

Outside the Law Office: Where Do the Boundaries of Regulation Lie?

International Conference of Legal Regulators, Sept. 5, 2019, Edinburgh, Scotland

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I. Overview of the Remit of Regulation in the United States

In the United States, lawyers are primarily regulated by individual states, not the federal government. The traditional view is that because of Constitutional “separation of powers” concerns, the primary regulatory responsibility lies with the state’s highest court (which will be referred to here as the state Supreme Court), rather than the legislature. Each state Supreme Court has the *ultimate* regulatory authority for the beginning, middle, and end stages of regulation (i.e., for admissions or entry issues; conduct rules; and the discipline or striking off stage). However, the Supreme Courts do not handle the *day-to-day* responsibilities of regulation. States vary with respect to who is the “front-line” regulator for each of the three stages of regulation – the beginning, middle, and end stages of regulation – i.e., 1) admissions and entry requirements; 2) conduct rules once one is a lawyer; and 3) the discipline or striking-off system. Most conduct rules only apply to lawyers when they are providing legal services, but some rules, including Rules 1.8(a), 5.7, and 8.4, apply to lawyers’ actions “outside of the law office.”

A lawyer may be licensed in more than one U.S. state and need not be a U.S. citizen. Some U.S. states have a unified or mandatory bar association that lawyers licensed in that state must join. It is common for these unified/mandatory bar associations to act as the “front-line” regulator for some or all regulatory issues. There is no standardization, however, with respect to which regulatory issues a unified state bar handles. Appendix 5 in this article summarizes information from the ABA about the regulatory tasks performed by U.S. unified state bar associations: https://works.bepress.com/laurel_terry/64/. There currently are some challenges to unified state bars.

In states without a mandatory/unified state bar, such as Pennsylvania, it is often one or more agencies of the state Supreme Court that act as the “front-line” regulator. The national organization that brings together state admissions regulators is the NCBE – the National Conference of Bar Examiners. The national organization that brings together state conduct and discipline regulators is the NOBC – the National Organization of Bar Counsel. Both the NCBE and NOBC websites contain links to the relevant state regulatory bodies. The IBA’s Directory of Regulators is also useful. See <http://www.ncbex.org/> and <https://nobb.org/> and <http://tinyurl.com/IBA-Directory>.

Most U.S. state supreme courts (and their front-line regulators) only regulate lawyers. They do not regulate law firms and they do not regulate legal services providers other than lawyers. (A few states, such as Washington and Utah, regulate individuals who are similar to paralegals. Washington calls these individuals LLLTs and Utah calls them LPPs. For presentation slides with additional information about U.S. lawyer regulation, see <https://bit.ly/2MvyJWQ>. See also pp. 4-7 on “instruments of lawyer regulation” in *Trends*: <https://bit.ly/2P5EtZw>.)

II. Key Points and Reference Resources

A. **Separate Business Interests**: International and United States Resources

1. International Bar Association, Presidential Task Force on the Future of Legal Services, <https://perma.cc/89LJ-Z75V>* (this page links to slides about the “drivers of change, <https://perma.cc/4X6N-APMP>”, Part I of the Task Force Report, <https://perma.cc/4VWQ-5BPH>, and conference presentations and other links of interest)
2. International Bar Association, *Bar Issues Commission, BIC Policy Committee Project on Guidelines on unregulated legal services*, <https://perma.cc/AN7D-E6MP> (this working group is looking at issues that are related to this ICLR panel; Professor Laurel Terry is a member of this IBA BIC Policy Committee Project)
3. ABA Model Rules of Professional Conduct, **Rule 5.7: Responsibilities Regarding Law-related Services**, <https://perma.cc/G76L-TAD3> and State Variations: <https://perma.cc/7RVH-Y9V8>; SSRN abstract # [2840913](https://ssrn.com/abstract=2840913)
4. See Rules 1.7, 1.8, 2.1, 5.4, & 8.4, <https://perma.cc/FH8T-GTCK>. Rule 5.4. prohibits fee sharing/partnerships between lawyers and others. See <https://perma.cc/E7LM-9VS3> and <https://perma.cc/6Y5W-JH26> (state variations). See also Laurel Terry, *Resources and URLs Related to ABA Model Rule of Professional Conduct 5.4* (2019), https://works.bepress.com/laurel_terry/97/ (has links to U.S. and foreign initiatives and resources re access to legal services, technology, and the Big 4). **U.S. Rule 5.4 will be discussed elsewhere during ICLR 2019** (e.g., at Day 1 Plenary Sessions ##1 & 2 and Panels ##A1 & A2; Day 2 Panels ##A1, A2, B2, C2, and D2).

B. Social Media

International

5. Int'l Bar Assoc. [IBA] *International Principles on Social Media Conduct for the Legal Profession* (Adopted May 24, 2014), <https://perma.cc/M4DC-2ZTK>
6. **IBA Webpage: *The Impact of Online Social Networking on the Legal Profession and Practice*** <https://perma.cc/7UAX-8DU2> (includes links to documents and news stories from 2011-2016)

United States

7. **Regulators' Use of Social Media for Character & Fitness [Fit & Proper] Inquiries:** *See* <https://perma.cc/9SZ9-9VQG> (describing Florida & other policies); *see also* <https://perma.cc/5DRQ-MGZJ> regarding the public record nature of the bar association's social media accounts
8. **For an Overview of Social Media Issues:** Jan L Jacobowitz and John G Browning, *LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK* (ABA 2017), <https://perma.cc/759G-CDPT>
9. **Voluntary Bar Association Ethics Opinions re Social Media Issues:** American Bar Association [ABA] Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary* (March 6, 2018), <https://perma.cc/3CJM-5CJR>; *Formal Opinion 466, Lawyer Reviewing Jurors' Internet Presence* (April 24, 2014), <https://perma.cc/NM2T-7HTE>; *Formal Opinion 478: Independent Factual Research by Judges Via the Internet* (Dec. 8, 2017), <https://perma.cc/NS7R-APHY>; *Formal Opinion 462, Judge's Use of Electronic Social Networking Media* (Feb. 21, 2013), <https://perma.cc/7NDT-3CGS> ; Social Media Ethics Guidelines, New York State Bar Association, Updated June 9, 2015, <https://perma.cc/F7BW-8QP8>; Pennsylvania Bar Ass'n, *Formal Opinion 2014-300: Ethical Obligations for Attorneys Using Social Media*, <https://perma.cc/2X9K-XQD4> (18 page overview of issues); can judges and lawyers be Facebook friends: <https://perma.cc/UB8Z-RZAM>.
10. **Social media is a common topic in U.S. continuing legal education programs:** *See, e.g.*, ABA Website: 2017 Social Media and Blogging, <https://perma.cc/P5C9-42QG>; Am. Law Institute, *Legal Ethics of Email and Social Media* (Sept. 11, 2019), <https://perma.cc/E6XG-5ALV>. (Note: Some law firms have social media practices.)

C. Gig Economy Lawyers

International

11. Margaret Thornton, *Towards the Uberisation of Legal Practice*, 1(1) *LAW, TECHNOLOGY AND HUMANS* (2019), <https://lthj.qut.edu.au/article/view/1277/800>:

Definition from p. 1: "The gig economy entails the traditional employment relationship being fragmented into 'short term, intermittent work for multiple engagers ("gigs")'. Tasks are usually performed through digital platforms by individuals as independent contractors. The ride-sharing service, Uber, which is changing the nature of work, is the best known of these. While 'gigging' is popularly depicted as the preserve of low-skilled and low-paid workers, white-collar professionals, including lawyers are allegedly the fastest growing sector in the United States (US), a scenario that is emerging in other parts of the world."

United States

12. William D. Henderson, *Legal Market Landscape Report* (July 2018) (Commissioned by the State Bar of California, a regulator), <https://perma.cc/X2KM-UTL5>. (Section 1.4 on pp. 6-10 is entitled "Lawyers in the Gig Economy"). This report contains useful data and an overview of lawyers' role in the "gig economy." After explaining the significance of several data charts, the article observes that: "These trend lines suggest that traditional law firm employment is slowly giving way to a workforce that is more contingent. **** The fact that these marketplaces are springing up in such numbers, often backed by professional investors, is a telling sign that buyers and sellers need better pathways to find each other."
13. **Additional Resources:** ABA *Formal [Ethics] Opinion 88-356: Temporary Lawyers* (Dec. 16, 1988), <https://perma.cc/2KFM-55JS> (summarizes issues); ABA Law Practice Magazine, *Risky Business: Misclassifying Gig Employees* (MAY/JUNE 2019), <https://perma.cc/N82F-KMPQ>; *Client-Lawyer Matching Services Study of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Released for Comments, Version 2, Released on June 25, 2018, (includes a framework for regulating for-profit lawyer-client matching services), <https://perma.cc/S7BF-HNRY>; *Resolution 10A: Encourages online providers of legal documents to adopt the ABA Best Practice Guidelines for Online Legal Document Providers* (2019), <https://perma.cc/559V-PQHC> and <https://perma.cc/ARX4-WC5M> (report); *see also* Jonathan Goldsmith's May 2019 Law Gazette column, <https://perma.cc/62B6-7V25> (impact of EU's Uber & Airbnb decisions on lawyers)
14. **The Gig Economy in General:** Gig Economy Data Hub [Aspen Institute Future of Work Initiative & Cornell University ILR], <https://www.gigeconomydata.org/about-us> [<https://perma.cc/HMR6-TG4E>] and Gig Economy Resources (Prof. Deepa Das Acevedo), <https://gigeconomyresources.com/> [<https://perma.cc/7E7W-V8PM>]

*Permalinks archive webpages. To see the current version of the webpage, click [Go to Live Page](#) in the upper-right corner.

Laurel Terry, *Resources re the Boundaries of Regulation Panel*, 2019 Int'l Conference of Legal Regulators, p. 2