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AMERICAN BAR ASSOCIATION

COMMISSION ON FUTURE OF LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the Model Regulatory Objectives, dated
2 [] 2016.

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4 ABA Model Regulatory Objectives

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6 A. Protection of the public
7 B. Advancement of the administration of justice and the rule of law
8 C. Access to information about, and advancement of the public's understanding of,
9 the law, legal issues, and the civil and criminal justice systems
10 D. Transparency regarding the nature and scope of legal services to be provided, the
11 credentials of those who provide them, and the availability of regulatory
12 protections
13 E. Delivery of affordable and accessible legal services
14 F. Efficient, competent, and ethical delivery of legal services
15 G. Protection of confidential information
16 H. Independence of professional judgment
17 I. Accessible civil remedies for breach of duties owed and disciplinary sanctions for
18 incompetence, misconduct, and negligence
19 J. Diversity and inclusion among legal services providers and freedom from
20 discrimination in the delivery of legal services and in the justice system
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23 FURTHER RESOLVED, That the American Bar Association urges each state's highest
24 court, and those of each territory and tribe, to be guided by the ABA Model Regulatory
25 Objectives to help (1) assess the court's existing regulatory framework and (2) identify
26 and implement regulatory innovations related to legal services beyond the traditional
27 regulation of the legal profession.
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I. Background on the Development of ABA Model Regulatory Objectives

The American Bar Association's [Commission on the Future of Legal Services](#) was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public's access to, those services. In the course of its work, the Commission, through its Regulatory Opportunities Working Group, learned that many countries have adopted regulatory objectives as a framework for implementing standards in a changing profession. The Commission drafted the present report to support its recommendation that regulatory innovations should be guided by the development of model regulatory objectives.¹

As part of its work, the Commission engaged in extensive research about regulatory innovations in the U.S. and abroad. Based on this research, the Commission believes that the development of regulatory objectives may be a useful initial step to guide supreme courts and bar authorities as they (1) assess the court's existing regulatory framework and (2) identify and implement regulatory innovations related to legal services beyond the traditional regulation of the legal profession.

This report sets forth the proposed model regulatory objectives along with an explanation of why the Commission recommends them.

II. The Purpose of Model Regulatory Objectives

In studying regulatory innovations in the United States and abroad, the Commission learned that the development of regulatory objectives has become increasingly common outside of the U.S.—nearly two dozen jurisdictions have adopted them in the past decade. For example, Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces either have adopted regulatory objectives or have proposals pending.² In contrast, the Commission is not aware of any U.S. jurisdictions with regulatory objectives.³

¹ Additional information about the Commission, including descriptions of the Commission's six working groups, can be found on the Commission's [website](#) as well as in the Commission's November 3, 2014 issues [paper](#). That paper generated more than [60 comments](#), which the Commission has been carefully reviewing.

² For a more extensive history of the "regulatory objectives movement," see Laurel Terry, *Why Your Jurisdiction Should Jump on the Regulatory Objectives Bandwagon*, THE PROFESSIONAL LAWYER (2013), available at http://www.personal.psu.edu/faculty/l/s/1st3/Terry_Regulatory_Objectives_Bandwagon_2013.pdf.

³ The closest comparison to regulatory objectives found in the U.S. is a mission statement, for example the Illinois Attorney Registration and Discipline Commission has adopted the following: "The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action."

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One recent article cites five benefits from the adoption of regulatory objectives:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation]. Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.⁴

In addition to these benefits, the Commission believes the model regulatory objectives will be useful to guide the regulation of an increasingly wide array of legal services providers, not just lawyers. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely for the ABA to offer guidance in this area.

The Commission intends for the regulatory objectives to be used by supreme courts and their regulatory agencies. They are not intended for legislative adoption. Although regulatory objectives have been adopted by legislatures outside the U.S., they are equally useful in the context of the judicially-based system of legal services regulation found in the U.S. Moreover, the Commission notes that, if supreme courts are more expressly guided by regulatory objectives, U.S. jurisdictions may be more successful in retaining judicial control over the regulation of legal services than has been true elsewhere.

Regulatory objectives can serve a purpose that is similar to the Preamble to the Model Rules of Professional Conduct. In jurisdictions that have formally adopted the Preamble, the Rules provide mandatory authority, and the Preamble offers guidance regarding the foundation of the black letter law and the context within which the Rules operate. In much the same way, regulatory objectives are intended to offer guidance to U.S.

⁴ Laurel Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM LAW REVIEW 2685, 2686 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003. The original quote refers to “legislation” rather than “regulation,” but regulatory objectives serve the same purpose in both cases.

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jurisdictions with regard to the foundation of existing legal services regulation (e.g., unauthorized practice restrictions) and the purpose of and context within which any new regulations should be developed and enforced in the legal services context.

While regulatory objectives could be adopted by the judiciary in the form of a court order or as an addition to general rules, they do not necessarily have to be formally adopted in order to be useful. They can serve as guidance for regulatory innovations and the interpretation of existing regulation, even in the absence of formal adoption.

III. Relationship to the Legal Profession's Core Values

Regulatory objectives are different from the legal profession's core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the "legal profession."⁵ By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide.

The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.

IV. Recommended ABA Model Regulatory Objectives

The Commission developed the following model regulatory objectives by drawing on the expertise of its own members,⁶ discussing multiple drafts of regulatory objectives at Commission meetings, reviewing regulatory objectives in nearly two dozen jurisdictions, and reading the work of several scholars and resource experts.⁷ The Commission also

⁵ See Recommendation 10F, adopted by the ABA House of Delegates, July 11, 2000, listing the following as among the core values of the legal profession: the lawyer's duty of undivided loyalty to the client; the lawyer's duty competently to exercise independent legal judgment for the benefit of the client; the lawyer's duty to hold client confidences inviolate; the lawyer's duty to avoid conflicts of interest with the client; the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice; and the lawyer's duty to promote access to justice.

⁶ The Commission includes representatives from the judiciary, regulatory bodies, academics, and practitioners.

⁷ Materials reviewed include Steve Mark, Tahlia Gordon, Marlene LeBrun & Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response*, available at <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/preserving%20>

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sought input and incorporated suggestions from the ABA Standing Committee on Discipline and the ABA Standing Committee on Ethics and Professional Responsibility.

ABA Model Regulatory Objectives

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- J. Diversity and inclusion among legal services providers and freedom from discrimination in the delivery of legal services and in the justice system

[ethics%20integrity%20legal%20profession%20uk_paper.pdf](#); Andrew Perlman, *Towards the Law of Legal Services*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561014; Laurel Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM LAW REVIEW 2685, 2686 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003; *The Ministry of Justice's Call for Evidence on the Regulation of Legal Services in England and Wales: The Law Society's Response* (Sept. 2 2013), available at <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/regulation-of-legal-services/>.