

THE BAR RE-IMAGINED:

Options for State Courts to Re-Structure the Regulation of the Practice of Law

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ABSTRACT	4
<hr/>	
INTRODUCTION	5
<hr/>	
I. What do regulators of legal services do now, and based on what evidence?	6
<hr/>	
II. What should a regulator of legal services do?	7
<hr/>	
III. How might we re-imagine the structure of legal services regulation?	11
<hr/>	
A Existing Regulator, Expanded Regulatory Scope	14
<hr/>	
B Sharing Regulatory Duties: The Arizona Approach	16
<hr/>	
C Dual Regulation: A New Regulator for Legal Service Entities	17
<hr/>	
D A Single New Regulator for Legal Services	19
<hr/>	
E Other Branches of Government	21
<hr/>	
IV. Conclusion	23
<hr/>	
ENDNOTES	24
<hr/>	

ABSTRACT

This white paper provides a roadmap for state supreme courts, as the regulators of the legal profession, to reconsider the role of state bar associations as part of a larger re-structuring of the regulation of the legal services market. The paper critiques the traditional delegation of regulatory authority from state supreme courts to state bars and discusses several options for a modern regulatory approach within the legal market. This paper expands on the regulatory design decisions discussed in our previous white paper [Designing and Implementing Legal Regulation](#).

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INTRODUCTION

In the United States, authority to regulate the practice of law is generally vested in the state supreme courts.¹ Regulation of the practice of law has historically meant the regulation of lawyers, who have been the sole providers permitted to provide services or engage in activities even arguably described as “the practice of law” (e.g. legal advice, document assistance and drafting, representation).² Most courts have, in turn, delegated almost all regulatory authority to state bar associations and, through its influential role, the American Bar Association (“ABA”).³ These organizations draft professional rules and requirements for lawyers, which are then adopted by the state supreme courts, administer the professional admission process, and execute enforcement through the professional disciplinary process.⁴ The regulatory mission is generally stated as the regulation of those authorized to practice law to ensure the protection of the public.⁵

Bar associations, however, are not just regulators of the legal profession. They are also, almost across the board, professional associations responsible for protecting and enhancing lawyers’ interests, economic security, and advancement. Indeed, critics have convincingly argued that state bars’ professional association identity is, in fact, their *primary* organizational identity—and that the interests of lawyers are regularly advanced before those of the American public.⁶ At the least, there is a conflict between these two functions that is fundamental and ongoing.⁷

The harm caused by this conflict is most starkly visible when assessing the organized bar’s reaction to movements to reform the regulation of legal services. Despite clear evidence that most Americans do not and cannot access legal help from a licensed lawyer, and despite mounting evidence that this lack of access is caused in no small part by the monopoly conferred upon lawyers, most state bar associations have refused to substantively re-think how legal services could be delivered to better serve more people.⁸ Reform efforts have often been met by hand-wringing about the potential harm for consumers, but also, whether explicitly or implicitly, about the potential threat to lawyers’ businesses and market value.⁹ The only acceptable solutions to consider are lawyer centric (e.g. more pro bono or increased legal aid); other avenues are dismissed and shut down.¹⁰ Each time this happens, we see the bar as professional association, advocating and advancing the interests of its members rather than guarding the public interest.¹¹ And the negative impacts of this regulatory arrangement are only likely to grow as technological and other innovations increasingly attract consumers to other, unregulated, sources of legal assistance.¹²

Because state bars labor under this core conflict of interest, the path to meaningful reform runs through state supreme courts. The bar's authority as regulator exists only by the grace of its state supreme court. Courts can, and should, re-assess the merits of the delegation to the bar and consider how to ensure proper legal services regulation while supporting the ability of lawyers to independently organize as a professional association.¹³ All know that regulatory change is hard and expensive and that there is limited appetite in any state for an expensive new regulatory body created from scratch. That said, there are relatively inexpensive and even cost-free actions that will help consumers and increase American faith in the rule of law writ large.

To see what such a reorganization might look like and grasp some of its implications, it is helpful to look more broadly at how consumer regulation of legal services might be structured, administered, and even re-imagined. The discussion below extends a set of ideas that we began to consider in our previous paper, [Designing and Implementing Legal Regulation](#), and focuses in on the particular question of institutional home for legal services regulation.

I. What do regulators of legal services do now, and based on what evidence?

The re-organization of legal services regulation requires an interrogation of the existing regulatory regime: the professional requirements core to lawyer identity. These consist of the educational and admission requirements, the Rules of Professional Conduct, and the lawyer discipline system. Key questions include: Are these professional requirements necessary to protect consumers? If so, how?

We lack virtually any objective data on the consumer protection benefits of current regulatory approach which uses detailed rules to govern who, what, when, where, and how of the practice of law.¹⁴ Although these rules could ensure a certain level of service quality for the public and thereby protect consumers from harm, we do not know whether they are actually effective.¹⁵ No definitive studies show that current educational or licensing requirements produce high quality legal services for the public. No definitive studies show that the rules of professional conduct protect consumers from poor quality services and the harm they might suffer. Nor is the data from bar disciplinary authorities very revealing. Backlogs in investigations pervade the system.¹⁶ In most states, the process is secret.¹⁷ As many as nine out of ten complaints are summarily dismissed—especially if they concern “mere negligence,” which is generally not

covered by the disciplinary system.¹⁸ The limited studies of bar enforcement activities indicate that enforcement is driven at least as often by lawyers seeking to protect their business interests as it is by concerns about consumer harm.¹⁹

These facts on the ground give good reason to question the legitimacy of both the existing regime and the gatekeepers who oversee it. We should acknowledge that many of the rules and requirements we associate with lawyer regulation are often primarily markers of membership in a professional association, rather than consumer protection regulations.²⁰ Professional markers do have value for consumers in the market. They communicate professional status, including education, training, and expertise which can help inform consumer choice of provider.²¹ A lawyer professional association can, and should, exist to advocate for lawyers' interests, provide professional certification, offer continuing education, and the like. But professional status should no longer be permitted to define the *totality* of the legal services market or the regulations governing it and the professional association should no longer control the regulation of legal services.

II. What should a regulator of legal services do?

a. If the regulation of legal services is disentangled from the functions of the professional association, what remains as the core functions of legal services regulation? What are the primary concerns that legal services regulation should target?

Legal services require regulatory oversight beyond mechanisms generally available in the market (i.e., contract, tort, general consumer protection statutes) for three reasons.²² First, legal services, like other professional services, frequently, but not always, require the deployment of expert knowledge and the exercise of discretion and judgement by an expert provider.²³ Second, legal services fall in the category of a “credence good.” These are goods or services for which it is very difficult for a lay consumer to assess the quality of the good or service, even after the good or service is utilized or provided.²⁴ And finally, legal services are often deployed in areas of high impact; the possible negative impact of poor quality services on an issue of liberty, family, or housing could be immense.

In light of these three attributes, legal regulation should primarily intervene to ensure the basic quality of the services provided to the

public. At its core, this is a consumer protection function. A legal services regulator should be focused primarily on protecting consumers from being harmed by poor quality services.²⁵

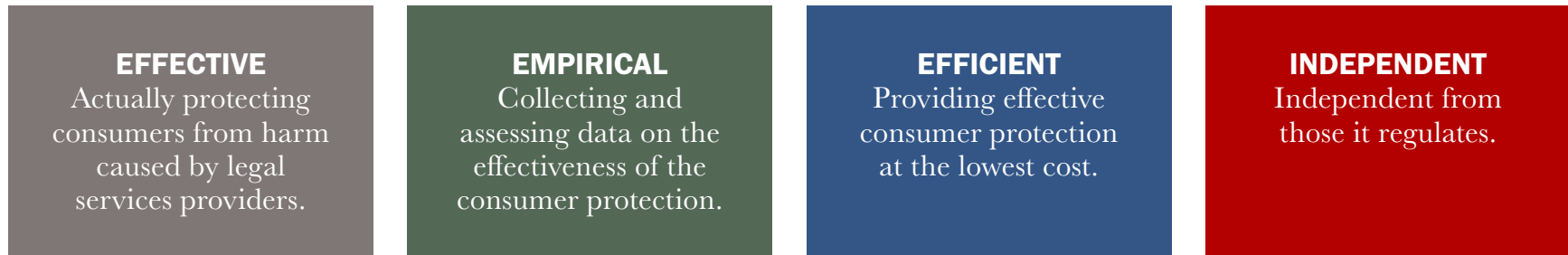
b. What should the regulator's scope of authority be?

The current, and future, legal services market is not limited to lawyers. Many consumers already receive their legal assistance from unregulated sources such as friends, family, trusted community leaders, and, of course, legal technology companies such as Legalzoom and Rocket Lawyer.²⁶ It seems likely that as artificial intelligence becomes more and more sophisticated, increasing numbers of consumers will be accessing legal help through service delivery models based in technology. The current approach is too narrowly focused on lawyers and excludes the large and diverse range of sources of legal help for most American consumers.

In embracing reform, a state supreme court can exercise its regulatory authority and expand the universe of authorized and regulated providers. The court should authorize the provision of legal services by individuals and entities *including but not limited to* lawyers, and it should build a regulatory structure capable of regulating across these diverse providers, including additional roles, such as para-professionals, organizational and entity-based providers, and technology platforms.²⁷ Each of these approaches to rethinking both the regulatory approach and the regulatory institution are discussed in options one through four below.

State supreme courts have a fifth and final option. Instead of expanding its regulatory scope beyond lawyers by acknowledging that other providers can practice law and be regulated when doing so, the court could narrow the definition of the practice of law to only those key activities lawyers should perform and defer regulatory authority over all other legal service activities to the state legislature. This approach is discussed as option five below.

c. If consumer protection is the core function of the legal services regulator, how should that regulator execute that function? What key characteristics should the regulator exhibit?



An ideal legal services regulator would be **effective, empirical, efficient, and independent**. These concepts are intertwined: The regulator is efficient when it provides effective consumer protection at a reasonable cost, and meaningful assessment of the regulator’s effectiveness requires an empirical basis for evaluation. Achieving these regulatory characteristics will require a regulator independent from those it regulates.

An **effective** legal services regulator regulates to protect consumers both from the harm caused by lack of access (by allowing more sources of legal help) and from the harm caused by poor quality legal services. This requires identifying and understanding what quality in legal services means, when poor quality services occur, what causes poor quality in legal services, what types of harm consumers experience, when harm is meaningful from a regulatory standpoint, and when and how to intervene to mitigate harm. Further, an effective regulator is responsive to changes in the market it regulates and adjusts regulatory resources as needed to avoid over- or under-regulation.

An **empirical** legal services regulator uses data to ensure the effectiveness of its regulation. The current system relies on the professional conduct rules as proxies for consumer harm, but we lack good empirical knowledge about the actual relationship between those rules and consumer harm. In other words, we do not know the effectiveness of any individual rule or the overall approach. If the legal

services regulator has the primary function of ensuring consumer protection, then the regulator must collect data on consumer harm both to guide its regulatory decision making, and its enforcement action in particular, and to ensure the overall effectiveness of the approach. One simple way the bar itself can begin the move toward a more empirical approach is to require lawyers and law firms to report their consumer complaints.

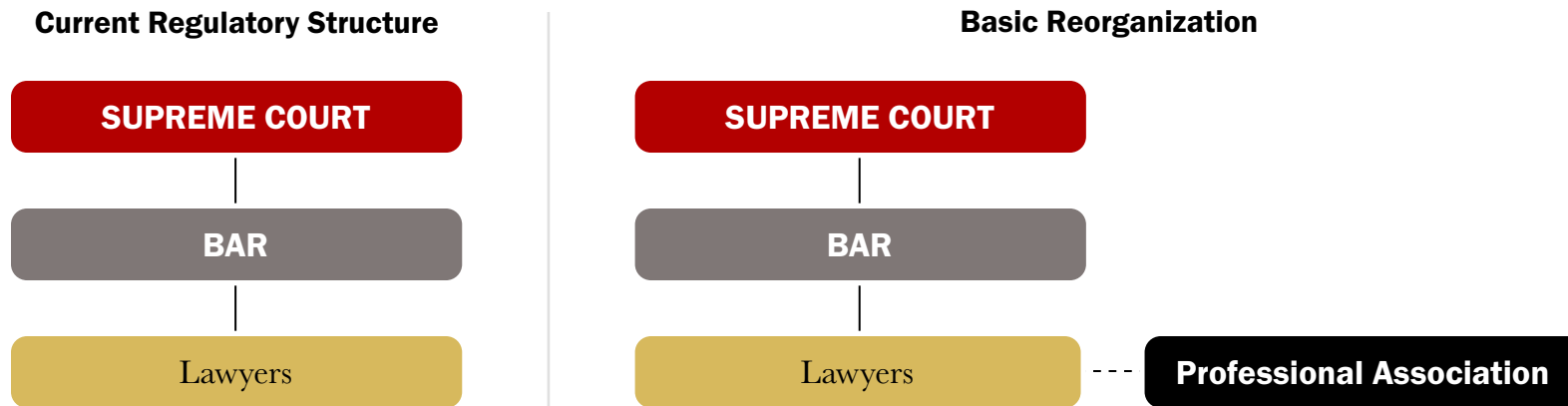
An **efficient** legal services regulator provides effective consumer protection at a reasonable cost. Cost should be understood not just as a measurement of cost born by the government in providing the regulation, but also the cost to the market of the regulation.²⁸ Currently, the cost of regulating legal services could be seen as very low because the government itself bears almost none of the cost. However, the cost to providers, consumers, and the justice system in general is significant. Providers incur high costs in overcoming the regulatory barriers to entry (law school, bar exam and other entrance requirements) and face ongoing high costs of service provision which must be born entirely by the lawyer herself.²⁹ Consumers face high costs in finding and using legal services.³⁰ The justice system experiences the cost primarily in terms of high numbers of unrepresented litigants in state civil matters and in the unaddressed poor quality of services provided by existing lawyers.³¹

An empirical regulator may, at the outset, be more expensive to operate than the current system. Data-based regulation requires institutionalizing the collection of robust data in an industry with no history or capability to do so.³² However, the benefits to the consumer protection function likely outweigh this cost. Over time, the increased effectiveness of the regulation, and the reduction of over-regulation and the externalized systemic costs, should mitigate the increased costs of empiricism.

An **independent** regulator is one which is not controlled by those it regulates. Although self-regulation has historically been a privilege of the profession, it is apparent that more independence is needed to ensure that regulation is in the public interest and prioritizes consumer protection.³³ Given the political challenges presented by lawyer control of regulation, a new regulator should be structured so as to protect against regulatory capture, not only by lawyers but also by future market participants.

III. How might we re-imagine the structure of legal services regulation?

This Part shifts gears to consider five ways in which state supreme courts could approach re-structuring the regulator of legal services.



A First Step

The current structure for legal services regulation is simple: generally, the state supreme court delegates much, if not all, of the regulatory activity to the state bar which develops and oversees lawyer regulation, including rulemaking, licensure, and discipline.

The most basic reorganization a state court could perform would separate out the professional association from the bar regulator but otherwise leave the current regulatory approach intact.

The de-unification of the California State Bar is a prominent example of this approach.³⁴ While this reform ostensibly separates out the professional association from the state bar, it only removes a limited scope of activity (particularly political advocacy). It is the most limited of the possible changes, though it may be the most politically palatable.³⁵ This reform does little to address the larger issues of access to justice and regulatory capture, and it does not, by itself, address the question of how to regulate new legal providers.

Thinking Beyond the First Step

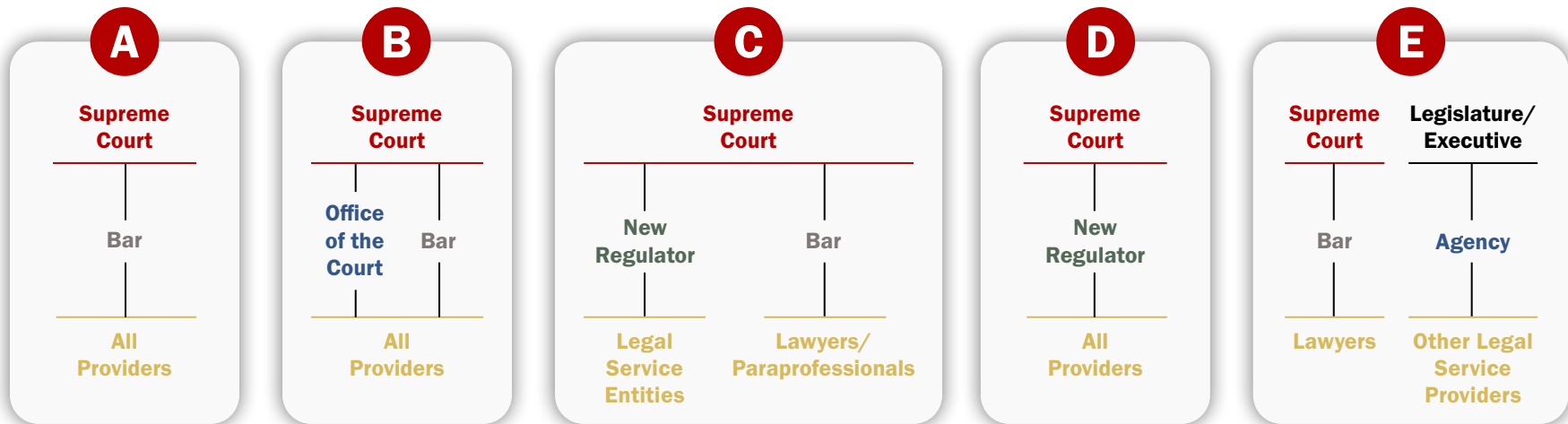
To create more impactful change, state supreme courts should consider more robust institutional reform and, potentially, a more active role in that regulation by the court. A number of factors influence the choice of an institutional host. Some courts may opt for state bars because they have a history of regulation (although we have noted the serious limitations of that regulation) and they have at least some of the machinery needed to operate a regulator (such the ability to track licenses and impose fees). Other courts may opt to avoid state bars as hosts because they want to establish a new approach to regulation and/or set up robust protection against regulatory capture by lawyers.

The court's desired regulatory approach should be a major factor in hosting decisions. Courts opting for a prescriptive approach—relying primarily on detailed rules governing conduct—may be more likely to continue regulation through state bar associations which are familiar with the development, implementation, and enforcement of rules. Those using a more empirical and risk-based approach may prefer setting up new organizations designed to act as a consumer protection regulator that can collect robust data on harm and benefits. Hybrid approaches to regulation make this decision more difficult. The partial redesign of state bars as true regulators then becomes correspondingly more complex.

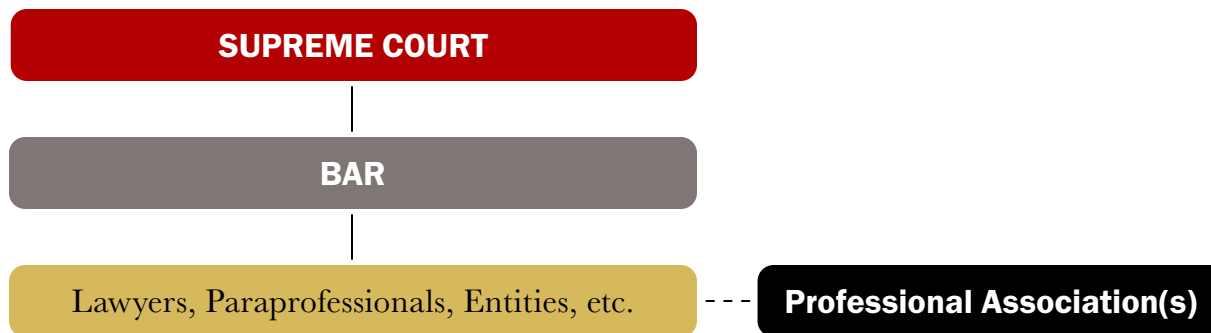
There are at least **five possible major structural reorganizations**:

- Retain the bar as the regulator but expand the scope of regulated providers
- Split regulatory *duties* (e.g. administration, authorization, enforcement) across multiple organizations such as court and bar
- Split regulatory *authority* and create a new regulator for non-traditional legal service entities
- Create a single new regulator for all legal service providers, including lawyers, paraprofessionals, entities, and technology platforms
- Redefine the regulated activity (the practice of law) to allow other branches of government to take responsibility for regulation of legal services

Each of these approaches presents opportunities and challenges, as assessed below.



A Existing Regulator, Expanded Regulatory Scope



In this reorganization, the supreme court could expand the state bar’s regulatory authority to include additional legal service providers, such as licensed paraprofessionals, legal document assistants, court navigators, or legal service entities. All of these providers would be authorized and overseen by the bar under the direction of the court. Assuming no change in regulatory approach, providers would be subjected to a set of prescriptive requirements that parallel those used for lawyers and other legal roles.

The primary contemporary example is the movement to license and regulate legal paraprofessionals. Several states, including Utah, Oregon, and Colorado, have extended the regulatory authority of their state bars to include paraprofessionals.³⁶ The extension of authority could also include organizational providers (entities), in addition to individuals.³⁷ The bar, in this proposed reorganization, would also regulate entities, both law firms and new entrants such as corporate providers of legal services. The regulatory reforms in England and Wales took this path. The traditional regulators of legal professionals, such as the Solicitors Regulation Authority (“SRA”) and the Bar Standards Board (“BSB”), now regulate law firms and Alternative Business Structures (“ABSs”) in addition to solicitors and barristers.³⁸

The significant benefit here is the reliance on the existing institutional structure and operational capacity of the bar which reduces

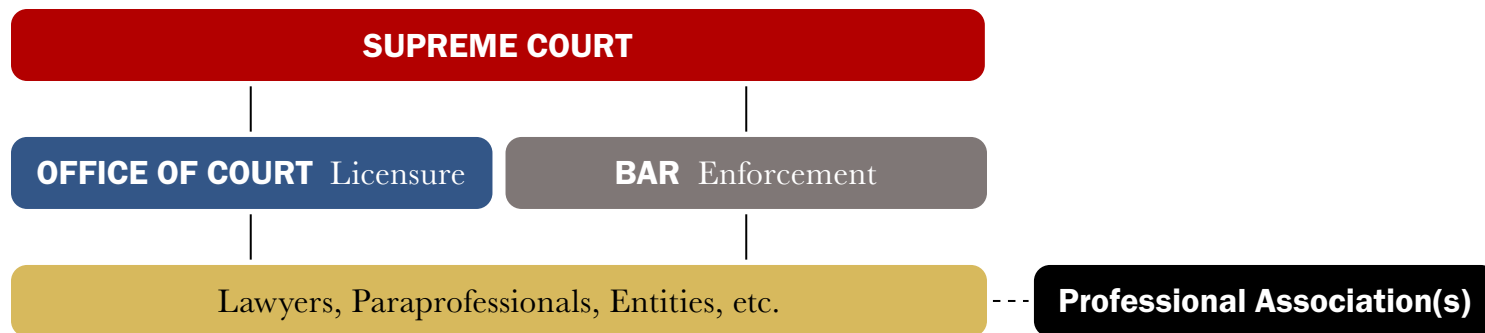
the costs of expanding the regulatory scope, though it is highly likely that there will be some costs associated with additional staffing. It also likely mitigates some potential political costs by allowing lawyers to retain control and regulatory authority.

This approach faces three major challenges. First, state bar associations have historically overseen only professional roles (i.e., lawyers or paraprofessionals in a limited number of states) and the existing regulatory controls, particularly on the front end, do not translate well to the regulation of entities. Requirements such as bar exams and moral character assessments will need to be rethought for entity regulation.

Second, unless the court also requires the bar to substantially revise its regulatory approach for all regulated providers to include some kind of empirical approach to consumer safety, there would be little robust consumer protection for either entities or roles.

Finally, expanding the regulatory scope of the bar, without other changes, allows lawyers to retain control of legal services regulation, does nothing to address the protectionist tendencies exacerbated by that control, and actually could make things significantly worse. Some might think expanding the ambit of bar association regulation is akin to expanding the size of the henhouse under charge of the foxes.

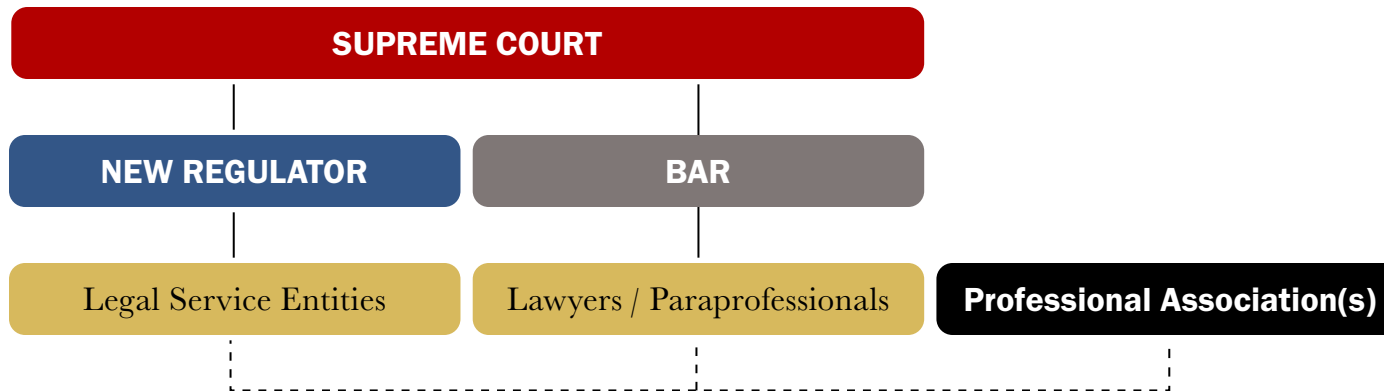
B Sharing Regulatory Duties: The Arizona Approach



A re-imagining of the legal services regulator could take the approach of splitting regulatory duties across different bodies. This is the approach taken in Arizona. The Arizona Supreme Court has authorized multiple regulated legal service providers, including legal document preparers (“LDPs”) (both individuals and entities), legal paraprofessionals (“LPs”), and entities (known as Alternative Business Structures (“ABS”)).³⁹ For each of these new categories of providers, the application and licensure process is run through an office and/or committee of the Supreme Court. While the Court itself administers the enforcement process for LDPs through its Certification and Licensing Division, the enforcement process for LPs and ABS tracks that of lawyers and is delegated to the Arizona state bar.⁴⁰

This approach may produce cost savings to the government because it uses the existing enforcement system rather than building out a new one. However, as we have seen, the current enforcement system, relying on passive regulation and enforcement only in response to the small subset of consumer complaints not dismissed, diverted, or resolved informally, may lack effectiveness.⁴¹ The opportunity to re-imagine the bar should, at the least, take the opportunity to re-design the consumer protection approach, including developing data to feedback and inform the efficacy of consumer protection interventions. One way to do this would be to begin proactively collecting complaint data as part of the bar’s enforcement duties under the expanded scope.

C Dual Regulation: A New Regulator for Legal Service Entities



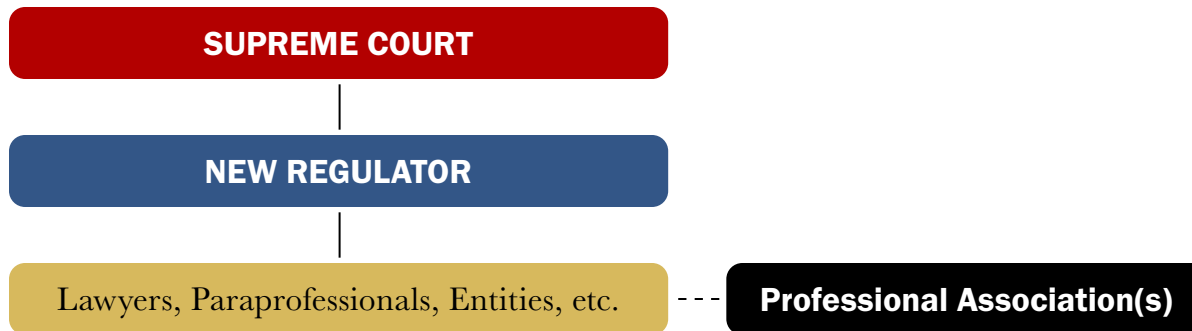
As noted above, the state bar’s historical approach to regulation faces challenges when applied to organizational providers. Courts thus could consider creating a new regulatory body to regulate entities, leaving state bars to regulate roles such as lawyers and paraprofessionals. This approach is conceptually clean and is easy to understand and implement. There is some perceived overlap when lawyers work for entities, but it is fairly straightforward to separate the regulatory requirements for roles from those for entities.

A new regulator may make particular sense if the court is deploying a new regulatory approach such as empirical regulation for non-traditional entities, including both ABSs (entities with nonlawyer ownership) and providers using non-lawyers and software. In Utah, the current system illustrates such a dual regulation of legal services. The Utah State Bar regulates lawyers and paraprofessionals, and the Legal Services Innovation Committee, a committee of the Utah Supreme Court, regulates non-traditional entities (not including traditional law firms). The Utah Supreme Court has explicitly directed the Legal Services Innovation Committee and the Office of Legal Services Innovation to which it has delegated responsibility for day-to-day regulatory activity to implement empirically-driven regulation targeting consumer protection. Utah thus has two different regulators, each following a different regulatory approach.⁴²

One benefit of this approach is that it separates the regulation of new entrants from regulation of lawyers and thus may better protect the independence of the new regulator. The court should ensure that those responsible for overseeing the development and operation of the new regulatory are not dominated by lawyers. It also confers the benefits of building a new system from scratch that prioritizes the consumer protection function and key characteristics we have identified, particularly empiricism.

However, the split regulator approach may lack efficiency and can create confusion because there are two regulatory bodies overseeing the same general area of activity. Further, unless the court requires both regulatory bodies to implement substantive policies to implement empirically driven consumer protection regulation, this approach will do little to address the lack of informed policy-making.

D A Single New Regulator for Legal Services



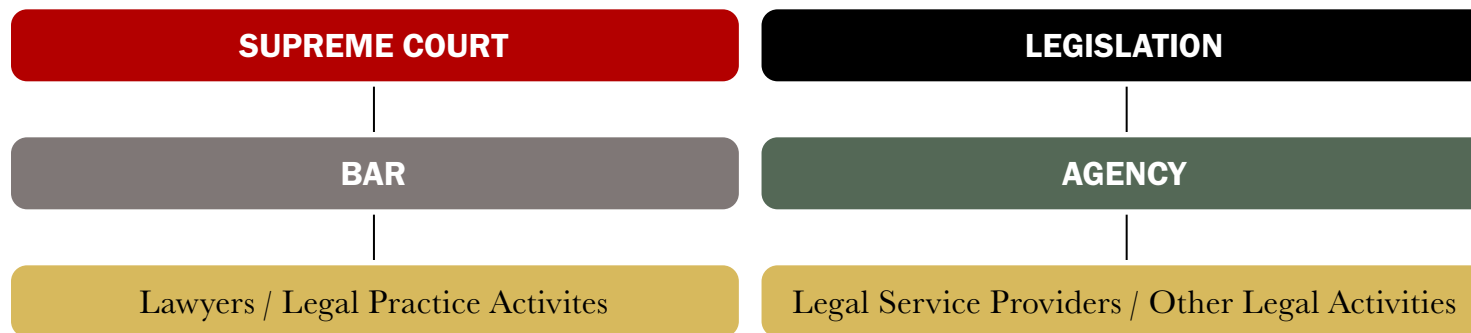
The next logical, but more politically challenging, reorganization shifts regulatory responsibilities to a new regulatory body that regulates both entities and roles, including lawyers and law firms, and requires the regulator to be created following the objective (consumer protection) and characteristics (effective, empirical, efficient, and independent) outlined above. The court could either create this regulatory body within the administrative office of the court or delegate power to a newly created, independent regulator.

Note that this approach would not have as radical an impact on lawyers as it might seem. State bar associations can continue to impose the same requirements on lawyers as before regarding educational, certification, and training. The difference is that it is now clear that those requirements are intended to provide benefits to lawyers as members and communicate value to the market, instead of protecting consumers. To the extent that they do so, they are still valuable to lawyers and worth bar membership to obtain.

There is a possible overlap between the new regulator and the state bars if the new regulator establishes additional criteria for role-based service providers. The worst case scenario for this problem would be if the new regulator established regulatory requirements that were functionally similar to those already established by the bar. This duplication will be less likely to occur if the regulator uses an empirical strategy for establishing consumer harm or protection.

If, however, the new regulator uses either a prescriptive or a management approach, then the requirements may make qualification for those roles more onerous than they are now.⁴³ If a lawyer was also a manager in an entity, she might be required to enforce a series of management best practices in addition to the traditional behavior requirements for lawyers. Note that this problem can occur even if the new regulator only oversees entities.

E Other Branches of Government



State supreme court regulation of the legal industry is unusual. Almost all other industries and professions in America are regulated through the legislative and executive branches.⁴⁴ One of the least expensive (to the court) approaches to reform legal regulation is for the court to limit the scope of its own authority to regulate the legal services market, giving the opportunity for the legislative and executive branches of the government to play a role.

This approach may raise substantial concerns sounding in separation of powers that have been assessed at length elsewhere.⁴⁵ For now, it can be noted that most state supreme courts claim the power to define and regulate the practice of law.⁴⁶ In some states, the legislature already has some power over legal practice (e.g., North Carolina, California).⁴⁷ The current expansive definition of the practice of law includes many activities occurring outside of court, such as the provision of legal advice, drafting letters and other communications with legal import, preparation and review of court forms and legal documents, and assistance with legal negotiations.⁴⁸

This has not always been the case and it is not the case today in other countries. Earlier in U.S. history, the regulation of legal practice focused on in-court appearances.⁴⁹ In England and Wales, the regulated practice of law is constrained to a much narrower set of activities, such as exercising a right of audience (appearing before a court and calling witnesses), the conduct of litigation (filing

proceedings in court and prosecuting or defending those proceedings), and activities related to certain legal instruments (includes instruments such as deeds but does not include wills).⁵⁰

Across the states, multiple activities have, over time, been defined as outside of the practice of law. In Utah, for example, several activities sit outside of the court's scope of the practice of law, including certain activities performed by real estate brokers, insurance agents, abstractors or title insurance agents, and financial institutions and registered broker/dealers.⁵¹

Rethinking the definition of the practice of law could open up alternative regulatory pathways to address providers performing a variety of legal service activities. The definition could be narrowed to focus on activities occurring in court and directly related to the conduct of litigation in court. Alternatively, exceptions could be implemented or expanded. Certain categories of providers, authorized and regulated by statute, could be excepted from enforcement under unauthorized practice of law (“UPL”) rules (similar to Utah’s approach to real estate brokers). These exceptions could include organizational providers; excepting certain community-based organizations from UPL, for example. Another approach would except certain activities from the UPL definition; the provision of free legal advice to help people complete state approved forms, for example, could be excluded from the regulated practice of law.

It would be within the province of the legislature, then, to develop a regulatory regime for legal services outside the more limited scope of the practice of law. It may be possible for the executive branch to use its existing consumer protection authority to provide regulatory oversight without additional legislation. This approach accepts the idea that the state court may not be the ideal institutional actor to develop and implement a robust regulatory scheme, particularly one seeking to prioritize consumer protection, and that the other branches of government have an important role to play.

IV. Conclusion

State supreme courts have the ultimate responsibility for the regulation of legal services within their state. The way regulation is currently structured and administered need not be the way regulation is done going forward. State bar associations only operate as legal regulators at the discretion of the court. When the evidence indicates that the existing regulator is not performing the delegated responsibilities properly and that consumers are being harmed, the courts have a responsibility to act. This is a significant challenge but not an impossible one. There are multiple ways to tackle re-imagining the bar; a court just needs to take the first step.

ENDNOTES

- 1 16 C.J.S. *Constitutional Law* § 289 (2023).
- 2 See Lauren Sudeall, *The Overreach of Limits on “Legal Advice,”* 131 YALE L.J.F. 637, 640 (2022).
- 3 The ABA is the “largest voluntary association of lawyers in the world.” *First-ever ABA Impact Report Highlights Association’s Influence on Legal Profession, Society*, A.B.A. (Jan. 17, 2023), <https://www.americanbar.org/news/abanews/aba-news-archives/2023/01/aba-impact-report/>. It does not have any actual regulatory authority over the practice of law (though it does play a role in accrediting law schools), but its influence over state level regulation is remarkably strong. A strong majority of states have adopted the ABA’s Model Rules of Professional Conduct in whole or in part. *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited Aug. 11, 2023).
- 4 Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 12 (1981).
- 5 See e.g., *Our Mission*, STATE BAR CAL., <https://www.calbar.ca.gov/about-us/our-mission#:~:text=The%20State%20Bar%20of%20California’s,inclusion%20in%2C%20the%20legal%20system> (last visited Aug. 14, 2023); *About Us*, UTAH STATE BAR, <https://www.utahbar.org/about/> (last visited Aug. 14, 2023).
- 6 Rhode, *supra* note 4; see also Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).
- 7 See Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 JUDICATURE 46 (2016).
- 8 Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 123-29 (1976); Bob Ambrogi, *California’s Chief Justice Faults Legislature and Lawyer Lobbying for Blocking Movement on Regulatory Reforms*, LAWNEXT (July 27, 2022), <https://www.lawnext.com/2022/07/californias-chief-justice-faults-legislature-and-lawyer-lobbying-for-blocking-movement-on-regulatory-reforms.html>; Matt Reynolds, *Sharing fees with nonlawyers is inconsistent with profession’s ‘core values,’ ABA House says*, A.B.A. J. (Aug. 9, 2022), <https://www.abajournal.com/web/article/resolution-402-aba-house-of-delegates-position-on-sharing-of-legal-fees-with-nonlawyers>; Gary Blankenship, *Board of Governors Unanimously Opposes Non-Lawyer Firm Ownership, Fee Splitting Ideas*, FLA. BAR (Nov. 10, 2021), <https://www.floridabar.org/the-florida-bar-news/board-of-governors-unanimously-opposes-non-lawyer-firm-ownership-fee-splitting-ideas/>.
- 9 Genie Harrison, *Paraprofessionals Won’t Fix the Access to Justice Problem*, BLOOMBERG LAW (Jun. 9, 2021), <https://news.bloomberglaw.com/us-law-week/paraprofessionals-wont-fix-the-access-to-justice-problem>.
- 10 Karen Sloan, *California Lawmakers Pull Plug on Legal Industry Reforms*, REUTERS (Aug. 29, 2022), <https://www.reuters.com/legal/legalindustry/california-lawmakers-pull-plug-legal-industry-reforms-2022-08-26/>.
- 11 Another way to assess the power of the bar as professional association is to compare the extent and efficacy of the barriers to entry to the profession (law schools, the bar exam, the MPRE, etc.) with the professional discipline system (rare, underfunded, and shrouded in secrecy). Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 546-548 (1985) (“Insofar as the profession is truly committed to public- rather than self-protection, the incongruity between disciplinary and certification procedures is untenable.”). The imbalance between these two points of regulatory intervention illuminates the self-interest at play: lawyers make it very hard to become a lawyer and very difficult to censure lawyers within the fold.
- 12 See Benjamin H. Barton and Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955 (2010).
- 13 See Gorsuch, *supra* note 7; see also Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J.F. 175 (2021), https://www.yalelawjournal.org/pdf/F7.McCormackFinalDraftWeb_ak4g6yo6.pdf.
- 14 See Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf; NAT’L CENTER FOR ACCESS TO JUSTICE, “UNAUTHORIZED PRACTICE OF LAW” ENFORCEMENT IN CALIFORNIA: PROTECTION OR PROTECTIONISM? (2022), <https://ncaj.org/sites/default/files/2022-02/Cease%20and%20Desist%20Report%20-%20%20Final%2C%202-14-22%20pdf>.

- 15 For a discussion of the potential costs and benefits of licensing requirements such as those applied to lawyers, see Gillian K. Hadfield, *Legal Markets*, 60 J. ECON. LITERATURE 1264 (2022).
- 16 Cheryl Miller, *Audit Criticizes State Bar’s Growing Disciplinary Case Backlog*, LAW.COM (April 29, 2021), <https://www.law.com/therecorder/2021/04/29/audit-criticizes-state-bars-growing-disciplinary-case-backlog/>.
- 17 See Leslie Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007).
- 18 A.B.A., *LAWYER REGULATION FOR A NEW CENTURY* (2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/; see also Rhode, *supra* note 11.
- 19 See Rhode & Ricca, *supra* note 6.
- 20 For critiques of particular aspects of lawyer regulation, see Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3-9 (1998) (examining confidentiality rules and concluding they primarily benefit lawyers); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 270-72 (1985) (critiquing conflicts of interest rules); Rhode, *supra* note 11, at 507-46 (arguing that the moral character admission requirement primarily benefits lawyers).
- 21 See Hadfield, *supra* note 14.
- 22 See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1193-94 (2016).
- 23 Elizabeth H. Gorman & Rebecca L. Sandefur, “Golden Age,” *Quiescence, and Revival: How the Sociology of Professions Became the Study of Knowledge-Based Work*, 38 WORK & OCCUPATIONS 275–302 (2011).
- 24 Mark A. Satterthwaite, *Consumer Information, Equilibrium Industry Price, and the Number of Sellers*, 10 BELL J. ECON. 483-202 (1979).
- 25 This is not to say that such a regulator could not have positive impacts in other areas, particularly given the history of the legal services market as highly restricted. By separating the regulation of legal services from the professional monopoly and allowing additional providers, including organizational (entity) providers and tech-based providers, it is likely that the market would see improvements in innovation, competition, and access. New entrants will have to provide services which are differentiated from the status quo, somehow better, cheaper, or more accessible, if they hope to gain traction in the market. The regulatory focus on consumer protection ensures that these new and different services are not so poor as to cause consumer harm.
- 26 Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016); Benjamin H. Barton, *The Lawyer’s Monopoly: What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3072-3076 (2014).
- 27 For a more detailed discussion of these choices, please see Lucy Ricca & Thomas Clarke, *Designing and Implementing Legal Regulation*, STAN. LAW SCH. (July 2022), <https://clp.law.stanford.edu/publications/designing-and-implementing-legal-regulation/>.
- 28 Gorsuch, *supra* note 7.
- 29 Tuition costs for law school range from \$84,558 (in-state public) to \$147,936 (private), not counting room and board and other expenses. Costs of studying for and taking the bar exam and undergoing the bar admission process vary from state to state. The University of California-Irvine suggests its students seeking admission to the State Bar of California put aside \$5800. *California Bar – Related Fees*, UCI LAW, <https://www.law.uci.edu/academics/registrar/bar-info/cal-bar-fees/> (last visited Aug. 14, 2023).
- 30 The average hourly rate for legal services provided by a lawyer is \$313. *Legal Trends Report*, CLIO (2022), <https://www.clio.com/resources/legal-trends/2022-report/read-online/>. The total cost of any legal engagement is difficult to know.
- 31 The National Center for State Courts estimates that in 75 percent of state civil justice matters, at least one party is unrepresented. NAT’L CENTER FOR STATE CTS., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 31 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljustice-report-2015.pdf; see also Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L. J. 509 (2022).
- 32 By “industry” here we primarily mean the legal profession. However, it is worth noting that courts also do not have a history or expertise with data, its collection, management, or analysis. State courts’ roles as regulators of data and as regulators of legal services may present similar challenges and opportunities. See David Freeman Engstrom & R.J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DEPAUL L. REV. 171, 173 (2022) (“A key question for the future, then, is whether the civil justice system—and, in particular, the courts that sit at its center—can harness new data flows in ways that promote the just, equitable, and efficient administration of justice.”).

- 33 See generally BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2010).
- 34 Lyle Moran, *California Split: 1 year after nation's largest bar became 2 entities, observers see positive change*, A.B.A. J. (Feb. 4, 2019), <https://www.abajournal.com/web/article/california-split-1-year-after-californias-state-bar-became-2-entities-observers-see-positive-changes>.
- 35 *But see id.*
- 36 *Licensed Paralegal Practitioner*, UTAH ST. CTS., [HTTPS://WWW.UTCOURTS.GOV/EN/ABOUT/MISCELLANEOUS/LEGAL-COMMUNITY/LPP.HTML](https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html) (last visited Aug. 14, 2023).
- 37 See Clarke & Ricca, *supra* note 27, 10-15 (discussing potential benefits of regulating legal service entities in addition to individual roles such as lawyers or paraprofessionals).
- 38 *Firm-based authorisation*, SOLICITS. REGUL. AUTH. (Nov. 25, 2019), <https://www.sra.org.uk/solicitors/firm-based-authorisation/> (last visited (Aug. 14, 2023)); *Welcome to the BSB*, BAR STANDARDS BD., <https://www.barstandardsboard.org.uk/> (last visited Aug. 14, 2023); see also Hadfield & Rhode, *supra* note 22.
- 39 Interestingly, the Arizona Supreme Court has authority to regulate an assortment of services, including defensive driving schools. *Certification and Licensing Division*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/cld> (last visited Aug. 17, 2023).
- 40 Ariz. R. Sup. Ct. 46 (a-c) (2021). See also *Legal Paraprofessional Program*, ARIZ. JUD. BRANCH, [HTTPS://WWW.AZCOURTS.GOV/CLD/LEGAL-PARAPROFESSIONAL](https://www.azcourts.gov/cld/legal-paraprofessional) (last visited Aug. 14, 2023); *Legal Services Reforms: Alternative Business Structures (ABS): Questions and Answers*, ARIZ. JUD. BRANCH, [HTTPS://WWW.AZCOURTS.GOV/ACCESSTOLEGALSERVICES/QUESTIONS-AND-ANSWERS/ABS](https://www.azcourts.gov/accesstolegalservices/questions-and-answers/abs) (last visited Aug. 14, 2023).
- 41 See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 17-20 (2007). The recent high-profile case of Tom Girardi in California has proved a powerful illustration of the failures of the lawyer discipline system, at least in California. At least 205 complaints were made against the prominent attorney but most were closed without investigation or dismissed for “insufficient evidence.” Harriet Ryan & Matt Hamilton, *Tom Girardi Faced More than 150 Complaints Before State Bar Took Action, Records Show*, LA TIMES (Nov. 3, 2022), <https://www.latimes.com/california/story/2022-11-03/california-state-bar-40-years-complaints-tom-girardi>.
- 42 The Utah Supreme Court recently moved the administration of the Office of Legal Services Innovation to the Utah State Bar, but all regulatory authority remains with the Legal Services Innovation Committee of the Supreme Court and is entirely distinct from the Bar. See Letter from Justs. of the Sup. Ct. of the State of Utah to Kristen K. Woods, President, Utah State Bar (March 28, 2023), <https://utahinnovationoffice.org/wp-content/uploads/2023/07/Letter-to-Utah-State-Bar-3.28.23.pdf>.
- 43 Ricca and Clarke, *supra* note 27, 16-17.
- 44 Benjamin H. Barton & Deborah Rhode, *Legal Services Regulation in the United States: A Tale of Two Models*, in INTERNATIONAL PERSPECTIVES ON THE REGULATION OF LAWYERS AND LEGAL SERVICES (Andy Boon ed., 2017). The American legal regulatory model is also an outlier internationally.
- 45 See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1189-1190 (2003) (noting that raising barriers to entry to the profession has been the “sine qua non” of the formation of modern bar associations). For the historical context of the institutionalization of regulatory authority in the state supreme courts, see Laurel Rigertas, *Lobbying and Litigating Against “Legal Bootlegers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65 (2009).
- 46 Rigertas, *supra* note 45.
- 47 See N.C. Gen. Stat. § 84; Cal. Bus. & Prof. Code §§ 6125-6133.
- 48 See Gorsuch, *supra* note 7.
- 49 Rigertas, *supra* note 45.
- 50 See Legal Services Act 2007, c. 29, part 3 (UK), <https://www.legislation.gov.uk/ukpga/2007/29/part/3> (last visited Aug. 14, 2023).
- 51 See UTAH CODE OF JUDICIAL ADMIN. r. 14-802(d)(12).