NOEL SEMPLE

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LEGAL SERVICES REGULATION AT THE CROSSROADS

Justitia's Legions

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Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2014950917

This book is available electronically in the **Elgar**online
Law subject collection
DOI 10.4337/9781784711665

MIX
Paper from responsible sources
FSC® C013056

ISBN 978 1 78471 165 8 (cased)
ISBN 978 1 78471 166 5 (eBook)

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by T.J. International Ltd, Padstow

Legal Services Regulation at the Crossroads

Dedicated to my parents, Wynton Semple and Jan Noel,
with love and gratitude.

Foreword

The legal profession, at least in North America (but probably elsewhere), is facing more severe stresses on numerous fronts than it has at any time over the post-war period. First, at the lower and less complex end of the legal services spectrum, involving the provision of relatively routine legal services to individual consumers, information technology through the provision of online and interactive services is commoditizing many of these services and introducing unconventional forms of competition into this market. At the other and more complex end of the legal services spectrum, corporate clients and the rapidly expanding cohort of in-house corporate counsel who represent them in dealing with outside law firms have become much more sophisticated and demanding in terms of both the price and quality of legal services, while information technology has again introduced new competitive options, such as contract lawyers and out-sourcing. Third, in the wake of the recent global recession, demand for new lawyers has significantly weakened, reflected in sharply declining applications and enrolments at many North American law schools. Fourth, in an era of widespread public cynicism about the competence and integrity of government generally, the self-regulatory model of governance of the legal profession is increasingly under challenge, fuelled by apprehensions that it is motivated less by regulation in the public interest and more by regulation in the interests of members of the legal profession, and reflects an abdication of responsibility by democratically elected governments.

As someone who has spent significant periods of my career writing about the regulation of the legal profession and access to justice, and indeed been an active participant in policy reform processes in these contexts, I have been delighted to have been able to observe, and discuss with Professor Noel Semple, the evolution of this outstanding book over the past three years. In my view, there is no comparable treatment of the regulation of legal services in North America that is as comprehensive in its substantive coverage, broadly interdisciplinary in the perspectives it engages, and original in the insights it offers.

A central theme in the book is a contrast between two paradigms of legal services regulation that have emerged in recent years: a

competitive-consumerist paradigm that has increasingly come to predominate in much of Western Europe and Australasia, with a significant role for some form of public oversight, and the traditional professionalist-independent paradigm that continues to prevail throughout the United States and Canada. In his book, Professor Semple compares and contrasts how these two paradigms deal with central regulatory issues, such as occupational structure; governance; insulation from governments, non-clients, and non-legal service providers; and the unit of regulatory focus (individual lawyers or legal services entities).

While Professor Semple is rightly critical of the failures of the professionalist-independent paradigm that continues to prevail in North America in addressing many of the issues that arise in these contexts, especially from a client and access to justice perspective, he argues that the paradigm should be reformed and revitalized, rather than abandoned, given the importance of professional independence in most robust conceptions of the rule of law.

Whether the legal profession is capable of reforming and revitalizing this paradigm without external threats of more direct regulation remains an open question. Professor Semple concludes this seminal contribution to scholarship and policy commentary on legal services regulation on a note of cautious optimism that the organized legal profession in North America is up to this task of regulatory rejuvenation.

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Acknowledgements

This project would not have been possible without Professor Michael Trebilcock, who has supported it tirelessly and in multifarious ways since its inception. I am also indebted to my mother, Dr Jan Noel, for thoughtful reading and constant moral support. Thanks are due to the following people for fruitful conversations and helpful suggestions: Russell Pearce, Renee Knake, Malcolm Mercer, and reviewers and editors at the *International Journal of the Legal Profession* and *Legal Ethics*.

This book was written during a postdoctoral research fellowship at the University of Toronto Faculty of Law's Centre for the Legal Profession. I am grateful to Anita Anand and Kim Snell for giving me an institutional home at the Centre, and to the Social Sciences and Humanities Research Council of Canada for funding the fellowship. Finally, thank you to Victoria Nicols and the staff at Edward Elgar Publishing for their courtesy and professionalism.

Contents

PART I

Regulation in the common law world

1. Introduction

Justitia is the goddess of law and justice, usually depicted blind and armed with sword and scales. Justitia's legions are those who earn a living by providing legal services to others. These people give advice about the law; they represent others in courts or tribunals; they prepare documents with legal effect. They do this work for individuals, for corporations, and for governments. Some march alone; others in small partnerships; still others in firms of thousands.

The goddess at the head of this column represents celebrated ideals such as the rule of law and the pursuit of justice. However, the reality is that Justitia's legions muster themselves with the goal of meeting human needs. We live in a law-thick world.[1] To secure a benefit or avoid a loss in this world, we often find that we must somehow use the law. This is as true for global corporations as it is for ordinary individuals, and it is as true for the most ambitious programs of social change as it is for the most elemental human needs.

People, in short, need to use the law. However, law has become more complex along with the world itself and is now intricate enough that most people, in most cases, are unable to make effective use of it without assistance. They need and are often prepared to pay for expert legal services. Even the loftiest conceptions of law and its practitioners must acknowledge that legal services will be bought and sold.

Nonetheless, transactions in legal services have long been considered ill-suited to untrammelled free market exchange. For that reason, *legal services regulation*, the subject of this book, has been with us for as long as expert legal services have been sold.[2] Legal services regulation

[1] Gillian K. Hadfield, 'Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets,' 60 Stan. L. Rev. 101 (2008).

[2] The Bible, for example, contains two passages quoted to guide lawyers. An aspirational ideal is provided by the Book of Proverbs: 'Open thy mouth for the dumb in the cause of all such as are appointed to destruction. Open thy mouth, judge righteously, and plead the cause of the poor and needy' (Proverbs 31:8–9). The Book of Luke takes a darker view, with Jesus urging: 'Woe unto

consists of rules about who can provide legal services, what characteristics those services must possess, and under what conditions they can be provided.

1. OVERVIEW

This book's primary focus is what I call the *professionalist-independent tradition* of legal services regulation. This tradition is characterized by self-regulatory governance of a unified legal profession, insulated from non-clients and focused on individual lawyers as independent moral agents. Within the developed common law world, the professionalist-independent tradition now survives primarily in North America.

This introductory chapter will provide a bibliographic sketch of the comparative literature, a definition of 'legal services regulation,' and a brief explanation of the terminology used in the book. Subsequent chapters of this book pursue two primary goals, one comparative and one normative. Part I pursues the comparative goal of identifying the distinctive regulatory techniques of professionalist-independent legal services regulation, which are observable today in the American states and the Canadian common law provinces. The professionalist-independent tradition contrasts sharply with the regulatory regimes of common law Northern Europe and Australasia, which have adopted competition and consumer interests as their core values in regulating legal services.

Chapter 2 identifies the shared frame of reference for *all* legal services regulatory regimes in the developed common law world. Policy-makers generally agree that legal services must be regulated in order to protect clients, to protect third parties from negative externalities, and to ensure that legal services providers produce certain positive externalities as they go about their business.[3] Developed common law countries also draw on the same toolbox of regulatory techniques in pursuit of these goals. Entry rules, conduct assurance rules, conduct insurance rules, and business structure rules are regulatory tools in all of these jurisdictions.[4]

Despite this shared frame of reference, Chapter 3 shows that regulators of legal services must nevertheless make four significant choices. These pertain to occupational structure, governance, insulation, and level of

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you also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers' (Luke 11:46).

[3] Chapter 2, section 1, *infra*.

[4] Chapter 2, section 2, *infra*.

regulatory focus.[5] Each of these four choices allows a spectrum of policy responses, and each common law jurisdiction will be plotted on each spectrum.

Chapter 4 will show that a paradigmatic contrast has emerged with the regulatory regimes of common law North America on one hand and those of common law Northern Europe and Australasia on the other. North Americans continue to regulate legal services in the *professionalist-independent tradition*, while England & Wales and Australia have reformed their regimes in order to emphasize competition and consumer interests.[6] The professionalist-independent tradition is characterized by:

(i) regulatory establishment of a hegemonic and unified legal profession;
(ii) self-regulatory governance;
(iii) a policy of insulating lawyers from non-lawyers; and
(iv) a regulatory focus on the individual practitioner, as opposed to the firm in which he or she works.[7]

After three decades of dramatic change, the reformed regimes of England & Wales and Australia contrast distinctly with professionalist-independent North America on all four of these features. These countries now have multiple competing legal occupations and co-regulatory governance. They no longer seek to insulate lawyers, and they have introduced firm-based regulation to complement individual-focused rules. Their smaller common law neighbours (the rest of the UK, the Republic of Ireland, and New Zealand) are in the process of undertaking similar reforms.

To explain this divergence, Chapter 4 considers the normative ideologies which underlie competitive-consumerist reform of legal services regulation. Competition and consumer interests became rallying cries for legal services regulatory reform in England & Wales and Australia beginning around 1980.[8] They continue to animate regulation in these countries and have subsequently been taken up to varying extents in their smaller neighbours. Observers have predicted for many years that these ideals will exert a similar influence in North America, but professionalist-independent regulation has proven surprisingly resilient thus far.[9]

The remainder of this book pursues a normative project. It argues that, although traditional professionalist-independent regulation is seriously

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[5] Chapter 3, sections 1 through 4, *infra*.
[6] Chapter 4, sections 1 and 2, *infra*.
[7] Chapter 4, section 4, *infra*.
[8] Chapter 4, section 3, *infra*.
[9] Chapter 4, section 4, *infra*.

problematic, it can and should be reformed and renewed rather than abandoned. Part II lays out the most significant problems with this approach to regulation. Chapter 5 shows how professionalist-independent regulation courts *regulatory failure*, which is to say inability to accomplish the agreed goals of legal services regulation. The regulatory failure risk is in part a consequence of the timeworn mode's multiple points of disjunction with the needs of today's clients.[10] Professionalist-independent regulation also fails when its self-regulatory governance renders regulators unable or unwilling to comprehend complex client interests and prioritize them over lawyer interests.[11]

Chapter 6 takes up the other major problem with professionalist-independent regulation: its deleterious consequences for the accessibility of justice. The unity of the profession and the prohibition or marginalization of paraprofessions increases the price of legal services for individual clients.[12] Meanwhile the insulation of lawyers from non-lawyers suppresses access-enhancing inter-professional collaboration and prevents the emergence of more accessible large firms serving individual clients.[13] If justice is less accessible in the United States and Canada than it is in other wealthy common law countries,[14] then professionalist-independent regulation seems to be at least part of the reason.

If the professionalist-independent tradition courts regulatory failure and impedes access to justice, then why should it not be swept into the dustbin of history? Part III of this book argues that this approach rests upon two public interest theories which, although often overstated, have convincing truth within them. The first theory is that legal services providers, like some other skilled workers, are *professionals* who collectively constitute a *profession*. Chapter 7 draws on functionalist sociology to explain professionalism as a series of arguments about altruism,[15] regulatory efficiency,[16] social contract,[17] and social cohesion.[18] The theory of professionalism is applicable to law as well as other expert occupations, and its influence is seen in the unified legal occupation and self-regulatory governance which characterize the mode. The elitism

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[10] Chapter 5, section 1, *infra*.
[11] Chapter 5, section 3, *infra*.
[12] Chapter 6, section 2, *infra*.
[13] Chapter 6, section 3, *infra*.
[14] Chapter 6, section 1, *infra*.
[15] Chapter 7, section 2, *infra*.
[16] Chapter 7, section 3, *infra*.
[17] Chapter 7, section 4, *infra*.
[18] Chapter 7, section 5, *infra*.

involved in this approach is unsupportable, and there is no 'social contract.'[19] However, the professionalism theory's accounts of service orientation and the rule of law are valuable and the efficiency claim for self-regulation also holds some water.[20]

Chapter 8 develops the second, lawyer-specific branch of the professionalist-independent public interest theory. The central idea here is that legal services regulation must protect lawyers' *independence*. Independence is asserted both for individual lawyers and for the profession collectively and both for the benefit of clients as well as the benefit of society more broadly. It is asserted both against the state[21] and against commercial interests.[22] Independence arguments underlie the insulation goal and the individual-provider focus which are key attributes of professionalist-independent regulation. The author concludes that independence from the state is a laudable goal,[23] although some of the other elements of the independence public interest theory are on shakier ground.[24]

Finally, Part IV of the book (Chapters 9 and 10) is the author's agenda for the future of professionalist-independent legal services regulation. Despite its shortcomings, the North American approach honours professionalism and independence commitments which have significant value in today's society. Professionalist-independent regulation must be revitalized by a thorough-going reform which updates it and refocuses it on the needs of today's clients and public. The book will argue that there is a way to carry out such a reform without abandoning commitments to professionalism and independence.

Chapter 9 argues that professionalist-independent regulators must become *more client-centric*.[25] Drawing on risk-based and principles-based theories of regulation, it asks regulators to focus on client interests in high quality,[26] variegated,[27] affordable, and innovative legal services.[28] Complaint-driven discipline systems and licensing regimes are

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[19] Chapter 7, section 6, *infra*.
[20] Chapter 7, sections 2.2, 3.2, 4.2, and 5.2, *infra*.
[21] Chapter 8, section 1, *infra*.
[22] Chapter 8, section 2, *infra*.
[23] Chapter 8, section 1.3, *infra*.
[24] Chapter 8, sections 2.2 and 3.2, *infra*.
[25] For the distinction between the client-centricity which this book proposes and the consumer interests focus in England & Wales and Australia, see Chapter 9, section 1.1, *infra* ('Client or Consumer?').
[26] Chapter 9, section 2, *infra*.
[27] Chapter 9, section 3, *infra*.
[28] Chapter 9, section 4, *infra*.

no longer sufficient to protect these interests.[29] Regulators must become more proactive in ensuring that lawyers deliver value to clients, especially those clients who are unable to protect their own interests.[30] Empirical output monitoring, promotion of price competition, and access to justice levies are among the reform ideas developed by this chapter.

Chapter 10 returns to the four distinctive policy commitments of the professionalist-independent tradition identified in Chapter 4. It shows how these ancient policies can be modernized in order to enhance regulatory effectiveness and accessibility, while revitalizing, rather than abandoning, professionalism and independence. *Professional unity* can be reconciled with multiple licensing, especially if governance structures are reformed to reflect the multiple communities of practice in today's legal profession.[31] *Self-regulation* can and should survive, if it is accompanied by enhanced lay participation within regulatory governance as well as better transparency and accountability.[32] *Insulating regulation* must be rolled back to foster innovation and accessibility, but professional independence need not be a casualty of these reforms.[33] Finally, the traditional *ethical focus on the individual practitioner* can be retained but complemented by a new attentiveness to ethical infrastructure within firms and, where appropriate, entity-based regulation.[34]

The crossroads of the book's title refers to the choice confronting policy-makers. There is a well-travelled path into competitive-consumerist legal services regulation, which offers accountability and accessibility, at the expense of professionalism and independence. There is also, however, a demanding and rocky high road upwards to the modernization of professionalist-independent legal services regulation. The book's ultimate goal is to map out this route.

2. THE COMMON LAW WORLD AND THE LEGAL SERVICES REGULATION LITERATURE

This book focuses on legal services regulation in the wealthy countries which were once part of the British Empire. These nations share the English language and the common law system, which is the Empire's

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[29] Chapter 9, section 2.1, *infra*.
[30] Id.
[31] Chapter 10, section 1, *infra*.
[32] Chapter 10, section 2, *infra*.
[33] Chapter 10, section 3, *infra*.
[34] Chapter 10, section 4, *infra*.