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Ruth Fleet Thurman

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English Legal System Shake-Up: Genuine Reform or Teapot Tempest?†

*Ruth Fleet Thurman**

INTRODUCTION

In Great Britain, a land steeped in tradition, a monumental change is taking place. Described by some commentators as the most extensive overhaul of the legal system of England and Wales in 700 years,¹ the Courts and Legal Services Act 1990 (Act)² became law by Royal Assent³ on November 1, 1990, after debate and passage by Parliament.⁴ This momentous change will have a ripple effect as far away as the United States. There it will reinforce pressures already at work to open up the practice of law to other qualified individuals and groups, thereby giving clients a wider choice of practitioners and fostering innovative approaches to legal problem solving.⁵

The majesty of the 700-year-old English legal system is seductive. Consider the following scenario, which the author experienced, as a case in point. Candles cast shadows on the ancient

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* Professor of Law, Stetson University College of Law; B.A., Smith College; J.D., Stetson University; LL.M., Columbia University.

¹ See, e.g., Josephine Carr, *Freedom with a Hint of Reciprocity*, 9 INT'L FIN. L. REV. 8, 8 (July 1990). "Lord Mackay [Lord Chancellor] has wrought more changes on the structure of the English legal profession in two years than have taken place in the last 700." *Id.*; see also, e.g., Robert Wernick, *Bewigged, Bothered and Beleaguered, the Barristers of London Carry On*, SMITHSONIAN, June 1991, at 77, 84. "[H]e [Lord Chancellor] called for more radical changes than any of the lawyers of England had seen in 700 years." *Id.*

Reaction to the Bill in the House of Lords was described by *The London Times*:

Lord Beloff (C) said that for this country voluntarily to set aside centuries of experience, and the institutions that had grown out of them, seemed to be most extraordinary—and all the more so from a Conservative government. . . . He could not think of a significant Bill, in the course of British history, that had been rushed through unnecessarily in this way as though it were an Emergency Powers Bill with an enemy at the door.

Reform of Legal Profession "Too Quick," THE TIMES (London), Dec. 21, 1989, at 12.

² Courts and Legal Services Act 1990, ch. 41 [hereinafter Act].

³ Royal Assent is the sovereign's assent to a bill agreed to by Parliament. DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 1089 (1980).

⁴ Act, *supra* note 2, at enacting clause.

⁵ See *infra* notes 24–25, 195–96 and accompanying text.

walls of the Great Hall. The starkness of the table tops, turned white from centuries of scrubbing, contrasted incongruously with the ornate silver candelabra, gleaming hollowware, and crystal wine glasses. Dons at high table wore academic gowns. Students fell silent as the Master intoned grace in Latin. Around the walls, long-dead fellows looked on from elaborately crafted goldleaf frames. Henry VIII dominated the room. Arms akimbo and his manner haughty, his huge portrait surveyed the ancient ritual of formal hall. The likeness gave forth an almost palpable presence.⁶

These and other ancient traditions observed in the cloistered halls of Cambridge University belie the changes on the horizon for the English courts and legal system.⁷ Wigs and robes are only the outward trappings of a profession staunchly clinging to what some critics consider to be outmoded, inefficient customs and procedures inimical to the administration of justice.⁸

During the summer of 1989, the British government published the White Paper,⁹ a follow-up to the Green Paper issued six months earlier entitled "The Work and Organization of the Legal Profession."¹⁰ The Green Paper issued by the Lord Chancellor, England's highest judicial officer,¹¹ created a furor,¹² drawing over 2,000 responses, predominantly from lawyers and judges.¹³ The White Paper reflected some of the concerns expressed, but still called for controversial major changes in the legal system of

⁶ Henry VIII founded Trinity College by uniting two existing colleges, Michaelhouse (founded 1323) and King's Hall (founded by Edward III in 1336). MICHAEL HALL & ERNEST FRANKL, CAMBRIDGE 69 (1988).

⁷ During the academic year 1989–1990, the author was granted membership of the faculty by the Faculty Board of Law for Cambridge University. As a Visiting Scholar at Wolfson College, Cambridge University, during her sabbatical leave from an American law school, the author was privileged to audit lectures throughout the University. During dinner at Trinity College formal hall following a lecture, the author ruminated about the impending changes in the venerable English legal system likely to be precipitated by the Act.

⁸ See, e.g., Wernick, *supra* note 1, at 83.

⁹ LORD CHANCELLOR'S DEP'T, LEGAL SERVICES: A FRAMEWORK FOR THE FUTURE, 1989, CMND 740 [hereinafter White Paper].

¹⁰ LORD CHANCELLOR'S DEP'T, THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION 1989, CMND 570 [hereinafter Green Paper].

¹¹ GEORGE W. KEETON, ENGLISH LAW: THE JUDICIAL CONTRIBUTION 112 (1978). The Lord Chancellor's name is James Mackay, Lord of Clashfern.

¹² See, e.g., Michael Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 INT'L LAW. 753, 763 (Fall 1990).

¹³ White Paper, *supra* note 9, § 1.3.

England and Wales,¹⁴ as did the Courts and Legal Services Bill (Bill),¹⁵ and ultimately the Act which was adopted.

The Act authorizes several major changes with respect to professional responsibility.¹⁶ First, it permits “qualified” solicitors and, more startlingly, “qualified” *nonlawyer members of other occupations* the right of audience and the right to conduct litigation in higher courts.¹⁷ Previously, only barristers had these rights.¹⁸ Second, the Act removes restrictions on probate of wills¹⁹ and allows “qualified” *nonlawyer organizations and individuals* to provide conveyancing services.²⁰ Third, it permits the establishment of multi-disciplinary law practices with *nonlawyer members of other groups*.²¹ Fourth, it allows the establishment of multi-national law practices with foreign lawyers.²² Finally, it introduces previously prohibited contingency fees, called “conditional fees.”²³

The second change noted above is reminiscent of the significant and controversial recommendation which the American Bar Association Commission on Professionalism suggested several years ago. The recommendation called for limited licensing of paraprofessionals to handle routine legal matters such as certain real estate closings and the drafting of simple wills.²⁴ The Commission’s report stated that the Bar should “encourage innovative methods which simplify and make less expensive the rendering of legal services” —particularly to the middle class.²⁵

In a vein similar to the ABA’s recommendations, the Lord Chancellor’s stated objective in the Green Paper (which ultimately

¹⁴ See Robert Rice, *Restrictive Practices Among Lawyers Still Face Broad Reform; Legal White Paper*, FIN. TIMES (London), July 20, 1989, § I, at 9; see also, Zander, *supra* note 12, at 776–79.

¹⁵ LORD CHANCELLOR, COURTS AND LEGAL SERVICES BILL, [H.L.] H.L. BILL 13 (Dec. 6, 1989) [hereinafter Bill].

¹⁶ Professional responsibility is the author’s major field of teaching and expertise.

¹⁷ Act, *supra* note 2, §§ 27–28. “A right of audience *entitles* a person to address a court of law on behalf of another.” Green Paper, *supra* note 10, § 5.1.

¹⁸ PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 49 (1976).

¹⁹ Act, *supra* note 2, § 55.

²⁰ *Id.* §§ 36–37.

²¹ *Id.* § 66.

²² *Id.*

²³ *Id.* § 58(1).

²⁴ A.B.A. COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 52 (1986).

²⁵ *Id.* at 51. It should be noted that this recommendation has not yet been significantly implemented.

led to the Act) was to widen public access to legal services "by ensuring that . . . a market providing legal services operates freely and efficiently . . ." ²⁶ Previously in England and Wales, there were few restrictions on who could provide legal advice and services.²⁷ Only lawyers, however, were permitted to appear before courts, issue writs, probate wills, and until recently, offer real property conveyancing services.²⁸ The conveyancing market was opened up to nonlawyer "licensed conveyancers" in 1985,²⁹ over the objection of lawyers.³⁰ This action was a portent of change to come, namely, the Courts and Legal Services Act 1990.

This Article examines the Act and explores the impact it will have on the practice of law in both Britain and the United States. Part I describes the structure of the pre-Act legal system. Part II sets out the major changes made by the Act and analyzes the advantages and disadvantages of these changes. The Article concludes that although initially the impact may not be readily apparent due to the Act's time-consuming implementation, the practice of law in England, Wales, and elsewhere will never be the same again.

I. PRE-ACT LEGAL SYSTEM

Traditionally, the British legal profession has been comprised of barristers and solicitors, two types of lawyers with different training and realms of practice.³¹ Solicitors have engaged primarily in office practice, while barristers have maintained advocacy practices. Solicitors contract with clients for legal services which might include representation in lower courts. They also

²⁶ Green Paper, *supra* note 10, § 1.1.

²⁷ *Id.* §§ 2.1–2.2.

²⁸ *Id.*

²⁹ *Id.* § 2.2. "Solicitors used to have an effective monopoly in the provision of conveyancing services but this monopoly was abolished by Parliament in 1985, when licensed conveyancers were allowed to enter the conveyancing market in direct competition with solicitors." *Id.*

³⁰ See, e.g., Robert Rice, *Little to Please Profession in Coming Measure on Courts*, FIN. TIMES (London), July 30, 1990, § I, at 8. "When the solicitors' conveyancing monopoly first came under attack in the early 1980s, the society made a great song and dance about it, particularly in its dealings with Parliament. It was all to no avail and the monopoly was swept away." *Id.*

³¹ JAMES, *supra* note 18, at 49–52. See also MJ [sic] Quinn, Note, *Reform of the Legal Profession in England and Wales*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 237, 239–50 (1991), for a discussion of the development of the legal profession in Great Britain.

prepare cases for higher courts, but as the common law has developed, barristers have conducted the actual trial work.

Barristers have operated individually in chambers or in loose groups sharing a single clerk.³² Unlike solicitors, barristers have not been allowed to form partnerships³³ or to contract directly with clients.³⁴ Instead, solicitors have engaged the services of barristers to represent their clients by directly negotiating with the barristers' clerks.³⁵

Barristers have been subject to the regulations and rules of conduct³⁶ adopted by the General Council of the Bar (Bar Council).³⁷ One of these rules, the so-called "cab rank rule,"³⁸ prohibits barristers, when otherwise unoccupied, from declining cases because clients or their causes are unpopular, or because their cases are less lucrative legal aid cases.³⁹ This rule, however, permits barristers to decline representation in cases presenting conflicts of interest or areas of expertise outside of their practice.⁴⁰

Solicitors, on the other hand, have been regulated by the Law Society⁴¹ and governed by its rules of conduct.⁴² Formerly, these rules did not include a cab rank rule.⁴³ During debate on the Bill, however, the House of Lords adopted an amendment adding a cab rank rule for solicitor-advocates.⁴⁴ Later, the House of

³² Green Paper, *supra* note 10, annex B at 58.

³³ *Id.* § 11.13.

³⁴ *Id.* at 58.

³⁵ *Id.*

³⁶ *Id.* § 4.5.

³⁷ Only barristers are members of the bar. A barrister is an individual who has been "called to the Bar by one of the Inns of Court . . ." 3(1) HALSBURY'S LAWS OF ENGLAND 271 (Lord Halisham of St. Marylebone, ed., 4th ed. reissue 1989).

³⁸ GEN. COUNCIL OF THE BAR, CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES Rule 203 (1990) [hereinafter CODE OF CONDUCT].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See RADCLIFFE & CROSS, THE ENGLISH LEGAL SYSTEM 386-87 (G. J. Hand & D. J. Bentley, eds., 6th ed. 1977). "The Law Society is the professional body of solicitors. In contrast to the Bar, many aspects of the solicitors' profession, such as entry, practice and conduct and discipline, are regulated by statute (the Solicitors Act c. 47, as amended)." Green Paper, *supra* note 10, annex B § 6.

⁴² THE LAW SOCIETY, THE PROFESSIONAL CONDUCT OF SOLICITORS (1986).

⁴³ See Russell Wallman, *Courts and Legal Services Bill*, LAW SOC'Y GAZETTE, May 2, 1990, at 11.

⁴⁴ See Carr, *supra* note 1, at 9.

The Bar successfully lobbied for the insertion of the 'cab rank rule' ([i.e.] a barrister never turns away a client). A rule it appears everyone except the public face of the Bar knows is of little relevance in everyday practice. But if it was

Commons added an exception permitting solicitor-advocates to decline cases on the basis of funding, such as lower paying legal aid cases.⁴⁵ Although the legislation applies equally to barristers,⁴⁶ the Bar Council's rules require a barrister to take legal aid cases.⁴⁷

The Act requires substantial implementation. For example, the rules of conduct which govern the Law Society and the Bar Council must be amended to conform with the provisions of the Act. This implementation process is currently underway.

II. NEW LEGAL SYSTEM UNDER THE ACT

The Act removes a number of obstacles between barristers and solicitors, between lawyers and nonlawyers, and between British and foreign lawyers. It breaks down the barriers prohibiting contingency fees and impeding access to the courts. Each of these significant changes will be subsequently discussed in more detail, but is briefly summarized in the following paragraphs.

The Act eliminates several distinctions between barristers and solicitors. First, the Act permits solicitors who meet appropriate standards of competence and conduct, to apply for the right of audience and advocacy rights in higher courts.⁴⁸ Second, the Act grants advocates, including solicitor-advocates with sufficient experience, eligibility for judgeships in higher courts.⁴⁹ Both of these privileges were previously restricted to barristers. Third,

rigidly imposed it may not be viable for commercial firms to set up advocacy departments.

Id.; see also Alison Smith & John Mason, 'Cab Rank' Rule to Be Accepted, *FIN. TIMES* (London), Apr. 19, 1990, § I, at 13. Solicitor-advocates are solicitors providing advocacy services.

⁴⁵ Act, *supra* note 2, § 17(3)(c)(iii). "The Law Society believes the cab-rank rule would be inappropriate and unworkable for solicitors . . . [T]he impression remains that it [the Bar] is merely protecting its monopoly." Kent Barker, *Law: Neat Reformer Follows Radical Volcano*, *THE INDEPENDENT* (London), Dec. 20, 1991, at 16.

⁴⁶ *Id.*

⁴⁷ CODE OF CONDUCT, *supra* note 38, at Rule 203. The rule's effectiveness is eroded by being subject to numerous exceptions. See Roger Smith, *The Courts and Legal Services Bill: A View at Half-Time*, 17 *J.L. & Soc'y*, 242, 248 (Summer 1990).

[T]he Bar's *Code of Conduct*, upon which this sub-clause is based, only required a barrister to act in a legally-aided case when a new version came into force on 30 March 1990. This contained sufficient exceptions to the general principle to enable unwanted cases to be turned down with the usual excuses touted by their clerks—that their barristers are, unfortunately, too busy (rule 501 (b)), know nothing of the relevant area of law (rule 501 (a)), or are not being offered enough money, that is, an amount 'other than [that] which is proper having regard to the complexity, length, and difficulty of the case and to [the barrister's] ability and seniority' (rule 502 (b)). It was only subsequently stiffened.

Id.

⁴⁸ *Id.* §§ 27–28.

⁴⁹ *Id.* § 71.

the Act removes restrictions preventing solicitors and barristers from entering into partnerships with one another.⁵⁰ Lastly, it permits barristers to contract directly with clients with or without the services of a solicitor.⁵¹

The Act also breaks down barriers that distinguish nonlawyers from lawyers. First, in addition to solicitors, it permits nonlawyer members of other groups with satisfactory standards of competence and conduct to apply for the rights of audience and litigation.⁵² Traditionally in higher courts, audience and advocacy rights have been restricted to barristers,⁵³ while solicitors' litigation rights in higher courts have been restricted to the preparation of cases for trial and the drafting and filing of pleadings and writs.⁵⁴ Second, the Act removes statutory restrictions so that "qualified" banks, building societies, insurance companies, and members of approved bodies which have been granted exemption may offer probate services.⁵⁵ Finally, the Act entitles banks, building societies, insurance companies, and others to become qualified "authorised practitioners" and to offer real estate conveyancing services to the public.⁵⁶

In addition, the Act breaks down international barriers by abolishing statutory bans on multi-national partnerships with foreign lawyers,⁵⁷ and requires the Law Society to maintain a register of foreign lawyers engaging in such partnerships.⁵⁸ It also breaks down ethical barriers that have restricted lawyers from charging contingent fees by permitting "conditional fees" in some cases.⁵⁹ By written agreement with the client, the legal fee in some types of cases may be increased by a specified percentage "in specified circumstances."⁶⁰ Finally, the Act breaks down jurisdictional barriers by permitting the Lord Chancellor to transfer cases among

⁵⁰ *Id.* § 66.

⁵¹ *Id.* § 61(1).

⁵² *Id.* §§ 27–28.

⁵³ "According to long custom, barristers have a general right of audience in High Court, whereas solicitors do not." Green Paper, *supra* note 10, annex E § 11.

⁵⁴ See M. H. OGILVIE, HISTORICAL INTRODUCTION TO LAW STUDIES 337 (1982). "[Solicitors] were primarily concerned with the behind-the-scenes aspects of litigation and the ordinary day-to-day work of conveyancing and draftsmanship." *Id.*

⁵⁵ See Act, *supra* note 2, § 55.

⁵⁶ See *id.* §§ 36–37.

⁵⁷ *Id.* § 66.

⁵⁸ *Id.* § 89(1).

⁵⁹ *Id.* § 58(1).

⁶⁰ *Id.* § 58(2).

courts.⁶¹ By granting him authority to confer jurisdiction and to allocate caseloads among courts,⁶² the Act enables the Lord Chancellor to avoid costs and delays which impede access to justice.⁶³

III. DISCUSSION OF SELECTED PROVISIONS OF THE ACT

A. *Extension of Rights of Audience and Litigation in Higher Courts to Qualified Solicitors and Nonlawyer Members of Other Groups*

Perhaps the most publicized provision of the Act permits solicitors and members of other groups with satisfactory standards of competence and conduct to apply for the rights of audience and advocacy in higher courts,⁶⁴ rights previously restricted to barristers. The Act provides a procedure by which the Law Society and *other groups* may become empowered as "Authorised Bodies."⁶⁵ In turn, these bodies are entitled to confer to their qualified members the rights of authorized practitioners.⁶⁶ To become designated as an authorized body, the group's qualifications, regulations, and rules of conduct must be approved by the Lord Chancellor⁶⁷ and four senior "Designated Judges."⁶⁸ This process of approval includes receiving advice from the "Lord Chancellor's Advisory Committee on Legal Education and Conduct" (Advisory Committee),⁶⁹ established by the Act,⁷⁰ and the Director of Fair Trading.⁷¹ The group's application fails if the Lord Chancellor or any of the designated judges refuses approval.⁷² If the application is approved, the Lord Chancellor may

⁶¹ *Id.* §§ 1-2.

⁶² *Id.*

⁶³ See *infra* text accompanying notes 197-211; see also *Law Update: Plan to Speed Up Civil Trials*, THE INDEPENDENT (London), Apr. 27, 1990, at 17.

⁶⁴ Act, *supra* note 2, §§ 27-28.

⁶⁵ *Id.* § 29.

⁶⁶ *Id.* §§ 27-28.

⁶⁷ *Id.* § 29(1), sched. 4, pt. I.

⁶⁸ *Id.* at sched. 4, pt. I.

⁶⁹ *Id.* §§ 19-20, sched. 1.

⁷⁰ *Id.* §§ 19-20, sched. 1.

⁷¹ *Id.* at sched. 4, pt. I.

⁷² *Id.* at sched. 4, pt. I. Incidentally, during the Parliamentary legislative process, the Law Society was unsuccessful in its efforts to give judges "a voice" but not "a veto" over approval of applications. See *infra* text accompanying notes 86-90. On the other hand, the Bar, from whose ranks judges have traditionally been drawn, vigorously favored expanding the authority of the judiciary regarding the approval of applications. *Id.*

recommend to Her Majesty that an Order in Council⁷³ be made designating that body as an authorized body.⁷⁴

The Act gives laypersons a significant oversight role vis-à-vis legal services. The Advisory Committee, a majority of whose members are required by the Act to be laypersons,⁷⁵ is charged with the duty of assisting in the development and maintenance of standards for education, training, and conduct of authorized practitioners offering legal services.⁷⁶ The Act also establishes a lay "Legal Services Ombudsman"⁷⁷ who investigates complaints and makes recommendations about rendering legal services and the discipline of authorized practitioners.⁷⁸

Not surprisingly, many members of the Bar vigorously opposed this encroachment on their monopoly.⁷⁹ Breaking the monopoly, however, fulfills the Act's statutory objective of providing new sources of legal services and a wider choice of providers, particularly with regard to advocacy, litigation, conveyancing, and probate.⁸⁰ The Act augments this objective by stating the following as its general principle: the right of audience and the right to conduct litigation should be determined only by whether a person is qualified by education and training and is a member of a professional *or other body* which (1) has rules of conduct appropriate to the efficient administration of justice, (2) has an effective means of enforcing the rules, and (3) is likely to enforce them.⁸¹ The statement of general principle also includes a cab rank rule,⁸² added by the House of Lords⁸³ and amended by the House of Commons:⁸⁴ no member may withhold services on the ground that the case or beliefs of the prospective client are objectionable, or because of the source of funding.⁸⁵

⁷³ "A decree or order made by the Queen by and with the advice of the Privy Council." WALKER, *supra* note 3, at 905.

⁷⁴ Act, *supra* note 2, § 29(2).

⁷⁵ *Id.* § 19.

⁷⁶ *Id.* § 20(1).

⁷⁷ *Id.* § 21.

⁷⁸ *Id.* §§ 22–23.

⁷⁹ White Paper, *supra* note 9, annex A at 44.

⁸⁰ Act, *supra* note 2, § 17(1).

⁸¹ *Id.* § 17(3).

⁸² *Id.* § 17(3)–(4).

⁸³ See *supra* note 44 and accompanying text.

⁸⁴ See *supra* note 45 and accompanying text.

⁸⁵ Act, *supra* note 2, § 17(3)(c)(iii); see *supra* text accompanying notes 38–47.

During debate, the Lord Chief Justice, members of the judiciary, and the Bar vehemently criticized the Bill and expressed concern that it made no mention of the “interests of justice” in the statutory objective.⁸⁶ These critics also wanted judges to have veto power over the right of audience.⁸⁷ The Law Society, on the other hand, objected to giving judges veto power.⁸⁸ Lord Chancellor Mackay responded that although the wording of the Bill was different from the White Paper, “[t]he principle [of interests of justice] was there and was intended to prevail over the statutory objective to widen consumer choice in the provision of legal services.”⁸⁹ Nevertheless, the Bill was amended to expand the definition of its general principle to include consideration of whether the profession’s (or other body’s) rules of conduct were appropriate “in the interests of the proper and efficient administration of justice.”⁹⁰

The Law Society also failed in its attempt to have all solicitors automatically transformed into solicitor-advocates.⁹¹ Instead, solicitors must apply to the Society for this status, which is to be granted only to individuals deemed qualified in advocacy skills.⁹² It is anticipated that not all solicitors will apply for this status because many will not wish to become advocates.⁹³ The Society is currently determining what qualifications, training, and experience should be required to achieve the enhanced status. As a first step, the Advisory Committee recently endorsed the Law Society’s application seeking wider advocacy rights for “[s]olicitors in private practice, qualified for three years, who can show experience

⁸⁶ See Frances Gibb, *Judges Attack Lack of “Interests of Justice” in Legal Reforms Bill*, THE TIMES (London), Dec. 20, 1989, at 2. This contrasts with its predecessor the White Paper, which allowed for the consideration of interests of justice within its statutory objective. White Paper, *supra* note 9, § 2.3.

⁸⁷ See Frances Gibb, *Bar Demands Judges Settle Rights of Audience in Court*, THE TIMES (London), Oct. 25, 1989, at 5.

⁸⁸ See Frances Gibb, *Judges “Should Have a Voice, Not a Veto,”* THE TIMES (London), Oct. 20, 1989, at 7. “Solicitors’ leaders fear the veto power in the Bill will be used by the four top judges to thwart solicitors gaining widespread rights of audience.” Peter Archer, *Solicitors Prepare for Lords Battle*, PRESS ASS’N NEWSFILE, Jan. 29, 1990, at Home News.

⁸⁹ Gibb, *supra* note 86, at 2.

⁹⁰ Bill, *supra* note 15, § 17(3)(d); see Zander, *supra* note 12, at 780.

⁹¹ See Robert Rice, *Stirred but Not Shaken*, FIN. TIMES (London), Oct. 19, 1990, at 33.

⁹² See Act, *supra* note 2, § 27.

⁹³ A Law Society survey found that “[o]nly about one solicitor in eight in private practice in England and Wales is likely to want to appear in the higher courts when the barristers’ monopoly ends. . . .” Terence Shaw, *Solicitors Reject Higher Court Privilege*, DAILY TELEGRAPH (London), Oct. 11, 1990, at 4.

of advocacy in the lower courts and who are prepared to attend a training course and pass tests on evidence and procedure. . . ."⁹⁴ The Law Society's application must now be approved by the Lord Chancellor upon advice of the Director of Fair Trading and without objection from the four designated judges.

Simultaneous with its announcement endorsing the Society's application, the Advisory Committee announced its rejection of applications for wider advocacy rights for "employed solicitors and barristers in the Crown Prosecution Service, the Government Legal Service, local authorities and in commerce, finance and industry."⁹⁵ Lord Griffiths, Chairman of the Advisory Committee, cited the need for "detachment and impartiality and to appear often enough in such courts to maintain their competence" and noted that these were criteria which currently-employed lawyers were not likely to meet.⁹⁶ The committee noted a lack of demand for wider audience rights for lawyers in commerce and industry and expressed concern that granting wider audience rights to the Crown Prosecution Service "would build up a 'monolithic prosecution service' leading to polarisation of attitudes between prosecution and defence as in the US [sic]."⁹⁷ Such reasoning smacks of discrimination and unequal treatment. Although England does not have a written constitution, there is still a delicate balance of powers that is apt to be upset by the Act.⁹⁸ The Act meshes the executive, legislative, and judicial functions and places too much power in the hands of the Lord Chancellor who is a cabinet member appointed upon recommendation of the Prime Minister and who also serves as Speaker of the House of Lords and Head of the Judiciary.⁹⁹

Inevitably, the necessity and value of "double-manning," the practice of engaging both a solicitor and a barrister to handle a single lawsuit, was called into question by the Green and White Papers and the ensuing debate.¹⁰⁰ Consumer groups and others

⁹⁴ Robert Rice, *Court Advocacy Changes Endorsed*, FIN. TIMES (London), Apr. 15, 1992, at 8; see also Evlynn Gilvarry, *Full Audience Rights Draw Closer for Some*, L. SOC'Y GAZETTE, Apr. 15, 1992, at 3.

⁹⁵ Rice, *supra* note 94, at 8.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., Francis Cowper, *The Lord Chancellor's "Indigestible Lump of Legislation,"* N.Y.L.J., Jan. 24, 1990, at 2; see also Quinn, *supra* note 31, at 297.

⁹⁹ WALKER, *supra* note 3, at 780-81; see also Quinn, *supra* note 31, at 258-59.

¹⁰⁰ Green Paper, *supra* note 10, §§ 7.2-7.4. Mr. David Ward, President of the Law

have expressed concern about the expense of employing a solicitor to prepare a case and a barrister to present it to the court.¹⁰¹ Barristers defend this practice, citing their greater skill in advocacy and litigation.¹⁰² Some barristers perceive a conflict of interest in having the case argued by the same lawyer who counsels the client, and then investigates and prepares the case for trial, as in the United States.¹⁰³

An example of the perceived conflict of interest is presented by client perjury. Because barristers frequently meet their clients for the first time in court on the day of the trial,¹⁰⁴ client perjury is arguably less likely to be a problem than under the U.S. system. This does not mean, however, perjury is less likely to occur, but rather, it is less likely to be recognized by a barrister who had not previously interviewed the client. Unfortunately, remedial measures are also less likely to be employed than under the U.S. system, in which perjury may be averted or remedied by the lawyer who prepared the case and recognizes the client's inconsistent statements.

Society, stated that "the society would continue to support the Lord Chancellor in ensuring the framework on rights of audience 'is capable of delivering the results the public [wants] to see—an end to unnecessary double manning.'" *Giving the Public Access to "More Expensive Jack of All Trades,"* THE TIMES (London), Dec. 8, 1989, at 39. Mr. Ward criticized the suggestion that the interest of justice requires that double manning be enshrined in law. "It is a clear attempt to force clients to have two lawyers where one would do. Many people want their solicitor, who knows all about their case, to represent them in court." Frances Gibb, *Mackay May Back Curbs on Solicitors' Court Role,* THE TIMES (London), Oct. 3, 1989, at 22.

¹⁰¹ See Frances Gibb, *Limits on Legal Aid Could Cut "Needless" Two-Lawyer Cases,* THE TIMES (London), Aug. 16, 1990, at 7.

¹⁰² *Id.* The former Lord Chancellor defended the practice and said that two counsel were used only where necessary and that the present practice is essential to the proper working of the system. *Id.* The Lord Chancellor commented, "[t]he real truth is, you need a solicitor to hold the papers and collect the material, and if the case is going to last, no one person can give it undivided attention." *Id.*

¹⁰³ See, e.g., *Master of the Rules?*, THE TIMES (London) Oct. 3, 1989, at 15. Lord Donaldson, Master of the Rolls, opined that "the 'interests of justice' may demand that the jobs of presenting and preparing the case be in separate hands." He cited as examples "cases where the public has a direct interest in the outcome of the case and where the interests of the client might differ from those of the public—criminal, matrimonial, those involving welfare of children or judicial review." *Id.*

¹⁰⁴ Wernick, *supra* note 1, at 82.

Like the samurai, a barrister has been exhaustively trained for one thing and one thing only, to fight for hire. His main function is to appear in court for his client. He is handed the necessary facts by the solicitor. He does not see witnesses till they take the stand. In many criminal cases, he does not even see his client till the day the trial starts.

Id.

Some critics complained that the Act would result in “Americanizing” the legal profession by fusing the bifurcated system of solicitors and barristers.¹⁰⁵ In the United States, lawyers admitted to practice may advocate for clients in all courts of the admitting jurisdiction. Many choose to do so only rarely or not at all, and a *de facto* specialized trial bar has emerged. Unlike barristers, however, U.S. trial practitioners have never been prohibited from forming partnerships with other lawyers.¹⁰⁶

One would have expected British lawyers to be more concerned about competition from outside than about fusion and competition from within the ranks of lawyers themselves. This concern should arise because the Act clearly states that the statutory objective is to “mak[e] provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.”¹⁰⁷

¹⁰⁵ See, e.g., Richard Hudson, *Keeping the CPS in Its Place*, NEW L.J., Mar. 2, 1990, at 292. During debate in the House of Lords, Lord Hutchinson expressed fear that extension of rights of advocacy would open the way to setting up a state advocacy service across England and Wales, creating a “polarized situation, with all prosecutions undertaken by employed lawyers and all defences [sic] by private advocates, as in the USA.” He was also concerned that it would remove “the essential independence of the prosecutor in serious crime,” abolishing for ever the figure of the “detached and independently-minded officer of justice . . . having no personal interest in the success of the case.” *Id.*; see also Timothy Harper, *Bye, Bye Barrister*, A.B.A.J., Mar. 1990, at 58.

Lord Ackner in the annual Bracton law lecture at Exeter University said that “not only was the package of measures in the Bill likely to lead to the legal profession in England and Wales becoming ‘Americanized’; it would mean ‘we will out-America America’ because non-lawyers would be permitted to appear in all courts and become judges at all levels.” Frances Gibb, *Law Lord Critical of Proposals to Appoint Non-lawyer Judges*, THE TIMES (London), Feb. 10, 1990, at 5.

¹⁰⁶ The advocacy skill of British barristers has often been praised by U.S. commentators, however, most notably former Supreme Court Chief Justice Warren Burger. See, e.g., Warren Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 229 (1973). For many years, he has also lamented the lack of trial skills demonstrated by U.S. lawyers. He hypothesized that “from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation.” *Id.* at 234.

Law schools, the American Inns of Court, and continuing legal education programs are making concerted efforts to meet the criticism by offering more opportunities for training in trial skills. The American Inns of Court was organized to provide a forum where seasoned members of the bar could interact on an intimate basis with attorneys and law students and professors to promote excellence in advocacy through the pupillage system. By sharing ideals and experiences in discourse, the Inns have proven to be a source of professional development and satisfaction for all classes of membership. See A. Sherman Christensen, *The Concept and Organization of an American Inns of Court: Putting a Little More ‘English’ on American Legal Education*, L.A. DAILY TIMES, Aug. 10, 1984, at 19.

¹⁰⁷ Act, *supra* note 2, § 17(1).

Moreover, the government's express objective, as stated in the Green Paper that generated the Act, was to ensure that "a market providing legal services operates freely and efficiently so as to give clients the widest possible choice of cost effective services . . . supplied by people who have the necessary expertise. . . . [S]uch providers may or may not need to be lawyers."¹⁰⁸ Internal strife between the two branches of the legal profession prevented solidarity which might have enabled lawyers to resist encroachment on their monopoly by nonlawyer members of other groups who may eventually qualify to offer legal services under the Act and directly compete in the legal arena.

The Law Society is currently amending its rules and devising skills and training requirements for solicitors wishing to qualify for audience and advocacy rights in higher courts.¹⁰⁹ The Society's application has been endorsed by the Advisory Committee and awaits approval by the Lord Chancellor and the four designated judges upon advice of the Director of Fair Trading.¹¹⁰ If the application is ultimately approved, clients will be able to choose representation in court by a solicitor, a barrister, or both. Some clients will feel comfortable continuing with their familiar solicitor-advocates. Others will choose barristers for their specialized skill and experience in advocacy. Because barristers have smaller staffs and lower overhead, their services will probably be less expensive.¹¹¹ This contrasts with the climate in the United States where lawyers generally charge higher fees for court time than office time. Double-manning will probably be reduced but not entirely eliminated in the immediate future, particularly in complex cases. Ultimately, a fused profession is foreseeable, but given the complexity of the law and the unique skills required of advocates, a specialized trial bar has many advantages.

¹⁰⁸ Green Paper, *supra* note 10, § 1.1.

¹⁰⁹ See *supra* text accompanying note 94. Much depends on this next stage of developing ground rules. See Frances Gibb, *Much Ado About Concessions*, THE TIMES (London), Aug. 21, 1990, at 23. "Any progress on rights of audience could yet be frustrated by the reluctance of the judges to see the Bar's monopoly of these rights in the higher courts broken. The judges could still thwart reforms." *Id.*

¹¹⁰ See *supra* text accompanying notes 67-74.

¹¹¹ See, e.g., Peter Archer, *Solicitors Called to the Bar*, PRESS ASS'N NEWSFILE, Apr. 14, 1992, at Home News. Advisory Committee Chairman Lord Griffiths said, "[H]aving one lawyer, a solicitor-advocate, to both prepare and present less complex cases may not necessarily be cheaper. Barristers, who do not need large staffs, have very much lower overheads than solicitors. . . ." *Id.*

Additionally, advocacy rights are being sought by groups other than solicitors. The Advisory Committee is currently considering an application from the Chartered Institute of Patent Agents for authority to grant increased rights of audience to qualified members.¹¹² The Institute of Chartered Accountants is also expected to apply for recognition as an authorized body entitled to confer audience and litigation rights upon members it deems qualified.¹¹³ Some critics have warned that the Act could lead to the demise of an independent Bar.¹¹⁴ In reality, because of their specialized training and skill in advocacy and litigation, barristers will probably continue to dominate higher court practice for some time to come.¹¹⁵

B. *Extension of Probate and Conveyancing Services by Nonlawyers*

1. Probate

The Act changes statutory restrictions to allow qualified banks, building societies, insurance companies, and members of other

¹¹² Sharon Wallach, *Don't Disturb Us, We're Busy*, THE INDEPENDENT (London), Mar. 20, 1992, at 19. "The rules governing rights of audience to non-barristers are being ponderously debated by the Griffiths committee [Advisory Committee, *see supra* notes 69–70 and accompanying text]." *Lawyers in Paradise*, THE TIMES (London), Feb. 17, 1992, at Features.

¹¹³ *See Rice, supra* note 91. "The large accountancy firms have made no secret of their desire to take on this role [conducting litigation]." *Id.*

Lawyers should change their rules to allow mixed partnerships with other professionals, Mr. Jock Worsley, immediate past president of the Institute of Chartered Accountants said. He said many accountants wanted to form such partnerships and the evidence was that clients also wanted to obtain their services under one roof.

Frances Gibb, *Conveyancing Safeguards Criticized*, THE TIMES (London), Oct. 23, 1989, at 4.

¹¹⁴ During debate in the House of Lords, Lord Rawlinson, a former Attorney General, said that the Bill "would inevitably lead to the destruction of a unique British institution, the independent Bar. . . . Competition would be reduced, the Bar would die, leading inexorably to the creation of the American legal factory system in this country." *Senior Judges Attack Legal Reforms Measure*, THE TIMES (London), Dec. 20, 1989, at 11.

¹¹⁵ Lord Chancellor Mackay, in an address to a group of American lawyers, stated, I believe there will always be a substantial demand from the public for the kind of independent specialist advocacy services which the Bar currently provides. . . . The only difference in the future will be that the Bar will survive by excellence, and not because it is buttressed by legal restrictions on those who can compete with its members.

Lord Mackay of Clashfern, *Law Reform and Civil Liberties in Britain*, 23 INT'L LAW. 711, 718 (Fall 1989).

Mr. Peter Cresswell, Bar Chairman, predicted that not only will the independent bar survive but that it "will continue to do all the leading advocacy work . . . 'simply because it can provide a better service and it is more cost-effective.'" *Rice, supra* note 91, at 33.

approved bodies granted exemption to offer probate services.¹¹⁶ Restrictions also do not apply to solicitors, barristers, certified notaries public, or the Public Trustee.¹¹⁷ Because there have been no restrictions on who may *draft* wills, as distinguished from *probate* wills,¹¹⁸ nonlawyer professional “will writers” have sprung up throughout Britain.¹¹⁹ As banks begin to offer probate services, it is anticipated that some will make their will-drafting services contingent upon “tying in” probate.¹²⁰ If American lawyers engaged in the practice of tying in, ethical questions about conflicts of interest, independent professional judgment, and improper solicitation of business would be raised. Thus, these same concerns will eventually arise within the post-Act English legal system. Additionally, the Act and the ensuing competition for probate and conveyancing work by nonlawyers will no doubt force some lawyers to find new sources of income and drive others into new areas of practice.¹²¹

2. Conveyancing Services

Opening up conveyancing work to nonlawyers can be expected to have an even greater impact than permitting nonlawyers to practice probate.¹²² The Act expands the conveyancing market to banks, building societies, insurance companies, and others to become qualified as authorized practitioners entitled to offer con-

¹¹⁶ Act, *supra* note 2, §§ 54–55.

¹¹⁷ *Id.*

¹¹⁸ “Under section 23 of the Solicitors Act 1974 it is an offense for anyone apart from a solicitor, barrister or notary to draw or prepare for reward the papers on which to found a grant of probate or letters of administration.” Green Paper, *supra* note 10, § 14.2.

¹¹⁹ Margaret Dibben, *Law Change Makes Wills Cheaper*, THE TIMES (London), Aug. 11, 1990, at 40.

¹²⁰ John Willman, *Writers Offer the Unwilling a Choice; Britain’s Intestate Masses No Longer Need Solicitors to Arrange Their Legacies*, THE INDEPENDENT (London), Sept. 16, 1990, at 17. “The Consumers Association has worries about how will-writing might be used to sell life insurance and other investments.” *Id.* National Westminster Bank has started a will writing service for customers, “[h]owever, it is compulsory to appoint NatWest Bank as executor when drawing up a will.” Dibben, *supra* note 119, at 40.

¹²¹ See Frances Gibb, *The Revolution of a Profession*, THE TIMES (London), Mar. 13, 1990, at 31. “The Law Society was also at pains to point out that competition from financial institutions threatened the economic viability of many provincial firms of solicitors and if they had to close their doors, the general public would suffer as much as the solicitors themselves.” Zander, *supra* note 12, at 765.

¹²² A survey of law firms found that “conveyancing typically accounts for more than 40 per cent of the total revenue of provincial solicitors and more than 50 per cent for those in rural areas.” Rice, *supra* note 30, at 8.

veyancing services to the public.¹²³ This expansion will permit institutions to offer "one-stop shopping" to home buyers who want to obtain financing, insurance, and conveyancing under one roof.¹²⁴

The Act establishes an "Authorized Conveyancing Practitioners Board" (Board) composed of practitioners and consumers¹²⁵ designed to develop competition in conveyancing, to establish qualifications for those providing services, and to supervise authorized practitioners.¹²⁶ It also establishes a "Conveyancing Ombudsman Scheme"¹²⁷ and "Conveyancing Appeal Tribunals."¹²⁸ The Act provides for supervision and advice from the Director General of Fair Trading,¹²⁹ and creates a compensation scheme for persons suffering a loss because of the dishonesty of authorized practitioners or their employees.¹³⁰ These mechanisms were obviously created to ensure that the legal service consumer is protected from the unsavory or unqualified practitioner.

To become authorized practitioners, applicants must satisfy the Board that they are "fit and proper" and will comply with the Board's rules.¹³¹ They must belong to the Conveyancing Ombudsman Scheme and have arrangements for covering the risk of claims and complaints from unsatisfied consumers.¹³² They must also comply with regulations to be prescribed by the Lord Chancellor regarding competence, conduct, and fair competition.¹³³ These regulations may provide for such items as required information, disclosures, and procedures for handling clients' money and avoiding conflicts of interests and delays.¹³⁴

Some critics predict that the competition resulting from the influx of nonlawyer participants will put the corner solicitor out of business.¹³⁵ Others foresee conflicts of interest such as making

¹²³ Act, *supra* note 2, §§ 36-37.

¹²⁴ Frances Gibb, *One-stop Shopping Plans for Banks and Building Societies*, THE TIMES (London), Dec. 8, 1989, at 38.

¹²⁵ See Act, *supra* note 2, § 34(3).

¹²⁶ *Id.* § 35(1).

¹²⁷ *Id.* § 43.

¹²⁸ *Id.* § 41.

¹²⁹ *Id.* § 45.

¹³⁰ *Id.* § 44(1).

¹³¹ *Id.* § 37(1).

¹³² *Id.*

¹³³ *Id.* §§ 37(7), 40(1).

¹³⁴ *Id.* §§ 37(7), 40(2).

¹³⁵ See *supra* note 121 and accompanying text. Others predict clients will use private

financing contingent upon tying in conveyancing and other services, perhaps at less competitive prices.¹³⁶ These concerns were persuasively expressed during Parliamentary debate and as a result, some consumer protections were written into the Act.¹³⁷ Additional safeguards are expected to be added within the implementing regulations. As expected, these safeguards are being met with opposition from certain nonlawyer groups wishing to offer conveyancing services.¹³⁸ The issue became temporarily moot recently when the Lord Chancellor postponed new regulations due to "insufficient demand" from lenders.¹³⁹ His decision likely stems from a sluggish property market, reduction in fees charged by solicitors, and a change in the Law Society's rules that allows solicitors to contract with lenders to provide customers with conveyancing services.¹⁴⁰ He vowed "to keep the position under review."¹⁴¹

C. *Multi-disciplinary and Multi-national Practices*

Potentially, the most far-reaching reform of the English legal system involves the Act's removal of restrictions on establishment

practice firms because of their efficient, comprehensive services. David Ward, *Conveyancing: The Future*, L. SOC'Y GAZETTE, Jan. 31, 1990, at 2. The depressed housing market may be slowing down competition from building societies and "detering them from entering this new field." Sean Webster, *Market Forces Help Solicitors Stay Ahead in the Monopoly Game; Despite Legislation, Lawyers May Manage to Retain Their Dominance of Conveyancing*, THE INDEPENDENT (London), Feb. 28, 1992, at 15. A further deterrent may be apprehension that the anticipated regulations will increase overhead. See *id.*

¹³⁶ Concern has been expressed that institutions might carry out conveyancing as a "loss leader" for other activities. Christopher Warman, *Lenders Welcome Proposals but Will Check Feasibility*, THE TIMES (London), Dec. 8, 1989, at 39. "The Law Society claims that if any mortgage lender offers conveyancing, house buyers will lose the independent advice about mortgage and endowment policies at present provided by solicitors." *Id.*

¹³⁷ In spite of attempts to bar institutions from making offers on the condition that other services, such as conveyancing or insurance, be provided by the company offering the mortgage, consumer groups and the Law Society do not think it will stop lenders from making "a stand-alone mortgage at high rates of interest while pushing 'package deals' at cheaper rates." Duncan Hughes, *Lenders Under Fire for "Package Deals"*, DAILY TELEGRAPH (London), Apr. 21, 1990, at 25.

¹³⁸ The Director General of Fair Trading warned that he will monitor any abuses of the Act such as tying the sale of insurance and other services to a mortgage or forcing borrowers to pay for a valuation report from an "approved" valuer. *Warning from Borrie*, FIN. TIMES (London), May 23, 1991, § I, at 8.

¹³⁹ *Delay in Rules Allowing Banks a Broader Role*, DAILY TELEGRAPH (London), Mar. 12, 1992, at 6.

¹⁴⁰ See *id.*; see also Evlynn Gilvarry, *LCD Shelves Plans to Widen Conveyancing*, L. SOC'Y GAZETTE, Mar. 18, 1992, at 7.

¹⁴¹ Peter Archer, *Conveyancing Plan Shelved*, PRESS ASS'N NEWSFILE, Mar. 12, 1992, at Home News.

of multi-disciplinary and multi-national practices. The Solicitors Act of 1974 restricted solicitors from entering into partnerships for legal services except with other solicitors.¹⁴² The new Act removes that restriction and creates the possibility of multi-disciplinary and multi-national practices.¹⁴³ It also declares that no rule of common law shall prevent barristers from entering into unincorporated associations with nonbarristers.¹⁴⁴ These provisions were undercut, however, by other language which states that the Act does not prevent the Law Society and the Bar Council from making rules which prohibit or restrict solicitors or barristers from entering into association with nonlawyers.¹⁴⁵

The Director of Fair Trading, who will scrutinize these rules to ensure that they do not impede competition, has warned that the Law Society and the Bar Council will have to justify any anti-competitive rules they adopt.¹⁴⁶ The lines are drawn and a battle over this issue seems likely. It is at the heart of the reform efforts set in motion by the Green and White Papers.¹⁴⁷

The Law Society and the Bar Council favor multi-national practices which permit partnerships with foreign lawyers, but oppose multi-disciplinary practices which permit partnerships with professionals in other fields.¹⁴⁸ Multi-disciplinary practices would make it possible for firms offering other services to offer legal services as well. For example, accounting firms with legal departments might offer accounting and legal services to their clients. Such a practice is not possible in the United States where bar ethics rules prohibit lawyers from sharing legal fees with nonlawyers or assisting them in the practice of law.¹⁴⁹

¹⁴² The Solicitors Act, 1974, ch. 47 (Eng.).

¹⁴³ Act, *supra* note 2, § 66(1).

¹⁴⁴ *Id.* § 66(5).

¹⁴⁵ *Id.* §§ 66(2), (5).

¹⁴⁶ Frances Gibb, *Borrie Acts to End Law Society's Ban on Mixed Practices*, THE TIMES (London), Sept. 17, 1990, at 5. Sir Gordon Borrie, Director General of Fair Trading stated, "[t]he Law Society's rules are subject to the competition rules of the existing fair trading laws." *Id.*

¹⁴⁷ "The Bill will shift the burden back on to the Law Society and Bar Council to justify any restrictions they attempt to preserve." Carr, *supra* note 1, at 8.

¹⁴⁸ *Id.* at 8-9. The Bar favors only those multi-national partnerships "already allowed by the rules in certain circumstances outside the UK." *Amendments Sought in Courts Bill*, NEW L.J., Jan. 19, 1990, at 42.

¹⁴⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1983). An exception to the general U.S. prohibition is the District of Columbia Court of Appeals' rule, effective January 1, 1991, which permits lawyers to practice law in a partnership or other organization and share legal fees, provided they agree in writing that: (1) the sole purpose of the firm is to provide legal services; (2) all persons having managerial authority or holding

Although they may not share legal fees with nonlawyers or assist them in the practice of law, a number of lawyers in the United States hire professionals from other fields as support personnel.¹⁵⁰ Many highly qualified professionals, however, prefer to have their own firms rather than becoming employees of law firms without partnership status.¹⁵¹ This factor may have prompted the more liberal District of Columbia rule.¹⁵² Even that rule, however, does not permit other professionals to offer legal services in addition to their own,¹⁵³ as the English Act does, unless undercut by the Law Society and the Bar rules of conduct.¹⁵⁴ If their rules do result in undercutting multi-disciplinary partnerships, however, critics will accuse them of thwarting the Act's statutory objective of providing new and more efficient sources of legal services.¹⁵⁵

The Law Society and the Bar Council are reviewing their rules of conduct relating to multi-disciplinary and multi-national practices.¹⁵⁶ As to the Law Society, rules similar to those of the District of Columbia Court of Appeals¹⁵⁷ might be a reasonable approach with respect to multi-disciplinary practices. Limiting the purpose of a firm solely to offering legal services, however, might not pass muster; the Act's stated statutory objective¹⁵⁸ and scrutiny by the Director of Fair Trading¹⁵⁹ make such a restriction problematic. Pressure for multi-disciplinary services is mounting both from consumers who view one-stop shopping as convenient and efficient, and from members of other occupations who want to offer comprehensive service to clients with the aid of lawyer partners. The distinctions that determine proper spheres of service often appear artificial. Commentators have cited the fields of intellec-

a financial interest agree to abide by the rules of professional conduct; and (3) lawyers in the firm agree to be responsible for nonlawyers' compliance with the rules. DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1991).

¹⁵⁰ Thomas S. Clay, *Should Non-Lawyers Be Admitted as Partners? Yes, Excellence Must be Rewarded*, A.B.A. J., May 1990, at 38.

¹⁵¹ See Carr, *supra* note 1, at 9.

¹⁵² See *supra* note 149 and accompanying text.

¹⁵³ DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1991).

¹⁵⁴ Act, *supra* note 2, §§ 66(2), (6).

¹⁵⁵ *Id.* § 17(1).

¹⁵⁶ "When the prohibitions [against multi-disciplinary and multi-national partnerships] go, it will be left to the professional bodies to decide whether or not to take advantage of their new freedoms, and draw up rules accordingly." Carr, *supra* note 1, at 8.

¹⁵⁷ See *supra* text accompanying notes 149, 151-53.

¹⁵⁸ Act, *supra* note 2, § 17.

¹⁵⁹ "The Bill will shift the burden back on the Law Society and Bar Council to justify any restrictions they attempt to preserve." Carr, *supra* note 1, at 8.

tual property and accounting as examples of the artificiality of these distinctions.¹⁶⁰

Law firms are already competing with accounting firms for the bright young lawyers coming out of school and out of the Inns of Court.¹⁶¹ The Act will intensify competition if accounting firms set up departments to offer legal services to their clients.¹⁶² The eventual competition from nonlawyers qualifying to offer probate and conveyancing services will cause some solicitors to branch out into new areas of practice and increase the number of solicitors applying to become solicitor-advocates.¹⁶³ Competition will be further augmented as members of other professional groups begin to qualify as litigators, and as nonlegal organizations establish law departments, unless prohibited by rules of conduct.¹⁶⁴

In addition, multi-national law firms will compete for legal work, but they will also present opportunities for British lawyers to tap into new markets abroad. Unlike multi-disciplinary practices, multi-national partnerships are likely to emerge rather quickly, fostered by the liberalization of practice by European Community lawyers that began in 1992 and the eagerness of some law firms in the United States to form international practices.¹⁶⁵ The Act authorizes the Law Society to regulate those practices to

¹⁶⁰ See, e.g., Robin Smith, *All Under One Roof*, THE TIMES (London), Apr. 14, 1992, at Features.

Firms that want to act as patent agencies argue that the distinction between the protection of intellectual property at the outset, and its protection when challenged, is an artificial one; further, that a client who believes he has a patent matter that should be handled by a patent agent may also need advice on the same matter about competition law or licensing.

Id.

¹⁶¹ See Carr, *supra* note 1, at 9.

¹⁶² See Gibb, *supra* note 121, at 31. Mr. Peter Cresswell, Bar Chairman, predicted that "some barristers will be 'bought up' by solicitors' or accountants' firms keen to set up their own advocacy departments." *Id.*

¹⁶³ Mr. Tony Holland, President of the Law Society, predicted, "The number of barristers and solicitors working in commerce and industry is going to increase enormously over the next 10 years. . . ." Rice, *supra* note 91, at 33. He also "expects to see solicitors gain wider rights of audience 'in the Crown Court within two years and in High Court within four years or less.'" *Id.*

¹⁶⁴ "It remains to be seen whether the solicitors' nightmare of large professional service conglomerates dominated by accountants comes to pass." *Id.*

¹⁶⁵ See Gibb, *supra* note 121, at 31.

[T]he advent of 1992 is spawning the growth of links between firms with EC counterparts, and the setting up of offices abroad. Global firms with offices in different countries are set to increase in number, as are multi-national partnerships. The Bar has been spurred to increased efforts to promote its services in the United States and in Europe. . . .

Id.

some extent through registration of foreign lawyers¹⁶⁶ and by requiring fees and annual renewal.¹⁶⁷ At least one commentator predicts that a substantial amount of legal business will fall into the hands of U.S. lawyers: "Some lawyers fear British firms will not be able to compete against what they consider to be more aggressive and better-capitalised [sic] American counterparts."¹⁶⁸ Moreover, "clients are more likely to choose Anglo-American partnerships for British law as they can turn for malpractice claims to U.S. courts where success brings a far higher settlement and loss does not entail a bill for the defendant's legal fees."¹⁶⁹

D. *Conditional Fees*

The Act removes restrictions on conditional fees, frequently referred to as "no win, no fee" agreements, in certain types of cases, and leaves to the Lord Chancellor the determination of the maximum permissible percentage that may be added to the normal fee upon a favorable outcome.¹⁷⁰ This is the culmination of the Green Paper's initial suggestion that contingency fees, long outlawed in England,¹⁷¹ be considered as a new approach to help achieve the government's objectives set out in the Green Paper.¹⁷² The public responded favorably to the idea "because of the possibility of improving access to the courts without incurring the substantial costs of an action."¹⁷³ Most of the responses, however,

¹⁶⁶ Act, *supra* note 2, § 89(1).

¹⁶⁷ Carr, *supra* note 1, at 9.

A serious impediment to creating a MNP [multi-national partnership] at this time relates to the cost of entry. The Law Society has decided to charge a high fee for the privilege of registering as an MNP. Fees are to be charged on a per-lawyer basis; a 100-lawyer firm, for example, can join an MNP for about \$1 million.

Lynn Mestel, *New Rules May Expand U.S. Firms' English Role*, NAT'L L.J., Dec. 23, 1991, at 27.

¹⁶⁸ Jonathan Confino, *Law Society Shake-up Could Lead to American Domination*, DAILY TELEGRAPH (London), May 9, 1991, at 27.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 58(1), (4), (5).

¹⁷¹ F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 36 (1964). "The Statute of Westminster I in 1275 contained the first prohibition of the maintenance of suits for a share in the subject of the suit." *Id.*

¹⁷² Green Paper, *supra* note 10, § 2.8. "In privately funded work also the Government is keen to encourage new approaches. One idea which has attracted much attention in recent years—contingency fees—is the subject of a separate consultation paper issued in parallel with this Green Paper." *Id.*

¹⁷³ White Paper, *supra* note 9, at 72.

were from lawyers who did not favor the introduction of contingency fees.¹⁷⁴ The Bar disapproved of giving lawyers a financial stake in the outcome of the client's case because "[t]he potential for fostering conflicting interests and the development of a litigious society outweighed the benefits to be obtained in terms of greater access to justice."¹⁷⁵ The Law Society opposed contingency fees but favored "permitting speculative actions with an uplift" for a favorable outcome.¹⁷⁶ Apparently, contingency fees have been informally utilized for some time in England.¹⁷⁷

The White Paper proposed the removal of existing prohibitions to enable clients "to agree with their lawyers [on] payment of a conditional fee on the speculative basis already permitted in Scotland."¹⁷⁸ It further proposed that the amount of increase or uplift for successful outcome be limited to a moderate percentage of the normal fee and that the percentage be determined by the Lord Chancellor.¹⁷⁹ Additionally, it proposed to exclude criminal and family proceedings from conditional fee arrangements.¹⁸⁰ The Bill included these exclusions and authorized the Lord Chancellor to prescribe the maximum percentage of increase after consultation with the Bar Council, the Law Society and "such other authorized bodies (if any) as he considers appropriate."¹⁸¹ The Act incorporates these provisions¹⁸² and requires that a conditional fee agreement "which provides for that person's [client's] fees and expenses, or any part of them, to be payable only in

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

It was generally acknowledged that in personal injury cases where the outcome of the case was certain, solicitors frequently undertook cases under an informal agreement with the client that they would recover their costs [including fees] out of the damages recovered, and would make no charge if the case was lost.

Id. at 73.

¹⁷⁸ *Id.* § 14.3.

¹⁷⁹ *Id.* § 14.4.

¹⁸⁰ *Id.* § 14.3.

¹⁸¹ Bill, *supra* note 15, § 44. During Parliamentary debate at the committee stage, the conditional fee proposal was strongly criticized as being "immoral," as "a poor substitute for improved Legal Aid . . ." and as giving advocates "a direct financial interest in the result of their case . . . [which] will develop into a kind of speculative litigation, some of which can at times amount to blackmail." Anthony Looch, *Bar Council Chairman Warns on Libel Danger*, DAILY TELEGRAPH, Feb. 6, 1990, at 12.

¹⁸² Act, *supra* note 2, § 58(7). The designated judges must also be consulted by the Lord Chancellor before making any orders under Section 58. *Id.*

specified circumstances" be in writing specifying the percentage by which the fee is to be increased.¹⁸³

In a Consultation Paper issued after the Act became effective, Lord Chancellor Mackay proposed to implement the Act by initially limiting the conditional fee to only personal injury cases with a maximum increase to 10 percent of the normal fee with the possibility of adding other types of cases such as libel actions and commercial court cases in the future.¹⁸⁴ Some commentators believe it will be difficult to police the rule because most solicitors do not publish their fees.¹⁸⁵ These commentators also predict that a low maximum uplift in fees will result in solicitors' using the conditional arrangement only when "success is virtually certain,"¹⁸⁶ which would not significantly fulfill the objective of increasing access to the courts.

The Lord Chancellor's Consultation Paper also suggested that the order implementing conditional fees should impose upon lawyers the duty to advise clients of other methods of funding, particularly legal aid, and of the client's possible liability for the other side's costs, including their lawyers' fees, if the case is lost.¹⁸⁷ The so-called "English rule" of ancient vintage requires the losing party in civil cases to pay the winning party's costs.¹⁸⁸ "[T]he English rule is part of a justice system that cushions the impact of the rule with an extensive government legal aid system. That

¹⁸³ *Id.* § 58(1)(b).

¹⁸⁴ See David Pannick, *No Win, No Fee, No Case Against*, THE TIMES (London), July 9, 1991, at 29.

¹⁸⁵ WALTER MERRICKS & RUSSELL WALLMAN, *THE COURTS AND LEGAL SERVICES ACT: A SOLICITOR'S GUIDE* 40 (1990).

¹⁸⁶ *Id.* at 41.

The Government can claim to have introduced legislation to permit "no win, no fee" agreements which have long been advocated by some consumer groups. However, this may do little more than legitimize the way in which some solicitors already help clients who have a very strong case but inadequate resources, by acting on the basis that the solicitor will not charge if the case is lost. At present such arrangements are technically in breach of the practice rules, and the fact that the Act will legitimize them is welcome. It is unrealistic, however, to suppose that the Act will do much to improve access to justice for those financially ineligible for legal aid.

Id.

¹⁸⁷ Consultation Paper: Commencement of S. 58 of the Courts and Legal Services Act 1990—Conditional Fee Agreements (The Lord Chancellor's Dep't, Apr. 1991).

¹⁸⁸ See Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 80 (1963). "This proposal of awarding attorney's fees as costs is not new. It is usually referred to as the 'English rule' as it has existed there at least since 1275." *Id.*

system casts a wide net; about 51% of the British population is eligible for legal aid.”¹⁸⁹

Under the Act, the Lord Chancellor has the discretion to increase the percentage uplift beyond 10 percent and to add other causes of action besides personal injury. This could create an incentive for filing doubtful cases, adding to court congestion. It is somewhat ironic that at a time when U.S. commentators,¹⁹⁰ including Vice President Dan Quayle¹⁹¹ and President George Bush,¹⁹² are calling for adoption of the English rule, the newly adopted English Act is adding the conditional fee, a type of contingent fee. This seems strangely ineffective, unwise, and out-of-step.

If conditional fees¹⁹³ catch on, the attendant problems with contingent fees experienced in the United States can be expected. As noted above, these problems include, among others, the creation of incentives for filing suit in questionable cases and difficulties in containing burgeoning damage awards and congested court dockets. The risk of having to pay the “winners” costs and fees under the English rule,¹⁹⁴ however, will have a tempering

¹⁸⁹ See Tim Cornwell, *Quayle Likes the “English Rule” but Brits Have Their Doubts; “Double or Quits,”* LEGAL TIMES, Feb. 10, 1992, at 1. “British lawyers believe the risk of having to pay twice as much in costs is a real deterrent to litigation in Great Britain. . . .” *Id.*

¹⁹⁰ See, e.g., Calvin A. Kuenzel, *Attorneys’ Fees in a Responsible Society*, 14 STETSON L. REV. 283 (1985).

As long as attorneys’ fees are handled under the American rule, an individual is given an incentive to litigate his claim. The English rule, of course, would do away with this incentive, and accordingly discourage a great deal of the litigation currently brought. How we can sit and look at the English rule that so clearly implements the policy of discouraging litigation and yet refuse to adopt it, indicates we are indeed a masochistic society.

Id. at 298–99. “Our society, however, constructed the American rule and its *enfant terrible*, the contingent fee, and we are thus responsible for their devastating consequences.” *Id.* at 317.

¹⁹¹ See, e.g., Cornwell, *supra* note 189, at 1.

To Vice President Dan Quayle, the so-called English rule, which requires losing plaintiffs in civil cases to cover defendants’ costs, could help save America from a crisis of excess litigation. . . . Quayle’s staff is not phased by the fact that the British are talking about going the American way while the vice president pushes the English rule.

Id.

¹⁹² The English rule is part of the Bush administration’s recently proposed comprehensive civil-justice reform bill, the Access to Justice Act of 1992. The legislation provides that the English rule apply to diversity cases in federal court. Those who wanted to avoid the new fee-shifting rule could elect to go to state court. See *id.*

¹⁹³ Act, *supra* note 2, § 58.

¹⁹⁴ See *supra* text accompanying note 188.

effect.¹⁹⁵ In the final analysis, it seems unlikely that conditional fees will satisfy critics who see them as “a poor substitute for improved legal aid”¹⁹⁶ and as an ineffective means of fostering access to justice.

E. *Authority to Confer Jurisdiction and to Allocate Business between Courts*

The Act grants authority to the Lord Chancellor to confer jurisdiction and to allocate cases among courts, subject only to consultation with the designated judges.¹⁹⁷ Predictably, this provision caused a great stir and heated debate in Parliament.¹⁹⁸ The Lord Chancellor, a political officer and cabinet member appointed by the Crown upon nomination of the Prime Minister,¹⁹⁹ promulgated the Green and White Papers which led to the Act²⁰⁰ granting his office this unfettered authority.²⁰¹

At the time the Act was adopted, the jurisdictional ceiling for lower courts was 5,000 pounds.²⁰² The Lord Chancellor proposed raising it to 50,000 pounds.²⁰³ Critics have expressed concern that lower courts are insufficiently staffed and funded to handle the large number of cases expected to be transferred from higher courts.²⁰⁴ The Lord Chancellor has pledged to implement the Act in increments and transfer cases only when lower courts are ready to receive them.²⁰⁵ This pledge has done little to quiet the fears of critics.

Moreover, the Act grants the authority to confer jurisdiction and allocate business among courts to an individual²⁰⁶ who is a political appointee.²⁰⁷ It is an accepted convention that a change of party in power would result in the appointment of a new Lord

¹⁹⁵ See *supra* note 189 and accompanying text.

¹⁹⁶ See Looch, *supra* note 181.

¹⁹⁷ See Act, *supra* note 2, § 1(9).

¹⁹⁸ See *Law Update: Plan to Speed Up Civil Trials*, *supra* note 63, at 17.

¹⁹⁹ WALKER, *supra* note 3, at 781.

²⁰⁰ See *supra* text accompanying notes 9–15.

²⁰¹ See Act, *supra* note 2, § 1.

²⁰² See Terence Shaw, *£50,000 Base for Damages in High Court*, *DAILY TELEGRAPH* (London), Apr. 24, 1990, at 4.

²⁰³ *Id.*

²⁰⁴ See *Law Update: Plan to Speed Up Civil Trials*, *supra* note 63, at 17.

²⁰⁵ *Id.*

²⁰⁶ Act, *supra* note 2, § 1(1).

²⁰⁷ KEETON, *supra* note 11, at 112.

Chancellor.²⁰⁸ The newly appointed Lord Chancellor would be empowered to change jurisdictional limits and reallocate cases yet again. Even without a change of the party in power, the person serving as Lord Chancellor serves at the pleasure of the Prime Minister and the Crown and may be summarily dismissed at will.²⁰⁹ Clearly, the inherent instability of the Lord Chancellor's position may result in varying jurisdictional requirements.

This grant of authority to confer jurisdiction contrasts with the legal system in the United States where jurisdiction of courts is set by statutes and by state or federal constitutions.²¹⁰ The highest legal officer in the United States, the Attorney General, although a political officer serving at the pleasure of the President,²¹¹ does not have power to confer jurisdiction on courts. Thus, the judicial system of the United States is not faced with the possibility of dynamic jurisdictional requirements within the discretion of an individual.

CONCLUSION

The impact of the Courts and Legal Services Act 1990 will not be felt all at once,²¹² but the practice of law in England, Wales, and elsewhere will never be the same again. As the Law Society and Bar Council amend their qualification requirements and rules of conduct pursuant to the Act, the distinctions between barristers and solicitors have begun to disappear, and the possibility of a fused profession in England has become real. Additionally, the new legal system under the Act provides a glimpse into a legal world where nonlawyers share an important role, either by providing legal services themselves, or by entering into multi-disciplinary practices with barristers or solicitors. Moreover, conditional fees could create incentives for filing doubtful cases, congest court dockets, and inflate damage awards. The risk to the losing litigant of having to pay the prevailing party's costs and legal fees under the English rule, however, will have a tempering effect. Conditional fees are not likely to significantly improve access to justice or reduce the need for improved legal aid.

²⁰⁸ WALKER, *supra* note 3, at 781.

²⁰⁹ The Lord Chancellor "holds office during the royal pleasure." *Id.*

²¹⁰ *See, e.g.*, U.S. CONST. art. III; *see also, e.g.*, FLA. CONST. art. V.

²¹¹ 28 U.S.C. § 503 (1982).

²¹² *See Lawyers in Paradise, supra* note 112, at Features. "It will be a year or two before these reforms are working, and it is too soon to judge their effect." *Id.*

The ripple effect of the Act will reach the United States, where it will augment the already strong clamor to open up the practice of law to other qualified individuals and groups.²¹³ Clients are demanding wider choices of practitioners and innovative approaches to solving their legal problems.²¹⁴ These changes are a far cry from the wigs and trappings of Britain's ancient legal tradition, but change is inevitable, sometimes even salutary.

²¹³ See *supra* notes 24–25 and accompanying text. “While the reform movement in England may not be duplicated in the United States, demand for change, even fundamental ones, may well occur.” Maynard E. Persig, *Court Reform in England*, 73 JUDICATURE, June–July 1989, at 54, 55 (reviewing MICHAEL ZANDER, *A MATTER OF JUSTICE* (1988)). “The judicial systems of the two countries are in many respects sufficiently alike so that reforms advocated and measures adopted in England may well serve as examples to be considered by the United States.” *Id.*

²¹⁴ See, e.g., Doug Bandow, *The Legal Monopoly*, CHRISTIAN SCIENCE MONITOR, Oct. 9, 1990, at 19. “Paraprofessionals, such as paralegals, and professionals from other fields, such as accountants, should be allowed to handle all cases for which they are qualified, subject only to prosecution for fraud or incompetence. . . . Consumers would no longer be forced to pay Cadillac fees in Yugo cases.” *Id.* He suggests that increasing competition would help consumers by bringing down costs and “[e]qually important, people who today try to go it alone could instead obtain affordable legal assistance.” *Id.*