

Chapter 12

GLOBALIZATION AND REGULATION

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Substantial change in the regulatory structure governing U.S. legal practice appears inevitable, compelled by the continuing transformation of the practice environment itself. The specifics of that change are as yet unclear, but its predictable scope has profound implications for the ways in which lawyers work. This chapter will identify some of the forces already creating pressure for regulatory changes across the United States, summarize the regulatory reformation that has taken root elsewhere in the world, and highlight pressing issues that U.S. lawyer regulators must confront soon in response to a rapidly evolving legal industry. It will conclude by offering some predictions about the future course of lawyer regulation in the United States.

I. Forces of Change

One could devote volumes to the professional, economic, regulatory, and consumer impacts of the forces of change bearing down on U.S. lawyers

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and legal practice. Technology, for example, has fundamentally transformed the ways in which lawyers practice. It is likely to continue to do so—only at an increased pace. Commentators such as Richard Susskind have predicted that the profession is likely to see more change in the coming twenty years than it has seen in the past 200 years. Professors John McGinnis and Russ Pearce have written about the radical change in legal practice in the near future as a result of greatly improved “machine intelligence.” If only half of what these commentators predict comes true, the implications for legal services and lawyer regulation are profound.

As is already evident in the legal services marketplace, the legal technology revolution means that lawyers will increasingly face competition not only from other lawyers, but from nonlawyer providers. Professor Ray Campbell was one of the first legal academics to write about the application of the theory of “creative disruption” to legal services. Among other things, this theory posits that “disruptive” new entrants are likely to come into a market when consumers are underserved (because they cannot afford the existing services or product) or overserved (because they are paying for more product or services than they want or need).

One can clearly see this theory in operation as corporate clients seek cheaper alternatives to their existing legal services providers and as new market entrants vie to serve previously unserved markets. For example, a prospectus filed by the legal document preparation company LegalZoom noted that in 2011, more than 20 percent of new California limited-liability companies were formed using its online legal platform. The *ABA Journal* reported that in 2013, \$458 million had been invested in legal services “start-up” companies, with more investment expected in 2014. In 2014, Harvard Law School sponsored a program devoted to disruptive innovation in the legal services market and now lists the study of “disruptive innovation” as one of its ongoing projects.

Although lack of easy access to affordable legal services is not a new problem, there seems to be a surge of new interest in addressing the problem. As noted above, some of this interest stems from for-profit companies seeking untapped opportunities in what is viewed as a fragmented legal market. From a different vantage point, lawyer regulators seem more focused than ever on addressing the major gaps in access to legal

services. These gaps appear on both the transactional and litigation sides. In the United States and elsewhere in the world, it is not uncommon for certain types of courts to have 80 percent of parties appearing pro se. On the transactional side, many individuals do not have meaningful legal protection or assistance.

Another powerful change agent for the legal profession is the post-recession assertiveness of clients in communicating dissatisfaction with their legal bills and with billing structures that they perceive as inefficient or that place billing risk on the client rather than the lawyer. Technology has given clients new tools and analytics to better measure the output and value they receive from lawyers. These developments have created downward billing pressures and have also contributed to the growth of fee structures other than hourly billing. Technology developments have contributed to the dramatic increase in the number of nonlawyer providers—both within the United States and in other countries—that now occupy the legal services “space” that was traditionally dominated by U.S. lawyers.

Increased mobility and the multinational dimension of contemporary business constitute additional and potent drivers of change. It is the rare business client these days who has legal needs confined to a single community. Business clients buy and sell products and services not only throughout their state, but across the nation and the world. Individual clients are also increasingly likely to have legal needs and interests that transcend state and even national borders. And the U.S. population itself is looking more like the larger world. For example, whereas the 1960 census found that approximately one-third of U.S. jurisdictions had a foreign-born population of 5 percent or more, by 2010 approximately two-thirds of states had a foreign-born population of 5 percent or more. These changes in client needs have dramatically influenced U.S. legal practice. One is not at all surprised to see law firms that have offices not only in multiple cities, but in multiple states and countries. It is common for lawyers to travel on business to jurisdictions different from the one where they were first licensed and to work with lawyers licensed in different jurisdictions. Indeed, the United States is the largest “exporter” of legal services—a 2013 U.S. government report noted that its \$7.5 billion

of exports in 2011 accounted for 39 percent of the global total. Moreover, despite the recession, global growth continues. In short, globalization is a phenomenon that has fundamentally reshaped legal practice and will continue to do so, especially in light of predictions about the shift of global GDP towards the “BRICS” countries of Brazil, Russia, India, China, and South Africa and other growing economies.

One consequence of globalization has been an increase in the number of entities that directly or indirectly regulate the legal profession. Rather than a unique, self-contained, and largely self-regulated profession, lawyers are coming to be viewed as just one of many kinds of legal service providers subject to more general sources of regulation (See Laurel Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROFESSIONAL LAWYER 189 (2008).)

There is less global tolerance today of “lawyer exceptionalism” in regulation. Some of the new “regulators” include the World Trade Organization, the Financial Action Task Force, antitrust regulators, and the so-called “Troika,” a term referring to the International Monetary Fund, European Central Bank, and European Commission, which have pressed for legal profession regulatory changes in European countries experiencing financial distress. A significant amount of “private ordering” has also emerged, whereby discrete categories of legal services providers—or others such as their insurers, advisors, or major clients—have a significant impact on the structure and delivery of legal services, sometimes equal to or more than the impact of their official regulators. Private ordering occurs both informally and formally. In England and Wales, for example, there have been suggestions that the largest City (i.e., London) firms might apply to the Legal Services Board to have their own “front-line” regulator, who is better equipped to address their particular situations.

A final, prominent change in the ways lawyers do business is the elevated importance of networks as a method of interaction. These networks include formal lawyer or law firm networks such as Lex Mundi and ad hoc networks of lawyers and firms. Other examples include international networks of legal academics (think Law and Society or the International Association of Legal Ethics) and regulators (such as the International Conference of Legal Regulators, which first met in 2012).

Although this section barely scratches the surface in describing the forces of change at play in the legal profession, it should help place the sections that follow in a useful context.

II. Regulatory Changes Elsewhere in the World

Dramatic changes in lawyer regulation have taken place outside the United States. These changes suggest the direction that U.S. changes might take.

Some of the most profound changes to lawyer regulation have taken place in the United Kingdom. The 2007 U.K. Legal Services Act introduced a new system of regulation that put the ultimate responsibility for lawyer regulation in the hands of the new Legal Services Board (LSB), which is statutorily required to have a nonlawyer majority and a nonlawyer chair. The LSB appoints the “front-line” regulators, which currently include the Solicitors Regulation Authority (SRA), regulating solicitors, and the Bar Standards Board, regulating barristers. With the LSB’s approval, these front-line regulators have made a number of significant changes to lawyer regulation. For example, the Solicitors Regulator Authority has (1) shifted its regulatory approach to one that regulates entities in addition to individuals; (2) adopted a system of “outcomes-focused” regulation; and (3) employed a risk-based approach to regulation.

In addition to changing the regulatory structure, the 2007 Legal Services Act dramatically altered the system of lawyer discipline. There is a new entity—the Legal Ombudsman—responsible for handling what are called “service” complaints as opposed to “conduct” complaints.

The third major change in the 2007 Legal Services Act was to authorize alternative business structures—the so-called ABSs—in order to permit outside investment and ownership in law firms. The U.K. SRA is an authorized ABS licensing body: by mid-2014 it had issued more than 300 ABS licenses to a range of entities. *See* Chapter 13, Mark S. Smith, “A Sea Change in England,” p. 171.

Those who study lawyer regulation have also taken note of the revolutionary changes in Australia. Although the U.K. ABS structures have probably received more notice in the United States, the Australian developments predate the U.K. developments. Several Australian states permit what are called “incorporated legal practices,” or ILPs, that can have

outside ownership or investment. The world's first publicly traded law firm is Slater & Gordon, a New South Wales ILP that went public on the Australian Stock Exchange in 2007 now own an ABS in the United Kingdom. The ILP legislation in New South Wales requires ILPs to have "appropriate management systems." This legislative requirement has been used proactively by Australian regulators to ensure that ILPs review their management systems and compliance level with respect to ten common problem areas (such as fees, communication, conflicts, and deadlines). Empirical studies have shown that there was a two-thirds reduction in client complaints after implementation of the "appropriate management systems" requirement. See Chapter 14, Tahlia Gordon and Steve Mark, "The Australian Experiment: Out with the Old, in with the Bold," p. 185.

Canada is a third jurisdiction American lawyers might look to when considering potential changes to U.S. lawyer regulation. See Chapter 15, Simon Chester, "Canada: The Road to Reform," p. 197.

For example, a number of Canadian provinces now regulate—or are considering regulating—law firms as well as individual lawyers. Ontario, which is Canada's largest province, has successfully regulated paralegals for more than five years, and other provinces are considering approaches to regulating paralegals or other nonlawyer providers.

In addition to law firm and paralegal regulation, at the time this chapter was written, one province has considered an alternative business structure system in order to promote greater access to legal services, another province had circulated an ABS proposal for consultation, and the national umbrella organization of Canadian regulators had decided to address this topic. There have also been discussions—and action—within Canada to (1) move toward "outcomes-focused regulation" and to (2) use a more proactive system of regulation, similar to what is used in New South Wales, Australia. Nova Scotia, for example, voted to develop a regulatory regime that is principle-based, risk-based, proactive, able to encourage and accommodate new business models, able to enhance access to justice and affordable legal services, and based on appropriate management systems involving new ways of engaging with law firms to achieve outcomes.

These three are not the only jurisdictions where changes to lawyer regulation systems have been made or seriously proposed. The *troika* has

created pressure for regulatory change in a number of countries throughout Europe. Thus, as one considers the likely future changes to U.S. lawyer regulation, it can be instructive to consider these changes in other nations and the forces that underlie them.

III. Regulatory Changes in the United States

The United States has witnessed changes in its regulatory landscape, although they are not yet as far-reaching as those found elsewhere in the world. For example, the American Bar Association has responded to globalization in several ways, including a 2013 Formal Opinion of the Standing Committee on Ethics and Professional Responsibility on “Division of Legal Fees with Other Lawyers Who May Lawfully Share Fees with Nonlawyers”; the 2013 adoption of additional policies regarding foreign lawyer practice in the United States; and the 2013 adoption of guidelines for an International Legal Regulatory Information Exchange. A number of states already have implemented the ABA’s model policies, and other jurisdictions are considering them. In January 2014, the ABA issued a revised version of the “State Toolkit,” based on the Georgia experience; it is designed to help jurisdictions recognize the reality of globalization, the impact of globalization on that jurisdiction’s residents, and the importance of proactively developing a regulatory response to globalization. Among other things, it recommends that states develop policy positions for each of the five methods by which foreign lawyers might actively practice in the jurisdiction and provides links to the ABA’s inbound foreign lawyer policies.

In addition to regulatory changes driven by the global mobility of lawyers, U.S. states have begun to see regulatory changes responsive to perceived structural gaps in access to legal services—a major impetus for change in some other countries. Examples of these kinds of changes include the Limited License Legal Technician system adopted by Washington state, the “Navigator” program instituted in select New York courts, and the proposals put forward in California to allow expanded nonlawyer practice or possibly joint practice. Other changes may be on the horizon. For example, the January 2014 report of the ABA Task Force on the Future of Legal Education included a call for dramatic regulatory change:

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The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four years of college plus three years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.

The ABA Commission on the Future of Legal Services, which was established in August 2014, undoubtedly will address many of these developments.

A final noteworthy development is the increased involvement of U.S. regulators in international networks. For a number of years, domestic networks have brought together lawyer regulators from various U.S. jurisdictions. These domestic networks provide an opportunity for regulators to exchange ideas and experiences, learn from one another, and in some cases develop joint policies that might take the form of resolutions, policy guidelines, or bar admission products. Some of the most important networks of lawyer regulators include the Conference of Chief Justices (CCJ), which includes the chief justice or chief judge from each jurisdiction's highest court; the National Conference of Bar Examiners (NCBE); and the National Organization of Bar Counsel (NOBC), which includes disciplinary and regulation counsel from across the United States.

These domestic lawyer regulator networks not only have had a large impact on U.S. regulatory policy, but they are now increasingly engaged with counterpart regulators and networks outside the United States. For example, the CCJ has adopted resolutions that endorse cooperation with

regulators in Europe and in Australia. It was these CCJ resolutions that provided the background for the 2013 ABA resolution endorsing International Legal Regulatory Information Exchange. The NCBE regularly invites foreign speakers to its annual bar admissions conference and has participated in the conferences of the International Conference of Legal Regulators. The NOBC not only includes Australian and Canadian members who interact with NOBC members, but its 2013 conference also had joint sessions with the International Conference of Legal Regulators. Going forward, its conferences seem poised to feature more presentations by, and dialogue with, non-U.S. regulators. One consequence of these developments is that more and more U.S. regulators have in-depth exposure to regulatory developments that take place in other nations.

IV. Predictions about U.S. Regulatory Changes

The regulatory changes elsewhere in the world to date are changes with respect to *who* regulates lawyers, *what* is regulated (individuals or firms, services or providers), *when* regulation occurs, *where* it occurs (matching a geographic-based regulation system to a world of virtual practice), *why* regulation happens, and *how* it occurs. It is highly likely that in the future, the U.S. legal profession will experience significant regulatory change in each of these respects.

With respect to *who* regulates lawyers, it is certainly possible that there will be a triggering event that would lead to federal regulation of lawyers displacing the traditional state supreme court regulation. The more likely scenario in my view, however, is that the role of the traditional state supreme court regulators will shrink over time, with a corresponding increase in the role of what might be called nontraditional regulators, including the marketplace; federal entities such as Congress, the U.S. Department of Justice, the Treasury Department, and the Federal Trade Commission; and international organizations such as the Financial Action Task Force (FATF). There will also continue to be increased private ordering.

I also would expect significant changes in *what* is regulated as U.S. states look to experiences elsewhere in the world and within the United States and as they weigh how best to respond to the gap in access to legal services. As has happened in other nations, regulation is likely to expand

from lawyers to those who provide legal services, even if that individual or entity is not a lawyer. At the same time, it is predictable that regulated legal services will shrink in proportion to the total legal services market. Some regulators may try to enforce the lawyer monopoly rules in a way that limits technology-driven delivery of legal services, but such efforts seem unlikely to prevail in the face of powerful consumer-serving technology and the reality that today's lawyers are simply not reaching many in need of legal services. Technology is usually impossible to stop, and there are many potential legal service consumers who are unserved or overserved by the current market for legal services.

We also may expect a shift in *when* U.S. lawyer regulation and oversight insert themselves into the lawyering process as more and more states recognize the benefit to clients and to the public of a proactive regulatory system. Florida, for example, recently adopted a rule that requires firms of two or more lawyers to have a written trust account plan in place for each of the firm's trust accounts. This seems to be a move in the direction of Australia's proactive management system, which has dramatically reduced client complaints in that nation. Thus, we likely will continue to see additional proactive regulation that focuses on law practice management.

Lawyer regulators in the United States, it seems certain, will have to cope with and resolve issues related to *where* they have jurisdiction as legal practice becomes more and more virtual. It is unclear how our geography-based regulatory system will adapt to a virtual practice world, but it is clear that regulators are going to have to address these issues.

Finally, it seems certain that as U.S. regulators confront the sorts of issues mentioned in this chapter, and as they increasingly are held to account by traditional and nontraditional stakeholders, these regulators will have to examine *why* they regulate and the goals and rationale of the current regulatory system. (See Laurel Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22(1) PROF. L. 28 (Dec. 2013)). As dynamic forces of change take hold of and reshape the legal industry, responsible lawyer regulators will follow the lead of their international counterparts by explicitly articulating their regulatory objectives and then using those objectives to frame their analysis whenever new issues arise. While the adoption of regulatory objectives will not in

themselves provide clear answers on policy choices, they should help the legal profession, its regulators, clients, the public, and other stakeholders better grapple with the regulatory challenges that lie ahead.

V. Conclusion

In sum, it is impossible to know exactly which regulatory changes will gain a firm foothold throughout the United States. It is all but certain, however, that change will come, and the impact will be dramatic. Some have predicted that we will see more change in the next two decades of legal practice than we have seen in the past 200 years. The same is likely to be true with respect to regulation of legal services. As U.S. regulators and stakeholders consider changes going forward, they should consider what it is they are trying to achieve through the lawyer regulatory system, the regulatory options available, and the degree to which they want the delivery of legal services to occur within the regulatory structure.

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