Overview of Remarks

- What are regulatory objectives?
- Which jurisdictions have them?
- How do they differ from each other?
- Why have them?
- My recommendations
  - Procedurally
  - Substantively
- Conclusion – How they might have changed recent conversations
Why this Topic?

“What gets measured matters”

What are “Regulatory Objectives”?

• Also known as purpose, duty, object, or objectives statements
• Set forth the goals sought to be achieved
• The term “regulatory objectives” became widespread after the UK Clementi Report & Act
Which Jurisdictions Have Them?

- 2007 UK Legal Services Act
- Legal Services (Scotland) Act 2010
- The Legal Profession Acts in all Canadian Provinces and Territories
- Australia and New Zealand
- Proposed legislation in India & Ireland
- Probably elsewhere (e.g. Denmark)
**How** Do They Differ From Each Other?

- **Common Themes:**
  - Protection of clients
  - Protection of the public interest
- **Frequently Found:**
  - Increasing access to justice
  - Promoting competition in legal services
  - Promoting the rule of law & public understanding
  - Promoting lawyer competence and compliance with professional principles

Objectives Found in a Few Countries

- Encouraging an independent, strong, diverse and effective legal profession
- Encouraging equal opportunities in the legal prof.
- Ensuring that lawyer regulation is consistent with principles of good regulation:
  
  4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
  (4). The Society has a duty to act in a *timely, open and efficient* manner.

See Ontario Law Society Act, R.S.O. 1990, c. L.8., at Section 4(2)(4); 2013 Australian bilateral framework (promoting regulation that is efficient, effective, targeted and proportionate).
The Language Can Differ:

• Protecting & promoting the interests of consumers (UK, Scotland, New Zealand)
• Protecting & promotion the interests of the clients of legal practitioners (Draft India)
• Enhancing the protection of clients of law practices and the protection of the public generally (2013 Australian framework)

For additional examples, see Terry, Mark Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 Fordham L. Rev. 2685, 2744-2750 (2012)

Why Should a Jurisdiction Have These?

• Regulatory objectives force a jurisdiction to consider what it is trying to achieve
• Regulatory objectives establish the “ground rules” for important policy debates
• Regulatory objectives can help regulators determine how to implement existing policy
• Regulatory objectives may not be able to change motives, but it can change rhetoric
They Can Help Jurisdictions Confront Issues


Using Regulatory Objectives in Policy Debates

*After global conversations, agreed to develop in 2½ years:*

- Principle-based, risk-based, proactive regulation
- Will adopt regulatory objectives
- Will accommodate new business models & enhance access to justice & affordable legal services

Canada’s largest jurisdiction is considering difficult issues
- Discussion has been framed in terms of access issues and regulatory-protection issues
- *Cf.* the US ABA 20/20 debates
When Could a US Jurisdiction Use These?

ABA Commission on Ethics 20/20

United States Court of Appeals for the Second Circuit

JAMES L. ALEXANDER, ALEXANDER & CATALANO LLC
and PUBLIC CITIZEN, INC.

THOMAS J. CARELL, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

See 634 F. Supp. 2d 239, 246, n.4 (ND NY 2007)

I cited them to 7 of 12 Fordham Authors

In more than 50% of the papers I read before the conference, I thought that regulatory objectives could have been useful:

– Benjamin Barton, The Lawyer's Monopoly - What Goes and What Stays
– Leslie Levin, The Monopoly Myth And Other Tales About The Superiority Of Lawyers
– Dana Remus, The Dangers of Deregulation
– Deborah L. Rhode and Lucy Ricca, Protecting the Profession or the Public?: Rethinking Unauthorized Practice Enforcement
– Laurel Rigertas, The Legal Profession's Monopoly and Its Consumer Protection Role
What Do I Recommend?

**Step 1: Develop a PROCESS for adopting regulatory objectives for the legal profession**
- Need broad stakeholder participation (& buy-in)
- For maximum credibility, use a committee appointed by each jurisdiction’s high court
- Circulate the drafts for comment
- *Why?* The first draft of the 2007 UK Legal Services Act omitted “protecting public interest”
- The first draft of the ABA MDP Commission Report omitted “competency” as a core value

**Step 2: Provide a Starting Point**

We recommended discussing these objectives:
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.”
What’s controversial in our proposal?

Perhaps:

• Our reference to “clients” rather than “consumers”
• The way in which we handled the concept of “promote competition”
• The way in which we treated lawyer independence
• Our inclusion of a “process” objective
• Our exclusion of a “diversity” objective

1. Protection of clients;
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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.”

(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.
Conclusion

- **US jurisdictions should adopt regulatory objectives for the legal profession**
  - The process of adopting these would lead to useful discussions and debates
  - Having regulatory objectives should make subsequent policy debates more focused and useful
  - There are difficult regulatory issues on the horizon
  - Objectives could help regulators as they implement existing policy
  - Why not create a committee to work on this? 19

Thank you!
To Read More About It…


Laurel Terry’s Publications by Topic:

http://www.personal.psu.edu/faculty/l/s/lst3/

Presentations Page:

http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm

2007 UK Legal Services Act, Sec. 1,


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My Presentations Webpage:

- Global Developments in general (See 1:11, 9:08 and 11:09) (See also 2008 Service Providers article: “The Legal World is Flat”, and other “Global Legal Practice”

  To read my law review articles for reference on the topics listed below, please visit my “Publications By Topic” section of my webpage

- Alternative Business Structure (ABS) developments (including the UK’s Legal Services Act 2007, Australia’s publicly traded law firms, EU, and OECD developments

- Antitrust initiatives directed towards the legal profession, including the EU’s Professional Services Competition Initiative (See 1:08, 4:09)

- the APEC Legal Services Initiative (See 10:09)

- Australian Legal Profession Developments (See 5:08, 7:09)

- the Bolage Process (See 3:06, 4:05; see also 1:11)

- Classification Systems for Counting Legal Services (See 10:08, 4:07)

http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm