Comment Letter re Regulatory Objectives to the ABA Commission on the Future of Legal Services

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Dear Commission Members:

I am writing in response to your request for comments on the draft ABA Model Regulatory Objectives. I have three comments for your consideration.

1. Adopt Model Regulatory Objectives

I urge the Commission and the ABA to adopt Model Regulatory Objectives. It seems imminently reasonable to ask a regulator to identify the goals it is trying to achieve. Moreover, experience has shown that explicitly identifying regulatory goals makes it less likely that something important is overlooked.\(^1\) Having explicit regulatory objectives also provides credibility and transparency to a regulator’s actions.

I recommend that the Commission and the ABA adopt Model Regulatory Objectives even if commentators disagree with the content you have proposed. In my view, the ABA Model Regulatory Objectives will have served their purpose if they prompt discussion and debate within a jurisdiction about the goals of lawyer regulation. If a jurisdiction adopts regulatory objectives that differ from those found in the ABA’s Model Regulatory Objectives, I view that as a success rather than a failure because it means that the jurisdiction has taken seriously its obligation to consider what it is trying to achieve with its regulatory system. Thus, even if the Commission receives extensive feedback criticizing one or more of the particular regulatory objectives, I would urge it to continue with the project and seek ABA approval of its proposed resolution. The ABA Model Regulatory Objectives will provide a starting point for a jurisdiction to have a conversation about what it is trying to achieve with its regulatory system.

2. Consider Amending the Draft Model Regulatory Objectives

Notwithstanding my first point, if the Commission decides to issue a revised draft of its Model Regulatory Objectives, then I have a proposed amendment. If I were on the Commission and if the Commission had decided to issue a revised draft, then I would urge my colleagues to include the concept of client protection as a separate objective. I realize that the concept of client protection arguably is embedded within many of the existing objectives, including the objectives of “efficient, competent, and ethical delivery of services,” “protection of confidential

\(^1\) The first draft of Section 1 the 2007 UK Legal Services Act omitted “protecting and promoting the public interest;” this is now the first objective in Section 1 of the Act. During the ABA’s MDP debates, the initial Recommendation and Report omitted lawyer competence from the list of core values. The Commission’s later report stated: “It is undeniable that competence is a core value of the legal profession and the Commission’s original recommendation should have so identified it.” See Laurel S. Terry, Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon, 22(1) Prof. L. 28, at n. 20 and accompanying text (Dec. 2013).
information,” “independence of professional judgment” and “accessible civil remedies.” Despite the fact that client protection underlies many of the paragraphs found in the draft ABA Model Regulatory Objectives, I believe that the omission of a simple, straightforward “client protection” objective may provoke unnecessary criticism and resistance.

Jurisdictions have differed in the ways in which they have expressed the concept of client protection. Some jurisdictions refer to protection of “clients” whereas other jurisdictions refer to the protection of “consumers.” Some jurisdictions speak of “protecting and promoting” whereas other jurisdictions omit the word “promoting.” If I were in charge of drafting the regulatory objectives, I would use the language recently adopted by the Nova Scotia Barristers’ Society: it lists as its first objective “protect those who use legal services.”

To recap, I support the adoption of the Objectives as currently drafted because I think the change I have suggested is precisely the type of discussion that it is beneficial for a jurisdiction to engage in. But if I were a Commission member and if the Commission had decided to issue a revised draft, then I would urge the inclusion of an overarching objective that makes it clear that one of the goals of the lawyer regulatory system is to “protect those who use legal services.”

3. Do Not Allow the Issue of Regulatory Objectives to Become Entwined with Controversial Issues that Involve Market Developments or Regulatory Developments

My final comment is that it is important for the Commission and ABA members not to allow controversies about regulatory developments in the United States or elsewhere to derail the discussion about Model Regulatory Objectives. Many of the recent lawyer regulatory developments have been quite controversial. As I have noted in several articles, one way to think about both market and lawyer regulation developments is that they present issues regarding the “who-what-when-where-why-and-how” of lawyer regulation. For example, the North Carolina Dental Board case and the 2007 UK Legal Services Act raise issues about who it is that should regulate lawyers; LLLT, entity regulation, and ABS developments raise issues about what it is that should be regulated; the UK’s outcomes focused regulation raises questions about how regulation should occur. While these who-what-when-where-why-and-how issues have become

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3 If I were writing my articles over again, I might recommend adoption of the regulatory objectives as developed by the Nova Scotia Barristers’ Society. See http://nsbs.org/nsbs-regulatory-objectives. I commend to the attention of U.S. jurisdictions Nova Scotia’s adoption of a “Triple P” system in which it strives to make its lawyer regulation system principled, proactive, and proportionate. See http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/lr.frameworkforthefuture.pdf.

intertwined in particular jurisdictions, it is important for U.S. jurisdictions to recognize that these issues are separable.

I believe that it is exceedingly important for a jurisdiction to ask itself the “why” question - why does the jurisdiction regulate lawyers and what it is trying to accomplish? I don’t think that asking the question of why a jurisdiction regulates presupposes a particular answer to one of the controversial “who-what-when-where-or-how” lawyer regulation issues. Moreover, failing to ask the “why do we regulate?” question doesn’t mean that the difficult issues are going to go away. Whether one likes it or not, there are market and regulatory developments in the United States and elsewhere that will be cited during regulatory debates. If a regulator can say what it is trying to achieve, its response to a particular issue – whatever that response is – should be more thoughtful and should have more credibility. It seems to me that this is in everyone’s interest.

The ABA has historically taken a leadership role on lawyer regulation issues. If we want jurisdictions to be thoughtful about what it is they are trying to achieve with their regulatory systems, the ABA can assist them by providing Model Regulatory Objectives. The Commission’s draft Model Regulatory Objectives can provide the starting point for important discussions within a jurisdiction. I therefore urge the Commission and the ABA to once again take a leadership role and to keep the focus on the issue of regulatory objectives and whether it is valuable for regulators to explicitly articulate their goals. Please do not allow the issue of regulatory objectives to become entwined with other, potentially controversial, issues.

Sincerely yours,

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