

# Standards for Regulatory Reform Assessment Metrics

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# Background

Many state court systems are now experimenting with various forms of regulatory reform of legal services. State supreme courts must ultimately decide which reforms to make permanent. To do so, they must choose among a rapidly growing number of different approaches, such as regulatory sandboxes and selective rule changes. A consistent way of comparing the relative success of each approach will help policymakers make informed judgments about how to move forward in each jurisdiction.

## Scope

Regulatory reform affects many stakeholders, but state supreme courts must consider two primary actors: the public as consumers and state supreme courts as regulators of legal services. Other stakeholders, such as the bar and legal aid organizations, will want to establish their own appropriate standards for assessment.

## Standards Approach

NCSC has created a number of standards in the past for assessing various court-related performance areas. These successful standards creation projects have several characteristics in common:

- **They consist of no more than ten measures.** *Eight to ten measures are enough to capture the dimensions of most interest to key stakeholders without becoming too complex or costly.*
- **They use a “balanced scorecard” approach.** *Different stakeholders value different types of measures, so it is important to capture a variety of the most important dimensions of impact.*
- **They are designed to act as a “canary in the mine.”** *The measures are designed to signal problems—not to capture all possible measures comprehensively and definitively as a researcher might wish to do.*
- **They are designed for cost effective implementation.** *All measures should be relatively easy and cost effective to collect routinely, ideally using existing data produced by the organizations concerned.*
- **They are designed to ensure data comparability.** *Measures should reuse existing data standards, where they exist, and use the same data standards when the data requirements overlap.*

# Regulatory Reform Objectives

As with stakeholders and scope, the objectives of regulatory reform are many and varied. This project considers the three principal objectives appropriate for state court supreme courts to pursue when acting as regulators.

## 1. Increase access to justice.

*This has three dimensions. The first is to increase the total volume of services available to middle and low-income consumers. The second is to provide services that meet the demand for certain types of legal problems that now go unmet. The third is to provide these new services in equitable ways, rather than exacerbating existing unequal access.*

## 2. Improve the market for legal services.

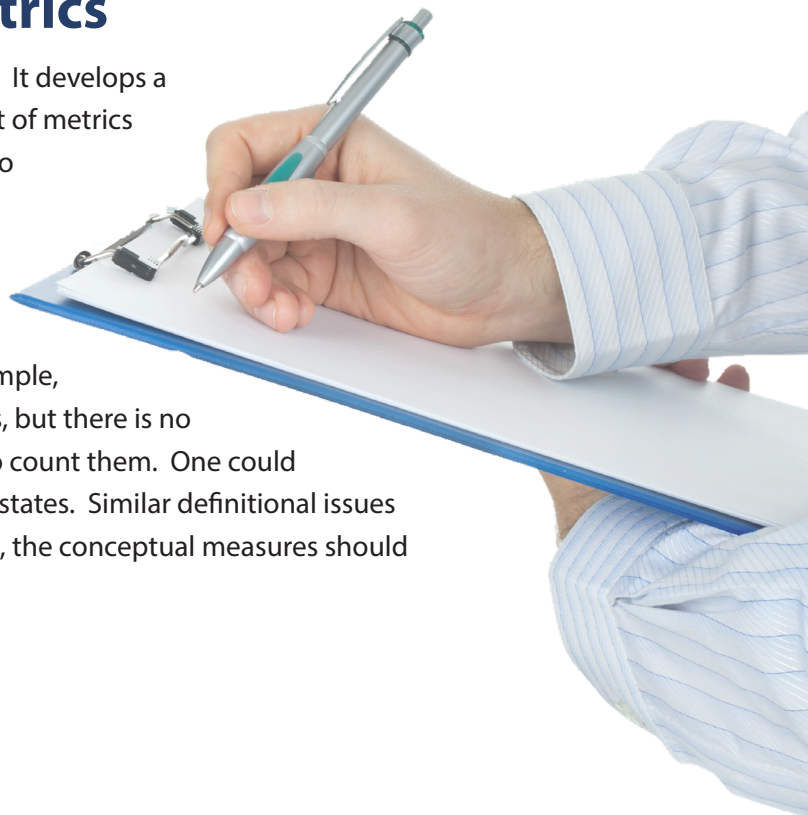
*This has three dimensions. The first is to lower costs to consumers by increasing the average productivity of legal services providers. A more competitive legal services market should lead to more innovation and higher productivity. The second is to increase the number of provider types, since this kind of innovation in business model is likely to lead to the largest improvements in productivity. The most impactful business models in this regard will likely be legal services provided by nonlawyers and/or software without lawyer oversight. The third is to increase consumer satisfaction. More access and better services should cause consumers to view the legal services they use in a more favorable light.*

## 3. Improve the regulation of legal services.

*This has three dimensions. First is to decrease the overall cost of regulation, which is currently prohibitive. The second is to increase the types of legal services and providers that are effectively covered by the regulatory approach. The current regulatory approach typically excludes a significant number of legal services explicitly because of the prohibitive cost and incentivizes a number of illegal service providers. Third is to improve the legitimacy of the regulatory approach in the eyes of consumers, who often see the current approach as ineffective at best and monopolistically protective at worst.*

## Conceptual vs. Technical Metrics

The approach presented here is for conceptual metrics only. It develops a consistent framework for assessment and recommends a set of metrics to collect. It does not define measures specifically enough to support entirely consistent data, which would require technical data definitions for all measures. Such definitions are not yet possible for several required data elements, since there do not yet exist supporting frameworks with a consensus for use behind them. For example, one proposed measure counts the types of business models, but there is no framework that defines a business model or explains how to count them. One could imagine a wide range of definitions being used by different states. Similar definitional issues will be encountered for other data elements. If nothing else, the conceptual measures should help states identify areas where technical work is required.



# Markets, Services, and Equity

Most lawyers work in for-profit law firms that compete with each other in the market. Yet approaches to solving the access problem that leverage markets are sometimes viewed as somehow inappropriate. Often there is an implicit assumption that approaches based on the market will automatically increase inequality without helping the worst off at all.

Unfortunately, it is now well established that relying on free and subsidized legal services to close the access gap cannot possibly scale to the magnitude of the problem with any realistic amount of funding. Markets can work to resolve this problem in several ways. Innovation may enable providers to offer services that are both lower in cost and more accessible. In turn, those positive features can increase the scale of services consumed and lower the costs in a virtuous cycle. The same process can yield positive results for non-profits that still charge some kind of fee, as long as they use innovation to achieve their results and set the fee at a level that delivers value to those with limited resources.

Yet it is likely that relative equity will initially decrease even while absolute access increases. People with higher incomes will always be more able to afford innovative services, including services that cost less than traditional offerings. This is how markets operate. Cars, telephones, flat screen TVs, and dishwashers are all examples of products that were at first only affordable by rich people. But volume led to lower prices over time and these products became affordable to almost everyone. Services can benefit from the same market dynamic if they incorporate innovations that significantly raise productivity. It is not automatic that new services will do this, but the ones that do are more likely to survive in the market.

Markets are an efficient mechanism for carrying out a huge number of experiments in innovation. Many of those experiments will fail, but the best innovations will survive and thrive. It is essentially impossible for non-profits in the current non-market scheme to innovate at all. Political organizations that create and/or fund them are notoriously bad at encouraging innovation and taking on risk of any kind. Radical innovation is necessary to achieve the degree of productivity improvements required to offer legal services at much lower costs.

Given the extreme scarcity of access to legal services, approaches that simply increase the number of services available will still have a positive effect. This can happen for low-income consumers when services are offered with prices that are somewhere in between the free rationing by legal aid organizations and the expensive standard fees by full-service lawyers. That leaves a lot of space for innovation. For middle-income consumers, the issue is partly one of value. They may be able to consume legal services at existing prices, but they do not because the perception is one of low value. Lower prices can increase both value and use.

Although market competition is an important aspect of regulatory reform, it is an intermediate mechanism for getting to the underlying goals, which are increased innovation, higher productivity, and lower prices. If market reforms are badly designed, it may be possible to increase competition incrementally without achieving the desired results. It is also difficult to assess meaningful changes in market competitiveness rigorously (and probably requires the services of a professional microeconomist), so it will be both simpler and less expensive to assess prices and costs to consumers instead.

# Conceptual Metrics

The conceptual metrics track the dimensions of the objectives.

## Access

### 1. Services consumed (increased)

*Given the size of the access gap (estimated to be 80% to 90% of the total legal need), an absolute increase in the number of services accessed and consumed is a sign of success all by itself. Use can be affected by economic fluctuations, pandemics and other external factors, so a trend over a range of years may be more indicative than short-term swings in consumption.*

### 2. Legal outcomes (improved)

*An increase in access to services should leave consumers no worse off on average, and hopefully better off, in terms of legal outcomes. It is critical to baseline this measure appropriately. Since most consumers receive no legal services now, the baseline will often be what happens when consumers proceed unaided.*

### 3. Equity (improved)

*People of color and low-income consumers now receive fewer services than others, partly because few of them are available in convenient ways and partly because they are priced out of the market. An increase in access should leave such groups no worse off on average, and hopefully better off, in terms of access and outcomes. This measure then looks at sub-groups of measures 1 and 2.*

## Market

### 4. Service Cost (costs decreased, consumer prices decreased)

*Legal costs are too high for many consumers partly because the monopolistic nature of legal services has prevented appropriate innovations that would steadily lower costs and prices. Opening up the market for legal services should stimulate innovation through competition and result in the productivity improvements necessary for lower prices. This measure is defined as economists do: increased outputs per inputs. It does not measure outcomes (which is done in measure 2).*

### 5. Provider types (increased)

*Provider types are really about business models. It is different business processes that will increase productivity and access. Any non-traditional business models that leverage nonlawyers and software (or lawyers in combination with nonlawyers and software in a way that more efficiently uses lawyers' time) should improve access and lower prices. Note that the emphasis is on non-traditional providers as entities—not new legal roles. Of course the latter may evolve in the context of the former. In most cases, a new role would constitute a new business model as well at first, but might then be incorporated in various ways in more complex business models than individual providers in that role.*

### 6. Consumer Satisfaction (increased)

*This measure looks at how happy consumers are with the services they use, separate from the objective effectiveness of the services. It could include measures of traditional procedural justice such as voice, neutrality, respect, and trust.*

## Regulation

### 7. Regulatory Cost (increased, then decreased)

*This measure looks at the cost of regulation—not the cost of legal services. There are two kinds of regulatory costs: those incurred by the regulator to operate and those borne by providers to comply with regulatory requirements.*

### 8. Regulatory Scope (increased)

*This measure looks at two ways that regulatory scope might be increased: more types of legal services regulated (rather than being excluded explicitly by state statutes) and more types of legal services being regulated rather than providing services on the black market and effectively escaping regulation.*

### 9. Provider Legitimacy (increased)

*Legitimacy is an inherently fuzzy concept and difficult to measure. The approach taken here is that legitimacy is best indicated by the bottom line: how many people use the new services made available by regulatory reform.*

# Implementable Metrics

## Services Consumed

**Baseline:** Services provided and consumed are estimated periodically by the LSC and by state bars (often via their bar foundations) in the context of legal need studies. Due to the lack of business model innovation by traditional providers, it is likely that the number of services provided will be relatively stable over the short-term.

**Data:** This measure simply tracks the absolute number of services provided to consumers, preferably in subsets by type of legal problem. It is a combination of services provided by baseline traditional providers and non-traditional providers.

**Issues:** Data drawn from legal need studies will become out of date after a few years. Raw data on services provided by non-traditional entities may be difficult to reliably collect unless the regulatory entity does so. Categories of legal problems are not consistently defined across legal need studies. Business cycles and other external factors may temporarily cause swings in consumption aside from impacts of regulatory reform.

## Legal Outcomes

**Baseline:** Services that involve courts may use data extracts from court management systems to analyze typical outcomes by case type. Services that do not involve courts might be assessed using the few studies on outcomes and time expended for those services by persons who were unaided by professionals.

**Data:** Services that involve courts may use data extracts from court management systems to analyze outcomes by case type. Services that do not involve courts may need to be sampled by type of provider.

**Issues:** Court databases often lack detail or quality, so estimates may be crude. Outcomes involve many legal nuances, so relatively objective and simple definitions must be used.



## Equity

**Baseline:** National and state legal need studies often estimate the services consumed by race, ethnicity, income, and gender.

**Data:** Consumption of services by race, ethnicity, income level and gender are the primary data desired. It may require sampling to acquire.

**Issues:** Courts typically do not identify litigants by race, ethnicity, or income level. Gender can sometimes be determined by the first name. Non-traditional providers may also not routinely collect demographic data. Since sampling is expensive, relatively small samples may not provide results that are statistically significant for subsets.

## Service Cost

**Baseline:** The inputs are typically lawyer labor time. The outputs are services consumed. Both need to be estimated by service type.

**Data:** Prices for non-traditional providers can be taken directly from provider websites if the prices are fixed. If not, then providers might be queried for their average prices per service type.

**Issues:** Productivity is difficult to measure directly, so average prices are used as a proxy. Providers may not have their average prices easily reportable by service type.

## Provider Types

**Baseline:** This is the bar plus any other traditionally regulated legal provider roles.

**Data:** Count types of legal service provider entities by business model.

**Issues:** There is no standard typology for relevant business models, especially those that are non-traditional. No organization routinely collects data on the number of non-traditional providers by business model.

## Consumer Satisfaction

**Baseline:** Get from surveys done by state bars and state courts for legal service provider roles regulated by the bar.

**Data:** Must generate original survey data on a regular basis using representative sampling of the new legal services.

**Issues:** Significant funding will be required to carry out the surveys. It is not clear who will pay for the surveys.

## Regulatory Cost

**Baseline:** Get from the state bar association the annual total cost of regulating lawyers and any other legal service provider roles regulated by the bar.

**Data:** Get from the regulators of newly permitted services their costs of regulation (monitoring, enforcement, sanctions, etc.).

**Issues:** Traditional regulators and non-traditional regulators carry out very different functions and may account their costs in different ways, making “apples to apples” comparisons more difficult. Because empirical regulatory approaches are new, they will inevitably cost significantly more initially. After that, similar approaches may be compared for efficiency and lower overall cost.

## Regulatory Scope

**Baseline:** Identify traditionally regulated roles for providing legal services besides lawyers (e.g., real property settlement agents) and what types of services/providers are subject to discipline for the unauthorized practice of law.

**Data:** Identify non-traditional providers of legal services—either by allowing the creation of entities with new business models or by removing UPL exclusions.

**Issues:** It is debatable whether or not the count of provider types should include only those types actually created and operated, or also those allowed but not yet implemented.

## Legitimacy

**Baseline:** This is by definition zero.

**Data:** Get from regulators the volume of consumption of services provided by newly permitted providers/business models over time.

**Issues:** Providers must be required to report service volume by the regulator. Providers who were already supplying services using traditional business models must be able to separate the tracking of traditional and non-traditional service volumes.

## Excluded Metrics

Because this assessment scheme focuses on regulatory approaches under the control of state court systems and their supreme courts, it excludes various types of measures often seen in evaluations of legal services.

**New legal roles**, as noted above, are really a special subset of new provider types, so it is not measured separately. There is no justification in this scheme for separating new business models that are roles from new business models that are entities that may or may not contain new roles.

**Impacts on lawyers and state bar associations** are defined as out-of-scope in this assessment scheme. Reforms to the regulation of lawyers should certainly be assessed as part of the broader measures described here, but the impact on the welfare of individual lawyers and law firms is best left to the bar associations themselves and the ABA. Those associations have a direct interest in the welfare of their constituents and have deep experience in evaluating such issues.

**Court impacts** are defined as out of scope for this assessment scheme, since the focus is on the access gap and consumer impacts—not what happens to court operations. Assessments of court process innovations occur all the time for many reasons having nothing to do with regulatory reform and are best done using measures directly related to the programs involved.



# Bootstrapping Data Collection

**Data collection** for several of the recommended measures will be problematic and probably require dedicated funding. Examples of recommended measures for which data collection may be especially difficult are #3 (equity) and #6 (consumer satisfaction).

**Output** measures may be easier to collect than **outcome** measures, especially in the early stages of implementation. Examples of recommended output measures include #1 (services consumed) and #5 (number of provider types).

**Quantity** measures may also be easier to collect than **quality** measures. For example, it will probably be easier to collect #1 (services consumed) or #9 (new services consumed) than to assess #2 (legal outcomes) or #3 (equity).

## Implementation Issues

**Sustainable funding** is an important consideration for regulatory reform, but it is by definition only possible to evaluate in the long term. This assessment scheme is intended to provide decision makers with periodic short-term assessments of alternative regulatory approaches. There is also a bit of a “chicken and egg” problem with funding. It is difficult to put sustainable funding in place at the start of an experimental or pilot program that may not prove to be a successful solution to the access problem, but funders may be willing to provide long-term support once an approach is shown to be cost-effective.

**Implementation best practices** for regulatory reform are little understood at this point. A couple of possible candidate best practices are 1) having a champion on the supreme court, and 2) including nonlawyers and members of the public on the project governance group. See below for related projects to improve our understanding of how best to implement.

## Recommended Related Projects

The assessment approach proposed here is all about the bottom line: what impacts were there on the legal services gap. For some, the journey is as important as the destination. **How** regulatory reform is done may be worthy of separate study and evaluation. Toward that end, states should conduct **process evaluations** to determine how well regulatory reform is going at an early stage of implementation. Waiting until reform has gone on long enough to evaluate outcomes is a risky strategy, since serious implementation flaws may be undermining the project. Catching those problems early is highly recommended.

The recommended measures above partially capture **consumer harms and benefits**, but probably not as systematically as some might wish. For example, #2 (legal outcomes) would indicate a harm if the outcomes were worse on average and a benefit if they were better. Similarly, #4 (productivity) would signal a harm if average prices were higher and a benefit if they were lower. There are however other types of possible consumer harms that are not measured in this scheme. Likewise, consumer benefits should probably be studied more comprehensively and systematically.

There are larger issues at stake with regulatory reform projects. Any interaction between the public and government institutions or agencies has the potential to impact **civic engagement** and democratic norms in a significant way. While assessing those impacts is beyond the scope of this assessment scheme, it is definitely a concern worthy of serious study.



# Appendix A

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The advisory committee provided many worthwhile suggestions and comments. The resulting views expressed in the paper (and any errors) are the sole responsibility of the authors and does not necessarily reflect the views of either the advisory committee members or the National Center for State Courts.

