

APPENDIX 5: A SUMMARY OF INFORMATION
PREPARED BY THE ABA REGARDING LAWYER REGULATORS
(WHICH IS THE AUDIENCE TO WHOM THIS ARTICLE IS
DIRECTED)

Jurisdiction	Lawyer Disciplinary Entity ²⁷⁴	Unified State Bar—Status ²⁷⁵	Unified Bar Functions ²⁷⁶
Alabama	Alabama State Bar Center for Professional Responsibility	Unified State Bar	A, D, CLE
Alaska	Bar Counsel Alaska Bar Association	Unified State Bar	A, CP, D, FDA
Arizona	Chief Bar Counsel State Bar of Arizona	Unified State Bar	A, CP, D, FDA, SA, CLE
Arkansas	Office of the Committee on Professional Conduct	Voluntary Bar	—
California	State Bar of California	Unified State Bar	CP, D, FDA, SA,

²⁷⁴ The information in this column comes from *DIRECTORY OF LAWYER DISCIPLINARY AGENCIES*, *supra* note 11 at 1–18. This directory is published by the ABA.

²⁷⁵ See *DBS Resource Pages*, UNITED BAR ASS'NS, http://www.americanbar.org/groups/bar_services/resources/resourcepages/unifiedbars.html (contains resources for and about unified bar associations). It is beyond the scope of this Article to address the topic of unified bar associations because this Article is directed to lawyer regulators, whoever they are. It should be noted, however, that there are pressures that may affect the regulatory roles of Unified Bar Associations. See, e.g., *Unified Bar Association Fact Sheet*, A.B.A., http://www.americanbar.org/content/dam/aba/uncategorized/barservices/resourcepages/unifiedbars_factsheet.authcheckdam.pdf (stating that data from an “unpublished section from the 2014 Membership, Dues & Finance Survey published by the ABA Division for Bar Services” indicated that one of the top five issues facing unified bar associations are threats to their bar’s unified status; that 8 of 33 unified bar associations have faced a threat to their unified status in the past ten years; 3 of 33 bar associations believe that their bar association will be a hybrid model (similar to Nebraska’s structure)); *Committee to Examine Future of State Bar of Arizona*, ALBUQUERQUE J. (Oct. 10, 2015), <http://www.abjournal.com/657808/news-around-the-region/committee-to-examine-future-of-state-bar-of-arizona.html>; *Fleck v. McDonald et al*, No. 1:2015cv00013 (D.N.D. 2015) (challenging the constitutionality of North Dakota’s unified state bar). It should be noted that the Unified State Bar Fact Sheet cited *supra* used 33 as the number of unified bar associations it reports on, but one of the rotating pictures on the DBS Resource Pages webpage cited *supra* states that “[t]oday, 37 bars claim unified status. South Dakota was the first bar to unify in 1921. Hawaii was the last, in 1990.” *Id.*

²⁷⁶ This column consolidates information found on an ABA webpage. See *Mandated Core Functions of Unified Bars* (2015), <https://magic.piktochart.com/output/6098174-core-functions> [hereinafter ABA Dynamic Map]. This Appendix uses the following abbreviations to refer to the functions of the unified state bar that appear on those dynamic maps: A=Admissions, CP=Client Protection, D=Discipline, FDA=Fee Dispute Arbitration, SA=Lawyer Substance Abuse, CLE=MCLE/ CLE. See also *North Carolina Board of Dental Examiners Decision Resources*, *supra* note 7, for a better understanding of the pressures on unified bar associations.

Jurisdiction	Lawyer Disciplinary Entity ²⁷⁴	Unified State Bar—Status ²⁷⁵	Unified Bar Functions ²⁷⁶
	Intake Unit		CLE
Colorado	Office of Attorney Regulation Counsel	Voluntary Bar	————
Connecticut	Statewide Grievance Committee	Voluntary Bar	————
Delaware	Delaware Office of Disciplinary Counsel	Voluntary Bar	————
District of Columbia	District of Columbia Office of Bar Counsel	Not listed on the map ²⁷⁷	No information available
Florida	The Florida Bar	Unified State Bar	CP, D, SA, CLE
Georgia	General Counsel State Bar of Georgia	Unified State Bar	D, FDA
Hawaii	Disciplinary Board of the Hawai'i Supreme Court Office of Disciplinary Counsel	Unified State Bar	CP, D
Idaho	Bar Counsel Idaho State Bar	Unified State Bar	A, CP, D, FDA
Illinois	Illinois Attorney Registration & Disciplinary Commission	Voluntary Bar	————
Indiana	Indiana Supreme Court Disciplinary Commission	Voluntary Bar	————
Iowa	Iowa Supreme Court Office of Professional Regulation	Voluntary Bar	————
Kansas	Kansas Disciplinary Administrator Office	Voluntary Bar	————
Kentucky	Chief Bar Counsel Kentucky Bar Association	Unified State Bar	CP, D, FDA, CLE
Louisiana	Office of the Disciplinary Counsel	Unified State Bar	A, CLE
Maine	Bar Counsel Maine Board of Overseers of the Bar	Voluntary Bar	————
Maryland	Attorney Grievance Commission of Maryland	Voluntary Bar	————
Massachusetts	Office of the Bar Counsel	Voluntary Bar	————
Michigan	Grievance Administrator Michigan Attorney Grievance Commission and Attorney Disciplinary Board	Unified State Bar	A, D, CLE
Minnesota	Minnesota Office of Professional Responsibility	Voluntary Bar	————
Mississippi	General Counsel Mississippi State Bar	Unified State Bar	D

²⁷⁷ The ABA Dynamic map, *supra* note 276, does not include data for the District of Columbia, Missouri or Rhode Island. Because Appendix 5 is derivative of the data that appears on the ABA's Dynamic Map, this Appendix does not include information for these three jurisdictions, which are listed here with a question mark. (The District of Columbia was not visible on the ABA Dynamic Map. Rhode Island was colored green on the ABA Dynamic Map, thus indicating that it has a Unified Bar, but the pop-up data was not available for Rhode Island. Although Missouri has a Unified Bar, the ABA Dynamic Map indicated that it was not a unified bar and thus no data was provided.)

Jurisdiction	Lawyer Disciplinary Entity ²⁷⁴	Unified State Bar—Status ²⁷⁵	Unified Bar Functions ²⁷⁶
Missouri	Missouri Supreme Court Office of Chief Disciplinary Counsel	Unified State Bar (but not listed on the map as a Unified State Bar)	No information available
Montana	Disciplinary Counsel	Unified State Bar	CP, CLE
Nebraska	Counsel for Discipline Nebraska Supreme Court	Unified State Bar	CP, SA, CLE
Nevada	Bar Counsel State Bar of Nevada	Unified State Bar	A, D, CLE
New Hampshire	New Hampshire Supreme Court Attorney Discipline Office	Unified State Bar	CP, FDA, SA, CLE
New Jersey	Office of Attorney Ethics Supreme Court of New Jersey	Voluntary Bar	————
New Mexico	Disciplinary Board of the Supreme Court of New Mexico	Unified State Bar	CP, FDA, SA, CLE
New York	TBD by New York Court of Appeals ²⁷⁸	Voluntary Bar	————
North Carolina	North Carolina State Bar	Unified State Bar	CP, D, FDA, SA, CLE
North Dakota	Secretary of the Disciplinary Board	Unified State Bar	D, CLE
Ohio	Office of the Disciplinary Counsel of the Supreme Court of Ohio [plus several county bar association officials listed]	Voluntary Bar	————
Oklahoma	General Counsel Oklahoma Bar Association	Unified State Bar	CP, D, SA, CLE
Oregon	Disciplinary Counsel Oregon State Bar	Unified State Bar	D
Pennsylvania	Chief Disciplinary Counsel	Voluntary Bar	————
Rhode Island	Disciplinary Board of the Supreme Court of Rhode Island	Unified State Bar	No information available on the map
South Carolina	Office of Disciplinary Counsel	Unified State Bar	CA, FDA, CLE
South Dakota	Disciplinary Board Counsel	Unified State Bar	D
Tennessee	Board of Professional Responsibility of the Supreme Court of Tennessee	Voluntary Bar	————
Texas	Chief Disciplinary Counsel State Bar of Texas	Unified State Bar	D
Utah	Utah State Bar, Office of Professional Conduct	Unified State Bar	A, CP, D, CLE
Vermont	Disciplinary Counsel, Professional Conduct Board of the Supreme Court of Vermont	Voluntary Bar	————
Virginia	Bar Counsel Virginia State Bar	Unified State Bar (and voluntary state bar)	D, CLE
Washington	Director of the Office of Disciplinary Counsel, Washington	Unified State Bar	A, D, CLE

²⁷⁸ See Press Release, *supra* note 5 (new uniform statewide rules to govern New York's attorney disciplinary process).

2016]

THE POWER OF LAWYER REGULATORS

801

Jurisdiction	Lawyer Disciplinary Entity ²⁷⁴	Unified State Bar—Status ²⁷⁵	Unified Bar Functions ²⁷⁶
	State Bar Association		
West Virginia	Office of Disciplinary Counsel	Unified State Bar (and voluntary state bar)	D, SA, CLE
Wisconsin	Office of Lawyer Regulation	Unified State Bar	CP
Wyoming	Office of Lawyer Regulation	Unified State Bar	CP, D, FDA, SA, CLE

2016

**THE POWER OF LAWYER REGULATORS
TO INCREASE CLIENT & PUBLIC
PROTECTION THROUGH ADOPTION OF
A PROACTIVE REGULATION SYSTEM**

Laurel S. Terry



This article can be cited as Laurel S. Terry, *The Power of Lawyer Regulators To Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 Lewis & Clark L. Rev. 717 (2016). Among other places, it is available on my personal webpage (<http://tinyurl.com/laurelterry>) and on my "Selected Works" webpage http://works.bepress.com/laurel_terry/.

ARTICLES

THE POWER OF LAWYER REGULATORS TO INCREASE CLIENT & PUBLIC PROTECTION THROUGH ADOPTION OF A PROACTIVE REGULATION SYSTEM

by
*Laurel S. Terry**

This Article focuses on those who regulate U.S. lawyers. The Article argues that the lawyers who head regulatory bodies in the United States have the ability to adjust the focus of the regulator for which they work in a way that will increase client and public protection. The Article further argues that it is appropriate for lawyers in these positions to exercise this power and that they should do so. The Article concludes by offering two concrete recommendations.

The first recommendation is that those who are in charge should, upon reflection, adopt a mindset in which they recognize that the regulator should be systematically trying to prevent problematic behavior by lawyers, as well as responding to such behavior after it occurs. The second recommendation is that regulators should take advantage of a tool they already have at their disposal, which is their state's equivalent to ABA Model Rule of Professional Conduct 5.1. If jurisdictions added two ques-

* Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Pennsylvania State University—Dickinson Law. The author would like to thank Deb Armour, Jim Coyle, Margaret Drent, Susan Fortney, Cori Ghitler, Tahlia Gordon, Alison Hook, Darrel Pink, Crispin Passmore, Victoria Rees, Ellyn Rosen, and Ted Schneyer for their assistance with this Article; all views, however, are solely those of the author. She would also like to thank research assistants Mingjie Gan and Ellen McClenaghan, and the participants of the First Annual Proactive Risk-Based Workshop held in Denver in May 2015. The author can be reached at LTerry@psu.edu. The URLs in this Article were accurate as of June 30, 2016.

tions about Rule 5.1 to lawyers' annual bar dues statement, along with a link to additional online resources, they would be able to emulate actions that have been taken in Australia and Canada. The data suggest that such steps could dramatically reduce client complaints, lead to improved client service, and change the ways in which lawyers operate their law practices.

INTRODUCTION	718
I. BACKGROUND INFORMATION ABOUT LAWYER REGULATORY BODIES IN THE UNITED STATES.....	719
II. GLOBAL EXAMPLES OF PROACTIVE LAWYER REGULATION.....	724
III. DEVELOPING A MORE SYSTEMATIC AND COMPREHENSIVE APPROACH TO PROACTIVE U.S. LAWYER REGULATION.....	754
A. <i>The Underdeveloped Middle Stage of Lawyer Regulation</i>	754
B. <i>U.S. Examples of Ad Hoc Proactive Middle Stage Lawyer Regulation</i>	756
C. <i>The Need to Develop a More Comprehensive Approach to Proactive Regulation</i>	762
IV. TWO SUGGESTIONS FOR LAWYERS WHO LEAD LAWYER REGULATORY BODIES.....	763
A. <i>Include Proactive Middle Stage Regulation as Part of the Regulator's Mission</i>	763
B. <i>Use Ethics Rule 5.1 to Create a More Proactive Regulatory System</i>	765
V. RESPONDING TO ANTICIPATED CRITIQUES.....	770
VI. OTHER CONTEXTS IN WHICH PREVENTATIVE ACTION HAS BEEN EFFECTIVE	777
CONCLUSION	781
APPENDIX 1: SUMMARY OF ABA DATA REGARDING STATE IMPLEMENTATION OF MODEL RULE 5.1 (a) AND SAMPLE BAR DUES QUESTIONS	783
APPENDIX 2: ISSUES IDENTIFIED IN SELECTED SELF-ASSESSMENT TOOLS	784
APPENDIX 3: A COMPARISON OF THE TOPIC HEADINGS IN SELECTED SELF-ASSESSMENT TOOLS.....	786
APPENDIX 4: EXCERPTS FROM SELECTED SELF-ASSESSMENT TOOLS.....	787
APPENDIX 5: A SUMMARY OF INFORMATION PREPARED BY THE ABA REGARDING LAWYER REGULATORS	798

INTRODUCTION

This Article is directed toward those who regulate the U.S. legal profession. The thesis of this Article is that those who lead these types of regulatory bodies can have a profound impact on the ways in which the regulators function. This Article suggests that these individuals should use their influence to steer the regulatory body they oversee towards a more comprehensive approach to proactive lawyer regulation. The Arti-

cle argues that a proactive approach to lawyer regulation is desirable because it would increase client and public protection by preventing problematic lawyer behavior before it occurs, in addition to responding to such behavior after it occurs.

Section I begins by providing background information about the lawyer regulatory bodies that are the subject of this Article. Section II reviews examples of proactive lawyer regulation outside of the United States and data that suggests that this type of proactive regulation has had a positive impact on clients and the public. Section III argues for a more systematic and comprehensive U.S. approach to proactive lawyer regulation. It begins by providing a structure that one can use to think about lawyer regulation. It continues by identifying U.S. examples of proactive lawyer regulation, but suggests that the U.S. approach has generally been ad hoc rather than systematic. This Section argues that it is appropriate for regulatory bodies—and those who are in charge of them—to adopt a comprehensive approach to proactive lawyer regulation. Section IV recommends that those who lead lawyer regulatory bodies take the necessary steps to develop a commitment to proactive regulation in which the regulator’s mission is defined to include preventing problematic behavior by lawyers, as well as responding to such behavior after it arises. This Section also explains how regulators that want to employ a more proactive approach could—without any additional rule changes—adopt a more proactive approach to lawyer regulation. This Section suggests that regulators use ethics Rule 5.1 more creatively than they currently are doing. Section V responds to anticipated criticisms. Section VI offers examples of other contexts in which preventive work has been shown to produce results and be cost-effective.

I. BACKGROUND INFORMATION ABOUT LAWYER REGULATORY BODIES IN THE UNITED STATES

This Article focuses on the regulatory bodies that are responsible for lawyer conduct in the United States and the individuals who lead these organizations. The lawyer regulatory situation in the United States is different than the regulatory situation one finds in some other countries. The 2007 U.K. Legal Services Act, for example, established the Legal Services Board (LSB) as a body that is independent of government and the legal professions and “is responsible for overseeing legal regulators in England and Wales.”¹ The LSB is statutorily required to be led by some-

¹ *About Us*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/about_us/index.htm. See generally Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661 (2012) (addressing trends regarding “who” regulates lawyers).