal profession.¹ These trends include issues about *who* regulates lawyers, *whom* or *what* is regulated, *when* lawyers are regulated, *where* lawyers may be regulated, *how* they are regulated, and *why* they are regulated. This Article expands on why lawyers are regulated.

In recent years, there has been increased interest in the question of why lawyers should be regulated. Some of this interest can be attributed to recent regulatory reform movements and to the United Kingdom's inclusion of "regulatory objectives" in its 2007 legislation regulating the legal profession.

We submit that regulatory objectives are a necessity, and jurisdictions that have not adopted regulatory objectives should seriously consider doing so. The adoption of regulatory objectives has multifaceted benefits. First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular legislation is transparent. Thus, when the regulatory body administering the legislation is questioned—for example, about its interpretation of the legislation—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the legislation and of public debate about proposed legislation. Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.

Part I of this Article places the legal profession's regulatory objectives—purpose movement in a larger context by: (1) identifying increased interest in regulatory theory generally; (2) identifying increased interest in lawyer regulation specifically; and (3) noting that other professions, such as medicine and financial services, are governed by regulatory objectives. Part II examines those jurisdictions that have adopted regulatory objectives for the legal profession, those jurisdictions that have drafted but not yet adopted regulatory objectives, and those jurisdictions that have not yet focused on the use of regulatory objectives. Part III of this Article explains the basis for our general recommendation that all jurisdictions adopt regulatory objectives. Finally, Part IV identifies the specific regulatory objectives that we recommend a jurisdiction should adopt.

1. See 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).

I. PLACING THE LEGAL PROFESSION REGULATORY OBJECTIVES—PURPOSE
MOVEMENT IN A LARGER CONTEXT

The adoption or pending adoption of regulatory objectives in legal profession regulation can be understood as part of a larger context in which there has been increased interest in regulatory theory in general, and legal profession regulation specifically. This section provides a brief introduction to some of these developments.

A. *The “Regulatory Objectives” Trend Reflects Increased Interest
in Regulatory Theory Generally*

The trend toward adopting regulatory objectives for the legal profession has taken place against the backdrop of global governmental interest in regulatory theory. A number of individual countries have explored what it means to have “good regulation.”² Intergovernmental organizations such as the Organisation for Economic Co-operation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC) have also explored these issues.³ The World Trade Organization (WTO) has been struggling with the issue of what constitutes appropriate domestic regulation (and thus should not be viewed as a barrier to trade).⁴

A typical example is the OECD’s extensive regulatory reform initiative.⁵ The 2005 OECD report, *Guiding Principles for Regulatory Quality and Performance*, states that good regulation should:

- (i) serve clearly identified policy goals, and be effective in achieving those goals;
- (ii) have a sound legal and empirical basis;
- (iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account;
- (iv) minimise costs and market distortions;

2. See, e.g., *Better Regulation*, U.K. DEP’T FOR BUS. INNOVATION & SKILLS (BIS), <http://www.bis.gov.uk/betterregulation> (last visited Apr. 21, 2012); *Self-Regulated Professions: Balancing Competition and Regulation*, COMPETITION BUREAU CANADA 37–41, (2007) [hereinafter CANADIAN COMPETITION REPORT], available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf).

3. See *Regulatory Reform*, OECD, http://www.oecd.org/topic/0,3373,en_2649_37421_1_1_1_1_37421,00.html (last visited Apr. 21, 2012); *The APEC-OECD Co-operative Initiative on Regulatory Reform*, OECD, http://www.oecd.org/document/25/0,3343,en_2649_34141_2397017_1_1_1_37421,00.html (last visited Apr. 21, 2012). The United States, Canada, and Australia are members of APEC and the OECD. See *id.*

4. See, e.g., General Agreement on Trade in Services art. 6.4, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 189–90. For a discussion of the “domestic regulation disciplines” debates, see Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 895–98 (2010).

5. See *Regulatory Reform*, *supra* note 3.

- (v) promote innovation through market incentives and goal-based approaches;
- (vi) be clear, simple, and practical for users;
- (vii) be consistent with other regulations and policies; and
- (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.⁶

APEC has a joint regulatory project with the OECD.⁷ APEC is an intergovernmental organization that consists of the twenty-one countries that, roughly speaking, surround the Pacific Ocean.⁸ For example, the *APEC-OECD Integrated Checklist on Regulatory Reform* asks whether regulation (broadly defined) is transparent, consistent, comprehensible, accessible to domestic and international users, governmental and nongovernmental users, and whether its effectiveness is regularly assessed.⁹

In addition to the APEC and OECD intergovernmental recommendations, a number of individual countries have also considered these types of issues. Among these countries, a common approach is to first determine whether regulation is necessary, for example, because of information asymmetry or externalities. If regulation, such as lawyer regulation, is considered necessary, the next question is whether specific regulations are consistent with the principles of good regulation. Different entities have articulated these general regulatory principles in different ways. The United Kingdom, for example, has an entity known as the Better Regulation Executive (BRE) that has conducted extensive work.¹⁰ In the past, the BRE articulated five ideal qualities for regulation: (1) transparency; (2) accountability; (3) proportionality; (4) consistency; and (5) targeting—that is, regulation aimed only at cases where action is needed.¹¹ U.K. legal profession regulators

6. *OECD Guiding Principles for Regulatory Quality and Performance*, OECD 3 (2005), <http://www.oecd.org/dataoecd/19/51/37318586.pdf>.

7. See, e.g., *Economic Committee*, APEC, <http://www.apec.org/Home/Groups/Economic-Committee> (last visited Apr. 21, 2012) (“In 2004, APEC Leaders endorsed an ambitious work programme called the Leaders’ Agenda to Implement Structural Reform 2010 (LAISR). The agenda covers five areas for structural policy reform: *regulatory reform*, competition policy, public sector governance, corporate governance, and strengthening economic and legal infrastructure.” (emphasis added)).

8. See *About Us: Member Economies*, APEC, <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx> (last visited Apr. 21, 2012). For additional information about APEC’s role with respect to legal services, see Terry, *supra* note 4; *APEC Legal Services Initiative*, APEC, <http://www.legalservices.apec.org/index.html> (last visited Apr. 21, 2012).

9. See *APEC-OECD Integrated Checklist on Regulatory Reform*, OECD 7 (2008), <http://www.oecd.org/dataoecd/41/9/34989455.pdf> [hereinafter *APEC-OECD Checklist*].

10. See *Better Regulation*, *supra* note 2.

11. Compare *id.*, with *BRE: What We Do*, <http://www.berr.gov.uk/whatwedo/bre/> (last visited Apr. 21, 2012); see also BETTER REGULATION TASK FORCE, BETTER REGULATION—FROM DESIGN TO DELIVERY 26–27 (2005); *infra* note 274. Although the BRE no longer features these five principles on its website, a number of U.K. entities continue to cite these five principles of good regulation. See, e.g., *Better Regulation*, U.K. ENVIRONMENT AGENCY, <http://www.environment-agency.gov.uk/business/regulation/31993.aspx> (last visited Apr. 21, 2012) (stating that “[w]e follow five principles of better regulation”); *How HSE Meets the Obligations in the Statutory Regulators’ Compliance Code*, U.K. HEALTH & SAFETY EXEC.,

have been among those who have explored questions about the nature of “good” regulation.¹²

The Canadian antitrust division relied on the OECD principles in the “Effective Regulation” chapter of its 2007 review of “self-regulated” professions, including the legal profession. Although the Canadian government reframed the OECD principles, the thrust of its report was similar:

1. Restrictions should be directly linked to clear and verifiable outcomes;
2. Regulation should be the minimum necessary to achieve stated objectives;
3. The regulatory process must be impartial and not self-serving;
4. A regulatory scheme should allow for periodic assessment of its effectiveness and be subject to regular reviews; and
5. A primary objective of the regulatory framework should be to promote open and effectively competitive markets.¹³

The Canadian antitrust authorities recommended that regulators conduct a “competition assessment” that asks: (1) “Does the proposal limit the number or range of suppliers?”; (2) “Does the proposal limit the ability of suppliers to compete?”; and (3) “Does the proposal reduce the incentive of suppliers to compete vigorously?”¹⁴

Australia is among the jurisdictions that have considered the issue of what makes for good regulation. The Australian Office of Best Practice Regulation (OBPR) promotes the government’s objective of improving the effectiveness and efficiency of regulation.¹⁵ The OBPR plays a central role in assisting Australian government departments and agencies in meeting the Australian government’s requirements for best practice regulatory impact analysis and in monitoring and reporting on their performance.¹⁶ The OBPR also serves a similar role for the Council of Australian Governments’ (COAG) requirements, in relation to national regulatory proposals considered by ministerial councils, national standard-setting bodies, or COAG itself.¹⁷

<http://www.hse.gov.uk/regulation/compliancecode/index.htm> (last visited Apr. 21, 2012) (“Since the early 1990s, we have followed the five principles of good regulation: proportionality, accountability, consistency, transparency and targeting.”).

12. See, e.g., Christopher Decker & George Yarrow, *Understanding the Economic Rationale for Legal Services Regulation*, REG. POL’Y INST. (Oct. 31, 2010), http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/economic_rationale_for_Legal_Services_Regulation_Final.pdf.

13. See CANADIAN COMPETITION REPORT, *supra* note 2, at 37–41.

14. See *id.* at 40.

15. See *Office of Best Practice Regulation*, AUSTRALIAN GOV’T DEP’T OF FIN. & DEREGULATION: OFF. BEST PRACTICE REG., <http://www.finance.gov.au/obpr/about/> (last visited Apr. 21, 2012).

16. *Id.*

17. See *Best Practices Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, COUNCIL AUSTRALIAN GOV’TS 7–9 (2007), http://www.finance.gov.au/obpr/docs/COAG_best_practice_guide_2007.pdf.

The Australian government has endorsed the following six principles of good regulatory process identified by the Taskforce on Reducing Regulatory Burdens on Business:

Governments should not act to address “problems” until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognizing that not all “problems” will justify (additional) government action.

A range of feasible policy options—including self-regulatory and co-regulatory approaches—need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework.

Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.

Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.

Mechanisms are needed to ensure that regulation remains relevant and effective over time.

There needs to be effective consultation with regulated parties at all stages of the regulatory cycle.¹⁸

The United States has also engaged in regulatory reform initiatives.¹⁹ Its efforts have been multifaceted and include regulatory impact analyses or assessments,²⁰ efforts to reduce the impact of regulations on small businesses,²¹ and to reduce paperwork.²² Although the United States does not have a central entity responsible for regulatory reform, its overall efforts have been positively reviewed.²³

18. See *Rethinking Regulation: Taskforce on Reducing Regulatory Burdens on Business*, AUSTRALIAN GOV'T 147 (Jan. 2006), http://www.regulationtaskforce.gov.au/_data/assets/pdf_file/0007/69721/regulationtaskforce.pdf.

19. See, e.g., Press Release, Office of the U.S. Trade Representative, USTR Announces Regulatory Reform Initiative Results with Japan (July 6, 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/july/ustr-announces-regulatory-reform-initiative-results-j>; see also NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993), available at <http://www.nsf.gov/pubs/stis1993/npr93a/npr93a.txt>

20. See, e.g., Exec. Order No. 12866, 58 Fed. Reg. 190 (Sept. 30, 1993), available at http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf; OFFICE MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 (2003), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

21. See, e.g., Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b) (2006); Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 note.

22. See, e.g., Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501–3521 (2006).

23. See, e.g., OECD, REGULATORY REFORM IN THE UNITED STATES: GOVERNMENT CAPACITY TO ASSURE HIGH-QUALITY REGULATION 45 (1999), available at <http://www.oecd.org/dataoecd/48/19/2478900.pdf> (“The US government faces formidable legislative, institutional, judicial and structural constraints on good regulatory practices. Yet, by most measures, the capacities of the US federal government for assuring the quality of federal regulation are among the best in OECD countries.”).

As these examples show, in recent years, governments have been interested in thinking about what makes a good regulatory system. Commentators have also been interested in these issues.²⁴ Thus, when considering the issue of regulatory objectives, it is useful to be aware of the broader context in which these developments have occurred. To the extent regulatory objectives are consistent with a jurisdiction's regulatory approach, they are more likely to be embraced by that jurisdiction. These general principles may, however, require adaptation when applied to legal professional regulators. For example, as explained in greater detail in Part IV, one of the questions that we have about some of these regulatory reform initiatives is the proper role of "empiricism" in legal profession regulation because it may be difficult to measure *ex ante* the impact of regulatory changes on objectives such as public interest or the rule of law.²⁵

B. The "Regulatory Objectives" Trend Reflects Increased Interest in Lawyer Regulation Specifically

In addition to the increased interest in regulatory reform theory in general, the regulatory objectives movement has taken place in the context of greater interest in the theory of lawyer regulation. (It is also worth noting that other professions are subject to regulatory objectives.²⁶) It is beyond the scope of this Article to explore in detail the background or results of these sometimes lengthy legal profession regulation studies, but it is instructive to realize how many there have been.

During the last two decades, there were a number of analyses of professions, including the legal profession, which were prepared by various competition or antitrust authorities. In the United Kingdom, for example, the 2007 U.K. Legal Services Act (U.K. Act) arose out of the Clementi Report.²⁷ The Clementi Report was inspired, at least in part, by a U.K. Office of Fair Trading report that focused on the legal profession,²⁸ which

24. See, e.g., Decker & Yarrow, *supra* note 12; Adam Muchmore, *Private Regulation and Foreign Conduct*, 47 SAN DIEGO L. REV. 371 (2010).

25. See, e.g., CANADIAN COMPETITION REPORT, *supra* note 2, at 37 ("Restrictions should be directly linked to clear and verifiable outcomes."); APEC-OECD Checklist, *supra* note 9, at 15 ("Are the legal basis and the economic and social impacts of drafts of new regulations reviewed? What performance measurements are being envisaged for reviewing the economic and social impacts of new regulations?"); OECD Guiding Principles for Regulatory Quality & Performance, *supra* note 6, at 3 (noting that "[g]ood regulation should: (i) serve clearly identified policy goals, and be effective in achieving those goals; (ii) have a sound legal and empirical basis;" along with six other items); *infra* note 276 and accompanying text.

26. Early drafts of this Article included information about the regulatory objectives that apply to other professionals, such as those in the fields of health and accounting. While we have since omitted this information from the Article, both cross-cultural and cross-professional comparisons can be useful. See, e.g., Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"* 2008 J. PROF. LAW. 189, 210.

27. See *infra* notes 59–60 and accompanying text.

28. See Director General of Fair Trading, *Competition in the Professions*, OFF. FAIR TRADING 328 (Mar. 2001), http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf.

in turn was probably influenced, at least in part, by the “competition” or antitrust reports prepared by the OECD.²⁹ In 2003, the European Union launched a competition project that focused on five issues related to five professions, including the legal profession.³⁰ This EU initiative spawned a number of inquiries in EU member states about the regulation of the legal profession.³¹ In addition to these OECD and governmental reports about lawyer regulation, there were a number of consultant reports that were commissioned by governments, bar associations, and others.³²

29. See *Competition in Professional Services*, OECD 2 (1999), <http://www.oecd.org/dataoecd/35/4/1920231.pdf> (“This document comprises proceedings in the original languages of a Roundtable on Competition in Professional Services, which was held by the Working Party No. 2 of the Committee on Competition Law and Policy in June 1999.”). Several years later, the OECD issued a report on competition in the legal services sector. See *Competitive Restrictions in Legal Professions*, OECD 18 n.5 (Apr. 27, 2009), <http://www.oecd.org/dataoecd/12/38/40080343.pdf>.

30. See COMM’N OF THE EUROPEAN CMTYS, COMMUNICATION FROM THE COMMISSION: REPORT ON COMPETITION IN PROFESSIONAL SERVICES 5 (Feb. 9, 2004), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0083en01.pdf; COMM’N OF THE EUROPEAN CMTYS, COMMUNICATION FROM THE COMMISSION: PROFESSIONAL SERVICES—SCOPE FOR MORE REFORM: FOLLOW-UP TO THE REPORT ON COMPETITION IN PROFESSIONAL SERVICES 10 (2005) [hereinafter EU FOLLOW-UP REPORT], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0405:FIN:EN:PDF>. For additional information about this EU Competition Initiative, see Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT’L L. & BUS. 1, 69 (2009). The EU commissioned a report about competition among the liberal professions. Iain Paterson et al., *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States*, EUROPEAN COMM’N, DG COMPETITION 9 n.1 (Jan. 2003), http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf. The EU announced the launch of its initiative at the same time that it announced the publication of the report it had commissioned. See Terry, *supra*, at 32.

31. See generally EU FOLLOW-UP REPORT, *supra* note 30; Terry, *supra* note 30, at 62–66.

32. See, e.g., EUROPEAN COMPETITION LAW 2004: THE RELATIONSHIP BETWEEN COMPETITION LAW AND (LIBERAL) PROFESSIONS (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2006) (contains written contributions from the 2004 Workshop and edited transcripts of the debates); BARBARA BAARSMA ET AL., REGULATION OF THE LEGAL PROFESSION AND ACCESS TO LAW, AN ECONOMIC PERSPECTIVE 48 (2008), available at http://www.seo.nl/uploads/media/2008-01_Regulation_of_the_legal_profession_access_to_law.pdf; COPENHAGEN ECONOMICS, THE LEGAL PROFESSION: COMPETITION AND LIBERALISATION (2006), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/The_legal_profession1_1195120689.pdf; COUNCIL BS. & L. Soc’YS EUROPE, CCBE ECONOMIC SUBMISSION TO COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES (2006), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf; *Economic Impact of Regulation in Liberal Professions: A Critique of the IHS Report*, RBB ECONOMICS (Sept. 9, 2003), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/rbb_ihs_critique_en1_1183706206.pdf; Martin Henssler & Matthias Kilian, *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States*, HANS-SOLDAN-STIFTUNG (Sept. 2003), available at <http://www.anwaltverein.de/downloads/praxis/Positionspapier-Henssler-Kilian-Englisch-Endversion.pdf>; Christoph Schmid et al., *Preliminary Findings from the Ongoing Study on “Conveyancing Services Regulation in Europe,”* EUROPEAN COMM’N, DG COMPETITION 4 n.2 (Dec. 11, 2006), http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/09_zerp.pdf; Nuno Garoupa, *Regulation of Professions in the US and Europe: A Comparative Analysis* (Ctr. for Econ. Policy Research, Working Paper No. 42, 2004), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1053&context=alea>.

This interest in legal profession regulation has not been limited to Europe. As noted earlier, in 2008, the Canadian antitrust authority issued a report on self-regulated professions and recommended several changes.³³ It issued its follow-up report in September 2011.³⁴ The Australian competition initiative began in 1994 and included the legal profession within its reforms.³⁵ Antitrust authorities elsewhere in the world also have been interested in issues related to regulation of the legal profession.³⁶ Although the past few years have not seen as intense an interest in the legal profession by antitrust authorities as in the past decade, there is still interest. The OECD, for example, has a project known as STRI—Services Trade Restrictiveness Index—that attempts to measure barriers to trade.³⁷ Legal services is one of the sectors whose barriers are measured.

There has also been a flurry of reports issued in the wake of the groundbreaking Australian developments related to public issuance of law firm shares, incorporated legal practices, and the proactive ex ante approach to lawyer regulation that has been based on the statutory requirement that incorporated legal practices have “appropriate management systems.”³⁸ These reports have focused on the theory of regulation,³⁹ as well as the empirical results.⁴⁰

For additional information, see Daniel Vázquez Albert, *Competition Law and Professional Practice*, 11 ILSA J. INT'L & COMP. L. 555, 568 & nn.8–10 (2005); Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415 (1998); Terry, *supra* note 30; see also John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301, 375–79 (1991) (discussing the FTC's *California Dental Association* decision and the application of antitrust principles to professionals other than lawyers).

33. See CANADIAN COMPETITION REPORT, *supra* note 2.

34. See COMPETITION BUREAU CANADA, SELF-REGULATED PROFESSIONS—POST-STUDY ASSESSMENT (2011), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03407.html>.

35. See, e.g., LAW COUNCIL OF AUSTRALIA, BLUEPRINT FOR THE STRUCTURE OF THE LEGAL PROFESSION: A NATIONAL MARKET FOR LEGAL SERVICES 3 (July 1994), available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2F019E0B-1E4F-17FA-D26D-E43663EDE0F9&siteName=lca; see also Steve A. Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671 (2004) (explaining that NSW's multidisciplinary practice rules were changed as a result of this report); *National Competition Policy Review of the Legal Profession Act*, LAWLINK, http://www.lawlink.nsw.gov.au/report%5Cld_reports.nsf/pages/ncp_1 (explaining why the 1995 amendments to the Trade Practices Act of 1974 led to the 1998 competition review of the legal profession).

36. See, e.g., Int'l Inst. of Law Ass'n Chief Executives, *The Implementation of the Reform of the Legal Profession—Case Studies in Change* (Aug. 18, 2006), IILACE 2006 New York City Conference Program August 17–19 (on file with author).

37. OECD, *Indicators of Regulatory Conditions in the Professional Services*, available at <http://www.oecd.org/dataoecd/25/19/42220487.xls> (spreadsheet) (at “Read me” tab).

38. Section 140(3) of the Legal Profession Act 2004 (NSW) requires a director of an incorporated legal practice to implement and maintain “appropriate management systems.” See generally OFFICE OF THE LEGAL SERVICES COMMISSIONER, <http://www.lawlink.nsw.gov.au/olsc> (last visited Apr. 21, 2012).

39. See, e.g., Steve Mark, *Regulating for Professionalism: The New South Wales Approach*, OFF. LEGAL SERVICES COMM'R (2010), http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Regulating_for_Professionalism_ABA_Conference_August

Since the adoption of the U.K. Act, there have been a number of influential British reports that have focused on regulation of the legal profession. For example, in 2009, the Law Society of England and Wales commissioned two reports. The “Smedley Report” recommended that the U.K. Solicitors Regulation Authority (SRA) separately regulate law firms representing sophisticated corporate clients.⁴¹ Smedley also recommended that certain principles might be applied differently to these firms. The “Hunt Report” took a broader approach and responded to certain of Smedley’s proposals.⁴² Where Smedley recommended that a separate division of the SRA should regulate firms providing certain kinds of corporate legal work, Hunt recommended a unified approach as a long-term target.

The SRA has issued an almost overwhelming number of consultations that address issues related to both the theory of the regulation of the legal profession, as well as specific issues.⁴³ The Bar Standards Board (BSB) has also issued consultations about issues related to the regulation of barristers.⁴⁴

The U.K. Legal Services Board, which is now the overarching regulator of legal professionals in the United Kingdom, also has commissioned a number of studies.⁴⁵ These studies include, for example, a report on regulatory objectives.⁴⁶ The number and breadth of these reports is breathtaking.⁴⁷

2010.pdf/\$file/Regulating_for_Professionalism_ABA_Conference_August2010.pdf. *See generally Speeches and Papers*, OFF. LEGAL SERVICES COMM’R, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches (last visited Apr. 21, 2012).

40. *See, e.g.*, 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).

41. *See generally* NICK SMEDLEY, REVIEW OF THE REGULATION OF CORPORATE LEGAL WORK (Mar. 31, 2009), available at http://www.lawcentres.org.uk/uploads/Review_of_the_Regulation_of_Corporate_Legal_Work_03.09_.pdf.

42. *See* RT HON LORD HUNT OF WIRRAL MBE, THE HUNT REVIEW OF THE REGULATION OF LEGAL SERVICES (Oct. 2009), available at http://www.lawcentres.org.uk/uploads/Legal_Regulation_Report_October_2009.pdf.

43. *See, e.g.*, *Closed Consultations*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/sra/consultations/consultations-closed.page> (last visited Apr. 21, 2012). In our view, it is hard to believe that any single person can monitor all of the consultations and respond appropriately.

44. *See Closed Consultations*, B. STANDARDS BOARD, <http://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/closed-consultations/> (last visited Apr. 21, 2012). For example, the BSB has issued consultations on regulating entities and implications on regulation of the 2007 Legal Services Act. *Id.*

45. *See, e.g.*, *Publications*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/news_publications/publications/index.htm (last visited Apr. 21, 2012).

46. *See The Regulatory Objectives: Legal Services Act 2007*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf.

47. *See, e.g.*, *Latest News*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/news_publications/latest_news/index.htm (last visited Apr. 21, 2012). As of April 21, 2012, the Legal Services Board’s “news” webpage listed more than one-hundred items, a number of which were announcements of reports or studies on a wide range of topics. *Id.*

These U.K. consultations and reports have generated great interest outside the United Kingdom. For example, a publication of the American Bar Association Section of International Law has reported on the Hunt and Smedley reports and other U.K. developments.⁴⁸ The Hunt and Smedley reports have been mentioned at a number of conferences we have attended. Moreover, although we are not familiar with all of the details of all of the consultations and reports that the LSB has commissioned, we can attest to the thoughtfulness of at least some of these reports and their close examination of the theory of lawyer regulation.⁴⁹

The United Kingdom is not the only country that has issued reports in the past five years examining legal profession regulation. In Canada, the Yukon Law Society has issued a lengthy discussion paper that considers whether to amend the Yukon legal profession act.⁵⁰ In Australia, there have been a number of reports that consider how legal profession regulation could be amended.⁵¹

In addition to these reports and studies, there appears to be increased academic interest in the theory of lawyer regulation. Commentators such as Professor Gillian Hadfield and others have been influential. Conferences such as "Future Ed,"⁵² the International Legal Ethics Conferences I–V,⁵³ the May 2009 Conference for the Conference of Chief Justices,⁵⁴ and the conferences sponsored by Harvard and Georgetown,⁵⁵ among others, have

48. See, e.g., Laurel S. Terry et al., *Transnational Legal Practice 2009*, 44 INT'L LAW. 563, 566–67 (2010).

49. See, e.g., Decker & Yarrow, *supra* note 12; Laurel S. Terry, *Understanding the Economic Rationale for Legal Services Regulation: The Importance of Interdisciplinary Dialogue*, in UNDERSTANDING THE ECONOMIC RATIONALE FOR LEGAL SERVICES REGULATION: A COLLECTION OF ESSAYS 11 (2011), available at http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/economics_of_legal_services_regulation_discussion_papers_publication_final.pdf.

50. See *Toward a New Legal Profession Act: A Discussion Paper*, LAW SOC'Y YUKON (May 12, 2011) [hereinafter *Yukon Discussion Paper*], available at <http://www.lawsocietyyukon.com/forms/towardanewlegalprofessionact.pdf>.

51. See the various discussion papers from the National Legal Profession Reform Taskforce at *Background to the Council of Australian Governments (COAG) National Legal Profession Reform*, AUSTRALIAN GOV'T ATTORNEY-GENERAL'S DEP'T, <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/BackgroundtotheCouncilofAustralianGovernment/COAGNationalLegalProfessionReform.aspx> (last visited Apr. 21, 2012).

52. See, e.g., *Future Ed: New Business Models for U.S. and Global Legal Education*, N.Y. L. SCH., http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/future_ed (last visited Apr. 21, 2012).

53. See, e.g., *International Legal Ethics Conference IV*, STANFORD L. SCH., <http://blogs.law.stanford.edu/ilec4/2009/10/15/hello-world/> (last visited Apr. 21, 2012); *Conferences*, INT'L ASSOC. OF LEGAL ETHICS, <http://www.stanford.edu/group/lawlibrary/cgi-bin/iaole/wordpress/conferences/> (last visited Apr. 21, 2012) (includes links to information about ILEC I–V).

54. See, e.g., *The Future Is Here: Globalization and the Regulation of the Legal Profession*, ABA CENTER FOR PROF'L RESPONSIBILITY AND STANDING COMM. ON PROF'L DISCIPLINE & GEORGETOWN CENTER FOR THE STUDY OF THE LEGAL PROFESSION (2009), <http://www.law.georgetown.edu/news/documents/CCJ-2009-WebMaterials-final.doc>.

55. See, e.g., *Center for the Study of the Legal Profession*, GEO L., <http://www.law.georgetown.edu/LegalProfession/> (last visited Apr. 21, 2012); *Globalization of the Legal Profession*, HARV. L. SCH., http://www.law.harvard.edu/programs/plp/pages/globalization_conference.php (last visited Apr. 21, 2012).

raised numerous issues related to lawyer regulation. Thus, when considering the regulatory objectives discussed in Part II (and the recommendations in Parts III and IV), it is helpful to understand that they have been adopted against the backdrop of increased discussion of the nature of regulation generally and the regulation of the legal profession specifically.

II. EXAMPLES OF REGULATORY OBJECTIVES FOR THE LEGAL PROFESSION

This part examines regulatory objectives that have been adopted in England and Wales, Scotland, Canada, New Zealand, and Denmark. It also examines the proposals by some jurisdictions, including Australia, India, and Ireland, to include regulatory objectives in their legislation regulating the legal profession. The intent of this part is to provide the reader with an understanding of the consistent and yet varied approaches to the topic of legal profession regulatory objectives.

A. Jurisdictions that Have Already Adopted Regulatory Objectives for the Legal Profession

1. England and Wales

As noted above, the United Kingdom provides one of the most prominent examples of regulatory objectives for the legal profession. These objectives, which are found in section 1 of the 2007 U.K. Legal Services Act, are as follows:

- (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—
- (a) protecting and promoting the public interest;
 - (b) supporting the constitutional principle of the rule of law;
 - (c) improving access to justice;
 - (d) protecting and promoting the interests of consumers;
 - (e) promoting competition in the provision of services within subsection (2);
 - (f) encouraging an independent, strong, diverse and effective legal profession;
 - (g) increasing public understanding of the citizen’s legal rights and duties;
 - (h) promoting and maintaining adherence to the professional principles.⁵⁶

The regulatory objectives espoused in the U.K. Act are not set out in any particular order, and the U.K. Act does not specify how these objectives and

56. Legal Services Act, 2007, c. 29, § 1 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2007/29/part/1>. The professional principles referred to in section 1(h) are defined in section 1(3). *Id.* § 1(3). It is beyond the scope of this Article to compare the professional principles found in different jurisdictions.

principles should be balanced in the event they conflict with one another. The Explanatory Note that accompanied the legislation stated that “[t]he Legal Services Board, the Office for Legal Complaints and the approved regulators will be best placed to consider how competing objectives are to be balanced in a particular instance.”⁵⁷ The Legal Services Board has agreed with this interpretation.⁵⁸

The inclusion of regulatory objectives in the U.K. Act marked a fundamental change in the United Kingdom’s legal profession regulation. The move to include regulatory objectives was bold and, as noted below, there was considerable debate about the particular objectives to include. The adoption of regulatory objectives had been one of the key points in the recommendations and report prepared by Sir David Clementi,⁵⁹ which was a major impetus behind the U.K. Act.⁶⁰ Because there had been debate about the draft regulatory objectives he circulated,⁶¹ Clementi concluded that it would be more sensible to have Parliament write detailed regulatory

57. See *id.*, Explanatory Note, Section 1: The Regulatory Objectives, available at <http://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/1>.

58. See *The Regulatory Objectives: Legal Services Act 2007*, *supra* note 46, at 2 (“The regulatory objectives are not set out in any hierarchy in the Act. Indeed, any attempt to weight or rank them would be doomed to failure by the significant overlap and interplay between them.”).

59. See DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT (Dec. 2004), available at <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/report/report-chap.pdf> (archived content). For additional information on the history of the U.K. Act, see also Judith Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53; *History of the Reforms*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm (last visited April 21, 2012).

60. See, e.g., Catherine Fairbairn, *Research Paper 07/48: Legal Services Bill [HL] Bill 108 of 2006-07*, HOUSE OF COMMONS LIBRARY 8-9 (May 29, 2007), <http://www.parliament.uk/briefing-papers/RP07-48.pdf>. Clementi was asked to recommend a framework that would be “independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.” See CLEMENTI, *supra* note 59, at 1. His assignment followed the issuance of several reports by the Office of Fair Trading on Competition in Professional Services and the issuance of a white paper and follow-up reports by the Department of Constitutional Affairs. See *Publications*, LEGAL SERVICES REV., <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/pubs.htm> (last visited Apr. 21, 2012) (archived content).

61. Clementi had circulated a consultation report in March 2004, in which he sought public comment on a number of issues, including six regulatory objectives. David Clementi, *Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales*, LEGAL SERVICES REV. (Mar. 2004), <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/consult/review.htm> (archived content). Clementi’s December 2004 Final Report summarized the comments received in response to his six proposed regulatory objectives and his reactions to those comments. CLEMENTI, *supra* note 59, at 15–20. The six objectives set forth in the report were: (1) maintaining the rule of law; (2) access to justice; (3) protection and promotion of consumer interests; (4) promotion of competition; (5) encouragement of a confident, strong and effective legal profession; and (6) promoting public understanding of the citizen’s legal rights. *Id.*; see also Terry, *supra* note 30.

objectives, rather than attempting to resolve the issue in his Final Report.⁶² He did, however, observe that the six objectives set forth in his Report could “provide the core around which a regulatory framework for legal services can be built.”⁶³

In May 2006, following the issuance of a governmental white paper,⁶⁴ the Department of Constitutional Affairs presented a draft Legal Services Bill to Parliament.⁶⁵ This bill omitted what is now the first regulatory objective in the U.K. Act, “protecting and promoting the public interest.”⁶⁶ The draft bill also omitted the word “independent” from what is now objective (f), “encouraging an independent, strong, diverse and effective legal profession.”⁶⁷

The draft bill was reviewed by a joint House of Commons and House of Lords Committee, which issued a lengthy report.⁶⁸ This Committee noted the shift in emphasis from public interest to consumer interest, and therefore recommended a change in the regulatory objectives to explicitly reference public interest along with the interests of consumers; it also recommended adding the word “independent” when describing the legal profession.⁶⁹ This Committee also recommended that the principles be expanded to include a lawyer’s duty to the court.⁷⁰ When the draft bill was introduced in the House of Lords, the regulatory objectives had been

62. CLEMENTI, *supra* note 59, at 20 (“[A] number of respondents have proposed minor changes to the regulatory objectives set out in the Consultation Paper and to the text which supports each objective. However, it has not been the intention of this Chapter to draft precisely the necessary objectives. The precise wording of statutory objectives would be subject to detailed analysis by Parliamentary draftsmen, and subsequent examination by Parliament itself. Whilst I do not believe it sensible to attempt that detailed analysis here, I do believe that the six objectives set out in this Chapter can provide the core around which a regulatory framework for legal services can be built.”).

63. *Id.*

64. U.K. DEP’T CONSTITUTIONAL AFFAIRS, THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST (2005), *available at* <http://www.official-documents.gov.uk/document/cm66/6679/6679.pdf>. This paper briefly sets forth seven regulatory objectives that it expected would be included in the legislation:

1) to support the rule of law; 2) to improve access to justice; 3) to protect and promote consumers’ interests; 4) to promote competition; 5) to encourage a strong and effective legal profession; 6) to increase public understanding of the citizen’s legal rights; and 7) to maintain the principles of those providing legal services (independence, integrity, the duty to act in the best interests of the client, and client confidentiality).

Id. at 20. The seventh item was not included in Clementi’s list. *See supra* note 61.

65. *See* DEP’T FOR CONSTITUTIONAL AFFAIRS, DRAFT LEGAL SERVICES BILL, EXPLANATORY NOTES AND REGULATORY IMPACT ASSESSMENT 1–2 (2006), *available at* <http://www.official-documents.co.uk/document/cm68/6839/6839.pdf>.

66. *Id.* at 1.

67. *Id.* The original bill also omitted two principles that appear in the U.K. Act: maintaining proper standards of work, and complying with the duty to the court to act with independence in the interests of justice. *Compare id.* at 1(3), with Legal Services Act, 2007, c. 29, § 1(3) (U.K.).

68. *See* HOUSE OF COMMONS & HOUSE OF LORDS, JOINT COMM. ON THE DRAFT LEGAL SERV. BILL, DRAFT LEGAL SERVICES BILL (July 25, 2006), *available at* <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf>.

69. *See id.* ¶¶ 3–4.

70. *See id.* ¶ 3.

revised to partially respond to these Joint Committee recommendations.⁷¹ The House of Lords bill included the word “independent” when describing the desired legal profession, but did not include “protecting the public interest” as one of the regulatory objectives.⁷² There were a number of debates in the House of Lords and its committees about the proper role of the regulatory objectives, whether to amend the draft regulatory objectives, whether to set priorities among the objectives, and who would have the primary obligation to enforce them.⁷³ Some of these efforts were

71. See Legal Services Bill, 2006-7, H.L. Bill [9] (U.K.), available at <http://www.publications.parliament.uk/pa/ld200607/ldbills/009/2007009a.pdf>; see also *Legal Services Bill 2006-07*, PARLIAMENT, http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm (last visited Apr. 21, 2012) (includes links to all drafts of the bill); Fairbairn, *supra* note 60, at summary (“The Bill as introduced in the House of Lords incorporated a number of amendments designed to address concerns raised by the Joint Committee which scrutinised the draft Bill. It has since been amended considerably during its passage through the House of Lords. Many of the amendments made were Government amendments tabled to meet concerns expressed during the Lords stages of the Bill. For example, the Bill now includes a regulatory objective of protecting and promoting the public interest . . .”).

72. See Legal Services Bill, 2006-7, H.L. Bill [67] cl. 1 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200607/ldbills/067/2007067a.pdf>.

73. The bill went through three “readings” and several committee sessions in the House of Lords. See, e.g., Legal Services Act Explanatory Note, *supra* note 57, at 81–82 (Hansard references show the progression of the bill); see also Fairbairn, *supra* note 60 (describing the history of the bill); *Influencing Law: Legal Services Bill*, LAW SOC’Y ENGLAND & WALES (Dec. 6, 2006) <http://www.lawsociety.org.uk/influencinglaw/currentbillactivity/view=billarticle.law?BILLID=313755>.

While the bill was in committee, there were three proposals to amend the regulatory objectives. Two of the proposed amendments were either not moved or withdrawn. Many of these debates and amendments are summarized in a report prepared by the House of Commons Library. See Fairbairn, *supra* note 60, at 73 (summarizing one of the successful amendments in which “the threshold for intervention by the LSB has been raised: it is now provided . . . [that to be overturned, an act or omission] would have, or would be likely to have, ‘a significant adverse impact on the regulatory objectives taken as a whole’ (rather than, as originally provided, an adverse impact on one or more of the regulatory objectives)”). The Law Society of England and Wales was among those who urged that the regulatory objectives section be amended to indicate that some objectives took priority over others. See, e.g., LAW SOC’Y OF ENGLAND & WALES, PARLIAMENTARY BRIEF, LAW SOCIETY’S SUGGESTED AMENDMENTS WITH BRIEFINGS (1ST TRANCHE) (Jan.–Feb. 2007), available at <http://www.lawsociety.org.uk/secure/file/163319/e/teamsite-deployed/documents/templatedata/Internet%20Documents/Parliamentary%20briefings/Documents/LSbillcommitt ee1trancheFeb07.pdf>. The Law Society offered the following explanation:

The Law Society recognises that it would not be appropriate to seek to provide a strict hierarchy between the seven objectives set out in the Bill. Nevertheless, some of the objectives are clearly of fundamental importance, whilst others—though desirable, all things being equal—should not be pursued at the expense of those more fundamental objectives. In particular, it is important that a desire to foster competition is not pursued at the expense of supporting the rule of law, improving access to justice, or protecting and promoting the interests of consumers. . . . The suggested amendment is intended to ensure that—whilst retaining the promotion of competition in the provision of services as a regulatory objective—it is made explicitly subordinate to the objectives of supporting the rule of law, improving access to justice, and protecting and promoting the interests of consumers.

Id. at 2. As set forth in the Explanatory Note, *supra* note 57, both the House of Lords and House of Commons rejected the idea of setting priorities among the regulatory objectives.

successful: the bill adopted by the House of Lords included for the first time what is now the first regulatory objective, protecting and promoting the public interest.⁷⁴ After the bill was passed by the House of Lords, the House of Commons began its consideration of the issues.⁷⁵ Once again, there was significant discussion and debate, including a proposal to set priorities among the regulatory objectives.⁷⁶ Ultimately, however, the House of Commons approved the same language in section 1 that had been approved by the House of Lords.⁷⁷ This language became section 1 of the U.K. Act, which received royal assent on October 30, 2007.⁷⁸ This legislative history and the amendments that were adopted illustrate the value of having a rigorous debate about the content of any regulatory objectives, because important objectives may inadvertently be omitted, and because views differ about which objectives are appropriate.

As Parts III and IV explain in greater detail, we believe that the regulatory objectives in the U.K. Act will educate consumers and the profession about the purpose and function of the legislation and of regulators. These regulatory objectives also underscore the need to promote the rule of law, provide consumer protection, and ensure access to justice, which are objectives that are not always readily understood as being a purpose of legal profession regulation. While the objective that focuses on competition has been somewhat controversial, the underlying goal—encouraging greater access to justice—is a laudable one.

During the debates on January 9, 2007, three amendments were proposed. The proposed amendments were to: (1) add the clause: “protecting and promoting the public interest” as a regulatory objective; (2) add the words “the public interests and” after the word “promoting” in section (1)(d) of the final bill; and (3) insert “subject to the objectives in paragraphs (a) to (c)” at the beginning of section (1)(d) of the final bill. 688 PARL. DEB., H.L. (5th ser.) (2007) 116–30. Only the first one of these amendments was included in the final version of the bill that the House of Lords passed on May 15, 2007. See Fairbairn, *supra* note 60, at 3–4; Legal Services Bill, 2006–7, H.L. Bill [67] cl. 1 (U.K.).

74. See Fairbairn, *supra* note 60, at 3–4; Legal Services Bill, 2006–7, H.L. Bill [67] cl. 1.

75. The Bill was introduced in the House of Commons as Legal Services Bill, 2006–7, H.C. Bill [108] cl. 1, available at <http://www.publications.parliament.uk/pa/cm200607/cmbills/108/2007108a.pdf>.

76. A similar amendment to that proposed in the House of Lords was proposed in the House of Commons’s committee. See Fairbairn, *supra* note 60, at 3–4. Mr. Djanogly proposed to insert after section (e) the clause “subject to objectives (a) to (d).” See 12 Jun. 2007, PARL. DEB., H.L. (2007) 7 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200607/cmpublic/legal/070612/am/70612s01.htm>. The following was offered as the reason for the proposal: “That would ensure that the objective of promoting competition is expressly subordinate to the objectives of protecting and promoting the public interest, thereby supporting the constitutional principle of the rule of law, improving access to justice and protecting and promoting the interests of consumers.” *Id.*

77. See 12 Jun. 2007, PARL. DEB., H.L. (2007) 15 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200607/cmpublic/legal/070612/am/70612s01.htm> (showing a 5–10 committee rejection of the amendment). Compare the House of Lords bill, Legal Services Bill, 2006–7, H.L. Bill [67] cl. 1 (U.K.), with the version that was ultimately enacted, Legal Services Act, 2007, c. 29, § 1 (U.K.).

78. See, e.g., Legal Services Act Explanatory Note, *supra* note 57, at 81–82.

2. Scotland

The U.K. Act explicitly states that it applies to the legal professions in England and Wales, but not in Scotland and Northern Ireland.⁷⁹ In 2010, Scotland passed its own legal services act.⁸⁰ The debate in Scotland was particularly heated, especially on the issue of alternative business structures.⁸¹ The regulatory objectives section, however, changed very little as it went through the legislative process.

The regulatory objectives in the Scottish legislation are found in section 1 of the Legal Services (Scotland) Act 2010.⁸² The regulatory objectives section in the original Scottish bill had a different format from the U.K. Act, but much of its content was similar.⁸³ During the amendment process, the Justice Committee approved an amendment to add “the interest of justice” to the first objective,⁸⁴ but rejected a proposal to set priorities

79. See Legal Services Act, 2007, c. 29, § 195 (U.K.); *id.* at Schedule 20; *id.* at Explanatory Notes: Territorial Extent, available at <http://www.legislation.gov.uk/ukpga/2007/29/notes/division/3>; see also *Frequently Asked Questions*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/can_we_help/faqs/index.htm (last visited Apr. 21, 2012).

80. See Legal Services (Scotland) Act, 2010, (A.S.P. 16), available at http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf; Richard Hough, *Legal Services (Scotland) Bill*, SPICE BRIEFING, <http://www.scottish.parliament.uk/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB09-78.pdf>.

81. See, e.g., Hough, *supra* note 80, at 1.

82. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1. This section provides:

For the purposes of this Act, the regulatory objectives are the objectives of—

- (a) supporting—
 - (i) the constitutional principle of the rule of law,
 - (ii) the interests of justice,
- (b) protecting and promoting—
 - (i) the interests of consumers,
 - (ii) the public interest generally,
- (c) promoting—
 - (i) access to justice,
 - (ii) competition in the provision of legal services,
- (d) promoting an independent, strong, varied and effective legal profession,
- (e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
- (f) promoting and maintaining adherence to the professional principles.

Id.

83. Compare Legal Services (Scotland) Bill, 2010, [as introduced], [http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20\(Scotland\)%20Bill/b30s3-introd.pdf](http://www.scottish.parliament.uk/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd.pdf), with Legal Services Act, 2007, c. 29 (U.K.).

84. See 8 June 2010, Justice Committee Official Report (2010) 3182 (Scot.), available at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=5552&mode=html>. The original version read:

- (a) supporting the constitutional principle of the rule of law,
- (b) protecting and promoting—
 - (i) the interests of consumers,
 - (ii) the public interest generally,
- (c) promoting—
 - (i) access to justice,
 - (ii) competition in the provision of legal services,
- (d) promoting an independent, strong, varied and effective legal profession,

among the objectives.⁸⁵ Both of these Committee actions were affirmed by Parliament.⁸⁶ Parliament approved the final bill in October and it received Royal Assent on November 9, 2010.⁸⁷ Although the objectives Scotland adopted are not identical to those adopted in the United Kingdom, there is substantial overlap among them. There are also some potentially important differences.⁸⁸ Similar to the U.K. Act, Scotland's regulatory objectives refer to professional principles.⁸⁹

3. Canada

Canadian lawyers are primarily regulated on a provincial rather than a national basis.⁹⁰ All of the Canadian provinces except Quebec have language in their legal profession acts that might be described as regulatory objectives provisions, even though none of these jurisdictions uses the term

(e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,

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

Legal Services (Scotland) Bill [as introduced] § 1, *supra* note 83.

85. *Id.*

86. *Compare* Legal Services (Scotland) Bill [as amended at stage 2], *available at* [http://www.scottish.parliament.uk/s3_bills/Legal%20Services%20\(Scotland\)%20Bill/b30as3-stage2.pdf](http://www.scottish.parliament.uk/s3_bills/Legal%20Services%20(Scotland)%20Bill/b30as3-stage2.pdf), *with* Legal Services (Scotland) Act, 2010, (A.S.P. 16). *See generally* 6 Oct. 2010 PARL. DEB. (2010) 29251 (Scot.), *available at* <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=5811&mode=html>. It should be noted, however, that the Committee recommended placing the "interests of justice" language in a different spot than where it appeared in the final bill. *Id.*

87. *See* Legal Services (Scotland) Act, 2010, (A.S.P. 16) (noting the date of passage and the date of Royal Assent).

88. *Compare id.*, *with* Legal Services Act, 2007, c. 29, § 1 (U.K.). Both of these are reproduced in Appendix 2, *infra*. The differences among the U.K. and Scottish objectives include the following: (1) the Scottish Act refers to protecting and promoting the public interest generally, whereas the U.K. Act omits the word "generally"; (2) the Scottish Act adds "supporting the interests of justice" to the objective about supporting the constitutional principle of the rule of law; (3) the Scottish act seeks to "promote" access to justice, whereas the U.K. Act aims to "improve" access to justice; (4) the Scottish Act refers to promoting a "varied" legal profession whereas the U.K. Act speaks of promoting a "diverse" legal profession; (5) the Scottish Act omits the objective of increasing public understanding of the citizen's legal rights and duties; and (6) the Scottish Act includes a provision not found in the U.K. Act, which is "encouraging equal opportunities." The first four differences listed above may simply be semantic, or they may have other more substantive interpretations that only time will divulge. The final two points may have a more considerable effect. The objective encouraging equal opportunity may limit the Scottish approach in terms of education to the rather narrow but important issue of gender equality within the profession.

89. *See* Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 2. Scotland's principles have a different format and some differing content than the U.K. principles, but there is still a significant amount of overlap between Scotland's and the U.K. Act's professional principles *Compare id.*, *with supra* note 56 (referring to the professional principles in the U.K. Legal Services Act).

90. *See infra* Appendix 2. Canada has ten provinces and three territories. The ten Provinces include Alberta; British Columbia; Manitoba; New Brunswick; Newfoundland and Labrador; Nova Scotia; Ontario; Prince Edward Island; Quebec; and Saskatchewan. The three territories are Nunavut, Northwest Territories, and the Yukon. *See Provinces and Territories*, CAN. PRIVY COUNCIL OFFICE, <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=provterr>.

“regulatory objectives.”⁹¹ One of the three Canadian territories has language that is directly analogous to regulatory objectives; the remaining two territories have “purpose” language embedded somewhere in their legal profession acts but not at the outset.⁹²

Although most of the Canadian provinces and territories have language that might be considered to be regulatory objectives language, the language that is used is not uniform. For example, some of these Canadian jurisdictions have regulatory objectives language that is quite detailed, located near the beginning of their acts, and similar in many respects to section 1(1) of the U.K. Act.⁹³ Others, however, have very broad language that is not located near the beginning of the act and thus does not establish the framework for what follows, in contrast with section 1 of the U.K. Act.⁹⁴ Some of these regulatory objectives provisions are of relatively recent origin, such as Saskatchewan’s regulatory objectives, which were added in 2010; Ontario’s, which were amended in 2006; and the Yukon’s regulatory objectives, which were amended in 2004.

The regulatory objectives-like section of the British Columbia and Yukon Legal Profession Acts are identical to each other. Substantially similar language is found in the legal profession acts of New Brunswick and Prince Edward Island.⁹⁵ They state as follows:

It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

91. See *infra* Appendix 2. As this Appendix shows, the nine Provinces that have such language are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan. Quebec, of course, is in a different situation because it is a civil law, French-speaking jurisdiction and has different kinds of legal professionals, such as notaries, than the other Canadian provinces. It appears that the Act respecting the Barreau du Québec does not contain any objectives language. See R.S.Q., c. B-1 (Can.) (last revised Aug. 11, 2012), http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB1%2FB1_A.htm. But the overarching Code of the Professions, which is administered by the Office des professions du Québec, includes “objectives” language. See Professional Code, R.S.Q., c. C-26 (Can.), available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_26/C26_A.HTM. That Office’s webpage also includes objectives-type language. See *Ordres Professionnels*, OFFICE DES PROFESSIONS QUÉBEC, <http://www.opq.gouv.qc.ca/ordres-professionnels/> (last visited Apr. 21, 2012).

92. See Legal Profession Act, R.S.N.W.T. 1998, c. L-2, pt. 3, § 22 (Can.) (last revised May 19, 2011); Legal Profession Act, R.S.N.W.T. (Nun.) 1988, c. L-2, § 22(2); S. Nu. 2010, c. 14, § 10; S. Nu. 2011, c. 6, §.15; S. Nu. 2011, c. 11, s.1; Legal Profession Act, R.S.Y. 2002, c. 134, amended by S.Y. 2004, c. 14, §§ 1–31; S.Y. 2008, c. 7, § 3; S.Y. 2010, c. 4, § 8 (Can.).

93. See, e.g., Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2 (Can.).

94. See, e.g., Legal Profession Act, R.S.A. 2000, c. L-8, pt. 3, § 49(1) (Can.).

95. See *supra* note 91 and accompanying text; *infra* Appendix 2 (discussing the regulatory objectives sections of these acts).

- (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
- (b) subject to paragraph (a),
 - (i) to regulate the practice of law, and
 - (ii) to uphold and protect the interests of its members.⁹⁶

The other provinces have language that overlaps some of the language found in these four provinces, but there are also some significant differences.⁹⁷ For example, Alberta, the Northwest Territories, and Nunavut regulate conduct that “tends to harm the standing of the legal profession generally.”⁹⁸ Nova Scotia says that one of the purposes of the Law Society is to address “the circumstances of members of the Society requiring assistance in the practice of law, and in handling or avoiding personal, emotional, medical or substance abuse problems.”⁹⁹ In Ontario, the Law Society has a duty to act in a “timely, open and efficient manner” when carrying out its functions.¹⁰⁰

This latter regulatory objective is noteworthy because it sets forth “good regulation” objectives in addition to objectives that are specific to the legal profession. In the future, support may increase for this type of general regulatory principle.¹⁰¹ For example, when the antitrust section of the Canadian government wrote its report about regulation of the legal

96. Compare British Columbia Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3 (Can.) (under the title “Public Interest Paramount”), with Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3 (Can.) (under the title “Duty of the society”). The relevant language in New Brunswick and Prince Edward Island is substantially similar to this British Columbia/Yukon language. The New Brunswick Act uses a different format, in which these six ideas are listed as six subsections, rather than divided into two sections. Law Society Act, S.N.B. 1996, c. 89 (Can.). It also uses different verb forms such as “to preserve” rather than “preserving.” *Id.* The only differences that arguably are significant are that British Columbia and the Yukon refer to the regulation of the “practice of law,” whereas New Brunswick refers to regulating the legal profession. See Terry, Mark, & Gordon, *supra* note 1, at 2674–77 nn.67–78 and accompanying text (noting that regulators must decide whether to regulate services or providers; although in the past there was a strong overlap between services and providers since lawyers were the primary source of legal services, that is no longer true). A second noteworthy difference is that section 3(b) in the Yukon and British Columbia Acts make the objective of the regulation of the practice of law and the objective of protecting the interests of its members subject to the other objectives, whereas New Brunswick does not contain this caveat. Similar to the New Brunswick Act, Prince Edward Island’s Legal Profession Act, S.P.E.I. 1992, c. L-6.1 (Can.), omits the caveat found in the British Columbia and Yukon Acts that regulation and protecting the interests of its members are subject to the other objectives. The Prince Edward Island Act is also noteworthy because it identifies five rather than six objectives, omitting the objective “to preserve and protect the rights and freedoms of all persons.” *Id.*

97. See *infra* Appendix 2 (setting forth the text of the regulatory objectives provisions found in the Canadian provinces and territories).

98. See Alberta Legal Profession Act, R.S.A. 2000, c. L-8, pt. 3, § 49(1)(b) (Can.); Northwest Territories Legal Profession Act, R.S.N.W.T. 1998, c. L-2, pt. 3, § 22(b) (Can.); Legal Profession Act, R.S.N.W.T. (Nun.) 1988, c. L-2, § 22(2)(b) (Can.).

99. See Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, § 33(d) (Can.).

100. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(4) (Can.).

101. Australia’s Draft Legal Profession National Law similarly includes among its objectives general regulatory principles. See *infra* notes 129–35 and accompanying text.

profession, one of the first chapters in that report was devoted to general regulatory principles.¹⁰² The provincial governments in Ontario, Manitoba, and Nova Scotia each have legislation that applies to the legal profession (and other professions) and includes this type of general regulatory objectives.¹⁰³ All three of these provincial provisions require “fairness, openness and transparency” in the admission processes of a number of regulated professions.¹⁰⁴ This legislation was controversial because it introduced a new level of government oversight over all professions.¹⁰⁵

In general, it does not appear that Canada’s regulatory objectives-like language has been subject to much debate, as was true in Scotland and the United Kingdom.¹⁰⁶ There is, however, increasing interest in this topic.¹⁰⁷ For the most part, the Canadian debates appear to have focused on whether to retain objectives that refer to the interests of the legal profession.¹⁰⁸

102. See CANADIAN COMPETITION REPORT, *supra* note 2. It should be noted that the Competition Bureau appears to have closed its inquiry into the self-regulated professions. See *Self-Regulated Professions—Post-Study Assessment*, COMPETITION BUREAU CANADA, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03407.html> (last visited Apr. 21, 2012).

103. See, e.g., The Fair Registration Practices in Regulated Professions Act, C.C.S.M. 2006-7, pt. 2, § 4 (“A regulated profession has a duty to provide registration practices that are transparent, objective, impartial and fair.”); Fair Access to Regulated Professions and Compulsory Trades Act, 2006, R.S.O. 2006, c. 31, § 6, *amended by* S.O. 2009, c. 22, §§ 97 (1), 104 (1) (same); Fair Registration Practices Act 2008, S.N.S. 2008, c. 38, § 6 (similar).

104. See *supra* note 103.

105. See, e.g., E-mail from Darrel Pink, Exec. Dir., Nova Scotia Law Society, to Laurel S. Terry (Oct. 15, 2011) (on file with author).

106. See, e.g., E-mail from Don Thompson, Exec. Dir., Law Society of Alberta, to Laurel S. Terry (Sept. 20, 2011) (on file with author); E-mail from Malcolm L. Heins, Chief Exec. Officer, Law Society of Upper Canada, to Laurel S. Terry (Oct. 17, 2011) (on file with author) (indicating that there had been little issue when Ontario amended its objectives since they largely mirrored the law society’s role or purpose statement and its commentary from 1994); E-mail from Marilyn Billinkoff, Exec. Dir., Law Society of Manitoba, to Laurel S. Terry (Oct. 19, 2011) (on file with author) (stating that when the current Manitoba legal profession act was enacted in 2002, “the [governing body of the Law Society, which consists of individuals who are called] benchers recommended that a purpose statement be added.” The government agreed and there was no debate about the purpose.).

107. The Northwest Territories are considering an amendment that would spell out the act’s objectives more clearly. See E-mail from Linda Whitford, Exec. Dir., Law Society of the Northwest Territories, to Laurel S. Terry (Oct. 18, 2011) (on file with author). See generally *Yukon Discussion Paper*, *supra* note 50. The *Yukon Discussion Paper* refers to the topic of regulatory objectives, and its appendix 2 sets forth the regulatory objectives in Canada and elsewhere in the world. *Id.* at app. 2. Yukon Appendix 2, which predates this Article, includes not only the material found in the Appendix to this Article but “purpose” and “objectives” statements found on Law Society webpages. It should be noted that the Appendix to this Article was derived independently from appendix 2 to the 2011 *Yukon Discussion Paper*. Although there are many similarities, the Appendix to this Article includes some sections, such as Section 22 of Alberta’s Legal Profession Act, not included in the Yukon appendix 2.

108. See, e.g., E-mail from Allan Fineblit, Exec. Dir., Manitoba Law Society, to Laurel S. Terry (Oct. 16, 2011) (on file with author) (discussing the ultimately rejected proposal in Manitoba of listing the dual objective of the best interests of the legal profession in its governance policies); E-mail from Alan Treleaven, Dir., Education & Practice, Law Society of British Columbia, to Laurel S. Terry (Oct. 20, 2011) (on file with author) (“The Law Society of BC drafted the language, and it was accepted by the provincial legislature without objection. At the Bencher meeting, the draft language provoked almost no controversy.

Although some Canadian provinces have far more robust, nuanced regulatory objectives language than other provinces,¹⁰⁹ it may be misleading to assume that the absence of robust statutory language means that a particular law society or governing body is not concerned with the issue of regulatory objectives. The Law Society of Alberta, for example, adopted “Mission and Vision” language to compensate for the rather “thin” language found in the Alberta Legal Profession Act.¹¹⁰ While we submit that it is useful for regulators to adopt and publicly articulate their mission, vision, values, and regulatory objectives, the thesis of this Article is that the appropriate entity in each jurisdiction should adopt binding regulatory objectives.

4. New Zealand

New Zealand provides another example of a jurisdiction that has legislatively adopted regulatory objectives for the legal profession. Like Canada, but unlike England, Wales, and Scotland, New Zealand does not regulate solicitors and barristers (or advocates) separately; instead, it has a unified legal profession. New Zealand is a federal system and lawyers originally were regulated on a district-wide basis, but this changed with the adoption of the national Lawyers and Conveyancers Act 2006¹¹¹ (LCA). Under the LCA, the New Zealand Law Society has both regulatory and representative functions and powers.¹¹²

There was near universal acceptance that the public interest is paramount, and the debates have been around whether the interests of lawyers should be articulated as secondary (subservient) objectives, or whether there should be only reference to the public interest, to exclude any criticism that perhaps the objectives internally conflict.”).

109. *Compare* Legal Profession Act, S.B.C. 1998, c. 9, § 3 (Can.), *with* Legal Profession Act, R.S.A. 2000, c. L-8, § 49(1) (Can.). Both laws are set forth in the Appendix 2, *infra*.

110. *See* E-mail from Don Thompson, Exec. Dir., Law Society of Alberta, to Laurel S. Terry (Sept. 29, 2011) (on file with author). Because of its focus, this Article does not purport to present comprehensive research on the topic of regulatory objectives or purpose statements found on websites.

111. Lawyers and Conveyancers Act 2006 (N.Z.). The LCA went into force on August 1, 2008. *Id.* § 2. Prior to the 2006 Act and the creation of one law society, there were fourteen district law societies, each with its own statutory powers, operating in a federal structure with the New Zealand Law Society. *See About Us*, NEW ZEALAND L. SOC’Y, http://www.lawsociety.org.nz/about_us (last visited Apr. 21, 2012). The statutory role of districts ceased on January 31, 2009 and, with the exception of Auckland, their assets and liabilities were transferred to the New Zealand Law Society. The New Zealand Law Society was established in 1869, but had not previously had regulatory authority.

112. The regulatory functions and powers of the New Zealand Law Society include controlling and regulating the practice of law, and assisting and promoting reform to uphold the rule of law and the administration of justice. Lawyers and Conveyancers Act 2006, pt. 4, § 65 (N.Z.). The Society’s regulatory functions include issuing practicing certificates, maintaining a register of lawyers, making practice rules, managing the Lawyers Complaints Service, and operating a Fidelity Fund. *Id.* pt. 4, § 67. The Society might be said to have “representational” functions insofar as it is directed to participate in law reform activities. *Id.* pt. 4, § 66; *see also Regulatory*, NEW ZEALAND L. SOC’Y, http://www.lawsociety.org.nz/home/for_lawyers/regulatory (last visited Apr. 21, 2012).

Unlike the United Kingdom and Scotland Acts, the LCA does not use the phrase “regulatory objectives,” but instead refers to the “purposes” of the Act.¹¹³ Section 3 of the New Zealand Act states:

(1) The purposes of this Act are—

to maintain public confidence in the provision of legal services and conveyancing services[;]

to protect the consumers of legal services and conveyancing services[;]

to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.¹¹⁴

The Act continues by indicating methods of achieving these purposes: law reform relating to lawyers, providing a regulatory regime for lawyers and conveyancers that is “more responsive,” and ensuring that the Act states the “fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services.”¹¹⁵

One view of the New Zealand objectives—particularly when compared to the objectives mentioned above or following in relation to Australia—is that they are rather narrow in scope, and miss the opportunity to educate in relation to promoting the rule of law and client protection. The objectives also fail, in our view, to promote the type of professionalism that we have endorsed. This is unfortunate. The effect of these objectives is thus rather limited when compared to some of the other examples.

Lawyers in New Zealand are subject to several other kinds of regulatory instruments beyond the LCA.¹¹⁶ These instruments also emphasize the purpose of the regulation. Consider, for example, the Schedule for the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which specifies the conduct and client care rules as they apply to lawyers in New Zealand. The rules are

based on the fundamental obligations of lawyers, set out in section 4 of the Act. These obligations include a duty to uphold the rule of law and to facilitate the administration of justice; a duty to be independent in providing regulated services to clients; a duty to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients; [and] to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interests of clients.¹¹⁷

Interestingly, while the LCA and the rules emphasize purpose, the focus on purpose does not extend to those bodies that enforce the regulatory

113. Lawyers and Conveyancers Act 2006, pt. 1, § 3.

114. *Id.* pt. 1, § 3(1)(a)–(c).

115. *Id.* pt. 1, § 3(2) (providing a full list of ways in which the Act purports to achieve these purposes).

116. For additional information about the types of regulatory instruments to which lawyers might be subject, see Terry, Mark, & Gordon, *supra* note 1, at 2664–66 nn.9–25.

117. Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Schedule.

framework in New Zealand.¹¹⁸ For example, there is no reference to aims, objectives, or purposes within the Constitution of the New Zealand Law Society.¹¹⁹ Similarly, there is little reference to purpose in the regulations that govern the Lawyers Complaint Service, the regulatory body that handles complaints against lawyers.¹²⁰ The regulations establishing that entity include a very brief “purpose” statement, but do not rise to the level of explaining why the entity has the powers it was given.¹²¹

5. Denmark

Denmark provides another example of a jurisdiction that has adopted the equivalent of regulatory objectives for the legal profession. These objectives appear in the bylaws of the Danish Bar and Law Society, which is the entity that regulates lawyers in Denmark.¹²² The very first bylaw sets forth the “objects” (or purpose or regulatory objectives) of the organization:

- to guard the independence and integrity of lawyers;
- to ensure and enforce the discharge of the duties and obligations of lawyers;
- to maintain the professional skills of lawyers; and
- to work for the benefit of the Danish legal community.¹²³

These bylaws were enacted following the 2008 judicial reforms.¹²⁴ These reforms removed from the Bar and the Law Society the responsibility to represent the commercial interests of the profession.¹²⁵ This separation of the Bar and Law Society’s regulatory and representative functions was

118. See Lawyers and Conveyancers Act 2006, pt. 4, §§ 65–66.

119. See generally Lawyers and Conveyancers Act (Lawyers) Constitution 2008.

120. See generally Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. The Lawyers Complaints Service was established in 2008 to receive complaints about current and former lawyers, incorporated and formerly incorporated law firms, and their current and former employees. *Id.* pt. 2, § 6; see, e.g., *New Zealand Solicitors — Lawyers and Conveyancers Act of 2006*, NEW ZEALAND SOLICITORS, <http://www.advocates.co.nz/> (last visited Apr. 21, 2012).

121. *Id.*

122. See DANISH BAR & L. SOC’Y, THE DANISH BAR AND LAW SOCIETY 4 (2009), available at http://www.advokatsamfundet.dk/Service/English/Organisation/~media/Files/English/Danish_Bar_and_Law_Society_20091.ashx (“The Danish Bar and Law Society is established by law . . . and is as such recognised as an official authority under the Danish legal system. However, the Society enjoys full independence from the state. Thus, the Society is not a governmental authority and is not part of the public sector or the executive. The Society is not subject to instructions from governmental authorities and the Society receives no public funding. The Society may be described as an independent, self-governing and self-funding public law institution comprising all lawyers.”).

123. *Bylaws of the Danish Bar and Law Society, Adopted by the General Meeting of Lawyers on 25 October 2008*, DANISH BAR & L. SOC’Y, http://www.advokatsamfundet.dk/Service/English/Rules/~media/Files/English/Vedtaegt_for_Det_Danske_Advokatsamfund_-_08122008_eng2.ashx (last visited Apr. 21, 2012).

124. See, e.g., E-mail from Lise-Lotte Skovsager Gümöes, Advokat, Danish Bar and Law Society, to Laurel S. Terry (Oct. 12, 2011, 5:07 AM) (on file with the Fordham Law Review).

125. *Id.*

consistent not only with ongoing EU antitrust initiatives, but also with a report that the Law Society had itself commissioned.¹²⁶ Other than that one change, the content found in Bylaw 1 has been largely unchanged since the foundation of the Bar and Law Society in 1919.¹²⁷

This Danish example is interesting because it shows that regulatory objectives need not be confined to common law or English-speaking jurisdictions. Although Denmark's regulatory objectives are not as detailed as those recently adopted or proposed in English-speaking common law jurisdictions, such as England and Wales, Scotland, Canada, Australia, Ireland, and India, it shows that the concept of regulatory objectives has the potential to be effective in many different kinds of legal systems, and that the current interest in regulatory objectives is not limited to English-speaking or common law jurisdictions.¹²⁸

B. Jurisdictions that Have Drafted but Have Not Yet Adopted Regulatory Objectives for the Legal Profession

A number of other jurisdictions also appear to have taken a keen interest in the use of regulatory objectives in legal profession regulation. Jurisdictions such as Australia, Ireland, and India have drafted regulatory objectives, but have not yet adopted them. The sections that follow describe these proposals.

1. Australia

Australia currently has a pending Draft Legal Profession National Law that includes a section that explicitly sets forth, for the first time, regulatory objectives for the legal profession.¹²⁹ The draft legislation on regulatory objectives provides:

126. See COPENHAGEN ECONOMICS, *supra* note 32, at 3; Terry, *supra* note 30, at 63.

127. See E-mail from Lise-Lotte Skovsager Gümöes, *supra* note 124.

128. See *infra* note 207 and accompanying text (identifying other jurisdictions that have adopted "purpose" or "object" statements).

129. Council of Australian Governments (COAG) *National Legal Profession Reform*, LAWLINK NSW, http://www.ipc.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/lpr_index (last visited Apr. 21, 2012). In early 2000, state and territory Attorneys-General, with the support of the Commonwealth Attorney-General, sponsored a National Legal Profession Model Laws Project through which the states and territories developed a Model Bill aimed at facilitating national legal practice and the development of the national legal services market. See LEGAL PROFESSION—MODEL LAWS PROJECT, MODEL BILL (2d ed.) (Aug. 24, 2006), available at http://www.ag.gov.au/Documents/SCAG%20Model_Bill%20August%202006.PDF. The Model Bill formed the basis of new legal profession acts, which have been enacted in all but one jurisdiction (South Australia). See *Legal Profession Act 2004* (N.S.W.); *Legal Profession Act 2006* (NT); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA). The adoption of these model laws by all but one jurisdiction in Australia was a significant milestone toward achieving a consistent national regulatory framework. However, with the changing nature of the legal services market globally and the impact on the domestic legal marketplace, it had become increasingly apparent that the former legal profession acts were not sufficiently uniform or harmonized to support a seamless national legal services market and to facilitate Australia's participation in the international legal

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by:

- (a) providing and promoting national consistency in the law applying to the Australian legal profession; and
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) enhancing the protection of clients of law practices and the protection of the public generally; and
- (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and
- (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.¹³⁰

The draft Australian regulatory objectives overlap in certain respects with the regulatory objectives found in the United Kingdom, Scotland, New Zealand, Canada, and Denmark, but there are some notable differences.¹³¹ Similar to some of the regulatory objectives of the other jurisdictions, the Australian objectives refer to the protection of clients and the protection of the public. The regulatory objectives in Australia also include compliance with professional principles, although the Australian draft objectives add an explicit reference to lawyer competency.¹³²

While many of the objectives overlap with the other jurisdictions, several appear to have a slightly different emphasis. For example, whereas the U.K. and Scottish objectives refer to promoting “competition” in the provision of legal services, the draft Australian objectives refer to “empowering clients of law practices to make informed choices about the services they access and the costs involved.”¹³³

What is perhaps most unusual about Australia’s draft regulatory objectives, and sets them apart from those of most other jurisdictions, is the fact that the Australian objectives include a number of general regulatory principles. For example, regulatory objective 1.1.3(e) provides that one of the objectives of the legislation is “promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.”¹³⁴ From a regulator’s perspective, this provides some guidance as to the approach to

services market. *See Background to the Council of Australian Governments (COAG) National Legal Profession Reform*, *supra* note 51.

130. *See [Draft] Legal Profession National Law 2011* (Austl.), available at [http://www.ag.gov.au/Documents/National%20Legal%20Profession%20Legislation%20-%20September%202011%20\(%20for%20web%20site%20\).pdf](http://www.ag.gov.au/Documents/National%20Legal%20Profession%20Legislation%20-%20September%202011%20(%20for%20web%20site%20).pdf).

131. *See supra* Part II.

132. *See [Draft] Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b).

133. *See infra* Appendix 2 (comparing the Australian, U.K., and Scottish regulatory objectives).

134. *See supra* note 130.

be taken to achieve the larger and perhaps even unstated goal of—in the words of Steve Mark, Legal Services Commissioner of NSW—reducing complaints against lawyers while promoting consumer protection and protection of the rule of law.¹³⁵ This means that an effective regulator must have a strong educational mandate, both to the profession to improve its professionalism and ethical standards, as well as to members of the community in relation to their expectations of the legal system.

Although certain aspects of the Australian draft regulation have been subject to some debate,¹³⁶ the “objectives” section has not attracted much controversy. One of the reasons there has been little controversy about including regulatory objectives in the draft legislation may be because legal regulators and legislative drafters in Australia already place a heavy emphasis on function and purpose. All of the legislative instruments regulating lawyers across Australia—that is, all of the individual state and territory legal profession acts—set out the purpose of the legislation at the outset of each act. Similarly, the state and territory-based entities that regulate the legal profession¹³⁷ include purpose statements in their governing mandates.

Consider, for example, the situation in New South Wales. There, the legal profession is co-regulated by the Office of the Legal Services Commissioner (OLSC), the Law Society of NSW, and the NSW Bar Association.¹³⁸ Since 1994, the practice of law and the legal profession has

135. See NEW S. WALES OFFICE OF THE LEGAL SERVS. COMM’R, ANNUAL REPORT 7 (2009–2010), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/OLSC_2009_2010_AnnRep.pdf/\\$file/OLSC_2009_2010_AnnRep.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/OLSC_2009_2010_AnnRep.pdf/$file/OLSC_2009_2010_AnnRep.pdf); see also Steve Mark, *Regulation for Professionalism*, WITHOUT PREJUDICE, June 2010, at 1, available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/WP_Issue50_June2010.pdf/\\$file/WP_Issue50_June2010.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/WP_Issue50_June2010.pdf/$file/WP_Issue50_June2010.pdf); Mark, *supra* note 39.

136. There has been considerable debate about certain aspects of the draft National Law. One of the most hotly debated issues has been the composition of the National Legal Services Board. See NATIONAL LEGAL PROFESSION REFORM TASKFORCE, COMPOSITION AND APPOINTMENT OF THE NATIONAL LEGAL SERVICES BOARD 2–3 (2010), available at [http://www.ag.gov.au/Documents/Taskforce+paper++models+for+composition+of+appointments+to+National+Board+v3+\(Final\)+PDF+FORMAT.pdf](http://www.ag.gov.au/Documents/Taskforce+paper++models+for+composition+of+appointments+to+National+Board+v3+(Final)+PDF+FORMAT.pdf). As these sources show, the debates have not focused on the Act’s regulatory objectives.

137. Australia is a federation of six states and two territories. The practice of law is regulated by these individual states and territories. See *Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2008* (WA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2006* (NT); *Legal Practitioners Act 1981* (SA). Regulation of the legal profession is based on a co-regulatory model involving the courts, government, and the legal profession, although the specifics of regulation and the split of functions varies in each jurisdiction according to its own legal, economic and social history, and norms.

138. These three entities share co-regulatory power in a system that may seem complex to outsiders. The OLSC is a purely regulatory body. See *About Us*, OFF. LEGAL SERVICES COMMISSIONER, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_aboutus (last visited Apr. 21, 2012). Its role is to resolve disputes and investigate complaints about professional conduct. See *id.* The OLSC also oversees the investigation of complaints about the conduct of practitioners and plays a major role in resolving consumer disputes. See *Legal Profession Act 2004* (NSW) pt 7.3 (Austl.). Within part 7.3, section 688 of the Act sets forth the functions of the Commissioner. See *id.* pt 7.3, s 688.

been governed by two pieces of legislation created and amended by the government, as well as two binding codes of conduct created by the Law Society of New South Wales for solicitors and the New South Wales Bar Association for barristers.¹³⁹

The Legal Profession Act 2004 (NSW),¹⁴⁰ which was introduced on October 1, 2005, regulates legal practice in New South Wales. It aims to serve the administration of justice and protect clients of law practices and the public generally.¹⁴¹ The Legal Profession Regulation 2005 augments the Act.¹⁴² It deals with a range of topics including admission and certification requirements, advertising, practice structures, trust money, and costs.¹⁴³ The Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules) outlines the duties owed by a practitioner to clients, the Courts, other practitioners, and third parties.¹⁴⁴ It also contains a section on legal practice.¹⁴⁵ Neither the 2005 Legal Profession Regulation nor the Solicitors' Rules includes the phrase "regulatory objectives." The Legal Profession Act 2004 (NSW) does, however, contain quasi-regulatory objectives by way of section 3, which outlines the purposes of the Act:

The Law Society of New South Wales is the representative body for solicitors practicing within the state but it also plays a co-regulatory role with the OLSC in setting and enforcing professional standards, licensing solicitors to practice, investigating complaints, and administering "discipline to ensure that both the community and the profession are properly served by ethical and responsible solicitors." *See Our Role*, LAW SOC'Y NEW S. WALES, <http://www.lawsociety.com.au/about/ourrole/index.htm> (last visited Apr. 21, 2012). The Law Society also offers confidential advice to members to assist them in complying with the Revised Professional Conduct and Practice Rules (Solicitors' Rules) and associated regulations. *Id.* The Law Society's Regulatory Compliance Support Unit also assists practitioners in meeting the compliance requirements of the Legal Profession Act 2004. *Regulatory Compliance*, LAW SOC'Y NEW S. WALES, <http://www.lawsociety.com.au/ForSolicitors/professionalstandards/RegulatorySystems/index.htm>.

The New South Wales Bar Association was incorporated on October 22, 1936 and is "a voluntary association of practising barristers." *See About Us*, NEW S. WALES B. ASS'N, <http://www.nswbar.asn.au/about.php> (last visited Apr. 21, 2012). The New South Wales Bar Association has a regulatory as well as a representational role. As highlighted in its constitution, the New South Wales Bar Association seeks "to promote the administration of justice[;] promote, maintain and improve the interests and standards of local practising barristers [and] to make recommendations with respect to legislation, law reform, rules of court and the business and procedure of courts." *Our Aims*, NEW S. WALES BAR ASS'N, <http://www.nswbar.asn.au/docs/about/aims.php> (last visited Apr. 21, 2012). The Bar Association's Professional Conduct Department "facilitates the investigation and reporting to Bar Council of conduct complaints" that are initiated by the Bar Council or referred to the Council by the Legal Services Commissioner as part of the co-regulatory system. *Id.*

139. *See Legal Profession Act 1987* (NSW); *Legal Profession Act 2004* (NSW); *Revised Professional Conduct and Practice Rules 1995* (Solicitors' Rules); *NSW Barristers' Rules*.

140. *Legal Profession Act 2004* (NSW), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/.

141. *Id.* s 3.

142. *Legal Profession Regulation 2005* (NSW), available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/.

143. *Id.*

144. LAW SOC'Y OF NEW S. WALES, REVISED PROFESSIONAL CONDUCT AND PRACTICE RULES 1995 (SOLICITORS' RULES), available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/.

145. *Id.* Rules 37–45.

(a) to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of clients of law practices and the public generally,

(b) to facilitate the regulation of legal practice on a national basis across State and Territory borders.¹⁴⁶

The Act, the Regulation, and the Solicitors' Rules are enforced by three regulatory associations in New South Wales: OLSC, the Law Society of NSW, and the NSW Bar Association.¹⁴⁷ Each of these three organizations has adopted their own set of regulatory objectives.

The regulatory objectives of the OLSC are specified in all of its constituent documents, and are also posted on its website.¹⁴⁸ These regulatory objectives are supported by the statutory functions of the OLSC which are set out in section 688 of the Legal Profession Act 2004 (NSW).¹⁴⁹ The OLSC's Vision and Mission Statement comes closer to the draft Legal Profession National Law by providing additional detail about what it is that the OLSC is trying to accomplish.¹⁵⁰

The situation is similar with respect to the Law Society of NSW and the Bar Association. The Legal Profession Act 2004 (NSW) sets forth the statutory functions of each of these organizations.¹⁵¹ These sections state *what* it is the Law Society Council and the Bar Council can do, but not necessarily *why* they have these powers. The Act is silent with respect to the regulatory objectives of these entities.¹⁵² Similar to the OLSC, the *why* question comes closest to being answered in statements that appear on the websites of the New South Wales Law Society and the New South Wales Bar Association.¹⁵³ In a similar fashion, the New South Wales Bar

146. *Legal Profession Act 2004* (NSW) pt 1.1, s 3 (Austl.).

147. See *supra* note 132 (explaining the co-regulatory system).

148. In May 1995, Steve Mark, Legal Services Commissioner of New South Wales, stated in his inaugural speech that the regulatory objectives of the OLSC are:

To reduce complaints against the legal profession received and handled by this office, by:

- Developing and maintaining appropriate complaints handling processes
- Promoting compliance with high ethical standards
- Encouraging an improved customer focus in the profession
- Developing realistic expectations by the community of the legal system.

Steve Mark, *Complaints Against Lawyers: What Are They About and How Are They Handled?*, OFF. LEGAL SERVS. COMM'R, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_may_1995 (last updated Feb. 20, 2007).

149. *Legal Profession Act 2004* (NSW) pt 7.3, s 688 (Austl.) (specifying the statutory functions of the OLSC).

150. See *About Us*, *supra* note 138.

151. See *Legal Profession Act 2004* (NSW) pt 7.4, s 696, 699 (Austl.) (identifying the statutory functions of the Law Society and its Council, and the Bar Council).

152. *Id.*

153. See *Vision and Mission*, LAW SOC'Y NEW S. WALES, <http://www.lawsociety.com.au/about/ourrole/VisionMission/index.htm> (last visited Apr. 21, 2012); see also NEW SOUTH WALES B. ASS'N, <http://www.nswbar.asn.au/index.php> (last visited Apr. 21, 2012).

Association's website identifies its "aims," thus answering the question of what it is trying to accomplish.¹⁵⁴

These examples from New South Wales are typical of the "regulatory objectives" language in the relevant statutory provisions in the Australian states and territories.¹⁵⁵ The use of regulatory objectives in the proposed draft National Law will augment the current regulatory framework that exists in the states and territories across Australia today. Those states and territories that agree to adopt the draft National Law will thus see regulatory objectives being a feature of their legislation for the first time in Australian legislative history.

2. Ireland

Ireland is among the jurisdictions that are considering massive reforms to the legislation governing the legal profession. On October 9, 2011, the Irish government unveiled its proposed Legal Services Bill.¹⁵⁶ Its proposed regulatory reforms, including the structure of the proposed new entity called the Legal Services Regulation Authority, have been controversial.¹⁵⁷ A recent article attributed the pressure for change to the European Union and the International Monetary Fund, which have described Ireland's legal

154. See *Our Aims*, NEW SOUTH WALES B. ASS'N, <http://www.nswbar.asn.au/docs/about/aims.php> (last visited Apr. 21, 2012).

155. For a list of the regulatory objectives in all of the Australian states, see *Yukon Discussion Paper*, *supra* note 50, at 109–11. The format of these acts differs and some of these acts refer to "consumers" rather than "clients," but there is significant overlap among the purpose sections of these acts. Most refer, in one way or another, to client interests, public interests, and the administration of justice. See *Legal Profession Act 2006* (ACT) s 6; *Legal Profession Act 2006* (NT) s 3; *Legal Profession Act 2007* (Qld) s 3; *Legal Profession Act 2007* (Tas) s 3; *Legal Profession Act 2004* (Vic) s 1.1.1; *Legal Profession Act 2008* (WA) s 11. The Legal Profession Act of South Australia does not contain a "purpose" or "objects" provision. See *Legal Practitioners Act 1981* (SA).

156. See Legal Services Regulation Bill 2011 (Act No. 58/2011) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b5811d.pdf>.

157. See *id.* at pt. 2 (setting forth details about the new entity); Niall Tierney, *Ireland Goes Further than U.K. and Unveils Independent Regulation of Lawyers*, LEGAL FUTURES BLOG (Oct. 6, 2011), <http://www.legalfutures.co.uk/latest-news/irish-government-goes-further-than-uk-and-unveils-independent-regulation-of-lawyers> ("The Legal Services Regulatory Authority, which will have a lay majority, will take over regulation from the Law Society and Bar Council of Ireland, who will pay for it through a levy. The government rejected a 2006 recommendation from the Irish Competition Authority that it introduce an English-style arrangement, with an oversight regulator and full separation of regulatory and representative functions within the Law Society and Bar Council."); SUBMISSION OF THE BAR COUNCIL OF IRELAND TO THE JOINT COMMITTEE ON JUSTICE, DEFENCE AND EQUALITY ON THE LEGAL SERVICES REGULATION BILL 2011 ¶¶ 14–15 (Mar. 2012), available at http://www.lawlibrary.ie/documents/news_events/BarCouncilSubmissionJointComm032012.pdf ("The Bar Council has concerns in relation to a number of aspects of the Bill and believes that they are not and have not been shown to be in the public interest. . . . (1) The lack of independence of the Legal Regulation Authority from the Minister and the Government and the extent of involvement and ministerial over and involvement in the powers and functions of the Authority."); *Rule of Law Under Threat: Legal Independence and the Public Interest*, LAW SOC'Y GAZETTE, Dec. 2011, available at http://www.lawsociety.ie/Documents/Gazette/Gazette%202012/January2012_GazetteSpecial.pdf (includes the Law Society's critique of the regulatory structure found in the Draft Bill).

profession as one of three professional sectors “targeted . . . as ‘sheltered’ and in need of reform to make [it] more competitive and cost-effective.”¹⁵⁸ The regulatory objectives are found in section 9(4) of the October 2011 draft bill.¹⁵⁹

The draft bill’s list of objectives is similar in many respects to the list found in the United Kingdom and Scotland. Unlike those jurisdictions, however, the proposed Irish regulatory objectives do not include “supporting the constitutional principle of the rule of law,” improving or promoting “access to justice,” or “increasing public understanding of the citizen’s legal rights and duties.”¹⁶⁰ Instead of these three objectives, the Irish bill substitutes “supporting the proper and effective administration of justice.”¹⁶¹ The Irish bill also excludes “diverse” or “varied” from the description of legal profession characteristics that regulation should encourage.¹⁶²

An explanatory memorandum accompanied the draft bill.¹⁶³ It did not, however, explain how the regulatory objectives were selected or why certain objectives found in the U.K. and Scottish bills were included, whereas others were not.¹⁶⁴ Although the draft Irish bill is controversial for

158. See *Legal Services Bill for Cabinet Today*, IRISH TIMES, Sept. 8, 2011, at 8; *id.* (“The other two professions are medicine and pharmacy.”). Some commentators have attributed the pressure for change to “the Troika,” which includes the European Commission, the International Monetary Fund, and the European Central Bank. See, e.g., Press Release, Council of Bars and Law Societies of Europe [CCBE], European and US lawyers alert IMF against Troika-imposed reforms affecting the independence of the profession in ‘bail-out’ countries (Jan. 5, 2012), http://www.ccbe.org/fileadmin/user_upload/NTCdocument/PR_on_CCBEABA_lette1_1325761475.pdf.

159. See *Legal Services Regulation Bill 2011* (Act No. 58/2011), § 9(4) (Ir.). They specify:

- (4) The Authority shall, in performing its functions of the regulation of the provision of legal services under this Act, have regard to the objectives of—
 - (a) protecting and promoting the public interest,
 - (b) supporting the proper and effective administration of justice,
 - (c) protecting and promoting the interests of consumers relating to the provision of legal services,
 - (d) promoting competition in the provision of legal services in the State,
 - (e) encouraging an independent, strong and effective legal profession, and
 - (f) promoting and maintaining adherence to the professional principles specified in *subsection* (5).

Id.

160. Compare *id.*, with *Legal Services Act, 2007*, c. 29 § 1(1)(b), (c), (g) (U.K.), and *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(a)(i), (c)(i).

161. See *Legal Services Regulation Bill 2011* (Act No. 58/2011), § 9(4)(b) (Ir.).

162. *Id.* As discussed below, the failure to include these kinds of specific objectives may create confusion over the educative role of the Irish regulators and its purpose.

163. See *Legal Services Regulation Bill 2011* (Act No. 58/2011), at Explanatory Memorandum (Ir.). The Explanatory Memorandum followed the text of the Draft Legal Services Bill.

164. The relevant portion of the Explanatory Memorandum simply repeated the contents of sections 4 and 5 without providing any explanation or analysis of how or why these were selected. See *id.* at 2.

a number of reasons, as of April 2012, the regulatory objectives section did not appear to have been a particular focus of discussion or debate.¹⁶⁵

3. India

In India, a draft bill has been introduced that would massively reshape regulation of the legal profession. Legal profession regulation in India is handled by the Bar Council of India and the councils in the individual Indian states.¹⁶⁶ Lawyer regulation has, on occasion, been a divisive topic, with the national government pressing for greater liberalization, which the Bar Council and many prominent Indian lawyers resist.¹⁶⁷ For this reason, it is difficult to predict what will happen in India with respect to lawyer regulation and the draft bill.

Nevertheless, it is interesting to note that the federal government has introduced a draft practitioner's act that is very similar to the U.K. Act. This draft act includes a section on regulatory objectives for the legal profession that lists eight objectives.¹⁶⁸ Although the first three and the last regulatory objective are identical to the U.K. regulatory objectives, there are four that are different. For example, the U.K. Act refers to protecting and promoting the interests of "consumers," whereas the draft Indian act refers to "protecting and promoting the interests of the clients of the legal

165. See, e.g., Bar Council March 2012 Submission, *supra* note 157, at 5–14 (objecting to the proposed regulatory structure and the business structures aspects of the Bill); L. SOO'Y GAZETTE, *supra* note 157; Dearbhail McDonald, *Independence of the Legal Profession Is Under Threat*, IRISH INDEP. (Oct. 14, 2011), <http://www.independent.ie/opinion/analysis/dearbhail-mcdonald-independence-of-the-legal-profession-is-under-threat-2906253.html>.

166. See *About the Council*, B. COUNCIL INDIA, <http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/> (last visited Apr. 21, 2012); see also Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 61–62 (2010).

167. See generally Krishnan, *supra* note 166; Kian Ganz, *Talking Shop: England's Law Soc Pres John Wotton on Liberalisation & New BCI Dialogues*, LEGALLY INDIA (Sept. 28, 2011, 5:25 PM), <http://www.legallyindia.com/201109282362/Interviews/talking-shop-englands-law-soc-pres-john-wotton-on-liberalisation-and-new-dialogues-with-bci>.

168. See [Draft] Legal Practitioners Act, 2010, § 3(d) (India), *available at* <http://www.prsindia.org/uploads/media/draft/NALSA.pdf>. This section states:

- (1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—
 - (a) protecting and promoting the public interest;
 - (b) supporting the constitutional principle of the rule of law;
 - (c) improving access to justice;
 - (d) protecting and promoting the interests of the clients of the legal practitioners;
 - (e) promoting healthy competition amongst the legal practitioners for improving the quality of service;
 - (f) encouraging an independent, strong, diverse and effective legal profession with ethical obligations and with a strong sense of duty towards the courts and tribunals where they appear;
 - (g) creating legal awareness amongst the general public and to make the consumers of the legal profession well informed of their legal rights and duties;
 - (h) promoting and maintaining adherence to the professional principles.

practitioners.”¹⁶⁹ The U.K. Act refers to “promoting competition in the provision of services within subsection (2)” (referring to authorized persons), whereas section 3(e) of the Indian draft act adds the word “healthy” before competition and adds additional language to explain that the goal of the increased competition is to improve the quality of service.¹⁷⁰ The U.K. objective encourages “an independent, strong, diverse and effective legal profession,” whereas the Indian draft objective adds “with ethical obligations and with a strong sense of duty towards the courts and tribunals where they appear.”¹⁷¹ The Indian draft act expands upon the U.K. objective that seeks to “increase[e] public understanding of the citizen’s legal rights and duties.” The Indian version of this objective is phrased as “creating legal awareness amongst the general public and to make the consumers of the legal profession well informed of their legal rights and duties.”¹⁷²

As these examples show, while significant overlap exists among the regulatory objectives in the United Kingdom and Scotland on the one hand and the draft bill in India on the other hand, there are also significant differences. One of these is the use of the term “client” rather than “consumer.” The use of the term “client” raises an issue that has sparked debate in many jurisdictions as to whether persons obtaining legal advice should be referred to as “clients” or “consumers.” From the perspective of many in the legal profession, the word “clients” creates a fundamentally different conceptual relationship than does “consumers.”¹⁷³ Use of the term “clients” brings with it a specific relationship that is fiduciary in nature in a way that the term “consumers” does not. In this fiduciary relationship, the lawyer generally has a number of professional and ethical obligations such as client confidentiality and legal professional privilege. The term “consumers” does not carry the same connotations, and its use could be seen to further commoditize the practice of law and undermine the system of professional rights and obligations.

Regardless of whether India adopts its draft Legal Practitioner’s Act, the regulatory objectives section in that act provides food for thought for jurisdictions that are considering adopting their own regulatory objectives.

169. *Compare* Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.) (using the term “consumers”), *with* [Draft] Legal Practitioners Act, 2010, § 3(d) (India) (referring “clients”).

170. *Compare* Legal Services Act, 2007, c. 29, § 1(1)(e) (U.K.), *with* [Draft] Legal Practitioners Act, 2010, § 3(e) (India).

171. *Compare* Legal Services Act, 2007, c. 29, § 1(1)(f) (U.K.), *with* [Draft] Legal Practitioners Act, 2010, § 3(f) (India).

172. *Compare* Legal Services Act, 2007, c. 29, § 1(1)(g) (U.K.), *with* [Draft] Legal Practitioners Act, 2010, § 3(g) (India).

173. The authors have personal experience of these kinds of reactions. The term consumer tends to commercialize legal services, because consumers are associated with goods and services.

C. Regulatory Objectives in the United States and in Other Jurisdictions

1. The United States

Although some observers might disagree, we submit that the United States has not adopted regulatory objectives for the legal profession. This section explains why we believe that neither U.S. state lawyer regulation nor the ABA Model Rules of Professional Conduct provide the equivalent to regulatory objectives. In general, U.S. lawyers are licensed on a statewide basis, rather than at a national level.¹⁷⁴ This state-based regulation is generally handled by the judicial branch of government, rather than by the executive or legislative branch.¹⁷⁵ The rationale for judicial branch regulation of lawyers is the U.S. constitutional concept of “separation of powers.”¹⁷⁶ As a result, in most but not all U.S. states, the state supreme courts admit and license lawyers, adopt lawyer codes of conduct, and discipline lawyers.¹⁷⁷

Some U.S. states have what is known as an “integrated” bar to which all lawyers licensed in that state must belong.¹⁷⁸ These integrated bars exercise both regulatory and representational functions.¹⁷⁹ If a state does

174. See, e.g., NAT'L CONF. B. EXAM'RS, <http://www.ncbex.org> (last visited Apr. 21, 2012) (includes links to state admission rules). Although lawyers generally are licensed on a state-wide basis, admission to practice before a federal agency, such as the U.S. Patent and Trademark Office, is typically set by that agency. See, e.g., *Office of Enrollment and Discipline (OED)*, USPTO, <http://www.uspto.gov/ip/boards/oed/index.jsp> (last visited Apr. 21, 2012).

175. See, e.g., NAT'L CONFERENCE OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS (Erica Moeser & Claire Huisman eds., 2011) [hereinafter COMPREHENSIVE GUIDE TO BAR ADMISSIONS], available at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf; see also ABA COMM'N ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES (REPORT 201A) (2003) [hereinafter MJP RESOLUTION #1], available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf>. MJP Resolution #1 stated “that the American Bar Association affirms its support for the principle of state judicial regulation of the practice of law.” *Id.* California provides an exception to this concept and has extensive legislative regulation of lawyers. See, e.g., CAL. BUS. & PROF. CODE §§ 6000–6238 (see div. 3, ch. 4 Attorneys); *Ethics Information*, ST. B. CAL., <http://ethics.calbar.ca.gov/> (includes links to various statutory provisions).

176. See, e.g., MJP RESOLUTION #1, *supra* note 175; see also PENN. CONST. art. V, § 10(c); Mark Scolforo, *Lawyer-Lobbyist Rules Expected*, PITTSBURGH POST-GAZETTE, Nov. 25, 2003, at A18.

177. See, e.g., ABA CTR. OF PROF'L RESPONSIBILITY, STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES (last updated Sept. 14, 2011), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf.

178. See, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (finding a First Amendment violation if California's bar dues are used for political or ideological lobbying); *Resources*, DIV. FOR BAR SERVS., ABA, http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html (last visited Apr. 21, 2012) (contains a map identifying unified state bar associations and voluntary state bar associations); see also *Unified State Bars/The Florida Bar*, ST. B. FL., <http://www.floridabar.org/DIVCOM/PLBIPS2001.nsf/1119bd38ae090a748525676f0053b606/ee84c9f3e29ca3b58525669e004e0cee!OpenDocument> (last updated May 26, 2005).

179. See, e.g., *The State Bar of California Overview*, ST. B. CAL., <http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx> (last visited Apr. 21, 2012). The

not have an “integrated” bar, it will have a voluntary bar association whose primary purpose is representational, although this bar may advise the state supreme court and others with respect to regulatory issues.¹⁸⁰

It is common for U.S. state supreme courts to delegate to separate entities the responsibility for administering bar admission rules developed by the courts¹⁸¹ and the responsibility for lawyer discipline.¹⁸² There are substantial differences, however, in terms of where these regulatory entities are housed. States that have an integrated bar sometimes have admissions and discipline entities housed within the structure of the state bar.¹⁸³ States with voluntary bar associations tend to have admissions and discipline entities that are viewed as agencies of the state supreme court or independent entities created by the court.¹⁸⁴ We are not aware of any U.S. state in which lawyer regulation is handled by a voluntary, representational bar association. Although that previously had been the case in many states with respect to discipline issues, there were substantial changes made following the 1970 ABA Clark Report, which recommended the professionalization of the lawyer disciplinary system.¹⁸⁵

It is commonplace in the United States to speak of state judicial regulation of lawyers, but that form of regulation is anything but exclusive. U.S. lawyers are also subject to state legislative regulation,¹⁸⁶ federal regulation,¹⁸⁷ indirect but powerful “regulation” by others entities,

U.S. Supreme Court has held that mandatory lawyer dues may not be used for certain kinds of representational actions and that lawyers licensed in these states may request a rebate of part of their annual dues. *See Keller*, 496 U.S. 1. See also Terry, *supra* note 30, for a discussion of the recent heightened antitrust scrutiny of bar associations that exercise both representational and regulatory functions. The division of functions was one of the major results of the U.K. Clementi Report and subsequent U.K. Act. *See About Us: History of the Reforms*, LEGAL SERVS. BOARD, http://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm (last visited Apr. 21, 2012).

180. *See, e.g., About the Committee on Legal Ethics and Professional Responsibility*, PA. B. ASS'N, <http://www.pabar.org/public/committees/lglethic/about/mission.asp> (last visited Apr. 21, 2012). The Pennsylvania Bar Association is not an integrated bar association, but its legal ethics committee makes recommendations to the Pennsylvania Supreme Court regarding proposed rule changes. *Id.*; *History of the Pennsylvania Bar Association*, PA. B. ASS'N, <http://www.pabar.org/public/about/history.asp> (last visited Apr. 21, 2012).

181. *See* COMPREHENSIVE GUIDE TO BAR ADMISSIONS, *supra* note 175.

182. *See, e.g., ABA STANDING COMM. ON PROF'L DISCIPLINE*, 2009 SURVEY ON LAWYER DISCIPLINE SYSTEMS (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.authcheckdam.pdf>.

183. *See, e.g., Public Information*, ST. B. GA., http://www.gabar.org/public_information/.

184. *See For the Public*, UNIFIED JUDICIAL SYS. PA., <http://www.courts.state.pa.us/Links/Public/> (last visited Apr. 21, 2012).

185. *See* ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 25–28 (1970); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 2008 J. PROF. LAW. 359, 369 (noting the changes that followed the Clark Report).

186. *See, e.g., John Leubsdorf, Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 998 (2009).

187. *Id.*

including malpractice insurers,¹⁸⁸ and direct and indirect regulation by international entities.¹⁸⁹

Although the American Bar Association is a voluntary national bar association with no binding powers,¹⁹⁰ it has been very influential in the area of lawyer admissions, conduct rules, and discipline rules. In each of those three areas, the ABA has issued model rules that it recommends the state supreme courts adopt.¹⁹¹ The website of the ABA Center for Professional Responsibility provides examples of the ABA's extensive efforts to monitor implementation of its policies.¹⁹² As this website shows, the ABA's work has been influential in the United States on issues related to lawyer regulation.¹⁹³

To our knowledge, no U.S. jurisdiction has adopted a succinct statement of regulatory objectives analogous to section 1 of the U.K. or Scottish Legal Profession Acts or the proposed regulatory objectives sections in the Australian and Indian Acts.¹⁹⁴ It is true that the preamble of the ABA Model Rules of Professional Conduct identifies regulatory concerns, and that this preamble has been used as a template by more than forty U.S.

188. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 881 (1992).

189. See Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 1, 20; Terry, *supra* note 26, at 193.

190. The ABA is not a regulatory entity. A subset of the ABA, however, might be considered to have regulatory powers. The Council of the ABA Section of Legal Education and Admissions to the Bar has been approved by the U.S. Department of Education as the national accrediting agency for programs granting J.D. degrees. See generally ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS 3–4 (2010), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accreditation_brochure.authcheckdam.pdf. Many state supreme courts have adopted admission rules that use attendance at an ABA-accredited law school as a requirement for first time admission. See COMPREHENSIVE GUIDE TO BAR ADMISSION, *supra* note 175.

191. See, e.g., *About the Model Rules*, CTR. FOR PROF'L RESPONSIBILITY, ABA, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html (last visited Apr. 21, 2012); DISCIPLINARY BD. OF THE SUPREME COURT OF PA., PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT (as of July 14, 2011), available at <http://www.padisciplinaryboard.org/documents/PARDE-current.pdf>; *Standing Committee on Professional Discipline*, CTR. FOR PROF'L RESPONSIBILITY, ABA, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/disciplinecommittee.html (last visited Apr. 21, 2012).

192. See, e.g., *Policy & Initiatives*, CTR. FOR PROF'L RESPONSIBILITY, ABA, http://www.americanbar.org/groups/professional_responsibility/policy.html (last visited Apr. 21, 2012).

193. *Id.*; *Comparisons Available for Selected Model Rules*, CTR. FOR PROF'L RESPONSIBILITY, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (last visited Apr. 21, 2012).

194. See generally *Charts Comparing Professional Conduct Rules as Adopted by States to ABA Model Rules*, CTR. FOR PROF'L RESPONSIBILITY, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/charts.html (last visited Apr. 21, 2012). It is difficult to prove a negative but these state rule comparisons contain no indication of regulatory objectives similar to those found in the U.K. and Australia.

jurisdictions.¹⁹⁵ Although at least one prominent commentator has suggested that the preamble should play a more prominent role in defining appropriate lawyer regulation,¹⁹⁶ to date that does not seem to have happened. The thirteen-paragraph preamble does not seem to have focused attention regarding what are and are not acceptable regulatory objectives.¹⁹⁷

The situation is similar with respect to admission rules. State supreme court bar admission rules typically do not include regulatory objectives or a purpose statement.¹⁹⁸ Many bar admission rules require candidates to have graduated from an ABA-accredited law school.¹⁹⁹ The preamble of the Accreditation Standards adopted by the Council of the ABA Section of Legal Education and Admissions to the Bar similarly includes “purpose” language that might be viewed as akin to regulatory objectives.²⁰⁰ However, the recent debate in the United States about whether the ABA should accredit law schools located outside the United States demonstrates that this preamble is not functioning as “regulatory objectives” in the sense of defining what are and are not acceptable objectives for accreditation. For example, some have argued that the ABA should not accredit foreign law

195. See, e.g., ABA CTR. FOR PROF'L RESPONSIBILITY, POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITIES (Oct. 21, 2010), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/preamble.authcheckdam.pdf>. This chart shows how the preamble has been adopted in the rules of professional conduct of U.S. states. It is those state adoptions, rather than the Model Rules, that are the binding regulatory provisions. California and Utah have their own versions of the preamble. The District of Columbia, Louisiana, Nevada, New Hampshire, New Jersey, Oregon, and South Dakota declined to adopt the preamble. *Id.*

196. See Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1323 (2009).

197. MODEL RULES OF PROF'L CONDUCT pmbl. (2011).

198. See, e.g., 204 PA. CODE §§ 101–105 (2012).

199. See COMPREHENSIVE GUIDE TO BAR ADMISSIONS, *supra* note 175; *Pennsylvania Bar Admission Rules*, PA. B. EXAMINERS, at Rule 203, http://www.pabarexam.org/bar_admission_rules/203.htm (last visited Apr. 21, 2012).

200. See, e.g., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf. The preamble states in part:

Therefore, an approved law school must provide an opportunity for its students to study in a diverse educational environment, and in order to protect the interests of the public, law students, and the profession, it must provide an educational program that ensures that its graduates:

- (1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
- (2) receive basic education through a curriculum that develops:
 - (i) understanding of the theory, philosophy, role, and ramifications of the law and its institutions;
 - (ii) skills of legal analysis, reasoning, and problem solving; oral and written communication; legal research; and other fundamental skills necessary to participate effectively in the legal profession;
 - (iii) understanding of the basic principles of public and private law; and
- (3) understand the law as a public profession calling for performance of pro bono legal services.

Id. at pmbl.

schools when the job market for graduates of U.S.-based law schools is so poor, whereas others have argued that this is not an appropriate basis for regulation.²⁰¹ Neither side seemed to look to the preamble in the Standards of Accreditation or in the Rules of Conduct to define the acceptable limits of regulation.²⁰²

In sum, we consider the United States to be among the jurisdictions that have not yet adopted regulatory objectives. As set forth in more detail in Parts III and IV, we recommend that the United States and other jurisdictions do so. We expect that such a project would require time and commitment and that there might be vigorous debates about the proper contents of any regulatory objectives. We believe, however, that such debate is healthy and that both the process and the results would be worthwhile.

2. Other Jurisdictions

This Article focuses on eight jurisdictions that have adopted or have pending regulatory objectives for the legal profession. Seven of these jurisdictions are primarily English-speaking.²⁰³ Six are common law jurisdictions.²⁰⁴ We understand that the world of lawyer regulation is much broader than is represented by these primarily English-speaking, common law jurisdictions²⁰⁵ and have conducted an informal, anecdotal survey of other countries in order to determine whether other jurisdictions have adopted or have pending regulatory objectives.²⁰⁶ Of the jurisdictions

201. See *infra* note 230 (citing these debates).

202. See *infra* note 230.

203. The seven English-speaking jurisdictions are England and Wales (which are treated as a single jurisdiction because their lawyers are regulated together), Scotland, New Zealand, Canada, Australia, Ireland, and India. Although there are many different languages in India, its lawyer regulatory provisions are in English. See *Professional Standards*, BAR COUNCIL OF INDIA, available at <http://www.barcouncilofindia.org/about/professional-standards/> (last visited Apr. 21, 2012).

The non-English speaking jurisdiction is Denmark. Although, in our opinion, the U.S. has not adopted regulatory objectives for the legal profession, it is included in this Article because it was the location of the Fordham colloquium and because the U.S. author of this Article urges adoption of a regulatory objectives approach.

204. Denmark and Scotland are civil law jurisdictions. See, e.g., *Civil Law Systems and Mixed Systems with a Civil Law Tradition*, JURIGLOBE, UNIV. OF OTTAWA, <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-civil.php> (last visited Apr. 21, 2012). We recognize that the Canadian province of Quebec is a civil law jurisdiction, but we have counted Canada as primarily a common law jurisdiction.

205. The World Trade Organization's sectoral report on legal services provides a useful overview of the many different types of law and lawyer regulation beyond English-speaking common law systems. See, e.g., World Trade Organization Council for Trade in Services, *Legal Services: Background Note by the Secretariat*, S/C/W/43 (July 6, 1998), at 2; see also 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* (Richard L. Abel & Philip S. C. Lewis eds., 1988).

206. Our efforts include reviewing the links that appear on the APEC Inventory and contacting the non-U.S. academics who attended the International Legal Ethics Conference IV, which was held in Palo Alto, California in 2010 and members of the IBA International Trade in Legal Services Working Group. We would welcome from readers information on regulatory objectives found elsewhere in the world.

surveyed, a number had “purpose statements” or “objectives” along the lines of the regulatory objectives found in Denmark and some Canadian provinces; in many cases, however, the regulatory instruments focused much more heavily on what the regulation was doing, rather than why.²⁰⁷ None of the surveyed jurisdictions had detailed regulatory objectives of the type found in the United Kingdom, Scotland, and in some Canadian provinces, or in the pending legislation in Australia, Ireland, and India.

207. A number of countries, including Bulgaria, Finland, Nigeria, Russia, Singapore, South Africa, Spain, and Sweden, have regulatory provisions that include purpose, objectives, or regulatory objectives language that attempts to answer the “why” question for lawyer regulation. *See, e.g.*, E-mail from Martin Gramatikov to Laurel S. Terry (Oct. 12, 2011) (noting that Article 2 of Bulgaria’s Bar Act states a general objective that lawyers conduct their business in accordance with the legitimate interests of clients, and the specific objective that the legal profession is exercised according to the principles of independence, exclusivity, self-governance, and self-support. Article 40 sets forth regulatory objectives for individual performance including compliance with the rule of law, client’s interest, and ethical behavior) (on file with authors); E-mails from Alexander Muranov to Laurel S. Terry (Oct. 13, 2011 and Apr. 7, 2012) (noting that Article 1 of the Federal Law No. 63-FZ of May 31, 2002 on the practice of law and the bar in the Russian Federation (as amended through Nov. 21, 2011) states as its purpose ‘in order to protect [client’s] rights, freedoms, and interests and to ensure access to justice.’ Article 3(2) provides that the bar shall function in accordance with the principles of legality, independence, self-administration, community, and equality among attorneys) (on file with authors); E-mail from Freddy Mnyongani to Laurel S. Terry (Oct. 12, 2011) (Sec. 58 of the Attorneys Act of 1979 [South Africa] (as amended) sets forth the objects of the society which include twelve very specific items. Interestingly, however, none included protection of clients) (on file with authors); E-mail from Micaela Thorstrom to Laurel S. Terry (Oct. 19, 2011) (the 2010 Bylaws of the Finnish Bar Association set forth three objects of the Bar Association and the bylaws of the Swedish Bar Association included four objects. Neither the Finnish nor the Swedish objects identified client protection as one of the objects) (on file with authors); E-mail from Ramon Mullerat to Laurel S. Terry (Nov. 6, 2011) (providing translations of Spain’s General Statute of the legal profession (Estatuto General de la Abogacia) which indicate, inter alia, that legal profession regulation is to provide a service to society in the public interest); E-mail from Mfon Ekong Usoro to Laurel S. Terry (Oct. 17, 2011) (indicating that the Constitution of the Nigerian Bar Association, which is recognized by the Legal Practitioner’s Act Cap L11, specifies the aims and objects of the Association, including inter alia, improvement of the administration of justice); *see also* E-mail from Dubravka Aksamovic to Laurel S. Terry (Oct. 12, 2011) (Croatia’s Attorney Code of Conduct, which includes soft law rules, states that in fulfilling their professional obligations and in order to preserve the dignity of, and respect for the legal profession, draft legislation always sets forth the regulatory objectives of the proposed legislation, even if it is not included within the act itself) (on file with authors); Singapore Legal Profession Act (CHAPTER 161) (Original Enactment: Ordinance 57 of 1966) REVISED EDITION 2009 (1st June 2009), [8/2011 wef 03/05/2011] at Sec. 38-39; E-mail from Martin Henssler to Laurel S. Terry (Oct. 17, 2011) (Germany does not currently have separate regulatory objectives but Matthias Kilian has reported on the discussions elsewhere) (translation by authors) (on file with authors); E-mails from Arnaldur Hjartarson, Law Clerk, the Supreme Court of Iceland to Laurel S. Terry (Oct. 12, 2011 and April 6, 2012) (the Act on Professional Lawyers No. 77/1998 does not have a provision that states the regulatory objectives, although objects are sometimes found in the explanatory documents with the legislative bill and in the Icelandic Bar Association Statutes) (on file with authors); E-mail from Limor Zer-gutman to Laurel S. Terry, (Oct. 12, 2011 (Sections 2 and 109 of the 1961 Israeli Bar Association Law spell out *what it is* the bar may do, but in the opinion of this Article’s authors, do not explain *why*) (on file with authors).

As noted earlier, we sought evidence of binding regulatory objectives, rather than non-binding “purpose” statements that may appear on webpages or elsewhere.

D. A Synthesis of Existing and Proposed Regulatory Objectives

As the prior discussion has shown, a number of jurisdictions around the world have adopted or proposed regulatory objectives for the legal profession. There is clearly a significant amount of overlap among these objectives. For example, most jurisdictions list client protection as a regulatory objective.²⁰⁸ Most jurisdictions also include public protection or public interest among their regulatory objectives.²⁰⁹ Many include concepts of access to justice,²¹⁰ public understanding of the legal system,²¹¹ and promoting the rule of law.²¹²

As to other regulatory objectives, however, some jurisdictions consider them important enough to explicitly include in their list of regulatory objectives, whereas other jurisdictions do not. For example, some jurisdictions have included as an explicit regulatory objective promoting the diversity of the legal profession or promoting equal opportunity within the legal profession.²¹³ Some jurisdictions consider it important to explicitly state that it is their objective to encourage competence²¹⁴ or compliance with the professional principles, whereas other jurisdictions are silent on this point.²¹⁵ Several jurisdictions explicitly refer to the importance to independence to the legal profession, but others do not.²¹⁶ At least two jurisdictions—Australia and Ontario—have included general regulatory principles among their regulatory objectives. As noted previously, Australia's Draft Legal Profession National Law includes as a regulatory objective promoting regulation of the legal profession that is efficient, effective, targeted, and proportionate.²¹⁷ Australia also includes as a regulatory objective an explicit call for consistency.²¹⁸ The importance of

208. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(b)(i)).

209. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(a) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(b)(ii); Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a) (Can.)).

210. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(c) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(i)).

211. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(g) (U.K.)).

212. See *infra* Appendix 1 (citing, *inter alia*, Legal Services Act, 2007, c. 29, § 1(1)(b) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(a)(i)).

213. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(f) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(d)).

214. See *infra* Appendix 1 (citing [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b) (Austl.)).

215. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(h) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(f) as examples of jurisdictions explicitly citing the principles, as contrasted, for example, with some Canadian provinces).

216. See *infra* Appendix 1 (citing Legal Services Act, 2007, c. 29, § 1(1)(f) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(d)). For a discussion of the topic of independence, see Terry, *supra* note 30, at 80 (criticizing the EU IHS study and Commission reports for their failure to consider adequately the impact of lawyer regulation on the public, and the importance of noneconomic arguments, such as the administration of justice and rule-of-law issues); Terry, *supra* note 49, at 14.

217. See *supra* note 130 and accompanying text.

218. See *supra* note 130 and accompanying text.

consistency among regulators is a topic that is important to a number of clients and lawyers.²¹⁹

It is unclear how much one can or should read into a jurisdiction's silence with respect to a particular objective. Especially for those jurisdictions that adopted their objectives some time ago, they simply may not have considered the issue. As to at least one issue, however, there appears to be a clear divergence of views about how to state the objective and where the emphasis should be. This concerns the objective about promoting competition for legal services. In the United Kingdom, for example, the objectives states "promoting competition in the provision of services within subsection (2)" (referring to authorized persons); whereas in the Draft Indian regulatory objectives, it states "promoting healthy competition amongst the legal practitioners for improving the quality of service."²²⁰ Finally, it is perhaps worth noting that a few jurisdictions have regulatory objectives that arguably are self-protective and that might lead at least some commentators to wonder whether they could withstand challenges from the competition authorities that have been very interested in lawyer regulation.²²¹

As this brief summary shows, jurisdictions that are considering whether to adopt or amend their regulatory objectives for the legal profession have many examples to follow and will face many choices. Part IV of this Article provides our recommendations with respect to the concepts we recommend and identifies jurisdictions that have adopted similar concepts.

219. See, e.g., ASS'N OF CORPORATE COUNSEL, THE GUIDING PRINCIPLE—FREEDOM OF MOVEMENT FOR ALL LAWYERS ACROSS STATE BOUNDARIES (2010), available at <http://www.acc.com/advocacy/keyissues/mjp/upload/ACC-Comments-ABA-Ethics-20-20-WGIFL-7-10.pdf>; ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMM. ON PROF'L RESPONSIBILITY, REPORT ON CONFLICTS OF INTEREST IN MULTI-JURISDICTIONAL PRACTICE: PROPOSED AMENDMENTS TO NEW YORK RULES OF PROFESSIONAL CONDUCT 8.5 (DISCIPLINARY AUTHORITY AND CHOICE OF LAW) AND 1.10 (IMPUTATION OF CONFLICTS OF INTEREST) (2010), available at <http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsofInterestinMulti-JurisdictionalPractice.pdf>; ABA COMM'N ON ETHICS 20/20, PROPOSALS OF LAW FIRM GENERAL COUNSEL FOR FUTURE REGULATION OF RELATIONSHIPS BETWEEN LAW FIRMS AND SOPHISTICATED CLIENTS 31–39 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110707_MJP_Comment_Compilation.authcheckdam.pdf.

220. Compare Legal Services Act, 2007, c. 29, § 1(1)(e) (U.K.), with [Draft] Legal Practitioners Act, 2010, § 3(e) (India).

221. New Zealand, for example, includes as one of its regulatory objectives "to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner." Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(c). Without knowing more about the history and context of this regulatory objective, it might raise some eyebrows about whether protecting the "status" of the profession is a legitimate objective. See also Legal Profession Act, R.S.A. 2000, c. L-8 (Can.). A number of jurisdictions in Canada list as a regulatory objective "upholding the independence, integrity, and honour" of its members. See, e.g., British Columbia Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a)(ii) (Can.); New Brunswick Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5 (Can.); Prince Edward Island Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(c) (Can.); Yukon Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a)(ii) (Can.).

III. GENERAL RECOMMENDATION: JURISDICTIONS THAT HAVE NOT
ADOPTED REGULATORY OBJECTIVES FOR THE LEGAL PROFESSION SHOULD
DO SO

The prior sections have shown that there is a global trend toward the adoption of regulatory objectives for the legal profession. This part recommends that jurisdictions that have not adopted regulatory objectives do so. We submit that regulatory objectives can create many different kinds of beneficial effects. Some of these beneficial effects may occur *before* specific lawyer regulatory provisions are interpreted or implemented and some of the effects may occur *after* such lawyer regulation is implemented. These benefits will inure to a number of different stakeholders, including regulators, lawyers, clients, consumers, and the public. Each of these considerations is addressed below.

A. *The Benefits of Regulatory Objectives
on Prospective Lawyer Regulation*

We submit that if a jurisdiction has adopted regulatory objectives, those stated objectives may have a positive effect on prospective lawyer regulation. As to the regulators themselves, regulatory objectives may aid them in their deliberations as to the appropriate bases for regulation. The list of objectives clearly would not provide lawyer regulators with all of the answers and would not tell them how to *apply* those objectives in different situations. They would not, for example, tell regulators when to require and when to permit consent to conflicts of interest, whether to permit nonlawyer ownership in a law firm, or whether to allow lawyer involvement in litigation funding, to name just a few of the difficult issues addressed at this colloquium. Regulatory objectives could, however, make the regulators' jobs somewhat easier by defining what are appropriate factors for them to weigh as they consider new regulation.

Second, the presence of regulatory objectives may prompt regulators to "think outside the box" regarding what they are trying to accomplish. For example, during the Fordham colloquium, Professor Alice Woolley suggested that it would be useful for lawyer regulators to focus on the root causes of lawyer problems and that regulatory objectives might be too general to be of much assistance in addressing problems.²²² We agree that addressing the root cause of lawyer problems is exceedingly important. In our companion article to this Article, we identify some of the current regulatory trends in which regulators are trying to do precisely that.²²³ We suggest, however, that regulatory objectives may encourage rather than hinder regulators' efforts to consider these types of issues. For example, if

222. For information on Professor Woolley's other views, see Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761 (2012).

223. See Terry, Mark, & Gordon, *supra* note 1. That article cites trends in lawyer regulation. One of the main focuses of the *when* trend is to identify root causes of lawyer problems by designing ex ante regulation.

regulatory objectives are prominently and regularly posted and cited, and remind regulators of their obligations to protect clients, that might encourage regulators to think about whether there are additional steps they could take that would advance this objective. It is unlikely, in our view, to discourage efforts to imaginatively consider what prospective regulation might look like.

Regulatory objectives also have the potential to affect prospective lawyer regulation by providing guideposts for what will be—and will not be—considered appropriate bases for regulation. It is certainly possible that when lawyers debate the regulations to which they will be subject and which will affect their livelihoods, they will lack the objectivity that they would have if they were not personally affected by the legislation.²²⁴ Some have argued that this personal stake in regulation is sufficient reason to remove regulation from the legal profession.²²⁵ Others have argued that self-regulation for the legal profession is critical.²²⁶ Regardless of one's views on this point, if a jurisdiction had adopted regulatory objectives for the legal profession, those objectives would set the parameters for acceptable debate on any particular issue. Even if lawyers were secretly motivated by self-interest, regulatory objectives could help change the discourse. We see this change in discourse as a benefit, even if some lawyers remain motivated by self-interest and even if they are able to frame their self-interest in regulatory objectives language.

Regulatory objectives also have the potential to affect the views of clients and the public toward prospective regulation. If they have an understanding of the interests involved, they may be likely to participate in the debates and to understand the differing positions.

Two examples illustrate the potential role of regulatory objectives in shaping regulator thinking and public discourse about lawyer regulation issues. The first example is *Alexander v. Cahill*, which is a twenty-first century case challenging New York's lawyer advertising rules.²²⁷ In the United States, commercial free speech is one area of the law in which concepts analogous to regulatory objectives apply. For example, if a U.S. regulator wants to justify advertising rules that limit a lawyer's commercial speech, then under the Supreme Court's commercial speech test, that regulator must show that there is a substantial government interest in support of the regulation; that the speech restriction directly and materially

224. See, e.g., Decker & Yarrow, *supra* note 12, at 36–37 (“Whilst the reason for the establishment of self-regulatory bodies in the legal profession may be to address quality issues in supply to relatively unknowing customers, there may also be other motivations and effects, including the desire to monopolise certain legal activities, to the detriment of consumers.”); Rhode & Woolley, *supra* note 222.

225. See, e.g., Rhode & Woolley, *supra* note 222.

226. See, e.g., Gordon Turriff, *The Importance of Being Earnestly Independent*, 2012 MICH. ST. L. REV. (forthcoming).

227. *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff'd in part, rev'd in part*, 598 F.3d 79 (2d Cir. 2010).

advances that interest; and that the regulation is narrowly drawn.²²⁸ If a regulator fails to use this type of discourse when adopting or justifying the rule, it will likely be struck down. In *Alexander v. Cahill*, both the U.S. District Court for the Northern District of New York and the Second Circuit struck down parts of New York's advertising rules; the district court in particular was critical of the regulators' failure to identify the substantial government interest at stake, or how the regulation directly and materially advanced those interests or how it was narrowly drawn.²²⁹ In other words, the *Alexander* courts expected the parties to shape their debates and disagreements according to the "regulatory objectives" framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. In view of this strong reminder, it seems quite likely that in the future, the discourse about lawyer advertising will be framed in terms of the *Central Hudson* factors. Thus, regulatory objectives can play a powerful role in shaping regulatory debates.

The recent ABA debates about accreditation of offshore law schools provide the second example of how regulatory objectives might set the parameters of public debate by defining the issues the regulator considers relevant. In 2010, the ABA provided notice and sought public comments on a proposal that would allow it to apply the existing ABA accreditation requirements to a prospective law school, even if that law school was not physically located on U.S. soil.²³⁰ The issue arose because the Peking University School of Transnational Law advised the ABA that it planned to seek ABA accreditation and believed that it satisfied all of the ABA's existing criteria, other than the requirement that it be located in the United States.²³¹ The ABA received a significant number of comments in response to its call for comments.²³² In the view of one of this Article's authors, a number of these comments addressed issues that would have been inappropriate for the ABA Council on Legal Education to consider. If the

228. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

229. See *Alexander*, 598 F.3d at 89 (rejecting defendant's argument that the *Central Hudson* commercial speech test was inapplicable); *Alexander*, 634 F. Supp. 2d at 256 n.20 (chastising counsel for failing to analyze the proposed rules under the *Central Hudson* test, the court stated: "Although the Court finds it commendable that the Appellate Division of the State of New York and the disciplinary committees that function on its behalf pursue ways to regulate the manner and means by which attorneys who choose to advertise may do so, they must be mindful of the protections such advertising has been afforded and take the necessary steps to see that the regulation of such advertising is accomplished in a manner consistent with established First Amendment jurisprudence.").

230. See ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON FOREIGN LAW SCHOOLS SEEKING APPROVAL UNDER ABA STANDARDS (2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20100719_special_committee_foreign_law_schools_seeking_approval.pdf.

231. See, e.g., Dean Jeff Lehman, Remarks at the 2011 Association of American Law Schools Annual Meeting (Jan. 6, 2011), available at <http://www.aalsweb.org/am2011/thursday/hottopicsABA.mp3>.

232. See *Notice and Comment*, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.htm (last visited Apr. 21, 2012) (providing links to comments).

United States had adopted regulatory objectives for the legal profession, those objectives presumably would have set the “ground rules” for the debates. Although there undoubtedly would have continued to be disagreements about whether the ABA should accredit foreign law schools, and while the motivations of some of the commentators might have been the same regardless of the existence of regulatory objectives, the existence of those objectives arguably would have shaped the debate in a way that would have made it more productive. Commentators would have had to figure out how to frame their arguments in terms of issues that the regulators had determined were relevant.

Some may argue that self-interested lawyers would simply find a way to fit their arguments into the regulatory objectives framework and therefore the adoption of regulatory objectives would not lead to meaningful accomplishments. Our response is twofold. First, as noted earlier, we are willing to believe that regulatory objectives might positively influence the conduct of professional regulators who are not motivated by financial self-interest. Second, we believe that even if the secret motivations of certain self-interested lawyers do not change, there is a benefit in changing the nature of the discourse (and a possibility that the changed discourse might lead to changed results).

*B. The Benefits of Regulatory Objectives After Lawyer Regulation
Has Been Adopted*

In addition to the impact that regulatory objectives can have in providing context and direction for regulation prior to and during implementation, regulatory objectives can also have an extremely important role *after* implementation and during regulation. As is explained in greater detail below, regulatory objectives may be useful to regulators who must decide how to interpret, implement, and enforce existing lawyer regulations. Objectives can also help the legal profession, clients, and the public understand the reasons for the regulators’ conduct—or lack of conduct. First, because regulatory objectives define the purpose of regulation and set its parameters, they will serve as a guide to assist those who are charged with interpreting and enforcing the regulations. For example, assume that one regulatory objective is to protect clients and another objective states that regulation must be “proportionate.” These objectives may assist the regulator in achieving the ultimate objective of reducing complaints against lawyers without the application of oppressive and proscriptive regulatory burden. A regulator might choose to enforce the existing regulation using an “education towards compliance” approach that focuses on the ethics and professionalism of legal practitioners.²³³ This is the approach that has been taken by the New South Wales OLSC, and it has resulted in a 33 percent

233. Parker, Gordon, & Mark, *supra* note 40, at 498.

reduction in complaints by clients against lawyers who are employed in incorporated legal practices.²³⁴

Second, regulatory principles can help the regulator in defining the parameters of the legislation by assisting in determining its breadth and depth. The regulatory objectives may, for example, create a path for the regulator to do more than simply discipline individual legal practitioners for breaches. The ultimate objective of legal profession regulation is, as has been mentioned, the higher purpose of reducing complaints against lawyers within a framework of consumer protection and protection of the rule of law.

Third, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. The inclusion of regulatory objectives may diffuse the oft-stated consumer claim that the purpose of lawyer regulation is merely to punish or discipline errant legal practitioners, thereby providing no direct benefit to the consumer. The experience of the OLSC is that explaining to consumers that the issues they raise will be directed at improving the professionalism of the legal profession, as well as ultimately reducing complaints against lawyers, goes some way toward providing disaffected consumers with an understanding that their complaint has had a positive impact.

Fourth, regulatory objectives assist in ensuring that the function and purpose of the particular legislation are transparent. When the regulatory body administering the legislation is questioned, for example, about its interpretation of the legislation, the regulatory body can point to the regulatory objectives to demonstrate compliance with this function and purpose. This transparency will be useful for clients, the public, and lawyers, as well as in the situation in which the regulators responsible for implementing and enforcing the regulation are not the same as those who drafted the regulation.

Some might contend that the adoption of regulatory objectives would make it more difficult for regulators to discipline practitioners because there would be two things they have to prove, rather than just one. However, in the opinion of two of the authors, who are both regulators, regulatory objectives could help in achieving their ultimate purpose of reducing complaints against lawyers and, particularly where coupled with principle-based regulation or outcomes-focused regulation, may facilitate disciplinary action based on first principles such as “unconscionable conduct” rather than relying on specific breaches of proscriptive legislation. A recent case in New South Wales considered the question whether lawyers should apportion fees among three clients when three personal injuries actions

234. *See id.* at 493. The drop in complaints does not refer to lawyers as a whole, it only refers to a subset of lawyers (those who work in incorporated legal practices). The OLSC has experienced a consistent drop in the number of complaints since the office first opened in 1994. This drop has occurred as the legal profession in New South Wales has continued to grow. Evidence of this is found in the Annual Reports of the OLSC. *See Annual Reports*, OFF. LEGAL SERVS. COMMISSIONER, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_annualreports (last visited Apr. 21, 2012).

were heard together.²³⁵ The lawyer charged each client full fare for each day in court (thereby charging three times her normal daily fee), which the Legal Services Commissioner considered gross overcharging.²³⁶ In the decision of the Tribunal, the judge pointed out that while there was no rule requiring the apportionment of costs, it would be an unwise lawyer who did not do so.²³⁷ The proposed National Law, which includes regulatory objectives as discussed above, will now require proportionality in relation to costs which will leave this matter beyond doubt.

C. *The Collective Impact of Regulatory Objectives for the Legal Profession*

One final point about regulatory objectives is the potential impact of widespread adoption of regulatory objectives for the legal profession. Regulatory objectives might help the legal profession when it interacts with non-traditional regulators. As one of the authors of this Article has written, there are an increasing number of external, non-traditional lawyer “regulators,” and this regulation occurs on both a national and an international basis, and on the basis of both “hard law” and “soft law.”²³⁸ If regulatory objectives are adopted by multiple jurisdictions and if they are generally consistent, that might help the legal profession in its negotiations with these entities. For example, the legal profession could point to these regulatory objectives when trying to convince the Financial Action Task Force (FATF) that there should be extremely limited circumstances in which lawyers are required to reveal confidential client information or “tip off” governmental entities about their clients.²³⁹ Another example is the proposed WTO Disciplines on Domestic Regulation.²⁴⁰ The current WTO Chair’s draft states that

[t]he purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria, such as competence and the

235. See *Bechara v Legal Servs. Comm’r* [2010] NSWCA 369 (Austl.).

236. *Id.*

237. *Id.*

238. See Terry, *supra* note 189, at 20.

239. See, e.g., *FATF Symposium*, IBA ANTI-MONEY LAUNDERING F., http://www.anti-moneylaundering.org/2010_FATF_Symposium.aspx (last visited Apr. 21, 2012); see also Terry, *supra* note 189, at 1–2; Laurel S. Terry, *Transformative Law: The Impact of International Law on Lawyer Regulation: A Case Study Focusing on the Financial Action Task Force (FATF) and Its 2008 Lawyer Guidance* (2010), available at http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/Terry_FATF_AALS_%202010.pdf (presentation slides).

240. WORKING PARTY ON DOMESTIC REGULATION, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4 (Mar. 14, 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/discipline.doc>. For additional discussion of the status of the disciplines discussion, see WORKING PARTY ON DOMESTIC REGULATION, ANNUAL REPORT OF THE WORKING PARTY ON DOMESTIC REGULATION TO THE COUNCIL FOR TRADE IN SERVICES (2011), S/WPDR/14 (Oct. 24, 2011); WORKING PARTY ON DOMESTIC REGULATION, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4, CHAIRMAN’S PROGRESS REPORT, S/WPDR/W/45 (Apr. 14, 2011).

ability to supply the service, and do not constitute disguised restrictions on trade in services.²⁴¹

To the extent that multiple jurisdictions identify the same regulatory objectives, they are more likely to be accepted by external audiences evaluating compliance with any (future) WTO domestic regulation disciplines.

We recognize that there are possible negative consequences connected to the adoption of regulatory objectives. It is possible, for example, that if a number of jurisdictions adopted regulatory objectives but these objectives differed from one another in significant ways, the existence of differing objectives would make it more difficult for the legal profession to interact with governmental representatives such as the FATF representatives. Despite this potential risk, we believe that the benefits of adopting regulatory objectives far outweigh the risks, especially since the biggest risk seems to be that regulatory objectives will be ineffectual. We therefore recommend that jurisdictions that have not adopted regulatory objectives for the legal profession do so.

IV. SPECIFIC RECOMMENDATIONS: CONCEPTS TO INCLUDE IN REGULATORY OBJECTIVES FOR THE LEGAL PROFESSION

Part III recommended that jurisdictions that have not done so develop their own set of regulatory objectives for the legal profession to be included in the jurisdictionally-appropriate regulatory instrument.²⁴² This part of the Article goes further, and addresses the content of such objectives. We recommend that jurisdictions that have not yet adopted regulatory objectives for the legal profession (or who have not yet adopted them after a rigorous consideration of the issues) use the following list as the template for their discussion and debate about the proper regulatory objectives for that jurisdiction. We recognize that there may be as much value in the *process* of adopting regulatory objectives as there is in the *result*. Indeed, because the history, context, culture, and needs of jurisdictions differ from one another, it is possible that modifications to this list may be necessary.

241. WORKING PARTY ON DOMESTIC REGULATION, DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4, at 6 (Mar. 14, 2010), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/discipline.authcheckdam.doc>.

242. *See generally* Terry, Mark, & Gordon, *supra* note 1 (explaining that different jurisdictions use different kinds of instruments for lawyer regulation). In Australia, for example, regulatory objectives might be included in the legal profession acts of each Australian state or territory. *See Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2008* (WA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2006* (NT); *Legal Practitioners Act 1981* (SA). In the United States, regulatory objectives might be adopted by a state supreme court in a court rule. It is beyond the scope of this Article to urge the use of one particular form of regulatory instrument over another. The purpose, rather, is to urge that, whatever regulatory instrument a jurisdiction uses, that instrument should explicitly include regulatory objectives for the legal profession.

Despite this possibility, we submit that the following list of concepts will provide a useful starting template:

1. Protection of clients;
2. Protection of the public interest;
3. Promoting public understanding of the legal system and respect for the rule of law;
4. Supporting the rule of law and ensuring lawyer independence sufficient to allow for a robust rule-of-law culture;
5. Increasing access to justice (including clients' willingness and ability to access lawyers' services);
6. Promoting lawyers' compliance with professional principles (including competent and professional delivery of services);
7. Ensuring that lawyer regulation is consistent with principles of "good regulation."

There are several different reasons that this list includes the concept of "protection of clients." Client protection is almost universally recognized as one of the key reasons why lawyer regulation exists.²⁴³ Although not all current regulatory objectives identify client protection,²⁴⁴ if one were starting from scratch in drafting objectives, it is difficult to imagine that there would be any significant debate about whether to include this concept.

The second concept we recommend is "protection of the public interest." This concept is nearly universally adopted among the jurisdictions we examined.²⁴⁵ Moreover, in those jurisdictions that do not include this objective, there is nothing to suggest that it was a deliberate rejection, rather than simply an oversight.²⁴⁶ For example, the first draft of the U.K. Act omitted public interest from its list of regulatory objectives.²⁴⁷ When the omission was pointed out, the Joint Committee of the House of Lords and House of Commons quickly added in the "public interest" objective.²⁴⁸ Protection of the public is often included in the literature that sets forth the rationale for lawyer regulation.²⁴⁹ In our view, it is one of the primary

243. See, e.g., Decker & Yarrow, *supra* note 12, at 41. See generally *supra* Part I.B and accompanying text (citing studies).

244. Interestingly, many of the Canadian provinces do not explicitly refer to "client protection" in their regulatory objectives. See *infra* Appendix 2. We predict, however, that if asked, they would not object to the inclusion of this concept.

245. See *infra* Appendix 2; see also *infra* Appendix 1 (comparing our recommended objectives to existing objectives).

246. See, e.g., Newfoundland Law Society Act, S.N.L. 1999, c. L-9.1, pt. 1, § 18(1)(1) (Can.); Yukon Discussion Paper, *supra* note 50, at 103 (indicating that although Newfoundland does not have a separate regulatory objectives section in its legislation, its webpage refers to "public interest"); see also Appendix 2, *infra*. The Alberta Legal Profession Act similarly omits public interest, but its website refers to public interest. Legal Profession Act, R.S.A. 2000, c. L-8, available at <http://www.qp.alberta.ca/documents/Acts/108.pdf>; see also Yukon Discussion Paper, *supra* note 50, at 107.

247. See *supra* note 66 and accompanying text.

248. See *supra* note 74 and accompanying text.

249. See generally Decker & Yarrow, *supra* note 12; Terry, *supra* note 49 (praising the Decker & Yarrow report for its analysis, which included public interest and public protection as one of the goals of lawyer regulation but critiquing the study for not explicitly making this point throughout the report).

justifications for lawyer regulation. Lawyers' actions have the potential to affect not only the clients they represent, but also society at large.²⁵⁰

We feel that an objective of protecting the public, while beneficial and critical as a regulatory objective is not in and of itself enough to achieve the broader objective of reducing complaints against lawyers and enhancing the standard of the legal profession in the eyes of the public. This is because a "protective jurisdiction" only acts to protect the public from unscrupulous lawyers by removing them from practice, limiting their ability to practice, or putting conditions on their practice. Such measures are often based on complaints made where the person lodging the complaint gets no benefit unless the regulator has additional functions, including dispute resolution and/or the power to compensate for damage. For this reason, our recommended objectives also include promoting adherence to principles to ensure competence and professionalism. This objective is described in greater detail below.

The third regulatory objective on the list is "promoting public understanding of the legal system and respect for the rule of law." While some but not all jurisdictions include a regulatory objective about promoting understanding of the rule of law,²⁵¹ it seems sensible to do so. There seems to be global agreement about the importance of the rule of law from both an economic perspective and from an individual rights perspective.²⁵² There also seems to be global agreement that lawyers play a crucial role in helping the public understand how the legal system works and the importance of the legal system to the rule of law.²⁵³ If the public has or develops distrust for the integrity of the system, that may be difficult to overcome. For this reason, we think it is desirable to have an objective that recognizes the important role that lawyers can play in facilitating public understanding of the legal system and the rule of law.

The fourth regulatory objective we recommend is promoting the rule of law, which includes ensuring lawyer independence sufficient to allow for a robust rule-of-law culture. Although this regulatory objective is related to the prior objective, the concepts are distinct. The prior objective focuses on

250. See, e.g., Final Report of Neal Batson, Court-Appointed Examiner, *In re Enron Corp.*, 298 B.R. 513 (Bankr. S.D.N.Y. 2003) (No. 01-16034), available at http://www.enron.com/media/Final_Report_Neal_Batson.pdf.

251. See, e.g., Legal Services Act, 2007, c. 29, § 1(1)(b), (g) (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(a)(i).

252. See, e.g., OECD, PROMOTING PRIVATE INVESTMENT FOR DEVELOPMENT: THE ROLE OF ODA 16 (2006), available at <http://www.oecd.org/dataoecd/23/40/36566902.pdf> (noting that private investment is tied to a reduction in risk, which can be accomplished "by making the implementation of regulations established by national and local governments more predictable and enforcement of the rule of law more rigorous"); Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, at 118, U.N. Doc. A/CONF.144/28/Rev.1 (1990) [hereinafter *UN Basic Principles*] (setting forth rule-of-law principles to which individuals are entitled).

253. See, e.g., *UN Basic Principles*, *supra* note 252, at 118 ("Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession . . .").

the importance of public support in maintaining the rule of law. This objective focuses on the importance of the rule of law itself and the role of lawyer independence in ensuring a vibrant rule-of-law culture.²⁵⁴ Although jurisdictions may differ on the specific regulatory structures that are needed to ensure lawyer independence²⁵⁵ and they may differ as to whether particular practices or rules impinge on that independence,²⁵⁶ there appears to be near-universal agreement that lawyer independence is an important attribute that must be maintained.²⁵⁷

Although a number of jurisdictions have regulatory objectives that use the word “independent” or refer to the independence of the lawyer, some of them use the word without any language to suggest why it is that “independence” is an important value.²⁵⁸ Because calls for lawyer independence may be viewed as a cover for “lawyer protectionism,”²⁵⁹ we think it is useful for a regulatory objective to explicitly articulate the value that lawyer independence serves. In our view, lawyer independence is important because it promotes a rule-of-law culture, which will impact both the individual client the lawyer serves as well as the larger society. We believe that this linkage helps explain why, after it was pointed out that the first draft of the U.K. Legal Services Act omitted any reference to “independence,” the concept was added to the U.K. Legal Services Act.²⁶⁰

The regulatory objectives in some Canadian jurisdictions and the proposed objectives in India and Australia come the closest to articulating why lawyer independence is important. For example, the British Columbia Legal Profession Act states that it is the duty of the law society “to uphold and protect the public interest in the administration of justice

254. See, e.g., *id.*

255. See Terry, Mark, & Gordon, *supra* note 1, at 2664–67.

256. See, e.g., *Yukon Discussion Paper*, *supra* note 50, at 86–88 (expressing concerns about publicly traded law firms).

257. See *UN Basic Principles*, *supra* note 252; see also *supra* notes 66–68 and accompanying text (explaining that when it was pointed out that the first draft of the U.K. Legal Services Act omitted the concept of lawyer independence, the Joint Committee of the House of Commons and House of Lords agreed without dispute to add this language to the next draft of the bill); INT’L B. ASS’N, GENERAL PRINCIPLES FOR THE LEGAL PROFESSION (2006), available at <http://www.int-bar.org/images/downloads/Executive%20office/Principles%20Legal%20Profession%20A3%20-%20Jan%2008.pdf>.

258. See, e.g., Law Society Act, S.N.B 1996, c. 89, § 5(c) (Can.) (“It is the object and duty of the Society . . . to ensure the independence, integrity and honor of its members.”); Legal Services Act, 2007, c. 29, § 1(1)(f) (U.K.) (“encouraging an independent, strong, diverse and effective legal profession”); Legal Services Regulation Bill 2011 (Act No. 58/2011), § 9(4)(e) (Ir.) (“encouraging an independent, strong and effective legal profession”); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(d) (“promoting an independent, strong, varied and effective legal profession”); Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1 (referring to the duty “to guard the independence and integrity of lawyers”).

259. See, e.g., Renee Newman Knake, *Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals*, 73 OHIO ST. L.J. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800258 (occasionally treating as interchangeable independence, reputation protection, and professionalism arguments).

260. See *supra* note 67 and accompanying text.

by . . . ensuring the independence, integrity and honour of its members.”²⁶¹ One of India’s proposed regulatory objectives encourages “an independent, strong, diverse and effective legal profession with ethical obligations and with a strong sense of duty towards the courts and tribunals where they appear.”²⁶² The Australian objective is to provide a “co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.”²⁶³ We believe that the rule-of-law concept includes within it the obligations to the tribunal found in India’s draft language. Unlike the Australian objective, however, we do not believe that all jurisdictions currently are in a position to recommend a co-regulatory structure of government.²⁶⁴ Nevertheless, we believe that whatever regulatory instrument(s) and regulatory structures a jurisdiction uses, they should be designed so as to maintain the independence of the legal profession. Moreover, we believe that it is important for the legal profession to be independent, not only with respect to the executive branch of government, but also with respect to the legislative branch of government.

The fifth regulatory objective we recommend is increasing access to justice (including clients’ ability to access and pay for legal services). A number of jurisdictions have included “access to justice” among their regulatory objectives.²⁶⁵ We suspect that the jurisdictions that have not included this objective would not object to it, but simply did not think to include it. Research has not revealed any instances in which proponents suggested adding this objective, but were defeated.

It is perhaps worth noting at this point that our list of recommended regulatory objectives concepts does not include the words “competition in legal services,” even though a number of jurisdictions have included “competition” among their regulatory objectives.²⁶⁶ This is because we concluded that competition is not a value in and of itself, but is an instrumental value—designed to achieve something else. Upon reflection

261. Legal Profession Act, S.B.C. 1998, c. 9, § 3(a)(ii) (Can.). While we think independence should be included in regulatory objectives for the legal profession, we do not believe that honor or dignity are comparable values. While “integrity” is obviously important, given the other objectives, we do not think it is necessary to include a reference to lawyer integrity among the regulatory objectives. *Cf. id.*

262. [Draft] Legal Practitioners Act, 2010, § 3(d) (India).

263. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(f) (Austl.).

264. *See generally* Terry, Mark, & Gordon, *supra* note 1.

265. *See, e.g.*, Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(i) (“Promoting . . . access to justice.”); Legal Services Act, 2007, c. 29, § 1(1)(c) (U.K.) (“improving access to justice”). It is not yet clear whether the difference between “promoting” and “improving” access will prove significant.

266. *See, e.g.*, [Draft] Legal Practitioners Act, 2010, § 3(e) (India) (“promoting healthy competition amongst the legal practitioners for improving the quality of service”); Legal Services Regulation Bill 2011 (Act No. 58/2011), § 9(4)(d) (Ir.) (“promoting competition in the provision of legal services in the State”); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(ii) (“promoting . . . competition in the provision of legal services”); Legal Services Act, 2007, c. 29, § 1(1)(e) (U.K.) (“promoting competition in the provision of services within subsection (2) [referring to authorized persons]”).

and consideration of the many antitrust studies of the legal profession,²⁶⁷ we believe that increased competition is desirable because of the effect it will have on access to justice issues. In our view, access to justice includes concepts related to the price of legal services, availability and accessibility of legal services, as well as quality. This concept is part of what underlies the proposed Australian objective that emphasizes “empowering clients of law practices to make informed choices about the services they access and the costs involved”²⁶⁸ and India’s proposed objective of “promoting healthy competition amongst the legal practitioners for improving the quality of service.”²⁶⁹ We believe that the best articulation of this concept of competition is a regulatory objective that refers to access to justice and makes clear that access includes issues of availability, access, price, and quality. We recognize, however, that this choice may be controversial and that some may view legal profession regulation as self-interested and may want the concept of competition to be explicitly included.

The sixth regulatory objective concept listed is promoting lawyers’ compliance with professional principles, including competent and professional delivery of legal services. A number of jurisdictions have regulatory objectives that refer to professional principles in one fashion or another.²⁷⁰ While one might argue that such a regulatory objective is unnecessary given the existence of the professional principles, we think that it is essential to include a reference to the professional principles (including conduct rules and the like) as a reminder of their central place in lawyer regulation and as a secondary means of promoting the rule of law. We have expanded upon the existing objectives by explicitly including the goals of competent and professional delivery of legal services. Competence is obviously necessary, but it is so fundamental that it sometimes goes unnoticed.²⁷¹ We believe it is important to make this objective explicit.

267. See *supra* notes 28–37 and accompanying text (discussing various antitrust studies of the legal profession).

268. See [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3 (Austl.).

269. *Id.* ch 1, pt 1, s 1.1.3(d) (Austl.); [Draft] Legal Practitioners Act, 2010, § 3(e) (India).

270. See, e.g., Legal Services Act, 2007, c. 29 § 1(1)(h) (U.K.) (“promoting and maintaining adherence to the professional principles”); [Draft] Legal Practitioners Act, 2010, § 3(h) (India) (same); Legal Services Regulation Bill 2011 (Act No. 58/2011), § 9(4)(f) (Ir.) (same); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(f). Australia does not refer to the concept of professional principles but identifies the principles of competency and high ethical and professional standards. See [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b) (Austl.) (“ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services”). Many Canadian provinces refer to professional responsibility. See *infra* Appendix 2.

271. See, e.g., *Report to the House of Delegates – Recommendation – Center for Professional Responsibility*, ABA, ¶ 1, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html (last visited Apr. 21, 2012) (listing core values but omitting competence); *Commission on Multidisciplinary Practice, Updated Background and Informational Report and Request for Comments*, ABA, pt. II ¶ 1, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/febmdp.html (last visited Apr. 21, 2012) (recommending the addition of competence as a core value); see also Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 903–04 n.158, 910 n.195 (1999).

We also added language to this objective specifying that legal services must be delivered professionally. While we recognize that in some jurisdictions, the concept of professionalism arguably has been used as a cover for lawyer self-protection,²⁷² we think that when interpreted and implemented properly, the concept is valuable. For example, the New South Wales OLSC has taken the position that in addition to promoting the other objectives, its role includes enhancing the professionalism of legal practitioners and reminding them of what it means to be part of a profession.²⁷³ We ultimately concluded that it is vital that regulatory objectives promote professionalism both to meet the primary purpose of regulation as well as to address concerns raised in some quarters that regulation could have the effect of suppressing professionalism.

The seventh and final regulatory objective on our list is ensuring that lawyer regulation is consistent with principles of “good regulation.” As noted earlier, only a few jurisdictions have included general principles within their regulatory objectives.²⁷⁴ There are several reasons why our recommendations include this objective. We believe that it is uncontroversial that lawyer regulators should comply with good regulation principles. Accordingly, we see a benefit to including that concept within the regulatory objectives so as to provide notice, transparency, and a reminder of these expectations. Second, if the regulatory objectives do not include these types of general principles, it is perhaps more likely that these principles will be imposed on lawyer regulators in ways that they find less satisfactory.²⁷⁵ Third, we believe that for regulation to be effective, it must include a constant questioning or assessment of the effectiveness of the regulation in terms of those that are regulated (lawyers) and those affected by the regulation (clients, consumers, and the general community). Regulatory objectives can have the effect of making this clear to the regulators so as to enhance their role in promoting professionalism, the rule of law, and client protection.

272. See, e.g., Knake, *supra* note 259; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 40 (1981); Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 368–69 (1993); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 725 (1989).

273. See Mark, *supra* note 39.

274. See *supra* notes 101–05, 128 and accompanying text (describing the general regulation principles found in Australia and in the regulated professionals' acts in Manitoba, Ontario, and Nova Scotia).

275. See, e.g., Terry, *supra* note 26, at 209 (“When these new regulators approach the topic of lawyer regulation, they are much more likely to assume that lawyers should be treated in a manner similar to other service providers. Moreover, such regulators are likely to be skeptical of claims that the legal profession is unique and should be treated differently than other professions.”); Terry, *supra* note 189, at 1 (explaining how the legal profession came into the game late with respect to implementation of the FATF recommendations); E-mail from Darrel Pink, *supra* note 105 (noting that there was “a fair amount of controversy” concerning legislation in Nova Scotia and elsewhere because “it introduced a new level of government oversight over all professions”).

If jurisdictions decide to include a reference to good regulation principles within their regulatory objectives, one of the decisions they will face is whether to spell out the principles of good regulation or simply refer to the concept in general. The Australian and Canadian examples have cited specific principles of good regulation. The advantage of doing that is that the expectations are clear. The disadvantages include the fact that what is considered good regulation is expressed somewhat differently in different jurisdictions and may evolve over time.²⁷⁶

A second possible disadvantage of including specific “good regulation” principles is that by specifying the issues, the legal profession may bring to the forefront an issue that to date has remained on the back burner. In particular, some governments and commentators have used language that could be interpreted to mean that before legal regulators act, they must have empirical evidence justifying the proposed rule or restriction.²⁷⁷

While this type of “empiricism” principle undoubtedly makes sense in some contexts (such as prescription drug approvals), is it an appropriate principle to use for legal profession regulation where it may be difficult to measure *ex ante* the impact of regulatory changes on objectives such as public interest or the rule of law? If this “empiricism” principle is not an appropriate one to include in regulatory objectives, is that a reason to exclude general regulatory principles such as those found in the draft Australian regulatory objectives? Despite these possible disadvantages, we conclude that jurisdictions should include a reference to good regulatory principles, if not a list of those general regulatory principles.

Appendix 1 is a chart that compares the objectives we recommend to the objectives that have been drafted for, or enacted by, other jurisdictions. Appendix 2 demonstrates that the seven regulatory objective concepts that we recommend are consistent with regulatory objectives found around the world.

Although Appendix 1 demonstrates that there is precedent for all of the concepts we recommend, we have not recommended adoption of all of the concepts currently found in various regulatory objectives. To the contrary,

276. The draft Australian regulatory objectives for the legal profession state that regulation should be efficient, effective, targeted, and proportionate. *See [Draft] Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e). Other jurisdictions have endorsed “good regulation” concepts that are similar in principle to these Australian objectives, but that are phrased differently. *See supra* note 11 and accompanying text. The APEC-OECD Integrated Checklist on Regulatory Reform asks whether regulation (broadly defined) is transparent, consistent, comprehensible, accessible to users both inside and outside government, and to domestic as well as foreign parties and whether its effectiveness is regularly assessed. *See APEC-OECD Checklist, supra* note 9, at 7.

277. *See, e.g.*, OECD, OECD GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE (2005) (“Good regulation should: (i) serve clearly identified policy goals, and be effective in achieving those goals; (ii) have a sound legal and empirical basis” and listing six other items); CANADIAN COMPETITION REPORT, *supra* note 2, at 37–41 (“Restrictions should be directly linked to clear and verifiable outcomes.”); APEC-OECD Checklist, *supra* note 9, at 12 (“Are the legal basis and the economic and social impacts of drafts of new regulations reviewed? What performance measurements are being envisaged for reviewing the economic and social impacts of new regulations?”).

we deliberately considered and then rejected a number of concepts found in other jurisdictions. One of the first concepts we rejected was the idea of setting priorities among the regulatory objectives. Although some jurisdictions—notably India—have tried to do this, most jurisdictions have chosen not to set priorities, even though the objectives may appear to compete on occasion. We consider the latter approach to be the wisest. We believe that it will be difficult to predict at the outset which objective should be given priority in any given set of facts. Although one might argue that the objectives provide little guidance, as noted earlier, we believe that it is a very useful step forward if the objectives can be used to frame the conversation and debate so that one knows what are acceptable grounds for regulation.

Second, we considered but deliberately omitted any regulatory objective that focused on the interests of the legal profession or that referred to maintaining the monopoly of the legal profession, even if it made those interests subordinate to the objectives described above. Different jurisdictions have framed this type of objective in different ways.²⁷⁸ Regardless of how it is couched, however, we believe that it is unwise to include this type of objective within the list. While we recognize that it might be possible to make a principled argument in favor of such an objective, we concluded that the risks were too great that such an objective would lead to rent-seeking behavior or self-dealing on the part of the profession or to concerns about such behavior.²⁷⁹

As noted earlier, we omitted the objective of “promoting competition,” which is found in several jurisdictions, because we concluded that it was best viewed as an instrumental value rather than as an end in itself. For similar reasons, we omitted the regulatory objective that encouraged an independent, strong, diverse, professional, and effective legal profession.²⁸⁰ We concluded that, in the context of developing objectives for lawyer regulation, this objective, similar to the competition objective, was best viewed as instrumental value rather than as an end in itself. One reason why we value a diverse legal profession is to ensure greater access to justice

278. See, e.g., Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(c) (N.Z.) (citing the purpose “to recognise the status of the legal profession”); Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1 (stating the purpose “to work for the benefits of the Danish legal community”); Legal Professions Act, R.S.A. 2000, c. L-8, pt. 3, § 49(1)(b) (Can.) (“tends to harm the standing of the legal profession generally”); Legal Profession Act, S.B.C. 1998, c. 9, § 3(b)(ii) (Can.) (“Subject to paragraph (a) . . . to uphold and protect the interests of its members.”); Legal Profession Act, R.S.N.W.T. 1998, c. L-2, § 22(a) (Can.) (“[prohibited conduct] is such as to be harmful to . . . the members of the Society.”).

279. See, e.g., Decker & Yarrow, *supra* note 12, at 61 (“We have explained why self-regulatory bodies have a natural incentive to promulgate rules that serve to improve their own positions, at the expense of consumers, particularly when such a shift in resources can be achieved with limited adverse effects on economic efficiency (the envelope theorem). This means that even self-regulatory objectives that are heavily weighted towards promotion of the general good, and only very modestly weighted towards professional self interest, could have significantly adverse implications for consumers.”); Rhode & Woolley, *supra* note 222.

280. Cf. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(d).

for clients and citizens. We value an independent and strong legal profession so that lawyers can take their proper place in preserving the rule of law in a society. We also thought that there were better locations to address the objective of ensuring equal access to the profession.²⁸¹

As a final observation, we recognize that even if a jurisdiction accepts our recommendation to include a particular concept in its regulatory objectives, the jurisdiction will have choices with respect to how it expresses that regulatory objective concept. Although we originally considered recommending specific language, we ultimately chose not to do so and to limit our recommendations to concepts rather than specific language.

Our decision not to recommend specific language, however, does not mean that we consider the language used in the objectives to be unimportant. To the contrary, as this Article has shown, many of the debates that have taken place in jurisdictions have been about relatively subtle language differences that affect the emphasis and tone. One jurisdiction may decide, for example, that given its history, context, problems, and goals, it is very important to refer to legal services “consumers” whereas another jurisdiction may decide just the opposite and that it is very important to refer to “clients.” We conclude that given the differing contexts in different jurisdictions, it is inappropriate to recommend a “one size fits all” approach with respect to specific language.²⁸² We do believe, however, that it is possible to recommend concepts that will serve as a useful template for all jurisdictions.

CONCLUSION

A number of jurisdictions have adopted regulatory objectives for the legal profession, and interest in this issue is growing: regulatory objectives have been proposed for Australia, Ireland, and India, among other countries. We submit that there is a very good reason for the increased interest in adopting regulatory objectives. Put simply, regulatory objectives make for better lawyer regulation both in theory and in practice. Because regulatory objectives define the purpose of regulation and set its parameters, they serve as a guide to assist those regulating the legal profession. Regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation. Regulatory objectives can help set the parameters of public debate by defining the issues the regulator considers relevant. Regulatory objectives assist in ensuring that the function and purpose of the particular legislation is transparent. For example, when the regulatory body administering the legislation is questioned, about their interpretation of the legislation, the regulatory body can point to the regulatory objectives to demonstrate compliance with this function and purpose. Regulatory objectives can help define the parameters of the

281. *Id.* § 1(e) (encouraging equal opportunities).

282. If asked, however, we are happy to make specific recommendations for our own jurisdictions.

legislation by assisting in determining the breadth and depth of legislation. Finally, if regulatory objectives are adopted by multiple jurisdictions and if they are generally consistent, that might help the legal profession in its negotiations with these jurisdictions.

For these reasons, we urge the jurisdictions that have not yet adopted regulatory objectives for the legal profession to do so promptly.

APPENDIX 1

COMPARING OUR RECOMMENDED OBJECTIVES WITH EXISTING AND DRAFT REGULATORY OBJECTIVES²⁸³

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
1. Protection of clients	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(d)²⁸⁴ ▪ Scotland § 1(b)(i)²⁸⁵ ▪ New Zealand § 3(1)(a)–(b)²⁸⁶ ▪ Nova Scotia § 33²⁸⁷ ▪ Draft Australia s 1.1.3(c)²⁸⁸ ▪ Draft India § 3(d)²⁸⁹ ▪ Draft Ireland § 9(4)(c)²⁹⁰ 	<p>Some objectives refer to “consumers” and some refer to “clients.”²⁹¹</p> <p>Some include in a single objective “protecting” and “promoting” the interests of consumers.²⁹² We have separated these in Recommended Objectives 1 and 5.</p> <p>Some do not refer explicitly to clients but presumably include this idea when referring to public interest.²⁹³</p>

283. Our recommended objectives and rationale are set forth *supra*. The existing and draft regulatory objectives for the legal profession are described *supra* at Part II.A–B. For convenience’s sake, the existing and draft regulatory objectives are consolidated in Appendix 2, *infra*. This appendix cross-references our recommended objectives with the existing and draft regulatory objectives for the legal profession. Appendix 1 also highlights some of the comments found in Part II.D.

284. Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.).

285. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(b)(i).

286. Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(a)–(b) (N.Z.).

287. Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, § 33 (Can.).

288. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(c) (Austl.).

289. [Draft] Legal Practitioners Act, 2010, § 3(a) (India).

290. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(c) (Ir.).

291. *Compare* Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.) (consumers), *with* [Draft] Legal Practitioners Act, 2010, § 3(d) (India) (clients).

292. *See, e.g.*, Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.) (“protecting and promoting the interests of consumers”). *Compare* Recommended Objective 1 (protection of clients), *with* Recommended Objective 5 (increasing access to justice).

293. *See, e.g.*, Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a) (Can.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
2. Protection of the public interest	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(a)²⁹⁴ ▪ Scotland § 1(b)(ii)²⁹⁵ ▪ New Zealand § 3(1)(b)²⁹⁶ ▪ Alberta § 49(c)²⁹⁷ ▪ British Columbia § 3(a)²⁹⁸ ▪ Manitoba § (3)(1)²⁹⁹ ▪ New Brunswick § 5(a)³⁰⁰ ▪ Newfoundland and Labrador § 18(1)(1)³⁰¹ ▪ Northwest Territories § 22(a)³⁰² ▪ Nova Scotia § 33³⁰³ ▪ Ontario § 4.2(3)³⁰⁴ ▪ Prince Edward Island § 4(a)³⁰⁵ ▪ Quebec § 12³⁰⁶ ▪ Saskatchewan § 3.1(a)³⁰⁷ ▪ Yukon § 3(a)³⁰⁸ ▪ Draft Australia s 1.1.3(c)³⁰⁹ ▪ Draft India § 3(a)³¹⁰ ▪ Draft Ireland § 9(4)(a)³¹¹ 	<p>Most cite protection of the public interest, but Australia simply cites protection of the public.³¹² Some refer to the “best interests” of the public and some add the word “generally” after stating protection of the public interest.³¹³</p> <p>Some say protecting and promoting, others do not.³¹⁴ Scotland has distinct objectives for supporting the interests of justice and protecting-promoting public interest.³¹⁵</p> <p>This key concept was omitted from the original U.K. bill.³¹⁶</p>

294. Legal Services Act, 2007, c. 29, § 1(1)(a) (U.K.).

295. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(b)(ii).

296. *Cf.* Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(b) (N.Z.). This section refers to maintaining confidence in the provision of legal services, which might mean something different than protection of the public interest.

297. Legal Profession Act, R.S.A. 2000, c. L-8, pt. 3, § 49(c) (Can.).

298. Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a) (Can.).

299. Legal Profession Act, C.C.S.M., c. L107, pt. 2, § (3)(1) (Can.).

300. Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(a) (Can.).

301. Law Society Act, S.N.L. 1999, c. L-9.1, pt. 1, § 18(1)(1) (Can.).

302. Legal Profession Act, R.S.N.W.T. 1998, c. L-2, pt. 3, § 22(a) (Can.).

303. Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, § 33 (Can.).

304. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(3) (Can.).

305. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(a)(Can.).

306. An Act Respecting the Barreau du Québec, R.S.Q., c. B-1, § 12 (Can.).

307. Legal Profession Act, 1990, S.S. 1990, c. L-10.1, pt. 2, § 3.1(a) (Can.).

308. Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a) (Can.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
3. Promoting public understanding of the legal system and respect for the rule of law	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(b)³¹⁷ ▪ Scotland § 1(a)(i)³¹⁸ ▪ Ontario § 4.2(1)³¹⁹ ▪ Draft India § 3(b), (g)³²⁰ ▪ Draft Ireland § 9(4)(b)³²¹ 	U.K. § 1(1)(b) and others refer to supporting the “constitutional” principle of the rule of law and § 1(1)(g) asks for increased public understanding of citizens’ rights and duties. ³²² India § 3(g) similarly focuses on public knowledge. ³²³ Ireland refers to supporting the proper and effective administration of justice. ³²⁴

309. [Draft] *Legal Professional National Law 2011*, ch 1, pt 1, s 1.1.3(c) (Austl.).

310. [Draft] *Legal Practitioners Act, 2010*, § 3(a) (India).

311. *Legal Services Regulation Bill 2011* (Act No. 58/2011), pt. 2, § 9(4)(a) (Ir.).

312. Compare *Legal Services Act, 2007*, c. 29, § 1(1)(a) (U.K.), with [Draft] *Legal Professional National Law 2011*, ch 1, pt 1, s 1.1.3(c) (Austl.).

313. See, e.g., *Legal Profession Act, R.S.A. 2000*, c. L-8, pt. 3, § 49(c) (Can.) (“is incompatible with the best interests of the public”); *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(b)(ii) (“the public interest generally”).

314. Compare *Legal Services Act, 2007*, c. 29, § 1(1)(a) (U.K.) (“protecting and promoting”), with *Law Society Act, R.S.O. 1990*, c. L.8, pt. 1, § 4.2(1) (Can.) (“The Society has a duty to protect the public interest.”).

315. See *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(a)(ii), (b)(ii).

316. See *supra* note 68 and accompanying text.

317. *Legal Services Act, 2007*, c. 29, § 1(1)(b), (g) (U.K.).

318. *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(a)(i).

319. *Law Society Act, R.S.O. 1990*, c. L.8, pt. 1, § 4.2(1) (Can.) (“The Society has a duty to maintain and advance the cause of justice and the rule of law.”). British Columbia, New Brunswick, Prince Edward Island, and the Yukon refer to the public interest in the administration of justice, which is arguably similar. See *Legal Profession Act, S.B.C. 1998*, c. 9, pt. 1, § 3(a) (Can.); *Law Society Act, S.N.B. 1996*, c. 89, pt. 2, § 5(a) (Can.); *Legal Profession Act, S.P.E.I. 1992*, c. L-6.1, pt. 2, § 4(a) (Can.); *Legal Profession Act, R.S.Y. 2002*, c. 134, pt. 1, § 3(a) (Can.).

320. [Draft] *Legal Practitioners Act, 2010*, § 3(b), (g) (India).

321. *Legal Services Regulation Bill 2011* (Act No. 58/2011), pt. 2, § 9(4)(b) (Ir.).

322. See *Legal Services Act, 2007*, c. 29, § 1(1)(b), (g) (U.K.) (“increasing public understanding of the citizen’s legal rights and duties”).

323. [Draft] *Legal Practitioners Act, 2010*, § 3(b), (g) (India) (“creating legal awareness amongst the general public and to make the consumers of the legal profession well informed of their legal rights and duties”).

324. *Legal Services Regulation Bill 2011* (Act No. 58/2011), pt. 2, § 9(4)(b) (Ir.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
4. Ensuring lawyer independence sufficient to allow for a robust “rule of law” culture	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(b)³²⁵ ▪ Scotland § 1(a)(i), 1(d)³²⁶ ▪ Denmark Bylaw 1³²⁷ ▪ British Columbia § 3(a)(ii)³²⁸ ▪ Manitoba § 3(1)³²⁹ ▪ New Brunswick § 5(c)³³⁰ ▪ Prince Edward Island § 4(c)³³¹ ▪ Yukon § 3(a)(2)³³² ▪ Draft Australia 1.1.3(f)³³³ ▪ Draft India § 3(f)³³⁴ ▪ Draft Ireland § 9(4)(e)³³⁵ 	<p>The concept of lawyer independence appears often but in varied settings. Several jurisdictions refer to lawyer independence; some of these same jurisdictions have separate objectives regarding the rule of law.³³⁶</p> <p>Regarding independence, the United Kingdom says “ensuring an independent, strong, diverse, and effective legal profession.”³³⁷ Others refer to “varied” rather than “diverse” and some omit this term.³³⁸ India adds language that lawyers have ethical obligations and a strong sense of duty toward tribunals.³³⁹</p> <p>Many Canadian provinces refer in the same paragraph to “independence, integrity, and honor.”³⁴⁰</p> <p>The Australian objective combines independence with a reference to co-regulatory systems.³⁴¹</p> <p>Our recommendation combines these concepts so that it is clear that lawyer independence is not a self-serving value, but is directly related to maintaining a robust rule of law.</p>

325. Legal Services Act, 2007, c. 29, § 1(1)(b), (e) (U.K.).

326. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(a)(i), 1(d).

327. Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1 (“to guard the independence and integrity of lawyers”).

328. Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a)(iii) (Can.).

329. Legal Profession Act, C.C.S.M., c. L107, pt. 2, § 3(1) (Can.).

330. Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(c) (Can.).

331. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(c) (Can.).

332. Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a)(2) (Can.).

333. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(f) (Austl.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
<p>5. Increasing access to justice (including clients' willingness and ability to access lawyers' services)</p>	<p>Access to justice provisions:</p> <ul style="list-style-type: none"> ▪ U.K. § 1(1)(c)³⁴² ▪ Scotland § 1(c)(i)³⁴³ ▪ Ontario § 4.2(2)³⁴⁴ ▪ Draft Australia s 1.1.3(e)³⁴⁵ ▪ Draft India § 3(c)³⁴⁶ <p>Competition provisions:</p> <ul style="list-style-type: none"> ▪ U.K. § 1(1)(e)³⁴⁷ ▪ Scotland § 1(c)(ii)³⁴⁸ ▪ Draft India § 3(e)³⁴⁹ ▪ Draft Ireland § 9(4)(d)³⁵⁰ 	<p>There is some language variability. The United Kingdom says "improving public access" whereas Scotland says "promoting public access."³⁵¹ Australia speaks of empowering clients to make informed choices about the services and costs.³⁵²</p> <p>We believe that "competition" is best thought of as an instrumental goal designed to increase access rather than as a stand-alone objective. We have added language to explain that access includes concepts of ability and willingness, which would include cost and other issues. There is some variability among those jurisdictions that list competition as a stand-alone objective. India, for example, states that competition must be for the goal of improving the quality of service.</p>

334. [Draft] Legal Practitioners Act, 2010, § 3(f) (India).

335. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(e) (Ir.).

336. *See, e.g.*, Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(a)(i), 1(d); *see also* Recommended Objective 3, *supra*, for citations to objectives with "rule of law" language.

337. Legal Services Act, 2007, c. 29, § 1(1)(b), (e) (U.K.).

338. *See, e.g.*, Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(d) ("promoting an independent, strong, varied and effective legal profession").

339. [Draft] Legal Practitioners Act, 2010, ch. 3(f) (India).

340. *See, e.g.*, Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(c) (Can.); Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(c) (Can.).

341. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(f) (Austl.).

342. Legal Services Act, 2007, c. 29, § 1(1)(c) (U.K.).

343. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(i).

344. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(2) (Can.).

345. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e) (Austl.).

346. [Draft] Legal Practitioners Act, 2010, § 3(c) (India).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
6. Promoting lawyers' compliance with professional principles (including competent and professional service)	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(h)³⁵³ ▪ Scotland § 1(f)³⁵⁴ ▪ Denmark Bylaw 1³⁵⁵ ▪ British Columbia § 3(a)(iii)³⁵⁶ ▪ Manitoba § 3(2)(a)³⁵⁷ ▪ New Brunswick § 5(d)³⁵⁸ ▪ Nova Scotia §§ 4(2)(b), 33³⁵⁹ ▪ Prince Edward Island § 4(b)³⁶⁰ ▪ Saskatchewan § 3.1(c)³⁶¹ ▪ Yukon § 3(a)(iii)³⁶² ▪ Draft Australia s 1.1.3(b)³⁶³ ▪ Draft India § 3(h)³⁶⁴ ▪ Draft Ireland § 9(4)(f)³⁶⁵ 	<p>There is variability in the way this concept is conveyed. The United Kingdom and Scotland refer to professional principles and then list them in a separate section.³⁶⁶ Australia does not refer to professional principles, but identifies competency and maintaining high ethical and professional standards.³⁶⁷ Denmark refers to discharging the duties and obligations of lawyers.³⁶⁸ Some refer to the professional responsibility of lawyers.³⁶⁹</p>

347. Legal Services Act, 2007, c. 29, § 1(1)(e) (U.K.).

348. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(ii).

349. [Draft] Legal Practitioners Act, 2010, § 3(e) (India).

350. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(d) (Ir.).

351. Legal Services Act, 2007, c. 29, § 1(1)(c) (U.K.).

352. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e) (Austl.).

353. Legal Services Act, 2007, c. 29, § 1(1)(h) (U.K.).

354. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(f).

355. Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1.

356. Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a)(iii) (Can.).

357. Legal Profession Act, C.C.S.M., c. L107, pt. 2, § 3(2)(a) (Can.).

358. Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(d) (Can.).

359. Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, §§ 4(2)(b), 33 (Can.).

360. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(b) (Can.).

361. Legal Profession Act, 1990, S.S. 1990, c. L-10.1, pt. 2, § 3.1(c) (Can.).

362. Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a)(iii) (Can.).

363. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b) (Austl.).

364. [Draft] Legal Practitioners Act, 2010, § 3(h) (India).

365. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(f) (Ir.).

366. Legal Services Act, 2007, c. 29, §§ 1(h), 2 (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), §§ 1(f), 2.

367. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b) (Austl.).

368. Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1.

369. *See, e.g.*, Legal Profession Act, C.C.S.M., c. L107, pt. 2, § 3(2)(a) (Can.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
7. Ensuring that lawyer regulation is consistent with principles of “good regulation”	<ul style="list-style-type: none"> ▪ Ontario § 4.2(4)–(5)³⁷⁰ ▪ Draft Australia s 1.1.3(a), (e)³⁷¹ 	Most jurisdictions do not include these types of principles. ³⁷² Australia and Ontario list regulatory principles but express them differently. ³⁷³

370. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(4)–(5) (Can.).

371. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(a), (e) (Austl.).

372. See generally *infra* Appendix 2.

373. See [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e) (Austl.); Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2 (4)–(5) (Can.). Both Australia and Ontario refer to proportionality. Australia also refers to national consistency and regulation that is efficient, effective, targeted & proportionate, whereas Ontario refers to timely, open and efficient regulation. *Id.*; see also *supra* note 103 (citing the Manitoba, Ontario, and Nova Scotia laws that apply to multiple professions, including the legal profession).

APPENDIX 2

EXISTING AND DRAFT REGULATORY OBJECTIVES

(IN REVERSE ALPHABETICAL ORDER)

*United Kingdom [England and Wales]*³⁷⁴

Legal Services Act, 2007, c. 29, § 1 (U.K.).

(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2) [referring to authorized persons];
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

*Scotland*³⁷⁵

Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1.

1 Regulatory Objectives

For the purposes of this Act, the regulatory objectives are the objectives of—

- (a) supporting—
 - (i) the constitutional principle of the rule of law,
 - (ii) the interests of justice,
- (b) protecting and promoting—
 - (i) the interests of consumers,
 - (ii) the public interest generally,
- (c) promoting—
 - (i) access to justice,

374. Legal Services Act, 2007, c. 29 (U.K.), *available at* <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=3&NavFrom=2&parentActiveTextDocId=3423426&ActiveTextDocId=3423429&filesize=4184>.

375. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1, *available at* http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf.

- (ii) competition in the provision of legal services,
- (d) promoting an independent, strong, varied and effective legal profession,
- (e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
- (f) promoting and maintaining adherence to the professional principles.

*New Zealand*³⁷⁶

Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(a)–(c).

3 Purposes

(1) The purposes of this Act are—

- (a) to maintain public confidence in the provision of legal services and conveyancing services;
- (b) to protect the consumers of legal services and conveyancing services;
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

*Denmark*³⁷⁷

Bylaws of the Danish Bar and Law Society

Adopted by the General Meeting of Lawyers on 25 October 2008.

Objects and registered office

Bylaw 1

The objects for which the Danish Bar and Law Society is established are to guard the independence and integrity of lawyers;
to ensure and enforce the discharge of the duties and obligations of lawyers;
to maintain the professional skills of lawyers; and
to work for the benefit of the Danish legal community.

376. Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(a)–(c), available at <http://www.legislation.govt.nz/act/public/2006/0001/latest/DLM364939.html>.

377. *Bylaws of the Danish Bar and Law Society, Adopted by the General Meeting of Lawyers on 25 October 2008*, available at http://www.advokatsamfundet.dk/Service/English/Rules/~media/Files/English/Vedtaegt_for_Det_Danske_Advokatsamfund_-_08122008_eng2.ashx.

Canada

<p><i>Alberta</i>³⁷⁸ Legal Profession Act, R.S.A. 2000, c. L-8.</p>
<p>Conduct of Members Interpretation 49(1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that</p> <ul style="list-style-type: none"> (a) is incompatible with the best interests of the public or of the members of the Society, or (b) tends to harm the standing of the legal profession generally, is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.
<p><i>British Columbia</i>³⁷⁹ Legal Profession Act, S.B.C. 1998, c. 9.</p>
<p>Public interest paramount 3 It is the object and duty of the society</p> <ul style="list-style-type: none"> (a) to uphold and protect the public interest in the administration of justice by <ul style="list-style-type: none"> (i) preserving and protecting the rights and freedoms of all persons, (ii) ensuring the independence, integrity and honour of its members, and (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and (b) subject to paragraph (a), <ul style="list-style-type: none"> (i) to regulate the practice of law, and (ii) to uphold and protect the interests of its members.
<p><i>Manitoba</i>³⁸⁰ Legal Profession Act, C.C.S.M., c. L107.</p>
<p>Purpose 3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence. Duties 3(2) In pursuing its purpose, the society must</p>

378. Legal Profession Act, R.S.A. 2000, c. L-8, *available at* <http://www.qp.alberta.ca/documents/Acts/l08.pdf>.

379. Legal Profession Act, S.B.C. 1998, c. 9 (effective Dec. 31, 1998) (current to Sept. 21, 2011), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_98009_01.

380. Legal Profession Act, C.C.S.M., c. L107 (last revised June 12, 2008), *available at* <http://web2.gov.mb.ca/laws/statutes/ccsm/l107e.php>.

<p>(a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and</p> <p>(b) regulate the practice of law in Manitoba.</p>
<p><i>New Brunswick</i>³⁸¹ Law Society Act, 1996, S.N.B. 1996, c. 89.</p>
<p>5 It is the object and duty of the Society</p> <p>(a) to uphold and protect the public interest in the administration of justice,</p> <p>(b) to preserve and protect the rights and freedoms of all persons,</p> <p>(c) to ensure the independence, integrity and honor of its members,</p> <p>(d) to establish standards for the education, professional responsibility and competence of its members and applicants for membership,</p> <p>(e) to regulate the legal profession, and</p> <p>(f) subject to paragraphs (a) to (d), to uphold and protect the interests of its members.</p>
<p><i>Newfoundland and Labrador</i>³⁸² Law Society Act, S.N.L. 1999, c. L-9.1.</p>
<p>Powers of benchers</p> <p>18. (1.1) The benchers have the authority to regulate the practice of law and the legal profession in the public interest.</p>
<p><i>Northwest Territories</i>³⁸³ Legal Profession Act, R.S.N.W.T. 1998, c. L-2.</p>
<p>PART III DISCIPLINE</p> <p>INTERPRETATION</p> <p>Definitions 22. In this Part, “conduct unbecoming a barrister and solicitor or student-at-law” means any act or conduct that, in the judgment of a Sole Inquirer or Committee of Inquiry, or the Court of Appeal, as the case may be,</p> <p>(a) is such as to be harmful to the best interests of the public or the members of the Society, or</p> <p>(b) tends to harm the standing of the legal profession generally[.]</p>

381. Law Society Act, 1996, S.N.B. 1996, c. 89, available at <http://www.lawsociety-barreau.nb.ca/assets/documents/law-society-act.doc>.

382. Law Society Act, S.N.L. 1999, c. L-9.1, amended by 2008 c. 17, available at <http://assembly.nl.ca/Legislation/sr/statutes/109-1.htm>.

383. Legal Profession Act, R.S.N.W.T. 1998, c. L-2 (last revised May 19, 2011), available at <http://www.justice.gov.nt.ca/PDF/ACTS/Legal%20Profession.pdf>.

*Nova Scotia*³⁸⁴

Legal Profession Act, S.N.S. 2004, c. 28.

Purpose of Society

4 (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

(2) In pursuing its purpose, the Society shall

- (a) establish standards for the qualifications of those seeking the privilege of membership in the Society;
- (b) establish standards for the professional responsibility and competence of members in the Society;
- (c) regulate the practice of law in the Province; and
- (d) seek to improve the administration of justice in the Province by
 - (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
 - (ii) engaging in such other relevant activities as approved by the Council.

Protection of public and integrity of profession

33 The purpose of Sections 34 to 53 [regarding the Complaints Investigation Committee] is to protect the public and preserve the integrity of the legal profession by

- (a) promoting the competent and ethical practice of law by the members of the Society;
- (b) resolving complaints of professional misconduct, conduct unbecoming a lawyer, professional incompetence and incapacity;
- (c) providing for the protection of clients' interests through the appointment of receivers and custodians in appropriate circumstances;
- (d) addressing the circumstances of members of the Society requiring assistance in the practice of law, and in handling or avoiding personal, emotional, medical or substance abuse problems; and
- (e) providing relief to individual clients of members of the Society and promoting the rehabilitation of members.

384. Legal Profession Act, S.N.S. 2004, c. 28, as amended by S.N.S. 2010, c. 56, (consolidated to Sept. 27, 2011), available at <http://nslegislature.ca/legc/statutes/legalpro.htm>.

*Nunavut*³⁸⁵

Legal Profession Act, R.S.N.W.T. (Nun.) 1988, c. L-2.

PART III, DISCIPLINE

Conduct unbecoming

[22] (2) Any act or conduct that in the judgment of a Sole Inquirer or a Committee of Inquiry or the Court of Appeal, as the case may be,

- (a) is such as to be harmful to the best interests of the public or the members of the Society, or
- (b) tends to harm the standing of the legal profession generally, is conduct unbecoming a barrister and solicitor or a student-at-law within the meaning of this section.

*Ontario*³⁸⁶

Law Society Act, R.S.O. 1990, c. L.8.

Function of the Society

4.1 It is a function of the Society to ensure that,

- (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
- (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

Principles to be applied by the Society

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

- 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
- 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
- 3. The Society has a duty to protect the public interest.
- 4. The Society has a duty to act in a timely, open and efficient manner.
- 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

385. Legal Profession Act, R.S.N.W.T. (Nun.) 1988, c. L-2 (current to Dec. 19, 2007), available at <http://www.justice.gov.nu.ca/apps/authoring/dspPage.aspx?page=CURRENT+CONSOLIDATIONS+OF+ACTS+AND+REGULATIONS&letter=L>.

386. Law Society Act, R.S.O. 1990, c. L.8, available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90l08_e.htm.

<p><i>Prince Edward Island</i>³⁸⁷ Legal Profession Act, S.P.E.I. 1992, c. L-6.1, c. 39.</p>
<p>4. The objects of the society are</p> <ul style="list-style-type: none"> (a) to uphold and protect the public interest in the administration of justice; (b) to establish standards for the education, professional responsibility and competence of its members and applicants for membership; (c) to ensure the independence, integrity and honour of the society and its members; (d) to regulate the practice of law; and (e) to uphold and protect the interests of its members.
<p><i>Quebec</i>³⁸⁸ An Act respecting the Barreau du Québec, R.S.Q., c. B-1³⁸⁹; Code des professions, L.R.Q., c. C-26.</p>
<p>12. The function of the Office shall be to see that each order ensures the protection of the public. For that purpose, the Office may, in particular, in collaboration with each order, monitor the operation of the various mechanisms established within the order pursuant to this Code and, where applicable, the Act constituting the professional order.</p>
<p><i>Saskatchewan</i>³⁹⁰ Legal Profession Act, 1990, S.S. 1990, c. L-10.1.</p>
<p>Duty of society</p> <p>3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:</p> <ul style="list-style-type: none"> (a) to act in the public interest; (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.

387. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, c. 39 (last revised Dec. 9, 2010), available at http://www.gov.pe.ca/law/statutes/pdf/1-06_1.pdf.

388. An Act respecting the Barreau du Québec [English title], R.S.Q., c. B-1 (last revised Aug. 11, 2010), available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB1%2FB1_A.htm; Code des professions, Law R.Q., c. C-26, available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_26/C26.htm&PHPSESSID=36617b2f4fa6d2928dd8ec6f1def1284 [French], http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_26/C26_A.HTM [English]; *Ordres Professionnels*, OFFICE DES PROFESSIONS QUÉBEC, <http://www.opq.gouv.qc.ca/ordres-professionnels/> (last visited Apr. 21, 2012) (describing the functions).

389. The Act respecting the Barreau du Québec does not contain any objectives language. But the overarching Code of the Professions, which is administered by the Office des professions du Québec, includes “objectives” language. What appears here is an unofficial translation of this Act.

390. Legal Profession Act, 1990, S.S. 1990, c. L-10.1 (current through 2010), available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L10-1.pdf>.

*Yukon*³⁹¹

Legal Profession Act, R.S.Y. 2002, c. 134.

Duty of the society

3 It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interest of its members.

REGULATORY OBJECTIVES THAT HAVE BEEN DRAFTED BUT NOT YET ENACTED

(IN REVERSE ALPHABETICAL ORDER)

*Ireland*³⁹²

Legal Services Regulation Bill 2011 (Act No. 58/2011).

9 (4) The Authority shall, in performing its functions of the regulation of the provision of legal services under this Act, have regard to the objectives of—

(a) protecting and promoting the public interest,

(b) supporting the proper and effective administration of justice,

(c) protecting and promoting the interests of consumers relating to the provision of legal services,

(d) promoting competition in the provision of legal services in the State,

(e) encouraging an independent, strong and effective legal profession, and

(f) promoting and maintaining adherence to the professional principles specified in subsection (5).

391. Legal Profession Act, R.S.Y. 2002, c. 134 (current through 2010), available at http://www.lawsocietyyukon.com/act/lpa_dec2004.pdf.

392. Legal Services Regulation Bill 2011 (Act No. 58/2011) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b5811d.pdf>.

*India*³⁹³

[Draft] Legal Practitioners (Regulations and Maintenance of Standards in Professions, Protecting the Interest of Clients and Promoting the Rule of Law) Act, Government of India, Ministry of Law and Justice, Department of Legal Affairs.

3. The Regulatory objectives. – (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of the clients of the legal practitioners;
- (e) promoting healthy competition amongst the legal practitioners for improving the quality of service;
- (f) encouraging an independent, strong, diverse and effective legal profession with ethical obligations and with a strong sense of duty towards the courts and tribunals where they appear;
- (g) creating legal awareness amongst the general public and to make the consumers of the legal profession well informed of their legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

*Australia*³⁹⁴

Council of Australian Governments (COAG) National Legal Profession Reform, [Draft] Legal Profession National Law (31 May 2011).

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by:

- (a) providing and promoting national consistency in the law applying to the Australian legal profession; and
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) enhancing the protection of clients of law practices and the protection of the public generally; and
- (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and

393. [Draft] Legal Practitioners Act, 2010, § 3 (India), available at <http://www.prsindia.org/uploads/media/draft/NALSA.pdf>.

394. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3 (Austl.), available at [http://www.ag.gov.au/Documents/National%20Legal%20Profession%20Legislation%20-%20September%202011%20\(%20for%20web%20site%20\).pdf](http://www.ag.gov.au/Documents/National%20Legal%20Profession%20Legislation%20-%20September%202011%20(%20for%20web%20site%20).pdf).

- (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.