The Future of Legal Services: Professional Regulation and Federalism— Let's Remove Access Barriers

Q&A with Dan Rodriguez

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As part of our Future of Legal Services Speaker Series, on December 9, IAALS and the University of Denver Sturm College of Law co-hosted a virtual discussion with Dan Rodriguez on why our balkanized system of professional regulation makes it much more difficult to meet the demand for legal services, and how states can join together and offer more legal services to those in need without opening up the public to the risk of harm.

Recap and video replay available here: https://iaals.du.edu/events/future-legal-services-professional-regulation-and-federalism-let-s-remove-access-barriers

What regulation would be needed to persuade the ABA to stop accrediting law schools with professors who teach lawyers in the 3rd year to be convincing liars? E.g. to pass "the snicker test."

The matter of ABA regulation is both more and less complicated than meets the eye. The "less complicated" aspect is two-fold: First, there are not, contrary to popular belief, a large number of specific curricular edicts in the ABA's accreditation standards. So, for example, a law school could, consistent with these standards, radically reshape its first-year curriculum, so as to, for example, focus on experiential learning, soft skills, interdisciplinary knowledge, etc. There are impediments to such major change, but most of these impediments are cultural, not regulatory. Likewise, law schools are free to experiment, and in various ways, with the second and third year of law school. There are a required minimum number of contact hours to graduate and, yes, this means that functionally law schools will be three-year endeavors (to be sure, some law schools have experimented with two-year programs, including mine, but they are nonetheless required to meet the overall credit minimum). Second, ABA accreditation is not strictly required in order to enable graduates to sit for the bar exam. That almost all states require graduation from an ABA-accredited law school reflects a choice made by state bar authorities, not by the ABA. So, for example, California enables graduates of non-ABA accredited law schools, with certain conditions, to sit for the bar exam. So, we shouldn't necessarily equate ABA accreditation with access to the profession. Indeed, one pathway toward radical change, if one wanted to push in this direction, would be to convince state bar authorities, generally operating under the aegis of the state supreme court, to decouple bar admission from ABA accreditation. Perhaps they would substitute different regulatory standards; or perhaps they would leave it to the law schools to experiment with their own models (Two year law schools? Law studied at the undergraduate level? A clinical third year?).

At the same time, ABA accreditation is rather complicated, in that there are many regulatory standards that seem fairly distant from any empirical evidence or even logic connected to

suitable training to practice law. So, for example, the rules against a distance education JD (which has, to be sure, softened in recent years, so that there are, at present, two law schools which do indeed have 100% online JD programs, and others with some hybrid models), are hard to justify on the grounds that in-person instruction is necessary to train new lawyers. Likewise, the limits on the number of academic credits taken in courses offered by part-time, adjunct instructors (often seasoned lawyers and judges) seems backwards in some meaningful sense, if and insofar as we aspire to a richer practical focus. There are other examples as well.

The matter of persuasion, raised by this question, is a tricky one. For many years, the ABA's law school accreditation process has been decoupled from the big ABA. This does not mean, however, that the ABA Section on Legal Education and Admission to the Bar, which is the full name of the entity that accredits law school, is free to do what they want. They are subject to oversight by the U.S. Department of Education. The DOE periodically reexamines the Section's role and authority to accredit law schools. And so the audience for advocacy and proposed reforms may ultimately be the DOE. They could, if they had the will to do so, impose restrictions on the ABA Legal Ed Section or, even more, remote the ABA from its position as accreditor altogether.

I have thought that developing uniform law/principles on nonlawyer practice UPL and cross-border practice UPL might be a good alternative to Congressional action. Could be a role for the ABA (along the lines of what the AICPA has done for public accounting), or other national organizations. Thoughts on that?

First, there is a more politically promising avenue, in my opinion, given what is likely to be the lack of serious interest in and attention to these issues by Congress. Perhaps things could change such that Congress would become more engaged in these issues, but I am not especially hopeful. Insofar, as my presentation to IAALS suggests, we worry about the balkanization of legal services regulation, we shouldn't lead these issues mainly to state legislatures either, as we would simply get more balkanization. So, it is more likely that the ABA or another entity (perhaps the American Law Institute on the National Comm'n on Uniform State Laws) could bear down constructively on these issues.

Second, the experience with the ABA on these issues hasn't been especially encouraging over the past, say, twenty years. When the ABA has confronted squarely the issues of nonlawyer practice and UPL, as they did in three major contexts in modern times, they offered little by way of constructive change, in my opinion. They are very dug in on the traditional model of legal practice being for lawyers and restrictions on imaginative solutions, through the use of various para-professions and alternative legal service providers, to the access to justice crisis. Nor have they been especially forward looking with regard to cross border practice. So, for example, the 2002 amendments to Rule 5.5, dealing with cross-border legal practice, proved to be of little consequence. They various interpretations by state bar authorities of the language in this amended rule left lawyers confused at best with what kind of cross-border activities would be allowed. The bottom line is that the ABA has many entrenched interests that have confounded efforts at reform in the areas you mention.

Third, and finally, the efforts of another entity to develop uniform rules should, in my view, be carried out within a rational, transparent process that purposively engages multiple stakeholders from various disciplines and includes, critically, the voices of consumers and also

alternative service providers. Moreover, it should bring in diverse segments of the profession, including younger lawyers, those who might be expected to be more agile with technology and attentive to modern approaches. A good process, with well-intentioned and skilled participants, will be essential to move reform forward. Given the tradition of self-regulation, which I do not expect to dissipate in any significant respect, it will be very important to engage judges, even the most skeptical ones, and help bring them along to new ways of thinking. (And, to be fair, reformers should also be open-minded so as to learn from the experience and wisdom of judges who are on the front lines of our civil and criminal justice systems).

Isn't there room for an expanded role for the state legislative and executive branches in regulation of the business of law (as opposed to the practice of law) without violating separation powers?

To begin with, it is a bit difficult for me to grasp precisely the distinction you draw between the business of law and the practice of law. These are more synthetic than distinct, in my view. But, taking your dichotomy on its own terms, I can agree with the general proposition that state legislatures especially and, in some ways, the state executive branch (often working through administrative agencies) can develop strategies to ensure that the functioning of law firms and even solo practitioners should be subject to responsible business regulation. To be sure, there are complex legal dynamics at work in the regulation of limited license corporations and other entities characteristic of legal practice. But, that all said, lawyering is generally a business, and state legislatures and administrative agencies have experience at regulating businesses. As your question implies, lawyering has been carved out, given our tradition of self-regulation, from ordinary business regulation to a very large degree, but the case for doing so erodes at least to some degree when we think about the nexus between legal services provision by credentialed lawyers and the welfare of consumers. Insofar as consumer protection is embedded in how government thinks about – and ought to think about – the regulation of business activity in modern society, then legal practice should be subject to scrutiny, even if there are unique considerations at work.

I also want to say that your assumption embedded in the question, that legislative regulation of the practice of law would violate the separation of powers, is a quite controversial one. That we largely take self-regulation for granted does not mean that this scheme follows inexorably from our state separation of powers. It would take many ore pages to give due to this large, complex topic, but let me just say that some of the separation of powers cases decided by state courts under the rubric of state constitutional law are not especially well-reasoned. Indeed, many reason by ipse dixit, simply asserting that lawyers as "officers of the court" should be subject to regulation only by those – the judiciary – that oversee such officers. We need much more by way of a fulsome theory and doctrine of separation of powers to ground adequately our system of self-regulation of legal practice. My own views, which remain tentative, is that we should, as the saying goes, "mend it, not end it." In other words, we should think more imaginatively about how to merge professional regulation of legal services as carried out by an admixture of authorities, including the legislature and the executive branch with self-regulation, grounded as it in a notion of law and lawyering as a special professional activity. Even opening up this debate reflects progress and improvement from our flawed status quo.

Chap. 42, Sec. 198 of the U.S. Code has failed, because the courts it seeks to hold accountable for violation of constitutional guarantees is decided by the very system of judges it seeks to hold accountable. Where is the recourse?

I do not know as I would go so far as to conclude, as you do, that Sec. 198 has failed because of a conflict of interest, but I do agree that the fundamental fact that judges are sitting in judgment of their own behavior raises particular concerns. It is hard to say what the best recourse is for this. But here are some tentative thoughts:

Procedural due process under the U.S. Constitution is binding upon judges as it is on other governmental officials. And our legal doctrine dealing with bias and conflict of interest is undergirded by the notion that a judge must behave consistent with due process and that means, at least, that s/he should be an unbiased decisionmaker and should, moreover, avoid even the appearance of impropriety. Caperton v. Massey (2009) is the most recent Supreme Court case on this subject.

If others are allowed to own law firms, do you have a thought on what this would do to the value of current law firms and the sale of their business interests? Perhaps lawyers would see this as a benefit rather and a benefit vs protectionism.

Difficult to tell, especially because it is so hard to assess the value of the law firm, apart from the revenues generated for the benefit of lawyers and other staff, and whatever reserves they keep. There are, after all, no shareholders, and so way to assess value as with a publicly traded, or even private, corporation. There are various alternative business structures, and I don't know enough to say something especially smart about which mechanism is better than another. The principal value of permitting others to invest, or conceivably even own, the firm is to enable the firm to have adequate capital to function as a worthwhile business. Not only firms will choose to accept such investments, and removing the ban on ABS certainly doesn't oblige them to do so. Nor does it necessarily point to the conversion of law firms as LLC/partnership in form to, say, publicly traded corporations. However, the current regime stands in the way of innovative alternatives.

I am in accord with your intuition that lawyers may come to see ABS and, correlatively, entity-based regulation as a benefit, looking at the economics of their situation and also the ability to innovate. How they assess this tradeoff with accountability to other stakeholders (or even shareholders) is difficult to assess without more information. But the heart of the question, to me, is what exactly to we have to lose? Independence of lawyers? This objection assumes its own conclusion. Ethical rules and appropriately targeted regulation could ensure optimal independence, while also enhancing the capacity of lawyers to take risks and, although this is more speculative, help close the access to justice gap.

What about also developing some very good pro se materials? I see more state court sites have some resources.

Yes, there are some materials popping up on various state court websites; and there are organizations, including for-profit businesses (think of Nolo Press, which was a pioneer in this space), that furnish these materials and help assist individuals who would represent

themselves pro se. However, I don't think greater pro se representation is the answer, any more than handling one's own health emergencies is a worthwhile substitute for seeking expertise assistance. Rather, we need to bring down the barriers to accessing legal information and legal assistance. One key way to do so is to reduce regulatory restrictions on legal advice and representation by alternative legal service providers. This is a better avenue for justice than "do it yourself."

Thoughts about regulatory reform as a civil rights issue? How do we make changes that address systemic racism within the rule of law?

Such a big question; such an important question. A few scattered thoughts:

First, we need to be intentional in describing our legal system as infused with racism and disparate treatment. Quibbling with the phrase "systemic racism" as a description of the condition of civil and criminal justice is not helpful. One need not believe that every judge and every lawyer is a racist to believe that the structures and schemes of our justice system reinforces our troubling history of racism and subordination. Second, we therefore need to be intentional about addressing the root causes of this systemic racism in our justice systems. The law is about power; and so power structures that reinforce patterns of racism need to be confronted and need to be reformed. There are many ways to go about this, and they should be pursued simultaneously. But one key element, in my view, is our contemporary scheme of regulation. When, for example, regulatory structures reflect protectionism, then the lawyers who are being most protected are those who are disproportionately (to the general population or even the population of lawyers) older, white, and male. When you subvert, and ultimately reconfigure, these regulatory structures, you can bring in competition and you can root out anachronistic schemes that cultivate disadvantage and enable subordination to continue unabated. Finally, we need to be more resolutely consumer focused and, drilling down more deeply, focused on the ways in which law can be a vehicle for shielding race-based subordination from eradication and can, likewise, be a vehicle for enhancing social justice.

Think of voting rights as a paradigmatic case of such a phenomenon. The law has long suppressed opportunities for people of color to vote and to participate effectively in our democracy; but the law can and has also been deployed to protect and advance democracy through protecting and improving the machinery of voting and representation. The focus, to oversimplify, has been on the voter, but not as an end in and of itself, but as a focal point for enhancing just representation and good governance. In a similar vein, widening opportunities for alternative legal service providers to advise and represent consumers in need helps level the playing field in matters of controversy, especially where the conflict is between disadvantaged individuals and the mighty State. In doing so, it helps dissolve asymmetries that are born of systemic racism and ultimately helps improve social justice. It is in this way that we can see access to justice as a civil rights issue and removing regulatory barriers to access to justice as, too, a matter of civil rights.

English lawyers resisted regulatory reform to such an extent that the legislature felt that it had to act. The Legal Services Act was probably a legislative over-reaction in its detail that is now seen to have institutionalized balkanization across sub-professions (solicitors/barristers/notaries, etc.). Have we reached a point in lawyer regulation where retention of regulatory control can only come with a broader and more nuanced view on what aspects of legal services really need qualified lawyers and what do not? Are U.S. UPL and English 'reserved activities' just too blunt for 21st century life, effective consumer protection and the practice of law?

Absolutely yes, in my view. We should begin at this place, that is, at the place where we consider what kinds of needs and wants are best satisfied through services furnished by lawyers, trained and credentialed a particular way. Whether and to what extent the category in the U.S. system of "unauthorized practice of law" or in the U.K. "reserved activities" is effective at addressing the fundamental question of what consumers need is largely an empirical question. Happily, we are steadily getting more empirical information on this subject (and I might add that Mr. Mayson himself has helped lead the way with his important evidence-based analysis of the LSA and other endeavors). And so we are learning ever more. But what is necessary, too, is that we ask the right question and we do not begin with priors – such as "law is too important to be ever left to non-lawyers" – which cloud judgment about what society needs or doesn't need with regard to legal services and, more to the point, how best law can serve the interests and needs, and also protect the fundamental rights, of individuals.

I should also add, given that this question comes from someone outside the U.S., that this is a question of comparative relevance and impact. We are, of course, entitled to develop our own rules, institutions, and structures; and there are Constitutional conditions and legal culture that point to solutions that are quintessentially American. Yet we should not overstate this. Access to justice matters necessitate scrupulous attention to experiments undertaken in other systems, especially those who operate, broadly speaking, within the common law tradition (but not forgetting about innovations in civil law countries). We should learn from one another, not in order to reach some general convergence on uniform global rules, but to gain the benefit of wide knowledge, big data, and experiments.