

*Regulation of Bar***ABA Commission on Future of Legal Services Floats 'Model Regulatory Objectives' Proposal**

**T**he ABA should adopt a set of “model regulatory objectives” that each state’s highest court could use in assessing its current regulatory framework and considering innovations in the delivery and regulation of legal services, an ABA commission says.

The draft report and resolution from the ABA Commission on the Future of Legal Services floats a tentative list of 10 such objectives. The commission explains that the measures are needed both to make clear the purposes underlying lawyer conduct rules and to mark a path for a future that will see increased participation by nonlawyers in providing services traditionally reserved for lawyers alone. (See box.)

**Draft ABA Model Regulatory Objectives**

- “A. Protection of the public
- “B. Advancement of the administration of justice and the rule of law
- “C. Access to information about, and advancement of the public’s understanding of, the law, legal issues, and the civil and criminal justice systems
- “D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
- “E. Delivery of affordable and accessible legal services
- “F. Efficient, competent, and ethical delivery of legal services
- “G. Protection of confidential information
- “H. Independence of professional judgment
- “I. Accessible civil remedies for breach of duties owed and disciplinary sanctions for incompetence, misconduct, and negligence
- “J. Diversity and inclusion among legal services providers and freedom from discrimination in the delivery of legal services and in the justice system”

The commission plans to have a final set of objectives ready for a vote by the ABA’s policy-making House of Delegates at the bar group’s February 2016 midyear meeting in San Diego. The deadline for submitting comments on the draft report is Oct. 30.

Lawyers not on the commission who spoke with Bloomberg BNA about the draft report expressed enthusiasm for the idea of developing model regulatory objectives that can serve as a springboard for each state to craft its own list.

One big proponent of regulatory objectives is Professor Laurel S. Terry of Penn State University–Dickinson Law. “I’m very pleased the ABA issued the draft resolution and report,” she said. “It’s useful for jurisdictions to consider what they’re trying to achieve with their regulatory systems.”

Another enthusiast is James C. Coyle who, as head of the Colorado Supreme Court Office of Attorney Regulation Counsel, is involved in a project to develop regulatory objectives and improve regulation in that state. He told Bloomberg BNA that the ABA models will create “opportunity for discussion” and that “people can vet the models for their own jurisdiction and regulatory system.”

Darrel I. Pink, who is leading an initiative to transform the regulation of the legal profession in Nova Scotia, also praised the ABA’s move to develop model regulatory objectives. A set of “high-level principles” is needed to guide regulation, Pink said. He is executive director of the Nova Scotia Barristers’ Society.

**Why They’re Needed.** The Commission on the Future of Legal Services was launched in 2014 by then-ABA President William Hubbard to examine how legal services are delivered in the U.S. and elsewhere, and to recommend innovations that improve the delivery of legal services and access to them.

As one aspect of its work, the commission has been studying regulatory innovations. From that research, it concluded that the development of regulatory objectives may be a useful first step for state supreme courts and bar authorities as they evaluate their existing regulatory system and work on regulatory changes that go beyond the traditional framework.

Nearly two dozen jurisdictions outside the U.S. have adopted regulatory objectives in the past decade, but so far no U.S. jurisdiction has done so, the draft report says.

According to the report, regulatory objectives differ from the legal profession's core values because they are geared not just to regulation of the legal profession but more broadly to cover new categories of legal services providers, including nonlawyers.

In addition, regulatory objectives are more comprehensive than core values and thus offer clearer regulatory guidance, the commission said.

The report posits numerous benefits of adopting regulatory objectives. One example given is that they help explain the purposes of regulation to the public and to those who create and administer regulations as well as those who are being regulated.

ABA models are also needed now that "legal services providers" increasingly include nonlawyers, the commission said.

"[T]he Commission believes the model regulatory objectives will be useful to guide the regulation of an increasingly wide array of legal services providers, not just lawyers," the report states.

Another benefit is that explicit regulatory objectives may help state supreme courts maintain control over regulation of legal services, according to the draft report. "[I]f supreme courts are more expressly guided by regulatory objectives, U.S. jurisdictions may be more successful in retaining judicial control over the regulation of legal services than has been true elsewhere," according to the commission.

Finally, the draft report suggests that regulatory objectives may help shore up the legitimacy of states' attempts to clamp down on the unauthorized practice of law. One purpose of regulatory objectives is to offer guidance about the basis for existing legal services regulations such as unauthorized practice restrictions, the report says.

**'Mom and Apple Pie' Concept.** It's a fairly new development that jurisdictions are explicitly adopting regulatory objectives, Terry told Bloomberg BNA.

As one example, she pointed to the UK Legal Services Act 2007, which dramatically altered regulation of legal services in that jurisdiction. In the course of drafting that law, Parliament debated the idea of regulatory objectives, and the very first section of the act contains a list of such objectives, she noted.

Terry said the idea of regulatory objectives shouldn't be controversial, considering that statutes often contain a statement of purpose.

"It's a 'Mom and apple pie' concept," she said. "I would hope every jurisdiction would take the opportunity to consider and articulate what they're trying to achieve with their regulation."

Terry said that when issuing regulations, jurisdictions implicitly consider what they're trying to achieve with their regulatory system. But "it's useful to step back and explicitly consider that question because sometimes when you're in the midst of a debate—

### Variations on a Theme: Objectives for Regulating the Provision of Legal Services Share Some Basic Tenets

*An article by Penn State law professor Laurel Terry and others recommends seven concepts to include in regulatory objectives for the legal profession:*

Protection of clients.  
Protection of the public interest.  
Promoting public understanding of the legal system and respect for the rule of law.

Supporting the rule of law and ensuring lawyer independence sufficient to allow for a robust rule-of-law culture.

Increasing access to justice, including clients' willingness and ability to access lawyers' services.

Promoting lawyers' compliance with professional principles, including competent and professional delivery of services.

Ensuring that lawyer regulation is consistent with principles of "good regulation."

*Section 1 of the U.K. Legal Services Act 2007 defines eight regulatory objectives:*

"(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. . . ;

"(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."

*The Nova Scotia Barristers' Society has approved these six regulatory objectives:*

"1. Protect those who use legal services.

"2. Promote the rule of law and the public interest in the justice system."

"3. Promote access to legal services and the justice system.

"4. Establish required standards for professional responsibility and competence in the delivery of legal services.

"5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system.

"6. Regulate in a manner that is proactive, principled and proportionate."

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particularly when it's heated—it's easy to overlook things," she said. She said regulators have told her, for example, that in regulating the legal profession it's easy to focus on client protection while overlooking access to legal services.

Terry also pointed out that the profession has at times been accused of regulating in a self-protectionist manner. "Having these goals to point to is very useful internally and externally," she said.

Regulatory objectives are useful as "a way to channel the debate and make sure it stays focused on the things that are relevant," regardless of the particular regulatory issue you're thinking about, Terry said. "You should decide what your goals are even though there will be disagreement about what that means with respect to any decision," she said.

**Your Mileage May Vary.** "The contents of the list will vary from jurisdiction to jurisdiction," Terry said. "Part of the benefit is from jurisdictions thinking about what they want on their list."

"It's not that every jurisdiction should adopt an identical list—it's that they start a conversation," Terry said. "Jurisdictions need to own it."

As an example of how this process can help, Terry noted when the UK Legal Services Act was being developed, the initial draft of regulatory objectives omitted the one that ultimately became first on the list—"protecting and promoting the public interest."

In an article on regulatory objectives for the legal profession, Terry and two co-authors analyzed various regulatory objectives that have been adopted or proposed, developed their own list of concepts to include in regulatory objectives and correlated the concepts on their list with regulatory objectives from jurisdictions that have them. (*See box.*)

The commission said it drew on that article and another one by Terry in developing its draft report on model regulatory objectives.

**Colorado Guidelines.** In Colorado, a supreme court subcommittee is developing regulatory objectives as one aspect of a larger effort to improve the regulatory system by embracing innovations such as proactive management-based regulation.

The subcommittee was launched after ideas for transforming attorney regulation were discussed at a meeting of attorney regulators who convened at the 41st ABA National Conference of Professional Responsibility in May.

The subcommittee has come up with a first draft of regulatory objectives geared toward the overarching goal of promoting the public interest. The list—still a work in progress—includes core principles such as increasing understanding and confidence in the rule of law and the justice system and promoting access to justice and consumer choice.

Regulatory counsel James Coyle said that in its deliberations the subcommittee borrowed language from other jurisdictions and relied heavily on Terry's article. "We haven't done anything bold and new," he said.

According to Coyle, the subcommittee wants the regulatory objectives eventually to become rules—not just guidance—that would be binding on all components of the Colorado attorney regulation system. When

finalized, the list will go to the advisory committee that oversees the lawyer regulation system, which may have additional tweaks, and the court itself will have the final say, Coyle explained.

Coyle said he's looking forward to seeing how the proposed ABA models end up but isn't set on any particular outcome. "It's just as much the process as the end result," he said.

In Coyle's view, developing regulatory objectives should be a high priority for all states. "States should really look at them and start working on them, because as we address these new frameworks for regulating lawyers and new legal service providers, we need a starting point," he said.

**Nova Scotia's Project.** On Canada's east coast, the Nova Scotia Barristers' Society already has its own set of regulatory objectives. NSBS is an independent regulatory body not subject to the courts, according to Darrel Pink, the law society's longtime executive director.

NSBS began a project a little over two years ago to transform regulation of lawyers in Nova Scotia. "We did lots of research and concluded that before we could go very far we needed a fairly high-level set of principles that would guide our work," Pink told Bloomberg BNA.

"Our regulatory objectives were designed to guide the work we're going to undertake to transform our regulation," Pink said. "They're aspirational in terms of what we bring to regulation."

NSBS's governing body approved the regulatory objectives but they don't have a statutory framework yet, according to Pink. He said NSBS is fine-tuning the objectives and debating whether they belong in a statute.

To transform its framework for legal services regulation, NSBS now has a number of ongoing projects addressing the range of issues the objectives cover, Pink said.

Pink was enthusiastic about the ABA's move to develop model regulatory objectives. Although "we can all quibble with some of the language" in the draft objectives, "each of them identifies core principles for regulation," he said.

"It's about bringing clarity to what you do," Pink stated. You can say "This is the purpose of regulation."

BY JOAN C. ROGERS

*Full text of the draft ABA report and recommendation at [http://www.americanbar.org/groups/centers\\_commissions/commission-on-the-future-of-legal-services.html](http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html).*

*Article by Laurel S. Terry, Steve Mark & Tahlia Gordon, [Adopting Regulatory Objectives for the Legal Profession \(2012\)](http://www.personal.psu.edu/faculty/l/s/lst3/TerryMarkGordonRegulatory_Objectives_for_Legal_Profession.pdf), is at [http://www.personal.psu.edu/faculty/l/s/lst3/TerryMarkGordonRegulatory\\_Objectives\\_for\\_Legal\\_Profession.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/TerryMarkGordonRegulatory_Objectives_for_Legal_Profession.pdf).*

*Article by Laurel S. Terry, [Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon \(2013\)](http://www.personal.psu.edu/faculty/l/s/lst3/TerryRegulatory_Objectives_Bandwagon_2013.pdf), is at [http://www.personal.psu.edu/faculty/l/s/lst3/TerryRegulatory\\_Objectives\\_Bandwagon\\_2013.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/TerryRegulatory_Objectives_Bandwagon_2013.pdf).*

*The NSBS Regulatory Objectives are available at <http://nsbs.org/legal-services-regulation>.*