

RESOURCE BRIEF

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Out of the Regulatory Roundabout A Path to More Effective Professional Regulation

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Executive Summary

With regularity outsiders to professional regulation, both academic and government sponsored, are critically commenting on the value of the work of regulatory bodies.² This brief looks at recent critiques of regulation in Canada, the United States and the United Kingdom by offering thoughts on several regulatory innovations, which based on my experience, regulators could initiate to improve the quality and relevance of their work. When professional and occupational regulatory bodies consider these reviews, they will be better able to anticipate the impact of these public focused reflections on quality, competence and fitness of current regulatory models. While their work remains important, many regulators have lost focus. Mired in their day to day work, they often lose perspective on the wider issues involved in protecting the public interest.

Challenging Times for Professional Regulation

These are challenging times for professional regulation. Regulators are like an island in a roundabout. Like their highway counterparts, professional regulators handle traffic coming from and heading in different directions. They are affected by the competing demands and expectations all around. The opportunities for collisions, perhaps with calamitous results, are ever present.

In one lane is the public, clamoring for better everything – more timely response to complaints and better and more effective service from the regulator. They are rarely happy or satisfied when they turn to regulators for help. Public trust in professional regulation is in jeopardy.³

In another lane are growing governmental interests in the true value of occupational regulation.⁴ Every recent study has concluded with a critical and skeptical view of the effectiveness of what regulators do. In a world where discussion of the value proposition dominates much public discourse, regulators are hard-pressed to demonstrate their actual worth. Does regulation make a difference? When governments examine occupational and professional regulation they find much to be wanting – they don't see outcomes and they don't see adequate public

- ¹ *Served as Executive Director of the Nova Scotia Barristers' Society from 1990 until 2018. During that time the Society undertook a project in entitled 'Transforming Regulation and Governance' with a goal of radically reforming its role as a public interest regulator. This paper is a reflection on some aspects of the work. Full details are available at www.nsbs.org.
- ² This paper reflects on a number of critiques of professional and occupational regulation by state and provincial governments and several academics. My thinking has been influenced by: Review of State Professional and Occupational Licensure Board Requirements and Processes By direction of Governor Tom Wolf, EXECUTIVE ORDER 2017-03 , PENNSYLVANIA DEPARTMENT OF STATE, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS, <https://www.dos.pa.gov/ProfessionalLicensing/Documents/EO2017-03-Executive-Report-Occupational-Licensing.pdf>; PROFESSIONAL RELIANCE REVIEW, The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making, https://engage.gov.bc.ca/app/uploads/sites/272/2018/06/Professional_Reliance_Review_Final_Report.pdf; OCCUPATIONAL LICENCING: A FRAMEWORK FOR POLICYMAKERS, https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; Modernizing the Oversight of the Health Workforce in Ontario, <https://www.mcmasterforum.org/docs/default-source/product-documents/evidence-briefs/workforce-oversight-eb.pdf?sfvrsn=4>; Review of the Regulation of Legal Services (in Scotland) <https://www2.gov.scot/About/Review/Regulation-Legal-Services> Independent Review of Legal Services Regulation (in England) <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>
- ³ This is well documented in the McMaster study. See Dialogue Summary, <https://www.mcmasterforum.org/docs/default-source/product-documents/stakeholder-dialogue-summary/workforce-oversight-sds.pdf?sfvrsn=4>
- ⁴ See fn. 1 The reports from the Obama White House, British Columbia, Scotland and Pennsylvania bring an objective, non-political/bi-partisan approach to their work which makes their conclusions more compelling

participation in organizations which purport to protect the public interest; rather, they see approaches, policies and processes entrenched, stagnant and steeped in tradition.

In another traffic lane are 'members' who regularly express concerns about the fees they pay, the intrusiveness of complaints and investigation processes, the complexity of licencing and recertification, the difficulty in relocating from one jurisdiction to another,⁵ and the challenges, complexity and relevance of continuing education requirements.

Not surprisingly, given the evolution of much professional regulation and the connection with professional associations, they expect the regulator to look out for their interests and those of the profession.⁶

Transformative technology occupies yet another traffic lane in the roundabout. Rapid change in the economy and how work is done impacts professionals daily. Most professions face challenges from artificial intelligence, block chain technology, electronic record keeping, privacy, instantaneous communication and other disruptions that shakes them to their core.⁷

Circling are others who seek to do the jobs of those we regulate, often doing so better and cheaper, often because they are unregulated.⁸

Affecting the flow of traffic in the regulatory roundabout is the ever-changing nature of voluntary professional organizations as they reflect the views of regulated professionals. My observation is that younger practitioners simply do not join, leaving professional organizations representing an older cohort and at risk of becoming disengaged from the broader profession.

The regulatory roundabout, like the one for vehicles, is confusing and dangerous. For a driver, a simple mistake or a failure to act defensively can cause a catastrophe. For the public, professionals, and the users of professional services, regulation is also confusing. If they make a misstep, they too can end up in a complex and incomprehensible place.

What are the greatest threats? Though they are not universal, the perspective I bring as a regulator of the legal

profession for 28 years is the combined impact of change, dissatisfaction and complexity, noted here and almost universally reflected in all outside reports, pose existential challenges to many regulators, especially those who rest on their laurels of strong reputation and a mindset of 'if it's not broken don't fix it'. A regulator can instantly lose credibility when it fails to anticipate the nature and impact of the changing environment and effectively respond to the changes happening all around and encircling it. That possibility ought not to be taken lightly.

The recent reports and academic literature conclude that many of the premises of current regulatory approaches need to be questioned. Some call for a transition from personal professional regulation, which focus on the licensure and oversight of individual practitioners, to corporate or entity regulation.⁹ Others question the approach of regulators to wait and react to issues brought to their attention, suggesting this should be replaced by a proactive mindset where regulators anticipate issues and address them before they arise.¹⁰

There are some who suggest regulation which is not focused on behavior that presents a risk of harm to the public has grown unnecessarily in scope and extent.¹¹

While every regulator purports to do its work in the public interest, almost none have defined what 'protecting the public interest' actually means or entails. It is feel-good language that is imprecise. Surely regulators should be expected to bring some definition to what is prescribed as their core purpose.

Most regulators cannot demonstrate how their work makes a difference or enhances the situation of members or the public. Outside observers are asking why regulators are not subject to requirements that demonstrate their effectiveness, namely, outcomes measurements or effectiveness assessment to prove their worth. Some even suggest a pan-professional public oversight body to 'regulate the regulators'¹² and make them more publicly accountable. This has been done by the *Office des Professions* in the Province of Quebec, for all professionals¹³, and by the Legal Services Board in England for legal regulation¹⁴, so the concept of an oversight regulator is no longer a completely foreign concept.

5 This is specifically addressed in the Obama White House Report.

6 The Review of Legal Services Regulation in Scotland speaks to this as it calls for a complete separation of regulation from representative work with the need for the regulator to have an ongoing relationship with the professional associations.

7 A detailed discussion of these phenomena can be found in Gillian Hadfield, *Rules for a Flat World, Why Humans Invented Law and How to Reinvent It for a Complex Global Economy*, 2016, Oxford University Press.

8 Though there are many examples, this recent article about unregulated legal service providers will illustrate the point - Unregulated legal services providers cheaper and more innovative, says LSB, <https://www.lawgazette.co.uk/practice/unregulated-legal-services-providers-cheaper-and-more-innovative-says-lsb/5056129.article>

9 See Deborah Rhode and Gillian Hadfield, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, Hastings Law Journal, USC CLASS Research Papers Series No. CLASS16-6, USC Law Legal Studies Paper No. 16-7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=273338

10 Professional Standards Authority, Right Touch Regulation, October 2015, <https://www.professionalstandards.org.uk/>

11 See Irwin Fefergrad, 'Right-touch regulation in practice' in Right-touch regulation in practice: international perspectives, Professional Standards Board, England, <https://www.professionalstandards.org.uk/publications/detail/right-touch-regulation-in-practice-international-perspectives> where the regulation of dentists in Ontario is discussed.

12 See the Review of Legal Services Regulation in Scotland, fn1.

13 <https://www.opq.gouv.qc.ca/accueil/>

14 <https://www.legalservicesboard.org.uk/>

Other issues discussed in several of the reports¹⁵, relate to regulators' openness and transparency, to the competency and skills of their boards, to their fixation with issues of professional self-interest and with lack of public accountability on an organizational level.

This is a long list of issues, criticisms and threats to professional regulation. These calls for change are widespread, but they have not been universally ignored. There are a number of Canadian and American regulators who are actively embracing the challenge to work differently, sometimes even radically so.¹⁶

Bringing Order to the Roundabout

However, those who have embraced significant regulatory reform are the exception, not the rule. In this brief, I address my experience in addressing these challenges in the context of legal regulation. In particular, I outline what we have done in Nova Scotia through a series of transformative changes to the core aspects of regulation, four of which I address here:

- Development of regulatory objectives
- Triple P Regulation (Proactive, Principled & Proportionate)¹⁷
- Risk management as a regulatory tool
- Outcomes measurement

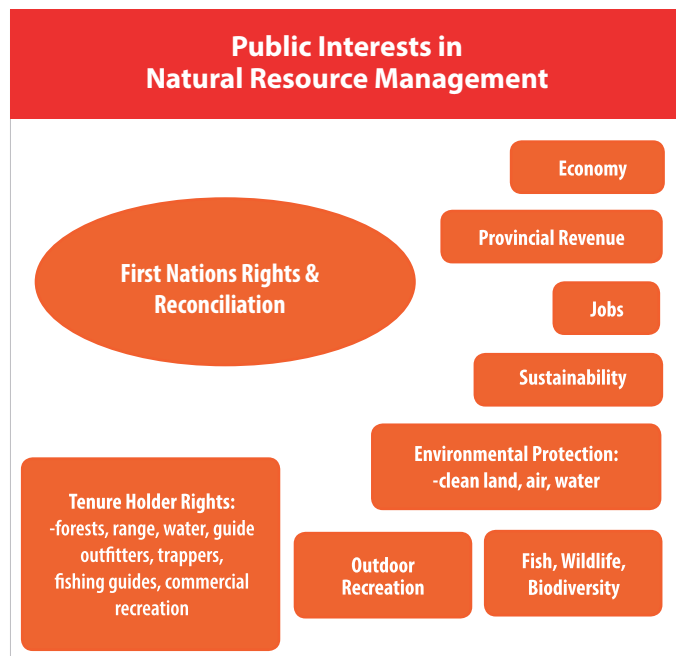
The early results of this rethinking and retooling are positive. Devoted and progressive leadership, prepared to ask difficult questions and not accept the status quo, has driven these changes. An overview of what we did, I share here. The longer story, in terms of how we made the change happen, is for another day.

Regulatory Objectives

The first requirement for effective occupational or professional regulation should be to define the purpose or objective of that regulation. Why do governments, through legislation, assign the responsibilities to oversee a profession to a regulator, usually one structured to advance self-governance?

Mostly the answer is in some vague and imprecise language. 'Public interest' is usually involved but it is neither defined nor described. Some broader societal benefit may also be included such as safety, public health, or public benefit but here too details are not specified.

A practical definition of public interest regulation was



developed by the International Federation of Accountants. It is as relevant to the public interest regulation of other professionals as it is to accountancy. The IFAC defined the public interest as, "the net benefits derived for, and procedural rigour employed on behalf of, all society in relation to any action, decision or policy."¹⁸

An excellent example of how public interest in a specific area of regulation can be explained and interpreted is discussed in The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making¹⁹ and illustrated by the chart above.

This chart shows exactly what the various interests are and how they are interrelated to account collectively for 'the public interest. But most regulators, in my experience, do not provide anything close to this degree of specificity to their 'purpose' or 'objectives'.

I believe modern and effective regulators should clearly articulate what they do, why and how they do it and what outcomes are expected from their efforts.

One example of this was developed in 2017, when as part of its study of the future of legal services delivery, the American Bar Association (ABA) proposed a set of regulatory objectives for state bars and the courts who oversee the legal profession. The rationale for its recommendation relied on the work of Laurel Terry, Steve Mark and Tahlia Gordon, who have written²⁰:

15 In particular, the British Columbia and Scottish reports address board member competence and selection. Another example of where this was considered, under significant pressure from a state legislature, was by the State Bar of California. See State Bar Board addresses governance reform and accountability measures, <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-board-addresses-governance-reform-and-accountability-measures>

16 See Right-touch regulation in practice: international perspectives, Professional Standards Board, England, <https://www.professionalstandards.org.uk/publications/detail/right-touch-regulation-in-practice-international-perspectives>

17 Triple P is a variation of right touch regulation

18 "IFAC Policy Position 5 – A Definition of the Public Interest", International Federation of Accountants, June 2012

19 The BC Report in fn. 1

20 Adopting Regulatory Objectives For The Legal Profession , Laurel S. Terry ,Steve Mark, Tahlia Gordon, Fordham Law Review, Volume 80 2012, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4807&context=fllr>

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.

The ABA states there is a need for ‘regulatory objectives’ (ROs) to guide the regulation of an increasingly wide array of already existing and possible future legal service providers.

In Canada and the US, several legal regulators have adopted ROs to bring clarity of purpose and greater transparency to their work.²¹ In my jurisdiction, where a strategic review of all aspects of regulation took place, our work was grounded on the ROs we adopted. Significantly, the ROs strive to enhance public understanding of and confidence in the regulation of legal services by the Barristers’ Society and speak to the unique and important role the Society plays in promoting and preserving the independence of the legal profession in the public interest.

The Nova Scotia Barristers’ Society Regulatory Objectives are:

- Protect those who use legal services.
- Promote the rule of law and the public interest in the justice system.
- Promote access to legal services and the justice system.
- Establish required standards for professional responsibility and competence in the delivery of legal services.
- Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system.
- Regulate in a manner that is proactive, principled and proportionate.

As an example of their impact, after their adoption each decision made at the staff and Board level was looked at through a RO lens – ‘How does this action advance the Regulatory Objectives?’ That simple task quickly changed the nature of work because things that were once done as a matter of course, such as having a representative from the Bar on an outside body’s committee, no longer met the ROs and therefore did not happen.

The rationale for developing a set of clear regulatory objectives stands for all professional regulators. My experience, consistent with other regulators who also have them²², is that they spell out what regulators do, for whose benefit and how. That simply makes for better regulation.

Triple P

The second aspect of the regulatory transformation came from the ROs themselves. They prescribed how work was to be done, namely ‘Regulate in a manner that is proactive, principled and proportionate.’ Key to any fundamental organizational reform is identification of what needs to be changed and why. What does not work well? What can be improved? It was with that goal the concept of ‘proactive, principled and proportionate’ or ‘Triple P’ regulation was developed and embedded in the ROs.²³

Briefly, here is a description of what is meant by each of the Ps.

Proactive approaches require a regulator’s approach to change. Rather than react to behavior it becomes aware of, the regulator uses its knowledge of the profession, the practice environment and the risks that may cause harm to the public (which I discuss below) to address matters before they become problems. Continuing professional development, quality assurance audits, competency assessments are common examples of proactive approaches. To become all encompassing proactive regulation requires a regulator to develop intelligence through better analysis and understanding of available data and information about the profession. It then uses its intelligence to guide all programs it offers, activities it undertakes, the policies it pursues and the rules it prescribes. Later to illustrate the impact, I will address how these approaches can be introduced into the complaints process.

Principled regulation requires regulators to move away from rigid rules and codes of conduct to descriptions of expected behavior focusing on outcomes rather than actions. An example of proportionate requirements taken from the Solicitors’ Regulation Authority states:

21 Nova Scotia - <http://nsbs.org/nsbs-regulatory-objectives>, Colorado - [https://www.coloradosupremecourt.com/PDF/AboutUs/2016\(06\)%20clean%20-%20PREAMBLE%20\(regulatory%20objectives\)%20ADOPTED%2004-07-16.pdf](https://www.coloradosupremecourt.com/PDF/AboutUs/2016(06)%20clean%20-%20PREAMBLE%20(regulatory%20objectives)%20ADOPTED%2004-07-16.pdf), Colorado - [https://www.coloradosupremecourt.com/PDF/AboutUs/2016\(06\)%20clean%20-%20PREAMBLE%20\(regulatory%20objectives\)%20ADOPTED%2004-07-16.pdf](https://www.coloradosupremecourt.com/PDF/AboutUs/2016(06)%20clean%20-%20PREAMBLE%20(regulatory%20objectives)%20ADOPTED%2004-07-16.pdf), Illinois - <http://www.iardc.org/>

22 See the Solicitors Regulation Authority, <https://www.sra.org.uk/sra/policy/regulation-reform.page>

23 Though the Triple P formulation was unique to Nova Scotia it was influenced by the Right Touch approach to regulation developed by the Professional Standards Board and the work of Malcolm Sparrow and in particular *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Press, 2000)

'The service you provide to *clients* is competent, delivered in a timely manner and takes account of your *clients*' needs and circumstances' rather than prescribing in detail all the things a lawyer must do.²⁴

Principled regulation is premised on a belief regulated professionals with proper incentives and oversight will act in the best interest of the public they serve. To do so they require education followed by competence and other assessments to verify their individual and collective ability to act properly.²⁵

Proportionate regulation requires regulators to involve themselves only in those areas where there is a demonstrable proof the regulation will benefit the public. The corollary is that regulators get out of the way in all other areas. Practices, organizations, connections and communication have become so complex and complicated that it is impossible to regulate all aspects of a professional life. For example, interpersonal behavior, in the lawyer context called 'civility', may not be an area where professional rules can be very effective, as the nature of relationships and roles are complex and not always precise. A zealous advocate may be playing an essential role for the client's benefit, but that behavior may be construed as 'uncivil'²⁶; a physician's behavior in a team setting may negatively impact the team's performance when on its own would have no significant consequences.

So regulators must choose where they can actually benefit the public and regulate proportionately.²⁷

As these changes matured in the Nova Scotia Barristers' Society, it was possible to think of the Regulatory Objectives as the 'rules of the road' and Triple P as the 'signage along the way'. In the metaphorical sense, with them we began to have the means to steer ourselves smoothly through the roundabout.

However, there was much more to be done. Below I outline two changes we made in our approach to accountability in order to advance our evolution²⁸ namely, risk management and outcomes measurement. Fundamental to behaving differently as a regulator was also a requirement to be transparent and report on those differences, how they worked, what they meant and what impact they had on our newly articulated requirements regarding the public interest.

Risk Management as a Regulatory Tool

The dominant model of occupational and professional regulation assumes enforcement of the profession's rules and codes of conduct is the *raison d'être*. Enforcement should be 'by the book'. If rules are broken and that brings the profession into disrepute, the breach must be addressed. However, the 'rules' which are being enforced are rarely based on any contemporary understanding of 'risk'.²⁹

This dominant approach, though of long-standing, fails to recognize:

- most rules of conduct were drafted in a different era;
- professions have evolved;
- professions are no longer homogeneous in gender race, ethnicity and many other diversity factors;
- larger numbers in the profession are from Generation X or Millennials, and these younger generations enter practice with different values and perspectives;
- technology has and continues to dramatically affect professionals and the public;
- there is a vast amount of information available to clients from public sources which they use to question and evaluate their professional service provider;
- the public can frequently choose where they want to obtain their services and from whom, as there are many competing or on-line service deliverers who provide the same services, often at less expense;
- work and communication happen at the speed of light;
- services are global, for example an x-ray can be read by a physician in India for a patient in Philadelphia or architectural drawings can be prepared by an architect or a technician in the Czech Republic while the construction will be in Vancouver.

These and other occupation specific phenomena should cause regulators to rethink their rules and how they enforce them.

Historically professional conduct rules have asserted the dominant view of those who lead the profession by promulgating their perspectives about what proper behavior ought to be. I do not want to suggest professional conduct rules are always separated from some possible harm; however, generally rules are hierarchical, often class and gender-biased, and designed to preserve a status quo. Some might suggest professional regulatory rules reflect the dominant or mainstream power structures of

24 <https://www.sra.org.uk/solicitors/handbook/code/part2/content.page> The SR has recently adopted a new Code of Conduct for lawyers and law firms that is wholly based on principles rather than rigid rules.

25 A very useful discussion of this approach to regulation can be found in Yuval Feldman, *The Law of Good People – Challenging States Authority to Regulate Human Behaviour*, 2018, Cambridge University Press the Law of Good People.

26 See *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII).

27 The regulation of professional advertising is one that invokes heavy handed and disproportionate regulation. See *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 1990 CanLII 121 (SCC) where the Supreme Court of Canada struck down limits on dentist advertising. In the case the constitutional requirement of 'proportionality' is considered under the Canadian Charter of Rights and Freedoms. The case also examines the then existing law in the US under the First Amendment.

28 See <http://nsbs.org/legal-services-regulation> which contains access to the research and policies developed to advance this work under the umbrella of a larger Legal Services Regulation initiative.

29 See *Risk Regulation For The Legal Profession*, Adam Dodek And Emily Alderson, *Alberta Law Review*, Volume 55, No 3, pp. 621, Ottawa Faculty of Law Working Paper No. 2017-41, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3026869. A discussion of these issues relating to the nursing profession can be found in *Underlying Philosophies and Trends Affecting Professional Regulation*, https://www.crnbc.ca/crnbc/Documents/783_framework.pdf

the enacting body which are most often white, middle or upper-middle classed and heterosexual. This was the underlying issue in a recent case in British Columbia, *Moore v. Law Society of British Columbia*³⁰ where an indigenous lawyer, applying to transfer her licence to BC argued that factors relevant to her being an indigenous person ought to have been significant in the law society's consideration. Her argument did not find favour with the legal regulator.

Often new rules are enacted with little or no reflection on what actual harm occurs beyond the specific incident that causes the enactment. It is very common for a regulator, as a rule-maker, to address a problem with a new regulation. New rules rarely deal with broad or systemic professional issues. Put another way, rules, codes and standards generally are not designed to minimize harm to the public. They are usually a response to a specific situation and designed to control professional behaviour.

The problem with creating rules in the traditional way is they are frequently inflexible and rarely focus on mitigating risk of harm to the public.

Shifting from rules to risk was an essential change in Nova Scotia's transition to becoming a risk-focused regulator. Victoria Rees, the Director of Professional Responsibility at the Nova Scotia Barristers' Society, describes the process this way:

A risk-focused regulator identifies and evaluates risks to its objectives in order to ensure consistent decision-making and effective allocation of resources. A risk-focused approach to regulation is different from traditional approaches as it focuses on risks to objectives rather than the rules (regulations) already set in place. While some regulators would prefer to enforce all rules with equal force, all the time, most are limited in doing so by available resources. By doing so, these regulators could fail to identify the most significant threats to their objectives. With a more modern, risk-focused approach to regulation, the regulator has a systematic framework in which to best achieve its ultimate goal within available resources – that being protection of the public interest.³¹

Here is another example of a legal regulator moving in this direction by using risk as a criterion for decision making and developing proactive procedures to give effect to new approaches.

The Law Society of Alberta has introduced risk as the number one factor in its initial evaluation of complaints.³² On receipt of a complaint, which they now call 'information', the staff mine all data about the

subject lawyer in the records of the law society. Using a sophisticated algorithm, developed using data analytics to evaluate the regulator's long and extensive involvement with lawyers, the risk analysis looks at: complaints history, demographics (the lawyer's age, length in practice, geographic location, gender, etc.), information from the credentialing stage, trust account information, the lawyers practice arrangements and their stability, and other relevant information maintained in its records.

Using this information, the algorithm creates a 'score'. Staff using a triage approach take the score and develop a plan to respond to the information that initiated the consideration. They consider a series of questions and options for a regulatory response driven by the overarching consideration - 'what risk of harm to the public is evident from what we have before us?' These questions and options include:

- Can the matter be resolved?
- Can the lawyer benefit from practice support?
- Is there an urgent issue?
- Is there money involved?

Analysis of the information and the risk may cause staff, based on seriousness and urgency, to move the matter to the formal complaint investigation process. However, given that most complaints raise quality of service or minor behavioral issues, this risk approach has allowed for alternative processes to be developed and used. By being more purposive and focused the Law Society of Alberta now brings a remedial or rehabilitative approach at this initial stage. Phone calls to the member of the public and the lawyer by experienced staff have allowed for early resolution resulting in more satisfied complainants and lawyers.

In Nova Scotia, the Barristers' Society is taking this approach one step further by building a complaint intake process premised on restorative justice principles. It supports proactive approaches designed to assist where possible in repairing the relationship between the lawyer and the member of the public, thus avoiding the costs, bureaucracy and stigma frequently associated with a complaints investigation process.

It is also designed to better address members of the public with high-conflict personalities who thrive on disputes and frequently move from one conflict or dispute to another in search of a non-existent resolution. Having tools in place to recognize and respond to these complaints - though small in number but significant in their drain on resources - is key to developing new risk approaches to complaints investigation.

30 2018 BCSC 1084, <http://canlii.ca/t/hssff>

31 See Regulatory Risk Management at NSBS, a memorandum to the Council of the Society, July 2018, <http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2018-07-20CouncilPackage.pdf> at p 37.

32 <https://www.lawsociety.ab.ca/public/providing-information-concerning-a-lawyer/early-intervention-programs-and-resources/>

Crucial in both the Alberta and Nova Scotia models is the ability to use a wide range of data to shape an appropriate response to information coming to the regulator's attention. In both provinces program design involves a commitment to moving away from traditional, often hard nosed, approaches. Staff are empowered as early decision makers to bring flexibility and proportionate responses to the file.

The most frequent criticisms of professional regulation are directed to complaints, investigations and discipline. These proactive and risk-based changes in how professional conduct information is thought about and handled by regulators bring greater clarity to the work of regulators and suggest a very effective way of taming some of the traffic in the roundabout.

Outcomes Measurement

How do Regulators know what they do makes any difference?

The answer to that question is 'they do not.'

The 2015 report from the Obama White House, 'Occupational Licensing - A Framework for Policymakers',³³ notes the scant evidence that licensing improves quality of public health and safety, stating:

... Most research does not find licensing improves quality or Public Health and safety...

and

There is also evidence that many licensing boards are not diligent in monitoring licensed practitioners, which contributes to a lack of quality improvement under licensing. These boards often rely on consumer complaints and third-party reports to monitor practitioner quality, but only a small fraction of consumer complaints result in any kind of disciplinary action.³⁴

This conclusion, which was affirmed in the recently released 'License to Work, A National Study of Burdens from Occupational Licensing', 2nd ed.³⁵, is both a strong argument for proactive approaches to regulation and a requirement that regulators actually be capable of demonstrating the 'public good', impact and effectiveness of their work. The License to Work Report reiterates the nature of the concerns expressed earlier³⁶:

The growth of occupational licensing and the barriers it presents to job seekers have attracted mounting bipartisan concern. Policymakers, scholars and opinion leaders left, right and center are increasingly recognizing that licensing comes with high costs—fewer job opportunities and steeper prices and does little to improve quality or protect consumers

These reports should be a clarion call to regulators to carefully examine what they do, how they do it and most importantly that what they do actually serves the public interest by advancing the public good. In light of the decision of the Supreme Court of the United States in *FTC v. North Carolina Dental Board*³⁷, states and their professional regulators should be on notice their various regulatory boards can be investigated for violating federal antitrust law. That ups the ante somewhat and should cause serious consideration of how professional regulators can do their work better.

Demonstration of the nature and quality of regulation, how it works and that it achieves results is 'Outcomes Focused Regulation' (OFR). It requires a regulator to define the intended results or impacts of its work. It then requires the regulator to identify how it will measure those results. The first step is to define; the second is to measure.

In Nova Scotia we began by defining five regulatory outcomes to measure and report on.³⁸ As a legal regulator we identified outcomes that 'connect us to the profession'. Lawyers' successes are our success, not in financial terms, but regarding competence and ethical practice. The regulatory outcomes require the Society to regulate in a manner that will result in lawyers and law firms who:

- provide competent legal services;
- provide ethical legal services;
- safeguard client trust money and property;
- provide legal services in a manner that respects and promotes diversity, inclusion, substantive equality and freedom from discrimination;
- provide enhanced access to legal services.

OFR is not about the quality of the mundane regulatory work such as licensing procedures, continuing education, complaints or discipline processes.³⁹ It is assumed those will operate effectively. However, overall the regulatory work changes. It is no longer focused on the prescription of detailed rules but rather on developing principles to guide practitioners. For example, OFR requires a rethinking about detailed and prescriptive codes of conduct/ rules/ ethics. By providing greater guidance and support to

33 Fn. 1

34 Op cit. p 13

35 *License to Work, A National Study of Burdens from Occupational Licensing*, 2nd ed., Dick Carpenter II, Lisa Knepper, Kyle Sweetland and Jennifer McDonald (2017), https://ij.org/wp-content/themes/ijorg/images/lw2/License_to_Work_2nd_Edition.pdf

36 At p.8, Executive Summary.

37 https://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

38 <http://nsbs.org/nsbs-regulatory-objectives>

39 An excellent description of how this works in the field is provided by the Solicitors Regulation Authority in England at SRA: The Path to Outcomes Focused Regulation <https://www.sra.org.uk/sra/news/press/path-to-ofr.page>

achieve the intended outcomes in the profession the nature of interaction with the profession changes. This entails developing tools and resources and then helping professionals to use them to improve their own behaviour and increase their competence. The regulator monitors, ideally with a light touch, but retains the authority to do more if the public interest requires. The regulator, while remaining an enforcer, is less of a police officer and more of a traffic cop.

Though much remains to be done in Nova Scotia to develop and test measuring tools, the first step of identifying the outcomes to be expected from regulation is a significant one. OFR sets a standard for regulators that allows the public, government and the profession to know what they should expect and what the regulator is committed to. As with each of the other new approaches we adopted in Nova Scotia, OFR will blunt the criticisms, especially from members, and allow the traffic to flow more smoothly because everyone is now driving in the same direction.

Conclusion

My metaphor of the roundabout suggests, because of a mix of heavy traffic impacting us, the viability of professional regulation is in jeopardy. The impact of wide-ranging pressures and threats ought to cause forward thinking regulators to seize the moment and change now. The experience I reflect from one regulator who transformed itself, in part to address the criticisms and threats before they became manifest, shows that, though difficult, changes can be made to dramatically enhance the quality of professional regulation. The changes in Nova Scotia's legal regulation have succeeded to calm the traffic – the ROs blunt much criticism from outsiders as they make it clear what regulation is and is not and how the public interest is promoted; proactive approaches have resulted in changed conversations with lawyers, a reshaping of that relationship and a rethinking of the role of the regulator vis-à-vis innovation and how services are provided; risk approaches have resulted in more targeted interventions and better value; outcomes focus has brought clarity and transparency so government, lawyers and the public can see exactly what is being done i.e. the value of professional regulation.

It is predictable a regulator will be involved in a catastrophic event which will likely cause government to force change.⁴⁰ The recent reviews in both Pennsylvania and British Columbia, and Ontario's review of the regulated health professions should signal that passivity brings real peril. For thoughtful regulators something short of an epiphany may be required, but it is necessary to be reminded, "insanity is doing the same thing over and over and expecting different results."⁴¹ The same results are no longer acceptable.

My call is for professional regulators to commit to better articulating what they do and why they do it, through Regulatory Objectives or otherwise; to move towards a form of 'right-touch' or proactive regulation; to commit to regulate using actual risk as a driving factor so they focus on where the need exists and where the public, those they are committed to protect, is vulnerable; to define what difference they will make and to measure their work and their outcomes. These are ways for modern and progressive regulators to tame competing demands and expectations, to calm the traffic, and to manage the wide-ranging pressures and distractions and of the regulatory roundabout.



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⁴⁰ Though maybe not catastrophic, the recent history of relations between the State Bar and the Legislature in California is an example of when change can be driven by failure of a regulator to act in the best public interest.

⁴¹ Frequently attributed to Albert Einstein, but may also have been said first by Mark Twain or Benjamin Franklin, <http://briancwatkins.com/definition-of-insanity/>