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Something's Afoot and It's Time to Pay Attention: Thinking about Lawyer Regulation in a New Way

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Something's Afoot and it's Time to Pay Attention: Thinking About Lawyer Regulation in a New Way

<http://legalpro.jotwell.com/somethings-afout-and-its-time-to-pay-attention-thinking-about-lawyer-regulation-in-a-new-way/>
Andrew M. Perlman, *Towards the Law of Legal Services*, Suffolk University Law School Research Paper No. 15-5 (2015), available at [SSRN](#).



Laurel Terry

We all know about tipping points...when something that previously seemed rare or unlikely acquires enough weight or momentum that the balance or status quo changes. As I read Professor Andy Perlman's article called "Towards the Law of Legal Services" it occurred to me that we may be getting very close to a tipping point in the United States with respect to the issue of lawyer regulation.

Professor Perlman's article argues that the time has come to "reimagine" our lawyer-based regulatory framework. He asserts that instead of focusing on the "law of lawyering" – which is how people in our field often refer to what we study – we need to develop a broader "law of legal services" that would authorize, but appropriately regulate, the delivery of more legal and law-related assistance by people who do not have a J.D. degree. He argues that reimagining regulation in this fashion will spur innovation and expand access to justice.

What Professor Perlman is writing about is not a particularly new idea. For example, back in the 1980's and 1990's, Professor Deborah Rhode was writing about nonlawyer practice. The ABA issued a report on this topic in 1995.

What feels different at this point in time is the variety of directions from which these calls for reform are coming. For example, last year the ABA Task Force on the Future of Legal Education issued a report that included the following as part of one of its key findings: "To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services." In August 2014, the ABA established the Commission on the Future of Legal Services [not lawyers] which has been asked, inter alia, to "propose new approaches that are not constrained by traditional models for delivering legal services and are rooted in the essential values of protecting the public, enhancing diversity and inclusion, and pursuing justice for all." For those who might have missed the news, after more than ten years of effort, which was led largely by its Supreme Court, Washington had its inaugural class of Limited License Legal Technicians (LLLT) take the required exams and begin their 3,000 hours of supervised work. Other states are talking about or exploring related ideas.

And this is just in the U.S. As Steve Mark, Tahlia Gordon and I noted in our 2012 article on Global Trends,

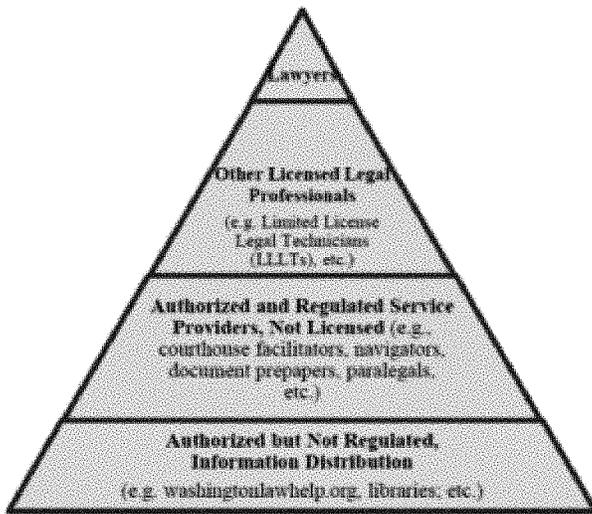
jurisdictions around the world are grappling with a variety of issues related to lawyer regulation, including the issue of what it is that should be regulated – lawyers or legal services. (We identified global trends regarding “who regulates-what or whom is regulated-when regulation occurs-where regulation occurs-why regulation occurs-and-how regulation occurs – the “who-what-when-where-why-and-how” of lawyer regulation.) Jurisdictions such as Australia, Canada, and the UK, are beginning to discuss or have already adopted an “entity” approach to regulation. Regulators in Ontario, Canada not only regulate lawyers, but have regulated paralegals for more than five years. Nova Scotia’s “Transforming Regulation” initiative is very interesting and other Canadian provinces are exploring the issue of what it is they should be regulating.

It is against this backdrop that Professor Perlman’s article is written. As a result of his experience as Chief Reporter (and one of the main technology gurus) for the ABA Commission on Ethics 20/20 and as Vice Chair of the ABA Commission on the Future of Legal Services, he brings to the article not only great familiarity with the issues, but a deep understanding of the difficulties involved in achieving the paradigm shift he recommends. But his methodical way of laying out the landscape and the arguments he offers may go a long way towards achieving the changes he recommends.

The first part of his article offers a hindsight look at the work of the Ethics 20/20 Commission, which was asked to evaluate what changes were needed to lawyer regulation in light of developments in technology and globalization. It also includes a response to some of the Commission’s critics. Because I recently completed my own reflective essay about the work of the 20/20 Commission, I was much more interested in the subsequent part of his article, which was entitled “Towards a Law of Legal Services.”

The “Towards a Law of Legal Services” section of Professor Perlman’s article begins by describing the difficulties inherent in trying to define the practice of law. I found myself wholeheartedly agreeing with his conclusions in this section. I am continually dismayed when I hear lawyers, regulators, or judges suggest that the “solution” to some problem is to develop a better definition of the practice of law (and thus unauthorized practice of law or UPL). During the MDP debates in the 1990s, I came to the conclusion (see p. 872-873) that at least in the transactional setting, it is exceedingly difficult to develop – in an exclusive UPL sense, rather than an inclusive descriptive sense – a definition of what constitutes the practice of law. Thus, whenever I see “developing a definition of the practice of law” as the proposed solution to anything, I am dismayed since I do not believe that such efforts – even if properly motivated – will yield satisfactory results.

After explaining why it is difficult to define the practice of law, the article offers Professor Perlman’s thesis that we “should ask a fundamentally different question: should someone without a law degree be ‘authorized’ to provide a particular service, even if it might be the “practice of law”? This section of the article includes this graphic to illustrate how one might respond to this question and begin to conceptualize a “law of legal services” that would supplemented the “law of lawyering:”



As Professor Perlman’s text explained, “the bottom of the pyramid captures very routine law-related needs (e.g., the creation of a living will) that can be addressed by completing blank forms. Regulatory barriers should not prohibit people from making these forms available to the public through websites or otherwise. But as consumers’ legal issues become more sophisticated, consumers typically need providers higher up on the pyramid. A central question for the law of legal service is this: at what point must a provider be subject to some kind of regulation?” (Professor Perlman’s footnote acknowledged Paula Littlewood for conceptualizing the issue this way and creating a slightly different version of the pyramid.)

The article continues by discussing the principles (or regulatory objectives) that a “Law of Legal Services” might be designed to achieve, which is a topic near and dear to my heart. It also illustrates how the “Law of Legal Services” might work in specific contexts, such as automated legal document assembly. This section offers a proposal to regulate automated legal document assembly that could be “promulgated either as a court rule or statute.” This section of the article also explains how Washington’s Limited License Legal Technician regime fits within Professor Perlman’s proposed approach. The article concludes with the following paragraph:

The law of lawyering is undoubtedly important, but it offers few options for transforming the delivery of legal services. Nonlawyer ownership of law firms is one possible exception, but even that reform envisions a world where lawyers remain the exclusive deliverers of legal advice. The law of legal services reflects a different approach to regulatory innovation, one that seeks to authorize, but appropriately regulate, the delivery of legal and law-related assistance by more people who lack a traditional law license. At a time when legal services are increasingly unaffordable, the law of legal services may reflect a promising way to unlock innovation and reimagine the regulation of the twenty-first century legal marketplace.

There were certainly places in this article where I found myself disagreeing with Professor Perlman. For example, I thought he might have been unduly optimistic with respect to his conclusion about the access to justice results that will accrue by virtue of regulating legal services providers such as LLLTs because there may be too few licensed LLLTs to address the significant unmet legal need. As I have noted in previous Jots, I see a larger role for technology (see [here](#) and [here](#)) than he acknowledged in this article – LLLT’s will help, but I don’t think that they alone will solve our access to justice problems. My bottom line, however, is that I agree with much of what Professor Perlman said. *Towards the Law of Legal Services* is an important article about an important topic. Given the gigantic unserved legal needs in this country and the decades of our saying that we need to address this problem combined with our failure to do so, I think the time may be ripe to think about a pyramid model of regulated legal services, in which lawyers are at the top of the pyramid, but not all clients

necessarily need to see a lawyer. To steal (and paraphrase) a set of images that I heard Futures Commission Chair Judy Perry Martinez refer to at the 2015 ABA Midyear Meeting, a nurse may be a suitable provider to give a flu shot, a physician's assistant may be a suitable provider to treat a cold, an Internist may be suitable to do an annual checkup, but you probably want a surgeon if you are having heart surgery. A patient may choose to go to an MD for all of these services, but that does not mean that the regulatory system should require a "one provider fits all" system. Just as there is a continuum of medical needs (and providers), perhaps the time has come to discard our mode of thinking in which we divide the world into "legal services/not legal services, with the former requiring a lawyer and the latter not. Perhaps the time has come to envision legal services as a continuum or a pyramid where clients can choose the type of provider they want – and we recognize that a legal services provider need not be at the apex of the pyramid in order to be regulated or in order to provide services that help clients address their legal needs.

It is true that this type of "pyramid approach" creates the potential for a tiered system of access in which lawyers are primarily utilized by those with greater financial resources and those with lesser financial resources receive services from someone lower on the pyramid. However, given the data that suggests that a large number of individuals currently need but do not receive any legal services at all, I consider this a second order problem that can be addressed through a process of incremental change.

In sum, I sense that we may be getting close to a tipping point in which we begin to take seriously the notion of a "law of legal services." Professor Perlman's thoughtful and measured article, his legal services "pyramid," and the model rule he includes in his article provide a useful way to start thinking about whether and how we might go about reimagining the regulatory space in which we operate.

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