

Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon

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INTRODUCTION

The thesis of this essay (and the 2012 Fordham law review article upon which it is based¹) is that it is extremely useful for a society to commit to writing the objectives of its system of lawyer regulation. This essay recommends that US jurisdictions join the growing number of jurisdictions that have adopted “regulatory objectives” for the legal profession. It proceeds from the straightforward premise that without knowing the underlying objectives of lawyer regulation, one cannot meaningfully measure whether the regulation succeeds, or is overbroad, too lenient, or too restrictive.

As the work of the ABA Commission on Ethics 20/20 and the ABA Task Force on the Future of Legal Education has shown, lawyer regulators (and legal education regulators) face difficult issues that are likely to persist.² Regulatory objectives can help regulators, the legal profession, clients, and other stakeholders face the myriad of issues ahead.

THE REGULATORY OBJECTIVES MOVEMENT

The “regulatory objectives movement” is a relatively new movement that can be traced to events culminating in the adoption of the 2007 UK Legal Services Act.³ Section 1 of that Act, which was hotly debated, set forth the regulatory objectives that the Act—and its implementation—should achieve.⁴ The UK Act was followed by initiatives in a number of other national jurisdictions that sought to identify regulatory objectives for the legal profession. For example, in 2010, Scotland set forth regulatory objectives in Section 1 of its new Legal Services Act.⁵ Regulatory objectives are found in Section 3 of the 2010 bill introduced by the Ministry of Justice in India and in Section 1 of the legal services bill currently pending in Ireland.⁶ Australia’s [Draft] Legal Profession National Law, which was agreed upon by the Council of Australian Governments (COAG) in 2011 as part of its National Legal Profession Reform, also contains regulatory objectives.⁷ Between 2010 and 2012, several Canadian provinces revised or discussed revising the objectives sections of their legal profession acts.⁸

In short, it is increasingly common to find jurisdictions adopting an explicit and succinct statement of the objectives they are trying to achieve when they regulate lawyers. US jurisdictions should take note of the new regulatory objectives movement and, for reasons set forth below, consider doing something comparable.

SOME BACKGROUND ON THE 2007 UK LEGAL SERVICES ACT THAT LAUNCHED THE MODERN REGULATORY OBJECTIVES MOVEMENT

Because the 2007 UK Legal Services Act launched the modern regulatory objectives movement, it may be useful to provide some background information about that Act. As many readers of this journal know, the 2007 UK Legal Services Act radically transformed the regulation of the legal profession in England and Wales. This Act is probably best known in the United States for having established a framework to allow alternative business structures (ABS). It authorized non-lawyer investment in law firms as well as partnerships among lawyers and nonlawyers, and permitted public trading of stock in law firms. (The ABA Commission on Ethics 20/20 discussed these UK ABS developments in the context of its work.⁹)

Although ABS may be, from a US perspective, the most high-profile aspect of the 2007 UK Legal Services Act, the 2007 Act had two other important effects. First, the Act revamped the system of lawyer discipline and complaint handling. Second, and arguably more significantly, the 2007 Legal Services Act completely restructured the regulation of the legal profession in England and Wales. The Act established the Legal Services Board (LSB), which is an oversight regulator legally required to have a nonlawyer majority and a nonlawyer chair. The Legal Services Board is responsible for appointing the “front-line regulators,” which currently include the Solicitors Regulation Authority (SRA) for solicitors and the Bar Standards Board (BSB) for barristers. Since the 2007 UK Legal Services Act was enacted and the SRA and BSB were appointed, they have issued many interesting and potentially significant consultations and research papers.¹⁰ Many areas of legal practice already have changed in England and Wales, with many more changes likely to follow.¹¹ All of these changes have been or will be evaluated through the lens of the new regulatory objectives found in Section 1 of the 2007 UK Legal Services Act.

IDENTIFYING REGULATORY OBJECTIVES IS IMPORTANT BUT NOT WITHOUT CONTROVERSY

Although it is critically important for every jurisdiction that regulates lawyers to adopt regulatory objectives, it is not always easy for a society to agree upon regulatory objectives for the legal profession. To illustrate this point, one may examine the UK and Scottish experiences.

The 2007 UK Legal Services Act emerged, in large part, from a study conducted by Sir David Clementi. His “consultation paper”, which was circulated for comments, recommended that the United Kingdom’s new legal services legislation include regulatory objectives and proposed six specific objectives.¹² Although the idea of having regulatory objectives was not particularly controversial,¹³ there was considerable controversy over the *content* of the draft objectives.¹⁴ The final Clementi report omitted any specific recommendations regarding regulatory objectives, concluding that it would be more sensible to have Parliament write detailed regulatory objectives.¹⁵

Parliament, however, was no more able to avoid controversy than was Sir David. Only after substantial discussion, debate, and stakeholder input,¹⁶ were the House of Lords and House of Commons ultimately able to agree on a set of regulatory objectives.

The final regulatory objectives, set forth in Section 1 of the 2007 UK Legal Services Act, are the following:

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

These regulatory objectives apply to the various kinds of legal professionals, such as solicitors and barristers, who are licensed in England and Wales. They do not, however, apply to the legal professions in Scotland.

Several years after the adoption of the 2007 UK Legal Services Act, Scotland adopted its own legal services bill.¹⁷ As was true in the UK, the regulatory objectives in the final version of the 2010 Legal Services (Scotland) Act are different from the objectives included in the version first introduced in Parliament.

The UK and Scottish experiences demonstrate some of the benefits of reducing regulatory objectives to writing. When the UK Department of Constitutional Affairs presented a draft Legal Services Bill to Parliament, and again when the bill emerged from its first Joint Parliamentary Committee consideration, the proposed legislation omitted what is now the first regulatory objective in the UK Act: “protecting and promoting the public interest.”¹⁸ After protest, this regulatory objective was inserted into the bill as the first regulatory objective and thereafter adopted. A similar thing happened in Scotland. During the amendment process, the Justice Committee approved an amendment to add “supporting the interests of justice” as an objective; this Committee action was affirmed by Parliament, and “supporting the interests of justice” is now included as regulatory objective 1(a)(ii).¹⁹

The initial omissions of the “public interest” objective illustrate how easy it can be to overlook an important regulatory objective and demonstrate the value of encouraging discussion and debate about the proper objectives of lawyer regulation. Lest one think that something similar could not happen in the United States, I would point out that during the ABA multidisciplinary practice debates that took place at the turn of the twenty-first century, the ABA’s initial Recommendation and Report omitted lawyer competence from the list of core values. It was only after receipt of comments pointing out this omission that lawyer competence was added as a core value.²⁰

In addition to pointing out omitted objectives for which there might strong support, there is a societal benefit to debating the desired goals of lawyer regulation. Public debate provides an opportunity for thorough airing of the issues and can lead stakeholders to have a better understanding of the issues than they would have had before the debates. The UK House of Lords, for example, had debates on important but controversial issues such as whether to prioritize the regulatory objectives and whether

to make the objective of promoting competition in the provision of legal services subordinate to several other regulatory objectives.²¹ The UK House of Commons similarly considered whether to set priorities among the regulatory objectives and whether to make the “promoting competition” objective subordinate to the first three objectives. As was true in the House of Lords, both of these proposed amendments failed, but they were important ideas, worthy of consideration.²²

As this brief history shows, a jurisdiction should not assume that if it decides to adopt regulatory objectives for the legal profession, it can do so without discussion and debate. But in my view, this type of discussion and debate should be viewed as a benefit rather than a detriment, given the importance of the topic and given some of the criticisms of the current lawyer regulatory system.²³

THERE ARE SIGNIFICANT JURISDICTIONAL DIFFERENCES IN REGULATORY OBJECTIVES

Section 1 of the final version of the Legal Services Act (Scotland) included regulatory objectives that were similar, but not identical, to the regulatory objectives found in the 2007 UK Legal Services Act.²⁴ It is too early to tell whether these semantic differences will prove to be inconsequential or something important.²⁵ Aside from these semantic differences, however, there are some significant substantive differences among the legal profession regulatory objectives that have been drafted or enacted. For example, Australia’s 2011 [Draft] Legal Profession National Law included the following objective: promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.²⁶

Although the Law Society Act in Ontario, Canada, also has a “process” provision,²⁷ most jurisdictions do not have any objectives that focus on the *process* of lawyer regulation as opposed to its *substantive goals*. Jurisdictions considering the adoption (or revision) of regulatory objectives will have to decide whether they want to focus on the regulatory *process* as well as the desired substantive goals.²⁸

There are some other significant differences among regulatory objectives that might provide the basis for important discussions.²⁹ Australia’s first objective is “providing and promoting national consistency in the law applying to the Australian legal profession.” This type of objective certainly would provoke much discussion and debate within the United States.³⁰ Australian objective 1(d) uses language not found elsewhere, identifying as an objective “empowering clients of law practices to make informed choices about the services they access and the costs involved.” Jurisdictions might find it useful to debate whether they want to adopt similar language. Another arguably significant variation is the “competition” objective in the legal services bill introduced in 2011 in India by the Ministry of Justice. This draft objective referred to “promoting healthy competition amongst the legal practitioners for improving the quality of service.” The Indian draft also explicitly referenced a duty toward the courts as it “encourage[ed] an independent, strong, diverse and effective legal profession with ethical obligations and with a strong sense of duty towards the courts and tribunals where they appear.” Examples of other variations include the objective found in several Canadian provinces to “to ensure the independence, integrity and honour of the [law] society and its members.” Until 2012, British Columbia had a regulatory objective that said it was an objective of the Law Society to “uphold and protect the interests of its members.”³¹ As these examples show, a jurisdiction considering the adoption of regulatory objectives for the legal profession may look to a number of existing models for guidance.

THE REGULATORY OBJECTIVES WE RECOMMENDED

Jurisdictions considering the adoption of regulatory objectives may also find it useful to consult the seven recommendations set forth in the 2012 Fordham law review article I co-authored with Steve Mark and Tahlia Gordon.³² When reviewing our list of recommended objectives, it is important to recognize that we recommended *concepts* rather than specific language. We did so not because we considered the language used in regulatory objectives to be unimportant. To the contrary, many of the debates that have taken place focused on language differences related to emphasis and tone. One jurisdiction may decide, for example, that given its history, context, problems, and goals, it is very important to refer to the protection of legal services “consumers,” whereas another jurisdiction may decide just the opposite, i.e., that it is very important to refer to the protection of legal services “clients.”³³ We concluded that in light of the differing contexts in different jurisdictions, it would be inappropriate for us to recommend a “one size fits all” approach with respect to specific language. We further concluded, however, that it *was* possible to recommend a set of concepts that can serve as a useful starting place or template for discussions in jurisdictions considering the issue of regulatory objectives.

Our seven recommendations drew upon the objectives we identified in various jurisdictions, but our list is different from the objectives we found in any one jurisdiction.³⁴ The seven regulatory objectives concepts we recommended were as follows:

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.”³⁵

For each of these seven objectives, the article:

- explained why we recommended that particular objective;
- identified the jurisdictions that included identical or similar concepts among their regulatory objectives; and
- identified language differences that some might find significant.³⁶

On this last point, the Fordham Law Review article provided examples of language variations, even if we did not think these variations would prove significant. For example, we highlighted some of the different ways in which the concept of protection of the public was expressed. Many jurisdictions refer to “protection of the public interest,” but Australia simply cites “protection of the public.” Some refer to the “best interests” of the public, and some add the word “generally” after stating protection of the public interest. Some jurisdictions say “protecting and promoting,” but other jurisdictions do not. Scotland separates into two separate objectives: “supporting the interests of justice” and “protecting and promoting the public interest generally.”

In addition to setting forth our list of seven recommended regulatory objectives and highlighting some of the language differences, the Fordham article identified concepts we had considered but rejected. For example, we rejected the idea of setting priorities among the regulatory objectives. Although some jurisdictions have tried to do this, most jurisdictions have chosen not to set priorities, even though the objectives may appear to compete on occasion. We consider the latter approach to be the wiser. We believe that it will be difficult to predict at the outset which objective should be given priority for any given issue or any given set of facts.

Our list also omitted the objective of “promoting competition,” which is found in many jurisdictions. We concluded that this objective was best viewed as an instrumental value rather than as an end in itself. We believe that the underlying goal that competition serves is taken into account through our recommended objective #5, which is “*increasing access to justice (including clients’ willingness and ability to access lawyers’ services)*.” We recognize, however, that antitrust authorities around the world have been interested in the regulation of the legal profession and that this might be viewed as a risky choice.³⁷

Our list also omitted the regulatory objective of “encouraging an independent, strong, diverse, professional, and effective legal profession.” We concluded that, in the context of developing objectives for lawyer regulation, this objective, similar to the competition objective, was best viewed as an instrumental value rather than as an end in itself. One reason why we value a diverse legal profession is to ensure greater access to justice for clients and citizens, which we set forth as objective #5. We also value an independent and strong legal profession so that lawyers can take their proper place in preserving the rule of law in a society, which we included as objectives ##4–5.

We considered but deliberately omitted any regulatory objective that focused on the interests of the legal profession or that referred to maintaining the monopoly of the legal profession. Even assuming that one could make a principled argument in favor of these objectives, and even if these objectives were subordinated to the other objectives, we concluded that the risks were too great that such an objective would lead to rent-seeking behavior or self-dealing on the part of the profession (or to concerns about such behavior).

Regardless of whether one agrees with all of the regulatory objective concepts we recommended,³⁸ this list of seven objectives, together with the supporting material cited in our article, should provide the basis for further discussion.

WHY SHOULD A JURISDICTION ADOPT EXPLICIT REGULATORY OBJECTIVES?

The most important “take-way point” from our 2012 article was our strong recommendation that ALL JURISDICTIONS engage in the same exercise that has happened in the United Kingdom, Scotland, Canada, Australia, Ireland, India, and elsewhere. We concluded that both the process and the results would prove valuable to jurisdictions. Our 2012 article set forth our reasons at great length, but I will briefly summarize them here.

First of all, adopting regulatory objectives may have a positive effect on regulators with respect to *prospective* lawyer regulation. Regulatory objectives help regulators understand the many different interests that are affected by lawyer regulation. In the ABS debates, for example, regulatory objectives could remind the decision-makers to consider access to justice issues, as well as client protection issues.³⁹ Regulatory objectives could also remind the decision-makers that one of the goals of a lawyer regulation system is to ensure a vibrant “rule of law” culture and to consider the impact of ABS on lawyer independence and on the rule of law. Neither of these objectives provides the answer to the difficult question of whether to permit ABS. They might, however, provide the regulators with a better appreciation of the many different factors that are worth considering.⁴⁰

As this example demonstrates, regulatory objectives will not serve as a panacea. They will not provide regulators with the answers to difficult issues or tell them how to apply those objectives in different kinds of situations. Regulatory objectives would not, for example, tell regulators whether to permit advance conflicts of interest waivers, whether to permit nonlawyer ownership in a law firm, how to regulate virtual law firms, or whether to allow lawyer involvement in litigation funding, to name just a few of the recent issues that have arisen. Regulatory objectives could, however, make regulators’ jobs easier by defining the factors that regulators should be considering. Having a concrete set of regulatory objectives that one regularly consults might also encourage regulators to think creatively and outside the box about what they could do to advance that jurisdiction’s regulatory objectives.

Regulatory objectives can also have a positive effect on individuals other than the regulatory decision-makers. If the public (and other stakeholders) have an understanding of the regulatory objectives that are implicated by particular issues, they may be more inclined to participate in the debates and better able to understand the differing positions that have been taken by various stakeholders. Another benefit is that if a jurisdiction has explicit regulatory objectives, the decision-makers in that jurisdiction can advise commentators that they will only consider arguments that are framed in terms of the regulatory objectives that the decision-makers will be using when deciding the issue.

Some may argue that this latter point is an illusory benefit because self-interested individuals, including lawyers, would simply find a way to fit their arguments into the regulatory objectives framework. For this reason—the argument would go—regulatory objectives would not lead to any meaningful change and would be a futile exercise. The responses set forth in our 2012 Fordham article were twofold. First, we were willing to believe that arguing in terms of the regulatory objectives might positively influence the conduct of professional regulators who, in the United States at least, do not have the same financial self-interest in lawyer regulation as do other stakeholders. Second, we believe that even if self-interest is the secret motivation behind certain regulatory objectives arguments, there is a benefit that arises from changing the nature of the discourse. Appropriate discourse could positively affect both the outcome and the credibility of the regulatory system.

Two examples illustrate the potential role of regulatory objectives in shaping regulator thinking and public discourse about lawyer regulation issues. The first example is inspired by *Alexander v. Cahill*, which is a twenty-first century case that challenged New York’s lawyer advertising rules. In the United States, commercial free speech is one area of the law in which concepts analogous to regulatory objec-

tives apply. If a US regulator wants to justify advertising rules that limit a lawyer's commercial speech, then under the Supreme Court's *Central Hudson* commercial speech test, that regulator must show that there is a substantial government interest in support of the regulation; that the speech restriction directly and materially advances that interest; and that the regulation is narrowly drawn. Speech restrictions that do not satisfy these requirements likely will be struck down. In *Alexander v. Cahill*, both the US District Court for the Northern District of New York and the Second Circuit struck down parts of New York's advertising rules; the district court in particular was critical of the regulators' failure to identify the substantial government interest at stake, or how the regulation directly and materially advanced those interests, or how it was narrowly drawn. In other words, the *Alexander* courts expected the parties to shape their debates and disagreements according to the "regulatory objectives" framework set forth in *Central Hudson* and were critical of the defendant's failure to do so. In view of the strong reminder that the parties received from these courts, it seems quite likely that in the future, the discourse about lawyer advertising will be framed in terms of the *Central Hudson* factors. This example demonstrates that regulatory objectives can play a powerful role in shaping regulatory debates.

The ABA debates about accreditation of offshore law schools provide the second example of how regulatory objectives might set the parameters of public debate and define the issues that a regulator considers relevant. In 2010, the ABA provided notice and sought public comments on a proposal that would allow it to apply the existing ABA accreditation requirements to a prospective law school, even if that law school was not physically located on US soil. The issue arose because the Peking University School of Transnational Law advised the ABA that it planned to seek ABA accreditation and believed that it satisfied all of the ABA's existing criteria, other than the requirement that it be located in the United States. The ABA received a significant number of comments in response to its call for comments. In the view of this essay's author, a number of these comments addressed issues that would have been inappropriate for the Council of the ABA Section on Legal Education and Admissions to the Bar to consider. If the United States had adopted regulatory objectives for the legal profession, those objectives presumably would have set the "ground rules" for the debates. Although there undoubtedly would have continued to be disagreements about whether the ABA should accredit foreign law schools, and while the motivations of some of the commentators might have been the same regardless of the existence of regulatory objectives, the existence of those objectives arguably would have shaped the debate in a way that would have made it more productive. Commentators would have had to figure out how to frame their arguments in terms of issues that the regulators and the society had determined were relevant.

A third argument in favor of regulatory objectives is that if the legal profession's primary regulators do not adopt regulatory objectives themselves, someone else may do so for them (and the results may be less satisfactory). As to who might step in, there are a number of domestic and global entities that are interested in issues related to the proper scope of regulation. These include the US Department of Justice and global entities in which the United States is active, such as the Organization for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC).⁴¹ The global

legal profession's experience with the Financial Action Task Force suggests that the legal profession and its regulators may be unhappy with the actions of non-traditional regulators who may not be sensitive to issues related to lawyer confidentiality or the rule of law.⁴²

In addition to the impact that regulatory objectives can have in providing context and direction for regulation prior to and during implementation, regulatory objectives can also have an extremely important role *after* implementation and during regulation. Regulatory objectives may be useful to regulators who must decide how to interpret, implement, and enforce existing lawyer regulations. Regulatory objectives can also help the legal profession, clients, and the public understand the reasons for the regulators' conduct—or lack of conduct.

For all of these reasons, I urge all US jurisdictions to commit themselves to developing regulatory objectives for the legal profession. Although the process may require the investment of time and resources in the short term, this investment should prove worthwhile in the long term.

WHAT PROCESS COULD A US JURISDICTION USE TO ADOPT REGULATORY OBJECTIVES?

If a US jurisdiction agrees that there is value in having regulatory objectives for the legal profession, the next question is how it should go about developing such objectives. Many of the foreign jurisdictions surveyed in our 2012 law review article included regulatory objectives in legislative acts regulating the legal profession. Given the state-based judicial system of lawyer regulation that is used in the United States, however, it would be preferable to have each state Supreme Court adopt a set of regulatory objectives.⁴³ In my view, this would minimize opposition to the objectives and increase the likelihood that courts and the legal profession would use the regulatory objectives when evaluating proposed changes to legal ethics rules or other rules affecting lawyers.

I recommend using an adoption process that is transparent and that encourages meaningful input from a wide variety of stakeholders. For example, each state Supreme Court could establish a “regulatory objectives” task force that includes lawyers, clients, judges, and representatives from consumer protection and antitrust agencies. The task force should be given a deadline by which it is expected to circulate a draft set of proposed regulatory objectives. These draft objectives should be widely circulated at in-person gatherings of lawyers, such as an annual state bar meeting, and at meetings where there are in-person gatherings of other important stakeholders, such as clients, courts, and the public.⁴⁴ After gathering written and oral comments, the regulatory objectives task force should present its final recommendations to the high court for adoption. This process should ensure that inadvertent omissions are avoided and that there is a vigorous public debate on the goals of lawyer regulation. This should lead to greater public understanding of our system of lawyer regulation. In sum, I urge US states to jump on the *regulatory objectives* bandwagon and to begin the process of developing objectives suitable for their respective jurisdictions.

Endnotes

1. Laurel S. Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM L. REV.* 2685 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003.

2. ABA COMMISSION ON ETHICS 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Oct. 24, 2013) (examining the impact of globalization and technology on the regulation of the legal profession); ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, http://www.americanbar.org/groups/professional_responsibility/task-forceonthefuturelegaleducation.html (last visited Oct. 24, 2013) (the Task Force was established to respond to “rapid and substantial changes in the legal profession, legal services, the national and global economy, and markets affecting legal education.”) *See also* Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 *FORDHAM L. REV.* 2661 (2012) (identifying “who-what-when-where-why-and-how” issues confronting lawyer regulators).

3. Some might challenge my assertion that the regulatory objectives movement is a relatively new movement, citing the Preamble of the ABA Model Rules of Professional Conduct. In my view, however, there is a qualitative difference between the two-page, thirteen-paragraph *Preamble* found in the ABA Model Rules of Professional Conduct, on the one hand, and these concise lists of regulatory objectives, on the other hand. Those who are skeptical that this is a new movement might also note that for many years the legal profession statutes in many Canadian provinces have included a section that sets forth the duties of the Law Society, which is the primary Canadian regulator. A number of these Canadian provisions, however, do not occupy a prominent place in their respective Acts and do not appear to have been the subject of much discussion or debate. Several omit what presumably would be key objectives, such as protection of clients or the public. *See* Terry, Mark & Gordon, *supra* note 1, Appendix 2, at 2753-2758.

4. Legal Services Act 2007, c. 29 (Eng.), *LEGISLATION.GOV.UK*, available at <http://www.statutelaw.gov.uk/content.aspx?LEGTYPE=All+Primary&PageNumber=3&NavFrom=2&parentActiveTextDocId=3423426&ActiveTextDocId=3423429&filesize=4184> (last visited Oct. 24, 2013).

5. Legal Services (Scotland) Act 2010 (asp 16), § 1 (1990), available at http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf.

6. [Draft] *Legal Practitioners (Regulation and Maintenance of Standards in Profession, Protecting the Interest of Clients and Promoting the Rule of Law) Act, 2010*, § 3, GOVERNMENT OF INDIA MINISTRY OF LAW AND JUSTICE DEPARTMENT OF LEGAL AFFAIRS, available at <http://www.prsindia.org/uploads/media/draft/NALSA.pdf>; Legal Services Regulation Bill 2011 (Act No. 58/2011) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b5811d.pdf>.

7. [Draft] Legal Profession National Law 2011, ch 1, pt 1, § 1.1.3 (Austl.), available at <http://www.ag.gov.au/Consultations/Documents/NationalLegalProfessionalReform/National%20Legal%20Profession%20Legislation%20September%202011%20for%20web%20site.pdf>.

8. *See* Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 *SASKATCHEWAN L. REV.* 145, 176-177 (2013) (citations omitted). For example, Saskatchewan amended its Act in 2010; British Columbia amended its Act in 2012, and the Yukon Law Society issued a lengthy discussion paper in 2011 that asked, inter alia, whether to amend the Yukon legal profession act, including regulatory objectives. Regulatory objectives and ABS were among the topics at the 2012 Federation of Law Societies of Canada (FLSC) conference held in Yellowknife. *Id.* at nn. 153-157 and accompanying text.

9. *See* ABA Commission on Ethics 20/20, *For Comment: Issues Paper Concerning Alternative Business Structures* (April 5, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

10. LEGAL SERVICES BOARD RESEARCH, <https://research.legalservicesboard.org.uk/> (last visited Oct. 24, 2013); LEGAL SERVICES BOARD CONSULTATIONS, http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm (last visited Oct. 24, 2013); SOLICITORS REGULATION AUTHORITY, *Consultation and Discussion*, <http://www.sra.org.uk/sra/consultations.page> (last visited Oct. 24, 2013); BAR STANDARDS BOARD, *Consultations*, <https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/> (last visited Oct. 24, 2013); *Legal Services Board, Market Impacts of the Legal Services Act of 2007—Baseline Report (Final) 2012* (Oct. 2012), available at <https://research.legalservicesboard.org.uk/wp-content/media/Impacts-of-the-LSA-2012-Final-baseline-report.pdf>.

11. For solicitors, these changes include the issuance of ABS licenses, the switch to an entity-based system of regulation, even for solo-practitioners, and the issuance of a new ethics handbook that uses outcomes-focused regulation. See generally UK SOLICITORS REGULATION AUTHORITY, <http://www.sra.org.uk/home/home.page> (last visited Oct. 24, 2013).

12. David Clementi, *Consultation Paper: Review of the Regulatory Framework for Legal Services in England and Wales*, LEGAL SERVICES REVIEW (Mar. 2004), (archived content), available at http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf. The six objectives set forth in the consultation report were: (1) maintaining the rule of law; (2) access to justice; (3) protection and promotion of consumer interests; (4) promotion of competition; (5) encouragement of a confident, strong and effective legal profession; and (6) promoting public understanding of the citizen's legal rights. *Id.* at 19-21. For additional information on the history of the UK Act, see Judith Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53 (2008). See also LEGAL SERVICES BOARD, *History of the Reforms*, http://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm (last visited Oct. 24, 2013).

13. See David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report*, THE NATIONAL ARCHIVES (Dec. 2004), (archived content), at para. 6 (“Almost all respondents appeared to support the view that the Regulator of legal services should operate to a set of clearly defined objectives.”), available at <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/report/chapter-a.htm>.

14. *Id.* at para. 8-14 (summarizing comments). He offered the following overall summary in paragraph 8:

In terms of the appropriateness of the six objectives set out above, most respondents to the Consultation Paper felt that those identified were broadly the right ones. Some respondents took the view that the objectives did not fully cover all of the key issues. They proposed minor changes to the regulatory objectives set out in the Consultation Paper. In most cases these sought to expand on, or give additional emphasis to, existing parts of the text which supported each objective. Where additional objectives were put forward by respondents they were for the most part either subsets of the objectives set out above, or the result of a combination of some or all of those objectives. However, a number of comments provided insights which merit particular consideration.

15. *Id.* at para. 14.

As already mentioned, a number of respondents have proposed minor changes to the regulatory objectives set out in the Consultation Paper and to the text which supports each objective. However, it has not been the intention of this Chapter to draft precisely the necessary objectives. The precise wording of statutory objectives would be subject to detailed analysis by Parliamentary draftsmen, and subsequent examination by Parliament itself. Whilst I do not believe it sensible to attempt that detailed analysis here, I do believe that the six objectives set out in this Chapter can provide the core around which a regulatory framework for legal services can be built.

16. See Terry, Mark & Gordon, *supra* note 1, at 2697-2702.

17. See Scottish Act, *supra* note 5. See also Terry, Mark & Gordon, *supra* note 1, at 2702-2703.

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

19. See Terry, Mark & Gordon, *supra* note 1, at 2702-2703.

20. See, e.g., American Bar Association, Commission on Multidisciplinary Practice, *Recommendation and Report to the House of Delegates* (July 2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html ("It is undeniable that competence is a core value of the legal profession and the Commission's original recommendation should have so identified it").

21. See Terry, Mark & Gordon, *supra* note 1, at 2700-2701, n. 73.

22. *Id.* at 2701, n. 76.

23. See, e.g., Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STANFORD L. REV. 1689 (2008).

24. Section 1 of the Scottish Act, *supra* note 5, states:

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

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

25. The differences between the UK and Scottish objectives include the following:

(1) the Scottish Act refers to protecting and promoting the public interest generally, whereas the UK Act omits the word “generally”;

(2) the Scottish Act adds “supporting the interests of justice” to the objective about supporting the constitutional principle of the rule of law;

(3) the Scottish act seeks to “promote” access to justice, whereas the UK Act aims to “improve” access to justice;

(4) the Scottish Act refers to promoting a “varied” legal profession whereas the UK Act speaks of promoting a “diverse” legal profession;

(5) the Scottish Act omits the objective of increasing public understanding of the citizen’s legal rights and duties; and

(6) the Scottish Act includes a provision not found in the UK Act, which is “encouraging equal opportunities.”

For a discussion about whether the differences between the UK and Scottish objectives are significant, see Terry, Mark & Gordon, *supra* note 1, at 2703.

26. See Australia, *supra* note 7, at §1(e). See *id.* at 2759.

27. See Law Society Act, RSO 1990, c. L.8, at 4.2(4) (requires the regulating authority “to act in a timely, open and efficient manner”), available at <http://www.canlii.org/en/on/laws/stat/rso-1990-c-18/latest/> (last visited Oct. 24, 2013).

28. One reason why a US jurisdiction might want to adopt this type of *process* regulatory objective is that if it doesn’t adopt this type of process regulatory objective itself, someone else may do so (and the legal profession’s regulators may be reluctant to have other entities take an active role in lawyer regulation). For example, the provincial governments in Manitoba and Nova Scotia, Canada adopted legislation that applies to the legal profession (and other professions) and that require “fairness, openness and transparency” in the admission processes of these professions. The inclusion of the legal profession in this legislation was controversial. See Terry, Mark & Gordon; *supra* note 1, at 2706.

29. Unless otherwise indicated, the objectives discussed in this paragraph are found in Appendix 2 to Terry, Mark & Gordon, *supra* note 1, at 2751-2760.

30. This type of debate emerged in the context of hearings held by the ABA’s Ethics 2000, MJP, and Ethics 20/20 Commissions. See generally AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, COMMITTEES AND COMMISSIONS, http://www.americanbar.org/groups/professional_responsibility/committees_commissions.html.

31. See Legal Profession Act, S.B.C. 1998, c. 9. Section 3 was amended in 2012. A red-line version showing the changes is available at this link: <http://www.lawsociety.bc.ca/docs/publications/ebrief/LegalProfessionAct-Bill40.pdf>. Among other things, the 2012 amendments deleted the provision that said that one of the objects of the law society was to “uphold and protect the interests of its members.”

32. See Terry, Gordon & Mark, *supra* note 1.

33. See, e.g., Terry, Gordon & Mark, *supra* note 1, at Appendix 2 (Australia and India refer to the protection of “clients,” whereas the United Kingdom, Scotland, New Zealand, and Ireland refer to the protection of “consumers”).

34. Our article explains why we believe our list selects the best objectives from the many existing examples.

35. *Id.* at 2734-2742 and at Appendix 1 (recommending the adoption of seven regulatory objectives concepts).

36. *Id.*

37. *See, e.g.*, Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT'L L. & BUS. 1, 4-10 (2009) (discussing a number of antitrust initiatives that have focused on the legal profession). *See also* US Department of Justice, Antitrust Division, *Comments to States and Other Organizations*, available at <http://www.justice.gov/atr/public/comments/comments-states.html> (last visited Oct. 24, 2013) (includes links to a number of comment letters to states regarding their UPL or lawyer advertising rules).

38. If you want an activity to liven up a gathering of lawyers or start a class-discussion, ask those gathered to write down what they think are the goals of lawyer regulation and then compare the results. If your experience is similar to mine, you will find that you and the other participants provided different answers to this seemingly simple question. Some of these differences may just be semantic. But others may be more significant. You may find that some participants identified regulatory goals that you hadn't thought of (but now wish you had). Or that some participants identified goals with which you disagreed.

39. Access to justice was one of the primary goals behind some of the UK changes, including access to justice. Regardless of whether you believe that ABS will provide greater access to justice, it is clear that access to justice is also a concern of US clients. *See, e.g.*, Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010) (an analysis of empirical evidence about the American public's experience with civil justice problems).

40. One of the main arguments cited in the UK in support of ABS was that it would promote greater access to justice. One of the main arguments in the US against ABS is that it would undermine lawyer independence and impair our system of justice and rule of law.

41. *See, e.g.*, OECD, REGULATORY REFORM, <http://www.oecd.org/regreform> (last visited Oct. 24, 2013); OECD, MEASURING REGULATORY PERFORMANCE, <http://www.oecd.org/gov/regulatory-policy/measuringregulatoryperformance.htm> (last visited Oct. 24, 2013); OECD, THE APEC-OECD CO-OPERATIVE INITIATIVE ON REGULATORY REFORM, <http://www.oecd.org/gov/regulatory-policy/theapec-oecdco-operativeinitiativeonregulatoryreform.htm> (last visited Oct. 24, 2013).

42. *See generally* Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 3 (2010); *FATF Symposium Issue*, 2010 J. PROF. LAW. 1 (2010) (includes articles reflecting Canadian, EU, UK, and developing country perspectives).

43. *See, e.g.*, ABA Commission on Multijurisdictional Practice, *Resolution 201A* (Adopted Aug. 2002), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf> ("RESOLVED, that the American Bar Association affirms its support for the principle of state judicial regulation of the practice of law.").

44. In order to solicit the views of potential clients, for example, the court might try to reach out to different groups that might represent different kinds of clients. For example, to reach corporate clients, courts might circulate the draft regulatory objectives to groups such as the Association of Corporate Counsel or the American Chamber of Commerce. To reach individual clients, the courts might circulate the draft regulatory objectives to groups such as Consumers Union, AARP, and Public Citizen.