

The Future of Attorney Regulation

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Bruce A. Green, *Bar Authorities and Prosecutors*, **Oxford Press Handbook of Prosecutors and Prosecutions** (Ronald F. Wright, Kay L. Levine, and Russell M. Gold eds., 2020), available at [SSRN](#).

[Bruce Green](#)'s new book chapter explores the regulation of prosecutors in the United States. It convincingly argues that, although the [ABA Model Rules of Professional Conduct](#) ("Rules"), as adopted by the various states, *formally* apply to all lawyers, they have little *practical* impact on prosecutors' practice.

The Rules have limited practical significance for prosecutors for three related reasons. First, many of the Rules do not apply to prosecutors' practice realities. Some of the inapplicable Rules are intuitive. For example, Rule 1.5 can't apply to prosecutors because prosecutors do not charge clients fees, and Rules 7.1-7.3 do not apply because prosecutors neither advertise nor solicit for their services. Professor Green establishes in a fascinating section, however, that even Rules that *could* apply to prosecutors, such as Rule 1.6 (confidentiality), Rules 1.7-1.10 (conflicts of interest) and Rule 1.1 (competence) have been construed narrowly and generically to mirror other obligations that apply to prosecutors such as criminal procedure rules. Second, Rules that do directly apply to prosecutors' practice, such as Rule 3.8 on prosecutors' special responsibilities, and Rule 4.2, which forbids lawyers from communicating directly with represented individuals, have been construed narrowly to merely codify prosecutors' constitutional obligations. The third and final problem is one of enforcement. The Rules are hardly enforced against prosecutors—giving these lawyers particularly wide berth.

Amid the ongoing trend of increased lawyer specialization, some have called on bar authorities to abandon their current one-size-fits-all regulatory approach and instead develop separate codes of conduct for lawyers in different specialized areas of practice. Indeed, prosecutors are likely the prime candidates for such specialized regulation. Not only are they "ministers of justice" and not mere advocates (see, Rule 3.8 cmt. 1), but they are generally not subject to demanding market and institutional controls. As Green astutely puts it, "[p]rosecutors do not interact with, advise or take direction from, an individual client or a representative of an institutional client." (P. 7.) And yet, bar authorities insist on preserving the myth of the "unified bar." Even in the face of external public pressure and critiques of prosecutorial misconduct, the ABA, committed to representing and serving all lawyers (including prosecutors), ended up deciding to avoid an internal battle with a powerful constituent and opted for a conciliatory tone vis-à-vis prosecutors. This results in what Green aptly calls the unfulfilled regulatory promise of the bar: although the ABA has acknowledged that the normative expectations for prosecutors should be more demanding than that of other attorneys, its Rules fail to deliver on this expectation leaving prosecutors underregulated.

Moreover, Professor Green shows that on the rare occasions in which the ABA and bar authorities have tried to promulgate more stringent Rules for prosecutors, they have been repeatedly stymied. In particular, they have run up against effective opposition by federal and state prosecutors, which demonstrates the bar's limited political influence, and further explains its reluctance to pick up a fight with prosecutors.

Bar Authorities and Prosecutors is a fantastic primer on attorney regulation and will be of great interest not only to prosecutors, defense counsel and judges but also to anyone interested in the effective regulation of the legal profession. Professor Green's insightful analysis of the regulation of prosecutors raises broad and fundamental questions about the future of attorney regulation, and, in particular, about the dominant role of the ABA in promulgating the Rules. To begin with, the ABA's insistence on a one-size-fits-all regulatory approach in the face of increased specialization may result in the under-regulation of lawyers. Simply put, having the same set of rules apply to all

lawyers may practically mean that the Rules end up being too abstract and inapplicable to the practice realities of most lawyers, prosecutors included. There are, to be sure, compelling arguments in favor of a unified regulatory approach, including clarity, certainty, the relative ease of promulgation, and the emphasis of core professional principles. Yet Green's analysis suggests that the day may come (or perhaps, the day *has* come) in which increased specialization will render the one-size-fits-all regulatory approach an outdated relic.

Next, Green's nuanced analysis questions whether the ABA is the most effective regulator of attorney conduct. The point is not merely that the ABA serves the interests of the legal profession and, as a result, may shy away from imposing stringent regulations on its constituents. Rather, as Green compellingly shows, because the ABA purports to regulate and serve *all* lawyers it is bound to try to please and placate all of its members and avoid controversies or hard-to-win internal battles, especially where, as here, the regulated members are powerful and organized. Given the limited scope of his inquiry in this chapter – the regulation of prosecutors – Green wisely stops short of calling for a radical reform in terms of who regulates lawyers in the United States. Certainly, there are pertinent advantages the ABA has as the leading force in promulgating the Rules, for example, experience and expertise in regulating lawyers' professional conduct. Nonetheless, Green's examination of the ABA's "unfulfilled promise" (P. 21) regarding the regulation of prosecutors raises an overdue question about the ABA's ability to tackle significant and controversial regulatory challenges pertaining to its members.

Finally, *Bar Authorities and Prosecutors* sheds a revealing light on how institutions of the legal profession, such as bar associations, courts, and law firms, influence the professional work of lawyers and the regulation of law practice. Rather than focus merely on promulgation and enforcement, Green demonstrates that effective regulation (or lack thereof, in the case of prosecutors) is a function of a complex interplay of factors. These include the political power and clout of the regulatory targets, the willingness of the regulator to pick internal fights and wage external battles and its fortitude to see them through, the interaction between regulatory controls and market and institutional controls, and the size, culture and ethos of law firms (private and public) and their inclination and ability to support or undercut applicable rules.

In sum, Bruce Green's new book chapter sets out to examine the regulation of American prosecutors (Pp. 1-2) and ends up accomplishing so much more. It effectively summarizes the regulation of prosecutors in the United States, including its shortcomings and its stickiness. The paper also examines the future of attorney regulation more generally. In the process, Green raises compelling questions about the effectiveness of the traditional one-size-fits-all regulatory approach and the dominant role of the ABA as the Rules' promulgator, and he sketches a convincing blueprint for an effective regulatory alternative.

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