



## ***Regulatory Objectives for the Legal Profession***



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**Prof. Laurel S. Terry (LTerry@psu.edu)  
Penn State Dickinson School of Law  
Carlisle, PA**



## **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”*



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## 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

British Columbia  
LEGAL PROFESSION ACT  
[SBC 1998] CHAPTER 9  
3 Object and duty of society

Lawyers and Conveyancers Act 2006  
New Zealand  
3 Purposes

Australian Government  
Attorney-General's Department  
Legal Profession National Law  
1.1.3 Objectives

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# Legal Services Act 2007

## 2007 CHAPTER 29

### PART 1

#### THE REGULATORY OBJECTIVES

#### 1 The regulatory objectives

- (1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—
- (a) protecting and promoting the public interest;
  - (b) supporting the constitutional principle of the rule of law;
  - (c) improving access to justice;
  - (d) protecting and promoting the interests of 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.

## 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

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## 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 proportionatg*).

## **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) 9

## **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



See Terry, Mark & Gordon, *Trends and Challenges in Lawyer Regulation*, 80 *Fordham Law Review* 2661 (2012) (uses this who-what-when-where-why-and-how framework to identify global issues) <sup>11</sup>

## Using Regulatory Objectives in Policy Debates



NOVA SCOTIA  
BARRISTERS' SOCIETY

October 15, 2013

### Transforming Regulation and Governance in the Public Interest

- ***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



The Law Society of Upper Canada | Barreau du Haut-Canada

FOR THE PUBLIC | FOR LAWYERS | FOR PARALEGALS  
Symposium on Alternative Business Structures for the Delivery of Legal Services

Friday October 4, 2013 | January 22, 2014  
9:00 a.m. – 4:00 p.m.

- 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.,

*Plaintiffs-Appellees-Cross-Appellants,*

- v -

THOMAS J. CAHILL, et al.,

*Defendants-Appellants-Cross-Appellees.*

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)

THE LEGAL PROFESSION'S  
**MONOPOLY**  
ON THE PRACTICE OF LAW  
October 18, 2013 | Fordham Law School

Report of Special Committee on Foreign Law Schools  
Seeking Approval under ABA Standards

**ABA**  
AMERICAN BAR ASSOCIATION  
Section of Legal Education  
and Admissions to the Bar

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## 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*
- Renee Newman Knake, *The Consumer Law Market and the First Amendment*
- 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*

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## 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<sup>15</sup>

## 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

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Ours→

1. Protection of clients;
2. Protection of the public interest;
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5. Increasing access to justice (including clients' willingness and ability to access lawyers' services);
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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;
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- (h) promoting and maintaining adherence to the professional principles.

← 2007  
UK  
LSA §1

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## 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 S. Terry, Steve Mark, Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *Fordham L. Rev.* 2685 (2012)

Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping On The Regulatory Objectives Bandwagon*, 22(1) *Prof. L.* 28 (Dec. 2013)

### 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,

<http://www.legislation.gov.uk/ukpga/2007/29/section/1> 21

## My Presentations Webpage:

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

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*To read my law review articles (or testimony) 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 5-08, 4-08)

> **the APEC Legal Services Initiative** (See 10-09)

> **Australian Legal Profession Developments**. (See 8-08; 5-09)

> **the Bologna Process** (See 3-06, 1-05; see also 1-11)

> **Classification Systems for Counting Legal Services** (See 10-04; 4-07)

<http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm> 22