American Legal Ethics: Federalized, Privatized …Commercialized?

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Renee Newman Knake, *The Commercialization of Legal Ethics*, 29 **Geo. J. Legal Ethics** 715 (2016), available at SSRN.

Previous scholarship has shown us how legal ethics in America has become "federalized" and "privatized."[1] In a recent essay in the Georgetown Journal of Legal Ethics, Renee Newman Knake outlines another modern phenomenon: the "commercialization" of legal ethics. Reading this piece, it becomes clear that the significant complexity now characterizing the regulatory environment for legal services in the United States, with state bars, courts, federal agencies and clients all now playing a role, shows no signs of waning.

Professor Knake's essay focusses on two types of "profit-driven" entities: (1) legal services providers, described as "entities and individuals serving legal needs without the same training and authorization traditionally required of state-licensed attorneys"; and (2) lawyer ratings companies. The essay aims "to provoke consideration about the proliferation [of these two types of entities] in an effort to determine whether and how this phenomenon ought to inform the ways regulatory authorities conceptualize and implement legal ethics rules." In relation to both types of entities, Professor Knake suggests that a mix of optimism and caution is warranted. She notes the promise of such entities filling some long-standing access to justice gaps while observing that careful study is warranted to measure the actual impact of their increasing presence.

As to be expected given the confines of an essay, the discussion of legal service providers is relatively brief. Professor Knake notes that the emergence of such entities has been "predominately an international occurrence" to date but that there are some initial moves in the United States, as evidenced by examples like Washington State's Limited License Legal Technician Program, the American Bar Association's ("ABA") adoption of Model Regulatory Objectives to guide the potential regulation of non-traditional legal services providers, and the emergence of new, non-traditional providers in the American legal services market, like LegalZoom and Lex Machina, among others.

The essay includes a longer discussion of lawyer ratings services—like, for example, Martindale-Hubble, American Lawyer Media, Who's Who Legal, UpCounsel and Vault. Professor Knake observes that such services are growing in both popularity and influence. She gives a tangible sense of their reach by citing the ABA's research that there are "now several hundred lists….[that] have become so prevalent that law firm marketing consultants are specializing in…management of [them]."[2] She also explores the emergence of new entrants, like Avvo and LawyerRatingz, which aim to not only rate lawyers using proprietary formulas but also to connect clients with lawyers in a virtual legal marketplace of sorts. Potentially surprising to lawyers who follow or use ratings services is research cited indicating that Yelp, a broad-based ratings service, appears to be the most trusted online source for lawyer evaluations rather than those services tailored to lawyers.

On the issue of lawyer ratings services, Professor Knake draws on research relating to consumer ratings services generally to outline the potential risk of the public being misinformed due to things like selection bias (i.e. those who tend to rate tend to have either very strong positive or negative opinions),

small samples or outright manipulation by those being rated. At the same time, she is clear that there is potential for more transparency in the legal services market and for clients to better assess quality. As she notes, information about quality contained in traditional regulatory mechanisms, like state bar complaints or civil malpractice suits, may be comparatively less accessible to the public than what is provided by ratings services.
Overall, one of Professor Knake's main conclusions is that there are more questions than answers. She writes:

> How should courts, tribunals, legislatures, and bar organizations respond to these commercial actors in the legal services marketplace? Are existing regulations sufficient or unnecessary? Should new regulations be adopted? Do bar associations and law schools have an obligation to educate members of the profession as well as the public in this regard? Should traditional authorities cooperate with new providers and companies to inform and protect the public? Should regulators monitor online ratings and reviews websites as part of ongoing disciplinary enforcement? (P. 726.)

These are all excellent questions. Professor Knake deserves credit for succinctly documenting the emergence of legal services providers and lawyer ratings services as well as for providing a roadmap for future research and policy discussions. The issues she raises are pressing and the environment she discusses is fast-moving, making scholarly intervention both critical and challenging.

One area of debate for readers may be the framing of the essay. Are the developments traced in the essay best characterized as the "commercialization of legal ethics" or something else? To be sure, legal service providers, as described in the piece, are "for profit", but so too are most individual lawyers and law firms. Lawyer ratings services are also "for profit", but is the impact of such services best described as commercializing legal ethics? No doubt, these services aim to influence client choice of lawyers, but client choice of lawyer is something largely, if not entirely, outside the ambit of traditional lawyer regulators (assuming, of course, the set of lawyers being considered are all properly licensed to deliver legal services in the relevant jurisdiction). In this sense, the phenomenon that Professor Knake is describing would seem to be different than issues raised in scholarship concerning the federalization and privatization of legal ethics, which discusses, among other things, increased power by federal agencies and clients, respectively, to control and sanction lawyer behavior that is concurrently under the jurisdictional authority of courts and state bars.

To be sure, in large part, any issue with the essay's framing is one of semantics. Professor Knake's thoughtful observations still hold whether one describes them as "commercialization" or something else. That said, there is also arguably a case that caution is warranted when describing innovations in the legal services market as being profit-driven in order to avoid setting up an overstated "business-profession dichotomy" when it comes to describing what traditional providers of legal services (i.e. lawyers) do. Labelling legal service innovations as "profit-driven" may also risk obscuring the possibility, which Professor Knake does explore, for such innovations to advance the public interest by expanding access to justice in ways that lawyers are currently not.

Any issues with framing aside, Professor Knake's essay is important, compelling and timely: a "must-read" for those interested in the future of legal services markets both in the United States and abroad!

1. See, for example, Fred C. Zacharias, Federalizing Legal Ethics, 73 **Tex. L. Rev.** 335 (1994); Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 **San Diego L. Rev.** 123 (2011); Eli

Wald, Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age, 48 **San Diego L. Rev.** 489 (2011); and Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 **Fordham L. Rev.** 2577 (2012).

2. ABA Commission on Ethics 20/20, Informational Report to the House of Delegates 6 (2011),

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