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(Based on a handout given to my legal ethics class)

The Global “Landscape” of Lawyer Regulation (including U.S. Developments)

This brief handout summarizes and updates information found in my law review articles on global trends in lawyer regulation.¹ In keeping with the topic of this ICLR panel, it highlights recent U.S. developments related to issues that involve the “who, what, when, where, why, and how” of lawyer regulation. It is important to remember that these issues can be independent of each other. In other words, a regulator might decide to adopt regulatory objectives (the “why” question) regardless of its views on the “when” or the “how” questions.² These issues are:

Who Regulates Lawyers: Self-Regulation versus Co-Regulation

What (or Whom) is Regulated: e.g., Entities versus individuals; Providers versus Services

When Lawyers are Regulated: Ex Ante versus Post Hac Regulation

Where Lawyers are Regulated: Geographically versus Virtually

Why Lawyers are Regulated: Using Regulatory Objectives

How Lawyers are Regulated: e.g., Outcomes-Based Regulation versus Rules; risk-based

Who Regulates Lawyers:

In recent years, there have been dramatic changes in *who* it is that regulates lawyers. The [2007 UK Legal Services Act](#) dramatically changed the identity of lawyer regulators in England and Wales. The new overarching regulator is the [Legal Services Board](#) (LSB). The LSB's first Chief Executive was a non-lawyer ([Chris Kenny](#)): the LSB is required to have a nonlawyer Chair and a nonlawyer majority. Changes in “who” regulates lawyers have taken place or been discussed in other countries. The [Legal Services \(Scotland\) Act](#) (2010) also created a new lawyer regulator. Ireland had pending [controversial legislation](#) that would remove lawyers from regulation. Pressure for this legislation reportedly has come from the so-called “Troika,” which includes the International Monetary Fund, European Central Bank, and European Commission. [The EU and others](#) have issued studies recommending separation of the regulatory and “representational” arms of bar associations. Australia has a co-regulatory system; two of its largest states recently adopted [Uniform Legislation](#) that creates a new co-regulatory system. Even in systems that have not made any changes, there is increasing discussion of the topic of *who* should regulate lawyers. One reason is because of the increasingly important role of international intergovernmental organizations such as the World Trade Organization ([WTO](#)) or the Financial Action Task Force ([FATE](#)) whose actions can affect lawyer regulation.³

¹ See Laurel S. Terry, Tahlia Gordon, and Steve Mark, [Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology](#), 80 Fordham L. Rev. 2661 (2012). See also Laurel S. Terry, [Trends in Global and Canadian Lawyer Regulation](#), 76 Saskatchewan L. Rev. 145 (2013).

² See Laurel S. Terry, [Why Your Jurisdiction Should Consider Jumping On The Regulatory Objectives Bandwagon](#), 22(1) Prof. L. 28 (Dec. 2013).

³ See Laurel S. Terry, [Legal Profession Efforts to Combat Money Laundering & Terrorist Financing](#), New York Law School Symposium on Combating Threats to the International Financial System: The Financial Action Task Force, 59 N. Y. L. S. L. Rev. 487 (2014/15); Laurel S. Terry, [From GATS to APEC: The Impact of Trade Agreements on Legal Services](#), 43 Akron L. Rev. 875 (2010); Laurel Terry, [The Future Regulation of the Legal](#)

This issue of who regulates lawyers is also relevant in the U.S. Until his retirement, Senator Carl Levin regularly introduced federal legislation that included aspects of lawyer regulation. There have been [proposals](#) in Arizona and South Carolina to change who it is that regulates lawyers; the South Carolina bill placed authority for bar admission and attorney discipline in a newly created Commission under the Department of Labor. The ABA has a task force devoted to WTO and [trade in services issues](#) and another devoted to [FATF issues](#). The U.S. currently is preparing to undergo its 4th FATF Mutual Evaluation.

What (or Whom) Is Regulated:

A second development is the issue of what exactly it is that lawyer regulators should be trying to regulate. One of the key issues here is whether regulators should be trying to regulate services or trying to regulate providers. In the past, there was a more complete overlap between these concepts. Legal services were the things provided by lawyers. There is, however, an increasing likelihood of divergence between these concepts. What we might call “legal services” are increasingly provided by those who are not licensed lawyers. [Legal365](#) and [LegalZoom](#), arguably provide legal services, yet they are not lawyers. The ABA recently reported that investors spent \$458million on legal services startups in 2013. [Many](#) are now talking about the impact of [creative destruction](#) on the legal services market.

One of the most controversial developments with respect to this issue of “what” is regulated is the regulation of [alternative business structures \(ABS\)](#) by the Solicitors Regulation Authority (SRA), which has jurisdiction over solicitors in England and Wales. Those [who have invested in ABS](#) include The Cooperative, hedge funds, a Big 4 accounting firm, British Telecom, and Lexis. Although the UK ABS developments probably have received more publicity in the US, Australia was the first jurisdiction to have a [publicly-traded law firm – Slater & Gordon](#). (Slater & Gordon is now a large presence in the UK as well).

Questions about “what” should be regulated also include issues related to whether regulation should focus on individuals (such as a lawyer or a lawyer or paralegal), on entities (such as a law firm or ABS), or both. The [Law Society of Upper Canada](#), for example, has [successfully](#) regulated paralegals for the past five years. The SRA has mandatory entity regulation and requires each firm (even if it has only 1 solicitor) [to designate](#) their both a Compliance Officer for Legal Practice (COLP) and a Compliance Officer for Finance and Administration (COFA). Some Australian states require certain firms to engage in [self-assessment](#). There have been [calls for](#) entity regulation in Canada and several provinces have or are considering entity regulation. For example, in addition to regulating paralegals, the Law Society of Upper Canada [i.e. Ontario], which has the most Canadian lawyers, [has created a Task Force to](#) study compliance-based entity regulation. is now considering the issue of entity regulation. It also has an ABS Task Force. The Law Society’s “benchers” authorized the release of [a Feb. 2014 ABS consultation report](#) and a September 2014 [consultation](#) but it has encountered [some pushback](#) in the comments it received. British Columbia and Nova Scotia have the power to regulate law firms as well as individual lawyers. After a “from the ground up” review of its lawyer regulatory system, in October 2013, Nova Scotia agreed to reform lawyer

[Profession: The Impact of Treating the Legal Profession as “Service Providers,”](#) 2008 J. Professional Lawyer 189 (2008).

regulation. It currently is in the [implementation phase](#) of its triple P system, which is intended to be proactive, principled, and proportionate.

In the U.S., there have been developments on several different “fronts.” After more than [ten years of effort](#), which was led largely by its Supreme Court, Washington had its inaugural class of Limited License Legal Technicians (LLLT) take the required exams and begin their 3,000 hours of supervised work. [Other states](#) are talking about or exploring related ideas. California has issued a [draft proposal](#) for an LLLT pilot project. [New York](#) has adopted its Navigator program in which non-lawyers help clients at the courthouse. Some of the recent developments have been motivated by access to justice concerns and the large gap between those who need legal services and those who receive them

There also have been some developments in the U.S. related to entity regulation. For many years, both New York and New Jersey, alone among U.S. states, have had the power to discipline law firms. Although there have been a few discipline cases, these two states have not, in general, exercised this power extensively or proactively. There are several states, however, that now seem interested in the possibility of more proactive lawyer regulation, including the possibility of entity regulation. (It is worth noting that the issues of “what” is regulated and “when” regulation occurs sometimes become intertwined.) Professor Ted Schneyer [called for](#) law firm discipline or “entity regulation” many years ago. In a recent article, he coined the term [proactive management based regulation \(PMBR\)](#) to describe some of the recent regulatory developments such as those that have taken place in Australia. PMBR involves both the “what” issue and the “when” issue because it has proactive entity-based regulation. The 2015 ICLR Annual Meeting materials include an “FAQ” document prepared by the entity regulation committee of the U.S.’ National Organization of Bar Counsel (NOBC). In June 2015 in Denver, the Colorado Office of Regulation Counsel and others sponsored a workshop for interested regulators on the topic of proactive regulation.

Another set of U.S. developments related to “what is regulated” concern the types of individuals who are regulated. For example, in 2014, the [ABA Task Force on the Future of Legal Education](#) issued a report that included the following as part of one of its [key findings](#): “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.” In August 2014, the ABA established the [Commission on the Future of Legal Services](#) [not lawyers] which has been asked, inter alia, to “propose new approaches that are not constrained by traditional models for delivering legal services and are rooted in the essential values of protecting the public, enhancing diversity and inclusion, and pursuing justice for all.” This [Commission](#) is actively exploring the issue of what it is that should be regulated. The Vice-Chair of this Commission recently wrote an article proposing that there we should think about the [“law of legal services”](#) rather than simply referring to the “law of lawyering.”

A fourth issue related to “what is regulated” concerns what might be called nontraditional providers. There have been challenges to the ethics rules that prohibit fee sharing and

partnerships between lawyers and nonlawyers and challenges related to the scope of the legal profession's monopoly. For example, several years ago the law firm of Jacoby & Myers filed [three federal lawsuits](#) challenging the state ethics rules that bar outside investment in law firms. At least one of these lawsuits is still pending. In some U.S. jurisdictions, [complaints](#) have been filed against LegalZoom alleging that it has engaged in the unauthorized practice of law. These issues are still being resolved on a [state-by-state basis](#), although a February 2015 Supreme Court decision applying federal antitrust laws to state [dental regulators](#) is likely to affect the types of arguments that are raised. For example, following that decision, [Legal Zoom filed a \\$10.5million antitrust suit against the North Carolina Bar Association](#), citing this case and challenging its approval process for prepaid legal plans. When analyzing this issue of whom or what is regulated, it may be useful to remember: 1) the issues of what it is that is regulated is related to the issue of the scope of the legal profession's monopoly – i.e., UPL; 2) the scope of this monopoly varies tremendously from [country-to-country](#); and 3) the size of the lawyer monopoly is one of five issues that had been targeted by a number of [antitrust authorities](#) around the world. As this brief review illustrates, there are a number of U.S. developments related to the issue of “what is regulated.”

When Lawyers are Regulated: Proactive versus Reactive Regulation

As noted above, a third contemporary issue concerns the timing of regulation. Several Australian jurisdictions have adopted a regulatory system that emphasizes prevention rather than simply reacting to lawyer misconduct and poor practice. For example, if a lawyer in New South Wales, Australia chooses to practice in an [incorporated law practice](#) (ILP), which has tax advantages, that lawyer is required to complete a “self-assessment” that asks the lawyer to evaluate the ILP's compliance level with respect to [ten common problem areas](#). An [empirical study](#) concluded that after implementation of this system, client complaints were reduced by approximately two-thirds and most of the surveyed ILPs [reviewed or changed their systems](#). [Nova Scotia](#) is in implementing proactive regulation.

This topic of “when” regulation should occur is of increasing interest in the U.S. It was featured at a [Plenary Session](#) at the ABA's 2014 annual ethics conference. [I have suggested](#) that it is possible to achieve proactive regulation without entity-based regulation by using ABA Model Rule of Professional Conduct [5.1](#) (and am currently writing a law review article on this topic). Colorado may adopt this approach in the future. A number of U.S. regulators considered the topic of proactive regulation during a June 2015 Workshop held in Denver.

Where Lawyers are Regulated: Geographically versus Virtually

Regulators traditionally have regulated those who were licensed in their jurisdiction (and perhaps those who practiced in their jurisdiction [even if they weren't licensed there](#).) As technology has expanded and lawyers [practice in a virtual space](#), it has become increasingly difficult for regulators to determine the scope of their jurisdiction (and for lawyers to know the jurisdictions in which they are subject to regulation). The broader the lawyer monopoly, the more difficult these issues can be. Because technology is global, this is an issue that regulators (and lawyers) around the world are having to confront.

U.S. regulators are among those interested in these kinds of issues. For example, technology was a major focus of the work of [the ABA Commission on Ethics 20/20](#). Its work

addressed [some but certainly not all of the regulatory issues](#) that technology has created. The [ABA Commission on the Future of Legal Services](#) is continuing to study related issues.

Why Lawyers are Regulated: Regulatory Objectives and Purpose Statements

The legal profession faces a number of interesting and challenging developments. For some of these topics, a regulatory response may be appropriate. It is difficult to know how to regulate, however, unless one knows what it is that one is trying to achieve. [Section 1](#) of the 2007 UK Legal Services Act provided an answer to this “why” question by setting forth its “regulatory objectives.” Although other jurisdictions, [such as some in Canada](#) (p. 105 on the link), previously had adopted regulatory objectives, the 2007 LSA has proven influential because of the prominence of Section 1 and the debates about its content. The 2007 LSA has prompted [additional legislation](#) and discussion about regulatory objectives.

U.S. regulators are increasingly interested in the topics of regulatory objectives. [I have called upon U.S. jurisdictions](#) to adopt regulatory objectives for legal profession regulation. The Regulatory Opportunities Working Group of the ABA Commission on the Future of Legal Services is looking into the issue of regulatory objectives and is expected to issue a draft soon. The PBA Legal Ethics Committee recently voted to create a committee to address this issue.

How Lawyers are Regulated: Outcomes-Based Regulation versus Rules

October 6, 2011 marked the effective date of the Solicitors Regulation Authority’s new [“Handbook”](#) for solicitors in England and Wales. This handbook uses an “outcomes-based” approach to regulation, rather than detailed prescriptive rules. The SRA describes [outcome based regulation](#) as follows: “Outcomes-focused regulation focuses on the high-level principles and outcomes that should drive the provision of legal services for consumers. It replaces a detailed and prescriptive rulebook with a targeted, risk-based approach concentrating on the standards of service to consumers. There is greater flexibility for firms in how they achieve outcomes (standards of service) for clients.” Other jurisdictions, such as some in Canada, also use a risk-based approach to regulation and are considering switching to a more outcomes-focused approach. In sum, there are a number of developments related to lawyer regulation.

In the U.S., there has been relatively little discussion of switching from a “rules” based system to an “outcomes based” system. However, some U.S. jurisdictions already use something of a risk-based approach in which they try to identify potential problem areas of practice or practice settings and develop appropriate resources. This was a topic of great interest during the U.S. Canadian Regulators’ networking breakfast that was held in May 2015 at the ABA’s [41st National Conference on Professional Responsibility](#).

In sum, there are a significant number of developments in the U.S. (and resources) related to the “who-what-when-where-why-and-how” of lawyer regulation.⁴

⁴ For additional information on these trends, see the articles cited in n. 1 of this handout; additional articles and presentation [slides](#) cited on Professor Laurel Terry’s personal webpage: <http://tinyurl.com/laurelterry>.