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A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England/Wales, and North America

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A TAXONOMY OF LAWYER REGULATION:
How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England/Wales, and North America

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ABSTRACT

What explains the dramatic contrast between legal services regulation in the United States and anglophone Canada, on one hand, and England/Wales and Australia, on the other? In order to help explain these divergent regulatory choices, and to further comparative analysis, this Essay proposes a taxonomy⁴ of theories of legal services regulation drawn from these common-law jurisdictions. Although most jurisdictions employ a combination of approaches, as well as some hybrid methods, the Essay identifies the two dominant perspectives: (1) the professionalist-independent framework, predominate in anglophone North America, and (2) the consumerist-competitive framework found in the common law jurisdictions of Northern Europe and Australia. This theoretical divide, in turn, helps explain why the United States and Canada have largely adhered to a body of self-regulation focused upon aspirations of professionalism and professional independence. Australia and England/Wales, by contrast, have embarked upon market-oriented reform that purports to promote consumer protection and consumer interests. In describing this taxonomy, we recognise jurisdictions sometimes employ hybrid regulatory strategies that combine elements of the professionalist-independent and consumerist-competitive frameworks, such as gatekeeper rules promulgated by the State (as opposed to gatekeeper regulations promulgated by judges or the legal profession). We also acknowledge that regulatory approaches are dynamic and that regulators may very well shift perspectives over time. Nevertheless, organising the claims of commentators and regulators into categories will help to promote analysis and comparison of legal services regulations, as well as to improve the quality of decision-making by those who craft and enforce the rules. We identify, for example, the crucial distinction between how these two approaches construct an understanding of legal services clients. Consumerist-competitive systems identify clients as consumers (who are similar to consumers of other goods and services) and apply this perspective to the particular context of purchasing legal services. In contrast, professionalist-independent systems understand the experience of a legal services client as fundamentally different from that of other consumers and, accordingly, require a wholly distinct regulatory approach.

¹ Postdoctoral Research Fellow, University of Toronto Faculty of Law (Centre for the Legal Profession). We are very appreciative to the helpful comments of Deborah Rhode, Laurel Terry, Susan Fortney, and the participants in the New York Legal Ethics Scholars Roundtable. We are also grateful for research assistance from Allison Eicher as well as comments and editorial assistance from the editors of this journal.

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The Essay proceeds as follows. Part I situates our inquiry in the context of a larger, more fundamental question: why regulate legal services in the first instance? We identify and describe various theories that explain the introduction of regulation, contrasting in particular the private interest (capture) and public interest (market failure) approaches. Part II then turns to an exploration of the regulators' normative theories on how legal services ought to be regulated. Here we describe the taxonomy of consumerist-competitive and professionalist-independent approaches, including how consumerist-competitive approaches tend to favour government regulation, market-oriented solutions, firm-level accountability, and principles-based regulatory strategies and why professionalist-independent approaches tend to favour self-regulation, individual lawyer accountability, and command-and-control regulatory strategies.

INTRODUCTION

In recent years, Australia and England/Wales took a markedly different approach to the regulation of legal services than the United States or Canada. Regulatory efforts in Australia and England/Wales provided different responses to changing technological and social conditions with a purported goal of enhancing both market competition and innovative regulatory strategies. By contrast, the American Bar Association (ABA), in response to the recent work of the ABA 20/20 Commission, embraced only minimal changes related to technology advancements and generally rejected efforts to promote market competition and innovation. While a few Canadian provinces made similar limited changes, most resisted these trends. Instead, anglophone North American jurisdictions generally adhere to a relatively traditional system of regulation based on professional independence.

Although a number of scholars and commentators throughout the common law world have noted these divergent regulatory responses, they have devoted less attention to the justifications that underpin these responses. This Essay proposes a taxonomy of the rationales underlying the contrasting regulatory strategies in order to help explain their divergence and to promote comparative analysis. In doing so, we build on the path-breaking work of Richard Abel in offering a taxonomy of sociological theories of the

5 We refer to England/Wales recognising that the Legal Services Act (2007) generally refers to England and Wales, but not the other jurisdictions within the United Kingdom.

6 See ABA Model Rule 1.1, Comment 8 (2012): ‘To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject’. (emphasis added to highlight revised language).


8 Among the numerous commentaries and publications, legal services regulation is the topic of a new annual International Conference of Legal Regulators and a major new monograph (Frank Stephen, Lawyers, Markets and Regulation (Edward Elgar, 2013)).
legal profession\(^9\) and David Wilkins in providing a taxonomy of models for controlling lawyer conduct.\(^10\) Our taxonomy classifies strategies for regulating legal services, including economic, sociological, policy, and professional perspectives.

The Essay proceeds as follows. Part I situates our inquiry in the context of a larger, more fundamental question: why regulate legal services in the first instance? It contrasts private interest (capture) theories relating regulation to supplier self-interest with public interest theories about regulation's value for clients and the public. The private interest theories include both sociological and economic variants, while the public interest theories divide into market-failure and legal-ethical accounts.

Part II then considers regulators' normative theories of how legal services should be regulated. Here we propose a distinction between a professionalist-independent framework that valorises the professional independence of lawyers and focuses on the special, non-consumer interests of clients versus a consumerist-competitive framework that focuses on the consumer interests of clients and seeks to advance them by fostering competition between legal service providers. These two frameworks, in turn, rely on underlying core values and promote particular regime elements, including (i) occupational structure, (ii) governance, (iii) regulatory posture toward people other than legal services licensees, and (iv) level of regulatory focus (individual versus firm). In anglophone North America, the professionalist-independent model is the dominant, although not exclusive strategy, while England/Wales and Australia generally employ the consumerist-competitive approach.

But while a particular approach may be dominant, most jurisdictions do not rely exclusively on one or the other and may shift their reliance from one regime to another over time. For example, while legal services regulators in the United States generally apply a professionalist-independent approach, a few jurisdictions have begun to apply a consumerist-competitive approach to permit licensed paralegals.\(^11\) Similarly, England/Wales generally employs consumerist-competitive strategy but maintains a system of self-regulating front line regulators based upon a professionalist-independent model.\(^12\) Jurisdictions also employ hybrid frameworks, such as a professionalist-regulatory model that combines professionalist assumptions regarding lawyer capabilities with consumerist disregard for self-regulation and includes gatekeeping legislation and common law malpractice doctrine.\(^13\)

We intend our taxonomy of current regulatory approaches to assist scholars and regulators alike as they evaluate merits of existing regulation and consider proposals for reform.\(^14\) For purposes of this Essay, we

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\(^{11}\) See discussion infra (n 160).

\(^{12}\) See discussion infra (n 161).

\(^{13}\) See discussion infra (n 162).

\(^{14}\) Significant changes can be seen in legal services regulatory regimes across the common law world. For example, consider the very short period which elapsed between the implementation of the *Legal Services Act 2007* in fall 2011 and the call for another major overhaul just two years later in fall 2013. See Owen Bowcott, 'Labyrinthine legal services regulation 'needs to be streamlined'' (The Guardian, first published 10 September 2013) www.theguardian.com/law/2013/sep/10/legal-services-board-labyrinthine-regulation (last accessed 23 October 2013). Similarly, shortly after the ABA 20/20 Commission declined to engage in meaningful reform related to nonlawyer ownership, multidisciplinary partnerships, and limited license legal technicians or similar efforts to
do not take a normative position on the relative merits of the contrasting approaches. Rather, we seek to clarify and facilitate analysis of legal services regulation as well as to improve the quality of decision-making by those who craft and enforce the rules.

PART I: WHY REGULATE LEGAL SERVICES?
The development of a taxonomy of legal services regulation begins with the question of why we regulate legal services in the first instance. Part I identifies and briefly summarises the justifications advanced for regulation of the legal profession across jurisdictions, including economic private interest theory, sociological private interest theory, market failure public interest theory, and legal-ethical public interest theory. Interestingly, the competing regulatory regimes in many ways are also rooted in a common goal of protection for clients (or consumers) but each aims to accomplish this goal via dissimilar means. For example, as we discuss below, client protection for North American regulators is grounded in preservation of autonomy for legal services practitioners and the legal profession, often framed as ‘professional independence’, to ensure loyalty and fidelity to the client and to avoid the influence of a competing interest such as a non-lawyer partner in the law practice. By contrast, client protection for Australia and England/Wales is drawn from consumer protection principles. Part I concludes by observing that while some of these theories provide a justification for different regulatory approaches, others merely offer critique.

1.1 Private Interest Theories
According to the private interest theory of legal services regulation, rules are created in order to protect the interests of lawyers. This is an application of the capture theory of regulation, which holds that regulation is typically ‘acquired’ by the regulated group, and ‘designed and operated primarily for its benefit’. Economists and critical sociologists have developed distinct versions of the private interest theory, but their shared premise is that provider self-interest typically explains observed regulation. The private interest critique implicates all regulated occupations (especially self-regulating ‘professions’), but it has also been specifically and forcefully applied to lawyers.

1.1.1 Economic Private Interest Theory
The economic critique of occupational regulation began where modern economics itself began: in 1776, with Adam Smith’s Wealth of Nations. Smith suggested that the true purpose of mandatory apprenticeships in that era was the suppression of competition. He also denounced self-regulatory occupational groups as natural fora for ‘conspiracy against the public’ and ‘contrivance to raise prices’.

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15 For the purposes of this Essay, legal services regulation includes only rules enforceable by the State or by a body with state-recognised powers.

16 For example, ABA Model Rule 5.4 is titled ‘Professional Independence of a Lawyer’.


18 Adam Smith, An inquiry into the nature and causes of the wealth of nations (1776), Book I, Chap. 10, Part II.

19 Ibid.
The subsequent economic literature in this field may be understood as an elaboration and empirical buttressing of Smith’s views. A major contribution came with George Stigler’s ‘regulatory capture’ concept in 1971. Stigler argued that economic groups consistently seek to enrich themselves by securing the state’s coercive power to limit competition and fix prices. Very soon after this idea became ascendant, its applicability to professional self-regulation was recognised. While the members of an economic group must typically exert some effort to capture a state regulatory agency and bend it to their interests, a self-regulator controlled by members of the occupational group is effectively ‘pre-captured’. Self-regulation gives an occupational group carte blanche to manipulate regulation in order to enrich itself.

To rebut arguments that regulation serves the public interest, economists in this school point to evidence that regulation of legal services and other occupations is excessive, ineffectual or unnecessary to protect consumers. They posit that the goal of occupational self-regulators (such as the American attorney licensing and disciplinary authorities or the Canadian law societies) is, instead, to maximise economic rents (artificially created transfers) for the members of the group. Rent-seeking can take the form of ‘ethics’ rules which reduce competitive behaviour. For example, prohibitions on multi-disciplinary practices and nonlawyer ownership or investment in law practices are understood as mechanisms to suppress competition and reserve profits for members of the legal profession, as are limitations on advertising and client solicitation.

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21 See Stigler (n 17) 4-7.
22 See Stephen (n 8) Chapter 7.
25 See section 1.2, below, for an account of the public interest theory of legal services regulation.
28 Deborah Rhode, ‘Reforming American Legal Practice and Legal Education: Rethinking the Role of Nonlawyers in Delivering and Financing Legal Services,’ (2014) Legal Ethics [forthcoming].
Rents are most reliably guaranteed by cartels, which is how these critics perceive licensing regimes.\(^{30}\) Occupational licensing, backed by the criminal prosecution of unauthorised practice, is understood as ‘use of the political process to improve the economic circumstances of a group’.\(^{31}\) If the licensing hurdles are set by self-regulatory groups, they will make them excessively onerous.\(^{32}\) As Milton Friedman pointed out in his analysis of the medical profession, lobbying for new licensing regimes and barriers almost invariably comes from occupational groups, and not from consumers. This, according to Friedman, is a telling indication that licenses serve the interests of the former group at the expense of the latter.\(^{33}\)

Far from safeguarding the public, Friedman argued,

licensure has reduced both the quantity and quality of medical practice… reduced the opportunities available to people who would like to be physicians, forcing them to pursue occupations they regard as less attractive; [and] forced the public to pay more for less satisfactory medical service.\(^{34}\)

Alex Maurizi found empirical support for the proposition that self-regulatory professions manipulate the pass rates on licensing exams to preserve professional incomes as demand fluctuates;\(^{35}\) Mario Pagliero added similar evidence specific to American lawyers.\(^{36}\) When standards are raised, existing practitioners are often ‘grandfathered’ while new entrants must meet the higher standard.\(^{37}\) According to the capture critique, grandfathering is a safe way for the members of the occupation to restrict supply and enhance their collective reputation without putting themselves to the inconvenience of meeting the higher standards.\(^{38}\)

1.1.2 Sociological Private Interest Theory

The critical sociology of the professions has also analysed their development and interaction using the premise of self-interest. This sociological version of the private interest theory (also known as the ‘market control’ approach) is often traced to early-20\(^{th}\) century German sociologist Max Weber.\(^{39}\)

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\(^{30}\) Michele Boldrin and David K. Levine, *Rent-Seeking And Innovation (Federal Reserve Bank of Minneapolis Research Department Staff Report 347)* (2004); Deborah L. Rhode, ‘Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions’ (1981) 34 *Stanford Law Review* 1 (noting that the legal profession’s “conduct in restricting entry and negotiating agreements with competing groups is that of a trade association or cartel, rather than that of a monopolist.”).

\(^{31}\) See Stigler (n 17) 13.


\(^{34}\) *Ibid*, 158.


\(^{36}\) See Pagliero (n 27).


\(^{39}\) See e.g., Abel (n 9).
observed the recurring tendency of economic competitors to form interest groups among themselves. These eventually evolve into a ‘legal order that limits competition through formal monopolies’.\(^{40}\) After a period of quiescence this approach was enthusiastically revived around 1970, and flourished for the next 25 years. The assumption of professional self-interest and the focus on social power are leitmotifs running through the leading texts of the sociological version of capture.\(^{41}\)

One of the distinct contributions of the sociological tradition, which is not present in the economists’ version, is the dual nature of professional self-interest. It has a pecuniary aspect (professionals’ desire for market-control or market-shelter to enrich themselves),\(^{42}\) but it also manifests itself in their desire to set themselves above and apart from other workers and service providers.\(^{43}\) Self-regulation helps them accomplish the latter goal by excluding arriviste competitors, and using discipline to expel those who lower the tone of the ‘club’ after somehow sneaking in.\(^{44}\) Professional discipline regimes are a favourite target for critics in this tradition. Typically it is argued that professional discipline will either be lax, or else will protect the interest of the profession and its elites rather than those of the public.\(^{45}\)

Lawyers are often identified (along with doctors) as archetypal professionals.\(^{46}\) It is therefore unsurprising that both the economic and the sociological versions of the capture critique have been applied explicitly to lawyers. Richard Abel and Deborah Rhode are perhaps the common law world's best known and most prolific authors in this tradition. Regulation, according to Abel, has typically been used by Anglo-American lawyers to dampen competition,\(^{47}\) build legitimating myths\(^ {48}\) and avert surveillance

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\(^{43}\) Eliot Freidson, *Professionalism: The Third Logic* (Polity Press 2001) 199; see also Larson (n 41): ‘I see professionalization as the process by which producers of special services sought to constitute and control a market for their expertise. Because marketable expertise is a crucial element in the structure of modern inequality, professionalization appears also as a collective assertion of special social status and as a collective process of upward social mobility’. Regarding the definition of ‘service providers’ and regulatory treatment of lawyers as service providers, see Laurel S. Terry, ‘The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”’ (2008) 2008 *ABA Journal of the Professional Lawyer* 189.


\(^{46}\) E.g Gunter Burkart, ‘Professions and Professionalization’ in Austin Harrington, Barbara L. Marshall and Hans-Peter Müller (eds), *Encyclopedia of Social Theory* (Routledge 2006).

by outsiders. Rhode has argued that lawyers' fear of third-party lawsuits has impeded the adoption of broader ethical standards, and pointed to various regulatory policy issues in which the Bar's interest is so directly affected that self-regulators should never be expected to make disinterested decisions. Benjamin Barton and Gillian Hadfield are other influential scholars who have applied capture theory to American legal services regulation. Barton contends that judges, as lawyers, consistently favour lawyers' interests in regulating them, while Hadfield argues that the American legal profession's monopoly distorts access to justice.

The private interest theory has been applied to legal services regulatory regimes around the common law world. Julian Webb has analysed the ramifications of evolving economic and governance phenomena for the legal profession using this standpoint. Frank Stephen's empirical research offers evidence for self-interest and capture among UK legal services regulators prior to the Legal Services Act, 2007. Constance Backhouse has shown how Canadian lawyers used professionalism rhetoric and legal ethics rules to 'exercise power and exclusion based on gender, race, class and religion.' Other legal scholars

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54 Its influence can be seen in works such as Christine Parker, Just Lawyers: Regulation and Access to Justice (Oxford University Press 1999) and Avrom Sherr, ‘The ‘Control’ Orthodoxy in England and Wales – A Retrospective Review’ (2009) 16 International Journal of the Legal Profession 153.


who have drawn on private interest and market control analysis include Wesley Pue and James Moliterno.\textsuperscript{58}

\subsection*{1.2 Public Interest Theories}

The two public interest theories of legal services regulation—market failure and legal-ethical—begin with the premise that the purpose of regulation is to protect clients, third parties and interests other than those of legal services providers. Throughout the industrialised world, regulators rely on these related, but conceptually distinct, rationales to justify their work.

The market failure version perceives legal services as instances of information asymmetries and externality problems, which occur in various markets. The legal-ethical version is found in lawyer credos and legal scholarship, as well as in the work of structural-functionalist sociologists. The legal-ethical approach, in turn, relies on arguments that self-regulation is necessary to protect clients and society. A major distinction between the legal-ethical and market failure approaches is that the legal-ethical version treats purchasers of legal services as clients of legal services providers, while the market failure version treats them as consumers, with the consumers' typical interests in price, quality, and choice.

\subsubsection*{1.2.1 Market Failure Public Interest Theory}

Market failure has been defined as ‘a situation where the free play of market forces cannot be relied upon to maximise economic welfare’.\textsuperscript{59} It is an exception to the doctrines of free markets and caveat emptor, which are today the general policy premises of wealthy common law countries.\textsuperscript{60} The market failure version of the public interest theory holds that regulation is imposed upon legal services to correct or mitigate these failures.

Information asymmetry is a commonly cited market failure justifying regulation.\textsuperscript{61} The information problem is that consumers are often unable to 'judge the value of the services offered on the market in terms of their own needs and priorities'.\textsuperscript{62} The asymmetry lies in the fact that the provider of expert services often has a much better grasp of the relevant information than does the prospective consumer.\textsuperscript{63}

\begin{thebibliography}{99}
\bibitem{58} W. Wesley Pue and University of Manitoba. Canadian Legal History Project., \textit{Lawyers and the Constitution of Political Society : Containing Radicalism and Maintaining Order in Prairie Canada, 1900-1930} (Faculty of Law, University of Manitoba 1993) W. Wesley Pue, ‘Becoming “Ethical”: Lawyers’ Professional Ethics in Early Twentieth Century Canada’ (1991) 20 \textit{Manitoba Law Journal} 237; Moliterno (n 37) Chapter 2.


\bibitem{62} Trebilcock, Tuohy and Wolfson (n 60) 51.

\bibitem{63} Some scholars describe these problems in terms of agency costs instead of information asymmetry, e.g. Barton, ‘Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation’ (n 52) 467; William Bishop, ‘Regulating the Market for Legal Services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise’ (1989) 52 \textit{Modern Law Review} 326, 328.
\end{thebibliography}
Information asymmetry is a consequence of the experience and credence qualities of expert services. Not only do consumers have difficulty ascertaining their needs for legal services and the quality of the available alternatives before purchasing them (the experience quality), but they also have difficulty in evaluating them before and after the purchase (the credence quality). The asymmetry is compounded by the fact that most individual consumer-clients utilise expert services infrequently, and therefore have little opportunity to learn from experience. The failures afflicting markets for professional services were clearly identified by Kenneth Arrow's 1963 article about medical care, and subsequent scholarship has argued that they are equally applicable in the case of legal services.

Specific problems resulting from information asymmetry include supplier-induced demand, and a downward spiral of declining quality attributable to adverse selection. Legal services regulation can prevent or mitigate all of these problems. This approach asserts that effective licensure will ensure all providers meet a minimum quality standard. Meanwhile conduct rules forbid exploitation of vulnerable clients or inflation of demand.

The second branch of the market failure public interest theory is that regulation prevents negative externalities resulting from bad legal service provision. An externality (also known as a third party effect) occurs when the costs and benefits of a transaction are not borne exclusively by the parties thereto. Externalities create the potential for under-production, over-production, and self-dealing by consumers and producers at the expense of third parties.

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65 Wilkins (n 10) 824.


70 See Leland (n 32); Paterson, Fink and Ogus (n 24) 17; Shinnick, Bruinsma and Parker (n 67); Spiegler (n 61).

71 E.g. Cox and Foster (n 69) 9-10.

A negative externality occurs when a deficiency in the service causes harm to a third party. The third party might be a secondary victim of the deficiency, along with the innocent consumer. However, a consumer who suffers from no information asymmetry, and requires no regulatory protection from her own service provider, might choose to purchase services that cause grave harms to others. Preventing these outcomes through licensing and conduct rules is the second public interest rationale given for legal services regulation.

In legal services, while protecting consumer-clients is the dominant regulatory rationale, negative externalities are also mentioned as a reason to regulate. The classic example is the slapdash will. An inexpensive but poorly prepared will that is ambiguous or incoherent might be perfectly acceptable to a fully informed client. The testator might visit a drafting solicitor’s office only because she wishes to see that a certain bequest is made. She might care little about the residue of the estate, given that she will not be around to see what happens to it. However, the resulting slapdash will can subject the beneficiaries to many painful and expensive years of personal strife and litigation.

The third branch of the market failure public interest theory maintains that regulation encourages positive externalities from legal services provision. Just like bad legal services, good legal services can spread their effects beyond the consumer. Regulation is justified, on this view, because unconstrained market actors will only transact for the quantity and quality of services that maximises their own welfare. The unregulated free market would therefore ‘under-produce’ good legal services. Regulation might in principle be used to encourage purchase of legal services when these positive externalities justify it but the consumer would not otherwise do so.

What are the positive externalities of good legal services? High quality litigated solutions to controversies create precedents and legal certainty from which others benefit. Hiring a good legal service provider as opposed to conducting litigation as an unrepresented litigant also has positive

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73 Manitoba Law Reform Commission (n 38) 14.


75 A defective transfer of real estate can have similar impacts on subsequent purchasers: Van den Bergh and Montangie (n 69) 196.


77 Trebilcock, Tuohy and Wolfson (n 60) 60-1.

78 Van den Bergh and Montangie (n 69) 191; Christopher Decker and George Yarrow, Understanding the Economic Rationale for Legal Services Regulation: A Report for the Legal Services Board (2010).

Regulation can also encourage—or even mandate—pro bono service that benefits the public by increasing access to justice at the same time that it benefits indigent individuals.81

1.2.2 Legal-Ethical Public Interest Theory

Bar leaders,82 legal scholars,83 and structural-functionalist sociologists84 have offered a very different public interest rationale for legal services regulation. Rather than view legal services through the lens of the market, these commentators argue that the function of legal services providers is exceptional. Based on the unique characteristics, they assert that licensed legal services providers—lawyers—should as a general matter regulate legal services independent of interference from the market or the State. They claim that the legal profession’s independence is necessary for lawyers to protect clients, the rule of law, and the public good. They differ slightly in their method of argument. Some derive lawyers’ function from their status while others derive their status from their function.

The argument from status to function begins with the business-profession dichotomy described by bar leaders, legal scholars, and structural-functionalist sociologists. Unlike business people, lawyers have both inaccessible expertise and commitment to the public good, which both requires, and justifies societal reliance upon, the legal profession to regulate itself.85

As a result, society enters into a bargain with the profession where society agrees to self-regulation that offers autonomy from regulation by the market and the state. In the words of one commentator,

Perceiving a social need, and the profession's competence to handle it, the society negotiates a deal with the profession: the society will confer the benefits and privileges of a legal monopoly upon the group in return for a promise of public service, i.e., a promise to carry on professional practice in accordance with high standards of performance, for the public good.86

80 Having a lawyer makes litigation easier and less costly for one’s adversaries and for the court system. See e.g. Rachel Birnbaum and Nicholas Bala, ‘Views of Ontario Lawyers on Family Litigants without Representation’ (2012) 63 University of New Brunswick Law Journal 99; PricewaterhouseCoopers, Economic Value of Legal Aid: Analysis in Relation to Commonwealth Funded Matters with a Focus on Family Law (2009).


84 Abel, American Lawyers at 12, 16, 35-37 (discussing Emile Durkheim and Talcott Parsons).


Complementing the argument from status to function is the argument from function to status that focuses on the role of lawyers in a liberal democracy. The independence of lawyers is necessary to protect individual rights, rule of law, and the public good. Independence both prevents ‘any source of authority, public or private, [from limiting] clients’ access to the public goods encoded in the law’ and encourages compliance with law by preserving lawyers’ discretion to serve ‘as a mediating force between the interests of private clients and the public purposes of the legal order.’ According to some, the independence of lawyers is also essential to protect judicial independence.

The legal-ethical public interest theories are both similar to, and different from, the market failure public interest theory. Both approaches acknowledge information asymmetry, as well as negative and positive externalities. They differ in that the legal-ethical approaches view the delivery of legal services as essentialist. Many legal ethicists ascribe special interests to lawyers' clients, including a client’s interest in loyal and devoted service from a trusted professional. These interests are unique, legitimate and not shared by most other consumers. Charles Fried’s conception of the lawyer as a ‘special-purpose friend’ who, within the scope of his retainer, ‘adopts your interests as his own’ reflects this view. No one would dream of demanding this from a microwave oven or a futures contract, and reducing client interest to any permutation of price, quality or choice does not sufficiently contemplate the nuanced and significant nature of legal advice.

Similarly essentialist is the description of lawyers’ public role. The ABA's Model Rules of Professional Conduct suggests in the preamble that regulation guides lawyers to contribute to public welfare as ‘officer[s] of the legal system’ who ‘play a vital role in the preservation of society.’ This notion has a long history in the United States, including Tocqueville’s often quoted description of lawyers as the aristocracy of the United States, Louis Brandeis’s exhortation that the legal profession promote the public good, and Roscoe Pound’s description of law practice as the ‘[p]ursuit of the learned art in the spirit of a public service.’ Structural-functionalist sociologists, such as Emile Durkheim and Talcott Parsons, offer a corresponding understanding that lawyers serve a necessary and beneficial role as intermediaries between the people and the law. Another version of this understanding is Brad Wendell and Alice Woolley’s view that the lawyer’s public role involves counselling, dispute resolution and

87 Wilkins, supra note , at 859. See also, e.g., Bruce A. Green, ‘Lawyers’ Professional Independence: Overrated or Undervalued?’ (2013) 46 Akron Law Review 599, 604, 613-19.

88 Wilkins (n 10) 859-60. See also, e.g., Green (n 87) 608-12.

89 Wilkins (n 10) 853-58. See also, e.g., Green (n 87) 607.


92 Alexis de Tocqueville, Democracy in America (Adlard and Saunders, [1831] 1862)

93 Pound (n 82) 5.

94 Pound (n 82) 5.

95 Emile Durkheim, Professional Ethics and Civic Morals (Brookfield Ctr, Routledge [1890] 1992)
preventing miscarriages of justice. If it is abandoned or performed negligently, the ‘pluralist compromise of democracy’ itself is put at risk.  

As a result of this essentialist view, legal-ethical theories propose that lawyers have the exclusive capacity to understand lawyers’ duties to their clients, the court, third parties, and the public and to promulgate regulations to promote and police those duties. Lawyers do so through a scheme of self-regulation that governs the licensing and discipline of legal services providers, as well as through regulations that focus on protecting clients such as through rules regarding confidentiality and conflicts; protecting the administration of justice such as through rules prohibiting client perjury; and promoting the public good such as through rules encouraging pro bono and compliance with law.  

Within legal-ethical theories, the concept of self-regulation is a relatively broad one. Proponents of legal-ethical public interest theory do not necessarily require that organisations of lawyers regulate lawyers. Rather, many commentators describe regulation by judges who are lawyers as self-regulation, presumably because those judges work closely with the organised bar to develop rules governing lawyers and ultimately those judges adopt and enforce the rules.  

As the American Bar Association’s Model Rules of Professional Conduct explain:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts. 

Where Part I offers a review of models for explaining the basis for regulating the delivery of legal services, Part II suggests a taxonomy of modes of regulatory strategies.

**PART II: HOW SHOULD LEGAL SERVICES BE REGULATED?**

Although sociological private interest theory provides only a critique, economic private interest, economic public interest, and legal-ethical public interest accounts prescribe regulatory modes. Because no jurisdiction has applied economic private interest theory to legal services, we focus here upon the economic and legal-ethical public interest accounts. To describe economic public interest modes of regulation, we use the term consumerist-competitive to underscore its emphasis on protecting consumers and promoting competition. To describe legal-ethical public interest modes of regulation, we use the term professionalist-independent to emphasise its commitment to the essentialist approach to legal services associated with professionalism and self-regulation. Professionalist-independent regimes are predominant in common law North America, while consumerist-competitive modes have increasingly come to the fore in England/Wales and Australia, as well as Ireland and New Zealand.

For purposes of our taxonomy, the dominant approaches of economic and legal-ethical public interest theories both define principles and suggest regulatory regimes. But examination of how regulation of

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97 See, e.g., ABA Model Rules of Professional Conduct.


99 See Model Rules (n 92) Preamble Para 10.
legal services functions in practice leads to further refinement of our taxonomy. While particular modes may be dominant in specific jurisdictions, all common law jurisdictions employ both professionalist-independent and consumerist-competitive strategies, as well as hybrid modes that combine elements of both. In addition, the professionalist-independent mode has produced an unintended consequence—the development of a robust sphere of legal services that is largely unregulated.

2.1. The Professionalist-independent Mode of Common Law North America
In the United States and in common law Canada, the dominant approach to legal services regulation still hews closely to a blueprint drafted in the late nineteenth century. With a few exceptions, these jurisdictions all maintain a unified, hegemonic occupation of ‘lawyer’ and uphold so-called ‘self-regulatory’ governance, whereby lawyers and lawyer-judges draft, adopt, and enforce the profession’s rules for admission to practice law and to maintain one’s law license. They are also distinctive in their regulatory efforts to insulate lawyers from non-lawyer influence through strictures on alternative business structures, external investment, and multi-disciplinary practice. They similarly promote lawyer independence from clients as a way to promote the public good. Finally, professionalist-independent regimes focus regulation on individual lawyers, as opposed to the firms in which they work.

2.1.1 Professionalism and Autonomy as Core Values
Professionalism and independence are the two conceptually connected but rhetorically distinct ‘core values’ which animate legal services regulation in common law North America. As noted in Part I, the professionalism approach to legal-ethical public interest theory assumes the essentialist character of lawyers and the lawyer-client relationship. Lawyers differ from providers of other services in that they both have an understanding of how to protect clients and the public that is inaccessible to non-lawyers and a unique capacity as individuals and a self-regulating collective to provide those services with fidelity to clients, courts, and the public good.

The second core value is independence, both of lawyers and of the legal profession. Although derived from the conditions that professionalism describes, the goal of independence is often deployed separately. It too references the assumption of legal-ethical theory that independence is necessary for lawyers to represent clients zealously, as well as to promote rule of law and liberal democracy. Both individual lawyers and lawyers as a group require independence to achieve these goals.

Noel Semple, for example, argues that each of the four distinctive characteristics of anglo-North American legal services regulatory regimes—the unified legal occupation, self-regulation, insulation of legal services providers, and the focus on individual providers—can be traced to one or both of the professionalism and independence values. Despite arguments that its influence is waning, the resilience of the professionalist-independent mode was demonstrated by the rejection of market-oriented reforms by ABA’s Commission on Ethics 20/20.

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101 See discussion supra Part I.

102 See discussion supra Part I.

103 Noel Semple, Core Values: Professionalism and Independence Theories in Lawyer Regulation (2013). For example, the core conception of each lawyer as an independent and autonomous moral agent underlies the resistance to firm-level regulation.

104 Pearce (n 81); Maute (n 110); Terry, ‘The Future Regulation of the Legal Profession” (n 35).

105 Moliterno (n 37), chapters 8 & 9.
2.1.2 Primacy of Self-Regulation

Self-regulation, the first defining feature of professionalist-independent regimes, is a form of governance characterised by the right of the regulatees to promulgate and enforce their own regulations.

The self-regulatory character of legal services regulation is clear in common law Canada. Legal services regulation is dominated by law societies. The law societies are led by boards of directors, the members of which are known as ‘benchers’. In each law society, at least eighty per cent of the benchers are licensees.

In the United States, while legislatures do engage in some limited forms of legal services regulation, the dominant roles are played by the state courts as well as state bar and licensing authorities and the ABA. For purposes of professionalist-independent proponents, the state bar and licensing authorities and the ABA are considered self-regulatory insofar as they are led by and accountable to lawyers (or lawyer-judges). The judiciary, which has a central role in American legal services regulation, is of course a branch of government. Some commentators therefore argue that the regime is better understood as one of state regulation or co-regulation rather than self-regulation.

For purposes of our taxonomy, we need not resolve this dispute. Rather, we seek to describe the professionalist-independent principles and practices as described by their proponents. In the United States today, advocates of a professionalist-independent approach do tend to define regulation by judges who are lawyers as self-regulation.

2.1.3 The Subject Matter of Professionalist-Independent Regulation

Both professionalism and independence require lawyers to promulgate rules for licensing, conduct, and discipline. These rules, in turn, prescribe lawyers’ duties to clients, third-parties, courts, and the public. Client protections include guarantees of competence, loyalty, and confidentiality. Essential to these protections are rules that assure lawyer independence from third parties, including rules that police third party payments for legal services, prohibit non-lawyer ownership of law firms, and circumscribe conflicts

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106 Adam M. Dodek and others, Canadian Legal Practice: A Guide for the 21st Century (LexisNexis Canada 2009) s. 1.71. In some of the Atlantic provinces, the term is ‘Council’ and in the northern territories of Canada, the term is ‘Executive’. In Ontario, where there is a paralegal licensure regime, 75% of the benchers (40 individuals) are lawyers and 9% are paralegals (5 individuals).

107 See Barton, The Lawyer-Judge Bias in the American Legal System.


111 See ABA Model Rules (2013)

112 See ABA Model Rules 1.1, 1.3, 1.6 (2013)
of interest.\textsuperscript{113} Fulfilling obligations to third-parties, courts, and the public also require independence from clients. Rules generally require lawyers to avoid misleading third parties or assisting clients in violating the law.\textsuperscript{114} They promulgate a duty to the court that includes prohibitions on making frivolous arguments or facilitating client perjury\textsuperscript{115} and advance a public good function through the exercise of independent judgment in counselling clients and an aspiration to provide pro bono assistance to the poor.\textsuperscript{116} We contrast the substantive rules of professionalist-independent regimes with those of consumerist-competitive regimes below at 2.2.3.

2.1.4 Exclusive Legal Occupation
An axiom of professionalist-independent regulation is that only licensed legal services providers can provide legal services. Today, within each common law North American jurisdiction there is one group of people who are authorised to provide legal services independently and that group is known as ‘lawyers.’ Historically, professionalist-independent principles have not necessarily required a unified legal occupation. In England/Wales, for example, professionalist-independent regulation included licenses for barristers, solicitors, and notaries. In all professionalist-independent regimes, the delivery of legal services by those who do not obtain licenses from a self-regulated legal profession is forbidden as ‘unauthorized practice of law’.\textsuperscript{117}

2.1.5 Insulation of Legal Service Providers
As explained above, professionalist-independent modes protect the independence of lawyers. One method for doing so is to insulate legal service providers from the influence of non-licensees. Various business structure rules are deployed to prevent individual providers from being economically beholden to anyone other than their clients or other lawyers in their firms. While this does not foreclose all possible forms of collaboration between lawyers and non-lawyers, it does significantly restrict them.\textsuperscript{118}

Non-lawyers are generally forbidden to own shares or assume directorship in incorporated law practices in anglo-North American jurisdictions.\textsuperscript{119} Regulators also seek to insulate lawyers using rules prohibiting multi-disciplinary partnerships (MDPs). An MDP is a ‘business arrangement[t] in which individuals with different professional qualifications practise together’.\textsuperscript{120} North American jurisdictions either forbid such

\textsuperscript{113} See ABA Model Rules 1.7, 1.9, 1.11, 1.12, 5.4, 5.5 (2013)

\textsuperscript{114} See ABA Model Rules 1.2, 4.1, 4.4 (2013)

\textsuperscript{115} See ABA Model Rules 3.2, 3.3 (2013)

\textsuperscript{116} See ABA Model Rules 1.2, 6.5 (2013)


arrangements, or regulate them very tightly.\textsuperscript{121} Finally, professionalist-independent regulators have also created rules to prohibit contractual relationships between lawyers and others which would give any ‘nonlawyer…the right to direct or control the professional judgment of a lawyer’.\textsuperscript{122} As a consequence of these rules, North American law firms historically have been exclusively financed and controlled by lawyers, and the consumer legal market has been served almost exclusively by small firms and solo practitioners.

\subsection*{2.1.6 Regulatory Focus on Individual Lawyers}

The professionalist-independent perspective favors, but does not require, regulation of individual lawyers, and not of law firms. Its essentialist construction of lawyers and legal services assumes that most lawyers are trustworthy and promotes independence of lawyers, as well as of the legal profession.\textsuperscript{123} It assumes that most lawyers will follow the rules provided them. The primary focus of discipline is the few lawyers who are not trustworthy. Accordingly, with minor exceptions, American and Canadian legal services regulation applies to individual lawyers, and not to law firms. American legal scholar Ted Schneyer recently concluded that, despite the scholarly efforts which Schneyer himself initiated,\textsuperscript{124} ‘the idea of disciplining firms has not caught on’ in the United States.\textsuperscript{125} This conclusion has been echoed by other observers of American legal services regulation.\textsuperscript{126} Adam Dodek’s comprehensive survey of Canadian legal services regulation reached a similar finding: ‘as a general matter, law societies regulate individual lawyers,’ and ‘there is little explicit regulatory focus on law firms’ in Canada although at least two provinces permit it, including British Columbia and Nova Scotia.\textsuperscript{127}

\subsection*{2.2 The Consumerist-competitive Mode}

Beginning in the 1970s,\textsuperscript{128} legal services regulators in England/Wales and Australia began to focus on two core values derived from economic public interest theory: competition and consumer rights. These values have gradually displaced professionalism and lawyer independence as they are understood in the United States and Canada, manifesting themselves in regulatory regimes which today contrast sharply with those of anglophone North America. More recently, the influence of the consumerist-competitive mode has become evident in legal services regulatory reforms taking place in Ireland and New Zealand. In Ireland, consumerist-competitive reform has been driven by both the national competition authority

\begin{thebibliography}{128}
\bibitem{122}American Bar Association, R. 5.4(d)(3) (2013); Hadfield (n 119) 15.
\bibitem{123}See discussion supra Part I.
\bibitem{127}Adam Dodek, ‘Regulating Law Firms in Canada’ (2011) 90 Canadian Bar Review 383, 404 and 409.
\bibitem{128}The United States Supreme Court also began to establish a consumer rights agenda during the late 1970s, for example overturning the blanket ban on lawyer advertising in Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977), yet state courts, state bar authorities and the ABA ultimately did not apply the Court’s reasoning in other areas of lawyer regulation.
\end{thebibliography}
and the similar inclinations of the "Troika" (International Monetary Fund, the European Central Bank, and the European Commission).129

The consumerist-competitive mode is characterised by (i) multiple and competing legal occupations, (ii) co-regulatory or external regulatory governance, (iii) tolerance of non-licensees influencing legal services providers and (iv) a dual regulatory focus on individual service providers and the enterprises in which they work.

2.2.1 Competition and Consumer Rights as Core Values

Consumerist-competitive approaches reject the essentialist view of legal services, including the business-profession dichotomy. They treat clients as being similarly situated to other consumers of goods and services, and lawyers as similar to other producers. Accordingly, applying an economic public interest theory of regulation, they address market failure by promoting competition and protecting consumers.

Competition between legal services providers is the first core value of these regimes. Many of the statutes in these jurisdictions now list ‘promoting competition’ among their regulatory objectives.130 Competition authorities outside of North America have taken a forceful approach to legal services regulation, providing a major driver of reform.131 Under economic public interest theory, competition will promote better quality services at lower prices.

Like competition, the second core value of consumerism treats clients as consumers, as opposed to essentialist clients. The goal of regulations and of increased competition is to provide consumers with lower cost services of better quality, while regulating providers to address market failures, such as information asymmetry.132 The predominant goal of consumerism is to make legal services cheaper, more satisfactory to consumers and more variegated. Accordingly, while sharing the professionalist-independent goal of loyal and devoted service, they reject the essentialist claim that lawyer-client relationship is somehow unique.133

The goal of promoting competition and consumer interests also addresses externalities. Improving the quality of legal services reduces the harms to third parties from low quality services.134 Reducing the price of legal services provides the positive externality of greater access to justice for low and middle income persons.135

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130 Legal Services Act 2007 (UK) s. 1(e); Legal Services Regulation Bill 2011 (Republic of Ireland) at main objectives section and at s. 9(4)(d); Legal Services (Scotland) Act 2010, s. 1(c).


132 E.g. Seneviratne (n 138) 313; Parker, ‘Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness’ (n 131) 690; Shinnick, Bruinsma and Parker (n 67) 246.

133 See section 1.2.1, above.


135 See n 76, above and accompanying text.
Because consumerist-competitive regimes include active regulation to protect competition and consumers, consumerist-competitive reforms often result in ambitious and complicated regulation of legal service providers at the same time they employ the competition-oriented rhetoric of deregulation.136

2.2.2 Co-Regulation or External Regulation
The consumerist-competitive mode rejects the professionalist-independent arguments for independence. Viewed in the context of consumers and producers more generally, self-regulation appears vulnerable to self-dealing and other forms of rent seeking.137 Accordingly, the preferred methods of regulation are external to legal services providers or co-regulation that includes both lay people and legal services providers. The most common approach today is co-regulation agencies that include legal services providers but which are dominated by laypeople and accountable to the legislative or executive branches of government.138 In England and Wales, for example, the primary regulator is the Legal Services Board, which follows this co-regulatory model at the same that it continues to employ subservient self-regulatory bodies to carry out delegated functions.139

2.2.3 The Subject Matter of Consumerist-Competitive Regulation
The goals of regulating the legal services consumer-provider relationship are similar to those for the lawyer-client relationship – competence, confidentiality, and loyalty. They similarly forbid lawyers from assisting clients in crimes or fraud, otherwise misleading third parties or deceiving the courts. Where they differ is the with regard to goal of lawyer independence. This distinction has three major effects. First, it could lead to a different evaluation of categories of regulation that both modes share. For example, in a competitive-consumerist regime, the purpose of conflict rules would be to require competent services and fulfilment of fiduciary obligations. In a professionalist-independent regime, the prohibition of conflicts that did not interfere with the provision of services could be justified in order to promote independence. Second, and similarly, although both regimes reflect public interest theories of regulation, the consumerist-competitive approach would have more tools available to solve externality problems. The professionalist-independent approach, for example, turns to a lawyer’s duty of pro bono to redress inequality in access to justice. The consumerist-competitive approach could certainly require – or facilitate -- pro bono, but it could also seek through competition and regulation to address the problem through lower cost, reasonable quality services. Similarly, where professionalist-independent regulators seek to promote lawyer independent judgment as a vehicle for promoting adherence to law, consumerist-competitive regulators could take a similar approach and in addition or as an alternative seek to develop an ethical culture in a particular situation or organisation. We discuss how this insight applies to lawyer regulation at 2.2.6 below. Third, a consumerist-competitive paradigm is likely to reject rules grounded solely in the value of independence, such as restrictions on alternative business structures or multidisciplinary practices discussed at 2.2.5. below. Of course, consumerist-competitive regulators could theoretically adopt such restrictions, but they would have to justify them on grounds of competence and integrity, and not independence.


137 See notes 28 and 29, above, and accompanying text.

138 Terry, Mark and Gordon (n 111) 2673. ‘Joint regulation’ is another phrase which has been used, e.g. by Mary Seneviratne, ‘Joint Regulation of Consumer Complaints in Legal Services: A Comparative Study’ (2001) 29 International Journal of the Sociology of Law 311, 311.

2.2.4 Multiple, Competing Legal Occupations
The value of competition favours a plurality of competing legal services providers. Consumerist-competitive jurisdictions tend to have multiple licensing regimes, authorising different occupational groups to compete in different parts of the legal services marketplace. In England and Wales, regulation establishes eight legal occupations. Consumerist-competitive ideology also favours permitting non-licensed legal providers that are subject to consumer protection regulations. These include the staff of Citizens Advice Bureaus in England/Wales and nonlawyer employees of for-profit businesses, such as banks, who could conceivably provide assistance to consumers in legal matters, as well as businesses that provide legal advice through software programs.

2.2.5 Tolerance of Non-Licensee Influence within Firms
Compared to professionalist-independent regimes, consumerist-competitive administrations allow significantly greater scope for non-licensees to become business partners, shareholders and managers of law firms. In England and Wales, non-lawyers may own and manage incorporated law firms and form partnerships of equals with lawyers. The Legal Services Act 2007 uses the term ‘alternative business structure’ for any law firm in which non-lawyers are owners or managers. Australia’s business structure rules are at least as liberal as England/Wales. Seven of the country’s eight states and the territories allow non-lawyers to own shares in, and manage, incorporated law firms. Multi-disciplinary partnerships have been permitted since 1990 and Australia is also home to the first publicly-traded law firm in the common law world. External investment and collaboration with non-lawyers has facilitated the emergence of consumer brands and large firms in the personal legal services marketplace, such as the U.K.’s Co-Operative Legal Services and Australia's Slater & Gordon.

2.2.6 Firm-Based Regulation for Ethical Infrastructure
Finally, consumerist-competitive regimes are distinguished by the fact that, in addition to regulating individual legal service providers, they also regulate the enterprises in which those people work. Where professionalist-autonomy regimes trust in lawyers and assume that lawyers will collectively enforce good behaviour, consumerist-competitive regimes do not. Accordingly, they are more likely to promulgate regulations aimed at enhancing firms' ‘ethical infrastructure’ of ‘organisations, policies, and operating

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140 Regarding multiple licensing as a regulatory technique, see Joan Brockman, “Fortunate enough to obtain and keep the title of profession: " Self-regulating organizations and the enforcement of professional monopolies’ (1998) 41 Canadian Public Administration 587, 607-8.

141 Legal Services Act 2007 (UK), sch 4.

142 One of the most notable American businesses providing legal services through software programs is Legal Zoom. We understand that Legal Zoom often refers to its work as providing legal information but not legal advice. See Unauthorized Practice of Law Committee v. Parsons Technology, Inc., 1999 WL 47235 (N.D. Tex. 1999). Our view is that providing specific information about the law that is uniquely tailored to the individual situation of a particular client or consumer constitutes legal advice.

143 Ibid s. 72.


procedures'. Much of the firm-based regulation in consumerist-competitive regimes is ‘indirect’—it requires leaders within a firm to take responsibility for others. However England/Wales and Australia have begun to adopt direct firm regulation, which looks beyond the behaviour of individuals and attends to the firm itself. Examples include the obligation to establish a procedure for responding to client complaints, and Queensland's Workplace Culture Check questionnaire and dialogue process.

How should legal services be regulated?

Dominant modes in developed common law countries.

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146 Schneyer, ‘Professional Discipline for Law Firms’ (n 124) 10. See also the definition offered by Christine Parker and Lyn Aitken, ‘The Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms’ (2011) 24 Georgetown Journal of Legal Ethics 399-401 note 5: ‘Ethical infrastructure refers to how law firms’ formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice influence and constrain ethical practice’.

147 Dodek, ‘Regulating Law Firms in Canada’ (n 127) 407. See e.g. Legal Services Act 2007 (UK), ss. 91 and 92.


149 Mark 2-3; Parker and Aitken, ‘The Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms’ (n 146) 407.
2.3 Adding Complexity to the Taxonomy: Multiple Strategies, Hybrid Categories, and Unintended Consequences

In Parts 2.1 and 2.2, we have described the professionalist-independent and consumerist-competitive frameworks. In practice, though, regulators rarely employ only one approach. In this section, we explain how the taxonomy sheds light on the complexity of legal services regulation by highlighting the use of multiple and hybrid frameworks, as well as the manifestation of unintended results.

2.3.1 Hybrid Strategies

The most common hybrid strategies are what we term professionalist-regulated approaches that combine professionalist-independent assumptions regarding legal services with external or co-regulation found in consumerist-competitive systems or professionalist-competitive approaches that combine professionalist-independent assumptions with the behavioural framework of the consumerist-competitive model.

One professionalist-regulated approach is the common law doctrine of malpractice, which regulates lawyers through tort and contract doctrines of general application, reflecting a consumerist-competitive strategy. But to the extent that malpractice law relies on the expert testimony of lawyers to define lawyers’ duties it employs a professionalist-independent strategy.

Another common professionalist-regulated strategy is gatekeeping rules which seek to protect third parties and the public by requiring lawyers to take steps contrary to the instructions, and possibly the interests, of the corporation, such as the Sarbanes-Oxley lawyer regulations and IRS Circular 230. These gatekeeping rules are consumerist-competitive in that they seek to remedy market failures through external regulation of lawyers. They are professionalist-independent in that, as Sung Hui Kim explains, they rely on “‘lawyer-exceptionalism’ – the notion that lawyers’ societal function is unique and qualitatively different from that of other professionals who have legal obligations to avert fraud.” In contrast to these professionalist-regulated approaches, other gatekeeping provisions are wholly professionalist-independent, such as Rule 1.13 of the Model Rules. It would also be possible to develop gatekeeping rules wholly within a consumerist-competitive framework, based upon a rationale that equates lawyers with fiduciaries generally or that imposes duties because of the tasks lawyers perform providing them with access to specific information and an opportunity to prevent wrongdoing, as opposed to lawyer exceptionalism.


A gatekeeping provision that presents a closer question of classification is Rule 11 of the Federal Rules of Civil Procedure. Rule 11 applies to lawyers and to clients as would a consumerist-competitive provision, although the Rule imposes greater duties on lawyers, as would a professionalist-independent provision. Promulgated by courts, as are lawyer regulations under the professionalist-independent mode, the Federal Rules of Civil Procedure are developed outside of the lawyer regulation framework and require approval by Congress. Because it is court regulation that posits a special role for lawyers, we suggest placing Rule 11 within the professionalist-independent framework and not the professionalist-regulated category.

An additional example of a professionalist-regulated approach is California’s regulation of lawyers. California is the only United States jurisdiction where the legislature, an external regulator, primarily promulgates rules of lawyer conduct. Yet these rules track professionalist-independent assumptions regarding the essentialism of legal services, including the prohibition of multidisciplinary practice.155

Another hybrid framework is professionalist-competitive. In the State of Washington and the Provinces of British Columbia, Quebec, and Ontario, for example, there are small notarial and paralegal professions which provide legal services in competition with lawyers.156 Similarly, in New York, British Columbia, and Nova Scotia, regulations contemplate imposing responsibilities on law firms,157 contrary to the professionalist-independent reliance on the accountability of lawyers as individuals.

2.3.2 Multiple Strategies

Where hybrid strategies combine professionalist-independent and consumerist-competitive elements, multiple strategies refer to employment of both professionalist-independent and consumerist-competitive strategies in the same jurisdiction. Indeed, no common-law jurisdiction employs only one regulatory strategy.

In common law North America, laws of general application that apply to lawyers, such as fraud or criminal provisions, represent a consumerist-competitive approach even within jurisdictions that generally regulate lawyers through professionalist-independent mechanisms. Similarly, England and Wales retain self-regulated entities reflecting a professionalist-independent approach as front-line regulators158 that are subservient to state-accountable and layperson-dominated bodies.

2.3.3 Unintended Consequences

Professionalist-independent or consumerist-competitive approaches may sometimes cause very different results than what regulators intend. For example, professionalist-independent regulators in the United States reject the possibility of nonlawyers delivering legal services and therefore refuse to encourage regulation of nonlawyer legal service providers. As a result, an increasing number of legal services businesses are developing outside of the regulatory regime at both ends of the market, such as Axiom (project-based legal work) or Clearspire (virtual law practice) as alternatives to the traditional corporate


156 Washington Supreme Court Admission to Practice Rule 28, Limited Practice Rule for Limited License Legal Technicians. Re these small Canadian sub-professions, see Law Society Act (Ontario), R.S.O. 1990, c L.8, ss. 25.1 and 25.2; Notaries Act, (British Columbia), RSBC 1996, c. 334; Notaries Act (Quebec), CQLR c N-3.


law firm and LegalZoom (online legal forms) or Modria (online dispute resolution) as options for the consumer law market.\textsuperscript{159}

**Conclusion**

We began this project by seeking to gain insight into why common law jurisdictions have adopted divergent regulatory strategies. By placing strategies for regulating legal services in the context of rationales for regulation more generally, we identified assumptions regarding the purposes and methods of regulations that we classify generally into professionalist-independent frameworks dominant in the United States and Canada, and consumerist-competitive frameworks dominant in Australia, England and Wales. These frameworks, in turn, construct particular occupational structures, governance regimes, and substantive rules, including limitations on the role of non-licensee service providers. The taxonomy of dominant frameworks also helps identify exceptions to these frameworks, whether they represent hybrid or alternate strategies, or unintended consequences.

A comprehensive normative evaluation of these alternative modes of regulation is beyond the scope of this Essay. Competitive-consumerist regulators take the consumer interests of clients more seriously, and this approach may produce more accessible and better-quality legal services for individual clients. However, others might argue that these regulators have abandoned ancient and worthy ambitions, such as instilling altruistic service orientation in lawyers and maintaining a profession independent of state and market. Even among the co-authors of this piece there is disagreement over the preferred regulatory regime. For example, one of us has advocated elsewhere that the American public would benefit from increased competitive-consumerist regulation through liberalisation of the nonlawyer ownership and investment bans in the United States.\textsuperscript{160} Another argues more generally that a competitive-consumerist approach best promotes the goals of individual rights and equal access to political and economic power.\textsuperscript{161} A third believes that sufficiently ambitious reform might bring professionalist-independent regulation into the 21st century without jettisoning its core commitments.\textsuperscript{162} Regardless of our individual normative views, there is benefit in crafting a descriptive categorisation of lawyer regulation as we have done here. The intention of this taxonomy is to stimulate further inquiry into the assumptions underlying, and characteristics of, comparative regulatory regimes, as well as into which assumptions and characteristics are appropriate for particular purposes. The taxonomy is designed to aid scholars and regulators alike as they evaluate merits of existing regulation and consider proposals for reform.

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