

Reexamining Regulation in Light of Its Objectives

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SPEAKING OF ETHICS



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By Hope C. Todd

The practice of law has changed dramatically during the past 30 years given the now commonplace use of email, e-research, e-filing, and e-discovery. Now that generative AI has arrived on the scene, it promises more change (for better or for worse).

The legal landscape has also shifted with an ever-increasing population of civil litigants who appear pro se either because they cannot afford or locate a lawyer or they want to handle matters themselves.¹

Beyond calls to increase pro bono participation and contributions, various nonlawyer solutions have emerged to help address barriers to access to legal services, including document preparers, court navigators, self-help kiosks at courthouses, informational websites, interactive apps, and platforms such as LegalZoom.

In the past few years, Utah and Arizona have authorized nonlawyers to partner with lawyers in alternative business structures to deliver legal services.² The goal of Utah's "regulatory sandbox" authorizing these new providers is to "optimize the regulatory structure for the legal services market, in order to increase the access and affordability of legal services ... [by] taking a data-driven, risk-oriented approach that also allows for new innovative models to be tried out in a controlled [regulatory environment]."³

Utah, Arizona, Minnesota, and Alaska have launched programs to license and authorize paraprofessionals to provide limited legal services heretofore reserved to lawyers, and similar programs are under consideration in other jurisdictions as well.

Moreover, the global pandemic confirmed what many lawyers already suspected or knew: An attorney may effectively and competently practice law from almost anywhere and even appear virtually in court.

WHAT'S DRIVING REGULATIONS?

Innovations in technology, the increase of non-lawyer participation in the delivery of legal services, and the continuation of geographic limitations on a lawyer's license to practice in a world of remote work all raise important regulatory questions.

To the extent that jurisdictions are not already doing so, this may be a good time to evaluate existing regulations and frameworks and, when developing new ones, to consider the fundamental questions about regulation: who, what, how, and why. Do a jurisdiction's regulations and regulatory frameworks advance or impede their purposes? How can, or should, the profession advance the objectives of regulation?

This is not an original thought. In 2016 both the American Bar Association and the Conference of Chief Justices endorsed the ABA's Model Regulatory Objectives for the Provision of Legal Services for regulators considering how to regulate nontraditional legal service providers, and "as a means to help assess a [jurisdiction's] existing regulatory framework and to help identify and implement regulations related to legal services beyond the traditional regulation of the legal profession."⁴

The ABA Model Regulatory Objectives are as follows:

- A. Protection of the public
- B. Advancement of the administration of justice and the rule of law
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems

D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections

E. Delivery of affordable and accessible legal services

F. Efficient, competent, and ethical delivery of legal services

G. Protection of privileged and confidential information

H. Independence of professional judgment

I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs

J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system⁵

When evaluating lawyer regulation, one may be tempted to focus exclusively on discipline, a core aspect of regulation that is designed to protect the public, principally by removing individuals (temporarily or permanently) from the practice of law in response to ethical misconduct. Traditional discipline is reactive in that it addresses post facto conduct of lawyers who have violated the ethics standards set forth in an applicable jurisdiction's rules of professional conduct, which often results in public harm. The conduct of such lawyers is usually brought to the attention of regulators via complaints filed by aggrieved clients, spouses, employers, and opposing counsel.

Certainly, a profession that requires adherence to high ethical standards must have both the ability to hold its members accountable for ethical violations through the imposition of

appropriate sanctions and the authority to remove from practice those who have hurt clients or are likely to cause future harm. Sometimes, however, lawyers are suspended or disbarred not for causing actual harm, but rather for violating (intentionally or unintentionally) a specific ethical standard.

Periodically, it may be reasonable to reevaluate presumptive sanctions for ethical violations through the lens of regulatory objectives, even when a standard embodies an important professional value. In some circumstances, there may be ways to protect the public, prevent future harm, and promote access to justice through education, training, and/or probation or monitoring of a lawyer, rather than through suspension or disbarment of a practitioner who, in some instances, may be among the few providing legal services to an underserved community.

THE VALUE OF PROACTIVE RULES

Many jurisdictions, including the District of Columbia, have in place extensive proactive regulatory programs to enhance client protection, help lawyers successfully practice law, and elevate competence and professionalism.⁶ This type of regulatory approach aims to prevent ethical and other problems before they occur. In appropriate circumstances, such programs can also aid in rehabilitation and offer alternatives to the more absolute consequence of suspension or disbarment.

Examples of proactive lawyer regulation include the following: ethics helplines and formal advisory opinions; practice management assistance (including advice on the business aspects of starting and running a law firm, trust accounting courses, firm assessments, and technology solutions); professional counseling and support for lawyers struggling with mental health, alcohol, and substance abuse issues; fee arbitration programs; ethics courses for newly admitted attorneys; continuing legal education; and practice standards.

In 2016 the Colorado Supreme Court adopted a new preamble to its Rules Governing the Practice of Law. Colorado's proactive regulatory approach includes measures such as mandatory firm self-assessments and automatic bar emails about practice management resources sent to lawyers who move from large firms to solo/small firms, given the higher rate of client complaints against such lawyers.

In 2017 the Supreme Court of Illinois formally adopted regulatory objectives and instituted a four-hour self-assessment course required every two years for lawyers in private practice who do not carry malpractice insurance. These approaches seek to target regulation where it is likely to have the greatest impact.

CONTINUALLY EVOLVING RULES


As the practice of law evolves in response to changes in the law, technology, and other societal norms, it is not surprising that the ethics rules sometimes require revision as well. Specific and articulated ethical standards are central to modern regulation. Today, all U.S. jurisdictions have at least an analog to the ABA Model Rules of Professional Conduct, although not necessarily a counterpart for each one.

Ongoing review of legal ethics rules by the ABA and individual jurisdictions that promulgate rules of professional conduct is fairly common. In the District of Columbia, the D.C. Bar Rules of Professional Conduct Review Committee is charged with this task. The committee also reviews changes to the ABA Model Rules and considers other events that may suggest or support changes to the D.C. Rules. Several committee recommendations to amend certain D.C. Rules have been approved by the Bar's Board of Governors and are pending consideration by the D.C. Court of Appeals, which promulgates the D.C. Rules. The proposals include amendments to rules related to technology, post-conviction exculpatory evidence, discrimination and harassment, outside counsel guidelines, and trust accounting.⁷

During the pandemic, when many lawyers were forced to work from their homes in jurisdictions where they were not licensed to practice, some jurisdictions reconsidered rules that prohibited such conduct, assessing whether those rules under contemporary circumstances were serving regulatory objectives. Many jurisdictions issued advisory opinions allowing such lawyers to perform legal work remotely from home. Indeed, one area of regulation that appears ripe for further assessment by the profession concerns the unauthorized practice of law — for lawyers and nonlawyers alike.⁸

Finally, the training, licensing, and development of lawyers are also a significant part of regulation. The substantive knowledge and skills required to practice law are most commonly acquired in law school and further developed through experience and continuing legal edu-

cation. When jurisdictions consider authorizing nontraditional legal services providers, questions about education, training, and public accountability must be addressed. The embrace of regulatory objectives may assist jurisdictions in creating and adopting requirements that, in addition to other objectives, safeguard the "efficient, competent and ethical delivery of legal services" regardless of the provider.

For a self-regulated profession in an ever-changing world, the ability to both define the objectives of regulation and ensure those objectives are being met is an ongoing and worthy endeavor. 

D.C. Bar legal ethics counsel are available for confidential inquiries on the Legal Ethics Helpline at 202-737-4700, ext. 1010, or at ethics@dcbar.org.

NOTES

- 1 For more information on unmet civil legal needs, see "Report on the Future of Legal Services in the United States," American Bar Association (August 2016), and *The Justice Gap Report*, Legal Services Corporation (July 2022).
- 2 More information on Arizona's alternative business structures is available at azcourts.gov/accesstolegalservices/Questions-and-Answers/abs; information on Utah's Regulatory Sandbox is available at demosite.utah.gov/innovation-office/about. In 1991 the District of Columbia became the first jurisdiction to allow nonlawyers to hold a financial interest in a law firm. That authorization is confined to the strict parameters of D.C. Rule 5.4(b).
- 3 Quoting the website of the Office of Legal Services Innovation, an office of the Utah Supreme Court, at demosite.utah.gov/innovation-office/about/what-we-do.
- 4 Conference of the Chief Justices, Resolution 9, Recommending Consideration of ABA Model Regulatory Objectives for the Provision of Legal Services, adopted on February 3, 2016.
- 5 ABA Model Regulatory Objectives for the Provision of Legal Services, ABA House of Delegates (February 2016).
- 6 Proactive Regulation FAQ Discussion National Organization of Bar Counsel (May 2017), available at coloradosupremecourt.com/PDF/PMBR/FAQs%20NOBC%20Proactive%20regulation%20Committee.pdf.
- 7 The committee's proposed amendments can be found at dcbar.org/for-lawyers/legal-ethics under Most Recent Reports and Recommendations.
- 8 See also "UPL: Reconsidering Regulation," *Washington Lawyer* (November/December 2022).