GONZAGA UNIVERSITY

SCHOOL OF LAW

2021 Clarke Prize in Legal Ethics

Regulatory Reform as a Means to Increase Access to Justice

April 15, 2021

12:30 – 2:30 p.m. PT

2.0 Ethics CLE Credit Approved (WA)

2021 Clarke Family Prize Legal Ethics CLE

Regulatory Reform as a Means to Increase Access to Justice

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Program Overview

12:30 p.m.	**Welcome from Jacob H. Rooksby, Dean, Gonzaga University School of Law**
12:40 p.m.	**Topic 1 – The Problem: An Overview of the Access to Justice Gap**
12:55 p.m.	**Topic 2 – How We Got Here: A History of Legal Services Regulation and the Unauthorized Practice of Law**
1:15 p.m.	**Topic 3 – Solutions: Exploring Innovative Legal Services and Regulatory Responses to Increase Access to Justice**
1:45 p.m.	**Break**
1:50 p.m.	**Topic 4 – The Future: Regulatory Objectives and the Future of Legal Services Delivery**
2:05 p.m.	**Audience Q & A**
2:30 p.m.	**Closing**

Speaker Biographies

Justice Debra Stephens

The Honorable Debra L. Stephens has been a member of the Washington State Supreme Court since January 2008 and served as the court's 57th chief justice. Justice Stephens previously served as a judge for Division Three of the Court of Appeals and is the first judge from that court to join the Washington State Supreme Court, as well as the first woman from Eastern Washington to do so. A native of Spokane, Washington, she practiced law and taught as an adjunct professor at Gonzaga University School of Law prior to taking the bench. She appeared as counsel over 125 times in the Washington State Supreme Court, in addition to appearances in the Idaho Supreme Court, in the United States Court of Appeals for the Ninth Circuit, and as counsel of record in the United States Supreme Court.

Justice Stephens is deeply involved in efforts to advance justice and improve the legal system in Washington State and beyond. A leader in judicial and public education, she serves on the Washington Civic Learning Council, is a founding executive committee member of the National Courts and Sciences Institute (NCSI), and a convener for Dividing the Waters, an organization supporting judicial education on water law issues. She has been a member and co-chair of the Board for Judicial Administration, and co-chair of the COVID-19 Court Recovery Task Force. Justice Stephens is active in the National and International Association of Women Judges and co-chairs its Judicial Independence Committee. Internationally, she works with USAID to train foreign judges on issues of judicial independence and the rule of law.

Justice Stephens has received numerous recognitions for her work, including the "Myra Bradwell Award" from the Gonzaga Women's Law Caucus, the "Leadership & Justice Award" from MAMAS (Mother Attorneys Mentoring Association of Seattle), the "Distinguished Judicial Service Award" from Gonzaga University School of Law, and the "President's Award" from Washington Women Lawyers. Most recently, the Board for Judicial Administration presented her the "Innovating Justice" award in recognition of her leadership of the judicial branch during the COVID-19 crisis.

Justice Stephens and her husband have been married for over 30 years and have two grown children. She comes from a large and loving family and enjoys nothing more than spending time with family at their home below Hell's Canyon.

For a full biography, please view the Washington State Supreme Court website.

Justice Constandinos Himonas

Justice Constandinos "Deno" Himonas was appointed to the Utah Supreme Court in February 2015. Prior to his appointment, he served as a trial court judge for over 10 years. Justice Himonas graduated Magna Cum Laude and Phi Beta Kappa in economics from the University of Utah in 1986 and received his Juris Doctorate from the University of Chicago in 1989. Upon graduating from law school, he returned to Utah and spent 15 years working as a litigator, focusing on complex civil litigation. Justice Himonas has served as the chairperson of the Litigation Section of the Utah State Bar, co-chairperson of the Third District Court's Pro Bono Committee, and member of the Judicial Conduct Commission. He currently serves on the Utah Judicial Council, as the Chair of the Supreme Court's task force for Licensed Paralegal Practitioners and the Chair of the Judicial Council's task force on Online Dispute Resolution, as well as on a number of national groups. Justice Himonas can often be found speaking to local, national, or international audiences on access-to-justice issues. And he is currently deeply involved in efforts aimed at reimagining how the legal profession is regulated in the United States. Justice Himonas has taught as an adjunct professor at the University of Utah S.J. Quinney College of Law and has been honored by the College of Law as an Honorary Alumnus of the Year. He is a recipient of the Rebuilding Justice Award from the Institute for the Advancement of the American Legal System and the Judicial Excellence Award from the Utah State Bar and is a Fellow of the National Conference of Technology and Dispute Resolution and a Life Fellow of the American Bar Association.

For a full biography, please view the Utah State Supreme Court website.

Dean Andrew M. Perlman

Andrew Perlman joined the Suffolk University Law School faculty in 2001 and became the Law School's dean in 2015.

Dean Perlman has served as the Chief Reporter for the American Bar Association's Commission on Ethics 20/20, which was responsible for updating the Model Rules of Professional Conduct in light of globalization and changes in technology. He subsequently served as the vice chair of the ABA's Commission on the Future of Legal Services and the inaugural chair of the governing council of the ABA's new Center for Innovation. He also recently served as a working group leader of an American Academy of Arts & Sciences project that is looking to improve access to justice, and he has visited the U.S. Congress as part of a briefing on related issues.

Prior to becoming dean, he was the inaugural director of Suffolk Law's Institute on Legal Innovation and Technology, which has been named twice as the top legal tech program among U.S. law schools. In 2015, he was recognized by FastCase as one of 50 "entrepreneurs, innovators, and trailblazers ... who have charted a new course for the delivery of legal services."

Prior to joining the Suffolk Law faculty, Dean Perlman practiced as a litigator in Chicago and clerked for a federal judge there. He has a BA from Yale, a JD from Harvard Law, and an LLM from Columbia Law School.

For a full biography, please visit his Suffolk University webpage.

Professor Laurel A. Rigertas

Professor Laurel Rigertas joined the NIU law faculty in 2006. She teaches professional responsibility, torts, advanced torts and a mindfulness course for law students. Professor Rigertas' research and scholarship focuses on the legal profession, particularly in the areas of ethics, professionalism, the unauthorized practice of law and access to the legal system. She served as the College of Law's Interim Dean during the 2019-2020 academic year.

Prior to joining the NIU law faculty in 2006, Professor Rigertas practiced complex commercial litigation as a partner with Michael Best & Friedrich LLP in Chicago, which she joined in 1999 as an associate. Professor Rigertas began her law career in 1997 at Jenner & Block in Chicago, where she also focused on complex commercial litigation. Professor Rigertas graduated magna cum laude from the University of Minnesota Law School in 1997. There she was a member of the honorary scholastic society, Order of the Coif, and served as articles editor of *Law & Inequality: A Journal of Theory and Practice.*

For a full biography, please visit her NIU webpage.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will

contribute to the competent and ethical representation of the client. See also RPC 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[Comment 6 Adopted September 1, 2016.]

[7] [**Washington revision]** When lawyers or LLLTs from more than one law firm are providing legal services to the client on a particular matter, the lawyers and/or LLLTs ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See RPC 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers, LLLTs, and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[Comment 7 Adopted September 1, 2016].

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

[Comment 6 Adopted effective September 1, 2006; Renumbered to 8 and Amended effective September 1, 2016.]

Additional Washington Comments (9-10)

[9] This rule applies to lawyers only when they are providing legal services. Where a lawyer is providing nonlawyer services (”supporting lawyer”) in support of a lawyer who is providing legal services (“supported lawyer”), the supported lawyer should treat the supporting lawyer as a nonlawyer assistant for purposes of this rule and RPC 5.3. (Responsibilities Regarding Nonlawyer Assistants).

[Comment 9 adopted September 1, 2016].

[10] In some circumstances, a lawyer can also provide adequate representation by enlisting the assistance of an LLLT of established competence, within the scope of the LLLT's license and consistent with the provisions of the LLLT RPC. However, a lawyer may not enter into an arrangement for the division of the fee with an LLLT who is not in the same firm as the lawyer. See Comment [7] to Rule 1.5(e); LLLT RPC 1.5(e). Therefore, a lawyer may enlist the assistance of an LLLT who is not in the same firm only (1) after consultation with the client in accordance with Rules 1.2 and 1.4 and (2) by referring the client directly to the LLLT.

[Comment [7] Adopted effective April 14, 2015; Renumbered to 10 effective September 1, 2016.]

RULE 1.3
DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

[Adopted effective September 1, 1985.]

Comment

[1] **[Washington revision]** A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer, is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] **[Reserved.]**

[Comments adopted effective September 1, 2006.]

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent; and

(9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. If a fee is contingent on the outcome of a matter, a lawyer shall comply with the following

(1) A contingent fee agreement shall be in a writing signed by the client;

(2) A contingent fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable, whether or not the client is the prevailing party;

(3) upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination; and

(4) a contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only

(i) by applying the percentage to the amounts recovered as they are received by the client; or

(ii) by applying the percentage to the actual cost of the settlement or award to the defendant.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) (i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;

(ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(iii) the total fee is reasonable; or

(2) the division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state.

(f) Fees and expenses paid in advance of performance of services shall comply with Rule 1.15A, subject to the following exceptions:

(1) A lawyer may charge a retainer, which is a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer's property on receipt and shall not be placed in the lawyer's trust account.

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. A statement in substantially the following form satisfies this requirement:

> [Lawyer/law firm] agrees to provide, for a flat fee of $_____, the following services: _____. The flat fee shall be paid as follows: _____. Upon [lawyer's/law firm's] receipt of all or any portion of the flat fee, the funds are the property of [lawyer/law firm] and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed-upon

legal services have been completed, you may or may not have a right to a refund of a portion of the fee.

(3) In the event of a dispute relating to a fee under paragraph (f)(1) or (f)(2) of this Rule, the lawyer shall take reasonable and prompt action to resolve the dispute.

[Amended effective September 1, 1990; Suspended September 18, 1990 and suspension lifted December 12, 1990; Amended effective September 1, 2006; November 18, 2008.]

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (9) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

See also Washington Comments [10] and [11].

Basis or Rate of Fee

[2] **[Washington revision]** When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding. See Washington Comment [17] for fee agreements that include LLLT services.

[Comment [2] amended effective April 14, 2015.]

[3] **[Reserved in part.]** Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the

situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] **[Washington revision]** Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, maintenance or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] **[Washington revision]** A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See RPC 1.1. See also RPC 1.1, comments [6] and [10] as to decisions to associate other lawyers or LLLTs. See also Washington Comment [18].

[Comment [7] amended effective April 14, 2015; September 1, 2016.]

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Additional Washington Comments (10–19)

Reasonableness of Fee and Expenses

[10] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (f)(1) or (f)(2), is subject to Rule 1.5(a) and may not be unreasonable.

[Comment [10] amended effective November 18, 2008.]

[11] Under paragraph (a)(9), one factor in determining whether a fee is reasonable is whether the fee agreement or confirming writing demonstrates that the client received a reasonable and fair disclosure of material elements of the fee agreement. Lawyers are encouraged to use written fee agreements that fully and fairly disclose all material terms in a manner easily understood by the client. See also Washington Comment [17] regarding fee agreements that include LLLT services.

[Comment [11] amended effective April 14, 2015.]

Payment of Fees in Advance of Services

[12] In the absence of a written agreement between the lawyer and the client to the contrary that complies with paragraph (f)(1) or (f)(2), all advance payments are presumed to be deposits against future services or costs and must, until the fee is earned or the cost incurred, be held in a trust account pursuant to Rule 1.15A. See Rule 1.15A(c)(2). This fee structure is known as an "advance fee deposit." Such a fee may only be withdrawn when earned. See Rule 1.15A(h)(3). For example, when an advance fee deposit is placed in trust, a lawyer may withdraw amounts based on the actual hours worked. In the case of a flat fee that constitutes an advance fee deposit because it does not meet the requirements of paragraph (f)(2), the lawyer and client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific "milestones" reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.

[Comment [12] adopted effective November 18, 2008.]

[13] Paragraphs (f)(1) and (f)(2) provide exceptions to the general rule that fees received in advance must be placed in trust. Paragraph (f)(1) describes a fee structure sometimes known as an "availability retainer," "engagement retainer," "true retainer," "general retainer," or "classic retainer." Under these rules, this arrangement is called a "retainer." A retainer secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a retainer under paragraph (f)(1). A written retainer agreement should clearly specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt and will not deposit the fee into a trust account.

[Comment [13] adopted effective November 18, 2008.]

[14] Paragraph (f)(2) describes a "flat fee," sometimes also known as a "fixed fee." A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort expended by the lawyer to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be deposited initially in the lawyer's trust account. See Washington Comment [12].

[Comment [14] adopted effective November 18, 2008.]

[15] If a lawyer and a client agree to a retainer under paragraph (f)(1) or a flat fee under paragraph (f)(2) and the lawyer complies with the applicable requirements, including obtaining agreement in a writing signed by the client, the fee is considered the lawyer's property on receipt and must not be deposited into a trust account containing client or third-party funds. See Rule 1.15A(c) (lawyer must hold property of clients separate from lawyer's own property). For definitions of the terms "writing" and "signed," see Rule 1.0A(n).

[Comment [15] adopted effective November 18, 2008; Amended effective April 14, 2015.]

[16] In fee arrangements involving more than one type of fee, the requirements of paragraphs (f)(1) and (f)(2) apply only to the parts of the arrangement that are retainers or flat fees. For example, a client might agree to make an advance payment to a lawyer, a portion of which is a flat fee for specified legal services with the remainder to be applied on an hourly basis as services are rendered. The latter portion is an advance fee deposit that must be placed in trust under Rule 1.15A(c)(2). If the requirements of paragraph (f)(2) are met regarding the flat fee portion, those funds are the lawyer's property on receipt and must not be kept in a trust account. If the payment is in one check or negotiable instrument, it must be deposited intact in the trust account, and the flat fee portion belonging to the lawyer must be withdrawn at the earliest reasonable time. See Rule 1.15A(h)(1)(ii) and (h)(4). See also Comment [10] to Rule 1.15A (explaining prohibition on split deposits). Although a signed writing is required under paragraphs (f)(1) and (f)(2) only for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer's property on receipt), the lawyer should consider putting the entire arrangement in writing to facilitate communication with the client and prevent future misunderstanding. See Washington Comment [11].

[Comment [16] adopted effective November 18, 2008.]

Fee Agreements in Law Firms That Include Both Lawyers and LLLTs

[17] LLLTs are required to disclose the scope of the representation and the basis or rate of their fees and expenses in writing to the client prior to the performance of services for a fee. APR 28(G)(3); LLLT RPC 1.5(b). Accordingly, when lawyers and LLLTs are associated in a firm, if the firm's services include representation by an LLLT who acts under the authority of APR 28, then there must be a written fee agreement that comports with APR 28(G)(3) and LLLT RPC 1.5(b). See RPC 8.4(f)(2).

[Comment [17] adopted April 14, 2015.]

[18] Paragraph (e) does not allow division of fees between a lawyer and an LLLT who are not in the same firm. See LLLT RPC 1.5(e).

[Comment [18] adopted April 14, 2015.]

[19] An LLLT, unlike a lawyer, is prohibited from entering into a contingent fee or retainer agreement with a client directly. See LLLT RPC 1.5 Comment [1]. Nonetheless, this prohibition was not intended to prohibit a lawyer from sharing fees that include contingent fees or retainers with an LLLT with whom the lawyer has entered into a for-profit business relationship under Rule 5.9. See Rules 5.9 and 5.10 for a managing lawyer's additional duties regarding LLLTs who are members of the same firm as the lawyer. See also RPC 5.4 Washington Comment [4].

[Comment [19] adopted April 14, 2015.]

[Comments adopted effective September 1, 2006.]

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

[Adopted effective September 1, 1985; Amended effective September 1, 1995; September 1, 2006.]

Comments

General Principles

[1] **[Washington revision]** Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0A(e) and (b).

[Comment 1 amended effective April 14, 2015.]

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also

Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical

questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

See also Washington Comment [37].

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] **[Washington revision]** When lawyers representing different clients in the same matter or in substantially related matters are related as parent, child, sibling, or spouse, or if the lawyers have some other close familial relationship or if the lawyers are in a personal intimate relationship with one another, there may be a significant risk that client confidences will be revealed and that the lawyer's family or other familial or intimate relationship will interfere with both loyalty and independent professional judgment. See Rule 1.8(l). As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer so related to another lawyer ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] **[Reserved.]**

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

[16] **[Washington revision]** Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states other than Washington limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. See Washington Comment [38].

[17] [**Washington revision]** Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0A(m)), such representation may be precluded by paragraph (b)(1).

[Comment [17] amended effective April 14, 2015.]

See also Washington Comment [38].

Informed Consent

[18] **[Washington revision]** Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0A(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[Comment [18] amended effective April 15, 2014.]

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the

benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

See also Washington Comment [39].

Consent Confirmed in Writing

[20] **[Washington revision]** Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0A(b). See also Rule 1.0A(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0A(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Comment 20 amended effective April 15, 2014.]

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

[Comment 22 amended effective September 1, 2018.]

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation,

regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to

establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

See also Washington Comment [40].

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients

at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

See also Washington Comment [41].

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Additional Washington Comments (36–41)

General Principles

[36] Notwithstanding Comment [3], lawyers providing short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court are not normally required to systematically screen for conflicts of interest before undertaking a representation. See Comment [1] to Rule 6.5. See Rule 1.2(c) for requirements applicable to the provision of limited legal services.

Identifying Conflicts of Interest: Material Limitation

[37] Use of the term "significant risk" in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

Prohibited Representations

[38] In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest.

Informed Consent

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made. Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate.

Special Considerations in Common Representation

[41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

[Comments adopted effective September 1, 2006.]

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

[Adopted effective September 1, 1985.]

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[Comments adopted effective September 1, 2006.]

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) **[Reserved.]**

(5) a lawyer authorized to complete unfinished legal business of a deceased lawyer may pay to the estate or other representative of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer (other than as secretary or treasurer) thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[Adopted effective September 1, 1985; Amended effective September, 1, 2006.]

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer’s professional independence of judgment. Where someone other than the client pays the lawyer’s fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer’s professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent).

[3] Paragraph (a)(5) was taken from former Washington RPC 5.4(a)(2).

[4] Notwithstanding Rule 5.4, lawyers and LLLTs may share fees and form business structures to the extent permitted by Rule 9.9.

[Comment 4 adopted effective April 14, 2015.]

[Comments adopted effective September 1, 2006.]

RPC 5.5
UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are (i) provided on a temporary basis and (ii) not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based on the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

(f) Subsection (b)(1) of this rule does not prohibit a law firm with offices in multiple jurisdictions from establishing and maintaining an office in this jurisdiction even if some of the lawyers who are members of the firm, or are otherwise employed or retained by or associated with the law firm, are not authorized to practice law in this jurisdiction**.**

[Adopted effective September 1, 1985; Amended effective October 1, 2002; September 1, 2006; July 1, 2008; January 1, 2014; September 1, 2016; January 26, 2021.]

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[Comment 1 adopted effective September 1, 2006; Amended effective September 1, 2016.]

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[Comment 2 adopted effective September 1, 2006.]

[3] **[Washington revision]** A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist LLLTs and other independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[Comment 3 adopted effective September 1, 2006; Amended effective April 14, 2015.]

[4] **[Washington revision]** Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also RPC 7.1 and Washington cmt. 14.

[Comment 4 adopted effective September 1, 2006; Amended effective January 26, 2021.]

[5] **[Washington revision]** There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d)(2), this Rule does not authorize a United States or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally or as house counsel under APR 8(f) here.

[Comment 5 adopted effective September 1, 2006; Amended effective September 1, 2016; January 26, 2021.]

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[Comment 6 adopted effective September 1, 2006.]

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[Comment 7 adopted effective September 1, 2006; Amended effective September 1, 2011; September 1, 2016.]

[8] [**Washington revision**] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client. See also RPC 1.1, Comment [6].

[Comment 8 adopted effective September 1, 2006; Amended effective September 1, 2016.]

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[Comment 9 adopted effective September 1, 2006.]

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[Comment 10 adopted effective September 1, 2006.]

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[Comment 11 adopted effective September 1, 2006.]

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[Comment 12 adopted effective September 1, 2006.]

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[Comment 13 adopted effective September 1, 2006.]

[14] **[Washington revision]** Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in Washington following determination by the Supreme Court that an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred, who are not otherwise authorized to practice law in Washington, as well as lawyers from another affected jurisdiction who seek to practice law temporarily in Washington, but who are not otherwise authorized to practice law in Washington, should consult Admission to Practice Rule 27 on Provision of Legal Services Following Determination of Major Disaster.

[Comment 14 adopted effective September 1, 2006; Amended effective September 1, 2008; January 26, 2021.]

[15] **[Washington revision]** Paragraph (d)(1) identifies another circumstance in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may provide legal services on a temporary basis i.e., as "in-house counsel" for an employer. Paragraph (d)(2) identifies a circumstance in which such a lawyer may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Except as provided in paragraphs (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction or as house counsel under APR 8(f). The Washington version of this comment has been amended to take account of the requirement that in-house counsel wishing to engage in nontemporary practice in Washington

must either be generally admitted to practice under APR 3 or obtain a limited license to practice law as in-house counsel under APR 8(f).

[Comment 15 adopted effective September 1, 2006; Amended January 1, 2014; August 20, 2013; September 1, 2016.]

[16] Paragraph (d)(1) applies to a United States or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[Comment 16 adopted effective September 1, 2006; Amended effective September 1, 2016.]

[17] **[Washington revision]** In Washington, paragraph (d)(1) applies only to lawyers who are providing the services on a temporary basis. If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer must seek general admission through APR 3 or house counsel admission under APR 8(f).

[Comment 17 adopted effective September 1, 2006; Amended effective August 20, 2013; January 1, 2014.]

[18] Paragraph (d)(2) recognizes that a United States or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[Comment 18 adopted effective September 1, 2006; Amended effective September 1, 2016.]

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[Comment 19 adopted effective September 1, 2006.]

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[Comment 20 adopted effective September 1, 2006.]

[21] **[Washington revision]** Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1.

[Comment 21 adopted effective September 1, 2006; Amended effective January 26, 2021.]

[22] Subsection (f) is derived from former RPC 7.5(b), which permitted law firms with offices in more than one jurisdiction to use the same name or other professional designation in each jurisdiction, and is intended to maintain authorization in the Rules of Professional Conduct for the presence of multijurisdictional law firms in Washington for purposes of RCW 2.48.180(7).

[Comment 22 adopted effective January 26, 2021.]

Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of pro bono publico service per year. In fulfilling this responsibility, the lawyers should:

(a) provide legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide pro bono publico service through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, or charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate:

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

Pro bono publico service may be reported annually on a form provided by the WSBA. A lawyer rendering a minimum of fifty (50) hours of pro bono publico service shall receive commendation for such service from the WSBA.

[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

Comment

[1] **[Washington revision]** Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, at a minimum, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] **[Washington revision]** Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means or organizations primarily representing such persons. The variety of these activities should facilitate participation by government lawyers, even when restrictions may exist on their engaging in the outside practice of law.

[3] **[Washington revision]** Persons eligible for legal services under paragraphs (a)(1) are those who qualify for services provided by a qualified legal services provider (see Washington Comment [14]) and those whose incomes and financial resources are slightly above the

guidelines utilized by such programs but nevertheless, cannot afford legal services. Legal services under paragraphs (a)(1) and (2) include those rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[Comment 3 amended effective April 14, 2015.]

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] **[Washington revision]** A lawyer's responsibility under this Rule can be fulfilled either through the activities described in paragraph (a)(1) and (2) or in a variety of ways as set forth in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] **[Washington revision]** Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving in a volunteer capacity on bar association committees or on boards of pro bono or legal services programs, taking part in Law Week activities, acting as an uncompensated continuing legal education instructor, an uncompensated mediator or arbitrator and engaging in uncompensated legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] **[Reserved.]**

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

[13] Washington's version of this Rule differs from the Model Rule. Washington's Rule 6.1 specifies an aspirational minimum of thirty hours of pro bono publico legal services per year rather than fifty, but provides for presentation of a service recognition award to those lawyers reporting to the WSBA a minimum of fifty hours. Unlike the Model Rule, paragraph (a) of Washington's Rule does not specify that the majority of the pro bono publico legal service hours should be provided without fee or expectation of fee. And Washington's Rule does not include the final paragraph of the Model Rule relating to voluntary contributions of financial support to legal services organizations. The provisions of Rule 6.1 were taken from former Washington RPC 6.1 (as amended in 2003).

[14] For purposes of this Rule, a "qualified legal services provider" is a not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients.

[15] Pro bono publico service does not include services rendered for wages or other compensation by lawyers employed by qualified legal services providers (as that term is defined in Washington Comment [14]), government agencies, or other organizations as part of their employment.

[16] The amount of time spent rendering pro bono publico services should be calculated on the same basis that lawyers calculate their time on billable matters. For example, if time spent traveling to a client meeting or to a court hearing is considered to be part of the time for which a paying client would be billed, it is appropriate to include such time in calculating the number of pro bono publico service hours rendered under this Rule.

[Comments effective September 1, 2006.]

AMERICAN BAR ASSOCIATION

CENTER FOR INNOVATION
STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL REGULATION
STANDING COMMITTEE ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider innovative approaches to the access to justice crisis in order to help the more than 80% of people below the poverty line and the many middle-income Americans who lack meaningful access to effective civil legal services.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public, including the provision of legal counsel as a matter of right and at government expense for children facing essential civil legal matters and for low-income individuals in adversarial proceedings where basic human needs or a loss of physical liberty are at stake.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after their adoption to ensure that changes are effective in increasing access to legal services and are in the interest of clients and the public.

FURTHER RESOLVED, That nothing in this Resolution should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject.

REVISED REPORT

I. Introduction

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people with low incomes as well as many middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody and support, debt collection, eviction, and foreclosure.[1] Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.[2] Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs.[3] As a result of these and related problems, the United States ties for 99th out of 126 countries in terms of the accessibility and affordability of civil legal services.[4]

Even where legal aid support is available, lawyers often carry extraordinary caseloads in an effort to help as many individuals in need as possible. Moreover, legal services organizations often lack appropriate assistance from trained professionals, such as paralegals, social workers, and investigators. As a result, in 2017, Legal Services Corporation providers were only able to offer some form of legal assistance to 59% of the eligible problems for which low-income Americans sought help.[5]

For decades, the legal profession and the organized bar have tried to address these problems by calling for increased funding for civil legal aid, more pro bono work, and the recognition of a right to a lawyer for low-income individuals at government expense in certain matters involving essential civil legal needs (referred to, in the past, as civil *Gideon*). These efforts must continue and increase, as the crisis is only becoming more severe,[6] and the ABA's longstanding polices on the right to counsel should remain unchanged.[7] But even the most avid proponents of the right to counsel acknowledge that it is a long-term movement that will take decades to accomplish in its entirety. Thus, we need to find ways to supplement and expand existing efforts to address the public's unmet

[1] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6, 22 (2017) (prepared by NORC at the University of Chicago), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [hereinafter THE JUSTICE GAP REPORT]; DEBORAH L. RHODE, ACCESS TO JUSTICE 3, 79 (2004).
[2] NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.
[3] *See* Jack Karp, *No Country for Old Lawyers: Rural U.S. Faces A Legal Desert*, LAW360 (Jan. 27, 2019. 8:02 PM), https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert.
[4] WORLD JUSTICE PROJECT, RULE OF LAW INDEX: CURRENT AND HISTORICAL DATA (2019), https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/current-historical-data (rankings are available in the downloadable spreadsheet).
[5] THE JUSTICE GAP REPORT, *supra* note 1, at 42 (2017).
[6] *See, e.g.*, Anna E. Carpenter et al., *Studying the "New" Civil Judges,* 2018 WIS. L. REV. 249, 284 (2018) (noting "[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se").
[7] *See, e.g.,* HOWARD H. DANA, JR., AM. BAR ASS'N, REPORT TO THE ABA HOUSE OF DELEGATES ON RESOLUTION 112A 2-3 (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

civil legal needs.[8]

In recent years, a number of innovative ideas have emerged to address the pervasive problems that exist. Examples include the use of online dispute resolution,[9] the development of new tools and forms of assistance for pro se litigants,[10] the expansion of virtual court services,[11] the adoption of streamlined litigation processes,[12] the use of technology to facilitate pro bono work,[13] and the implementation of technology and innovation to help lawyers deliver their services more efficiently.[14]

In addition, U.S. jurisdictions, through their supreme courts and bars, are considering regulatory innovations. For example, regulators and bar associations in several states, including Arizona, California, Connecticut, Florida, the District of Columbia, New Mexico, Oregon, Utah, and Washington, are considering or have adopted substantial regulatory innovations.[15] In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise,

[8] The word "public" is intended to refer to both clients and members of the public who do not currently receive assistance from a lawyer.

[9] *See* JOINT TECHNOLOGY COMMITTEE, CASE STUDIES IN ODR FOR COURTS: A VIEW FROM THE FRONT LINES 1 (2017), https://www.ncsc.org/~/media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx; RICHARD SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE (2019); Erika Rickard & Amber Ivey, *Can Technology Help Modernize the Nation's Civil Courts?*, PEW (Mar. 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/03/04/can-technology-help-modernize-the-nations-civil-courts.

[10] *See, e.g.,* COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 19 (2016), https://www.srln.org/system/files/attachments/2016%20ABA%20Future%20of%20Legal%20Services%20-Report-Web.pdf; Tyler Technologies, *Increased Access to Justice for All*, NAT'L ASS'N COUNTIES (Apr. 8, 2019), https://www.naco.org/blog/increased-access-justice-all.

[11] COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 10, at 19.

[12] *Id.* at 46.

[13] *See, e.g., Our Work,* PRO BONO NET, https://www.probono.net/our-work/ (last visited Feb. 10, 2020); *What Is ABA Free Legal Answers?,* AM. BAR ASS'N FREE LEGAL ANSWERS, https://abafreelegalanswers.org/ (last visited Feb. 10, 2020).

[14] *See, e.g.,* Brooke Moore, *ABA TechReport 2019: Solo & Small Firm*, AM. BAR ASS'N: LAW TECH. TODAY (Dec. 4, 2019), https://www.lawtechnologytoday.org/2019/12/techreport-2019-solo-small-firm/; Press Release, Legal Servs. Corp., LSC Awards More Than $4 Million in Technology Grants to Legal Aid Organizations, (Oct. 10, 2019), https://www.lsc.gov/media-center/press-releases/2019/lsc-awards-more-4-million-technology-grants-legal-aid-organizations.

[15] *See, e.g.,* ARIZONA SUPREME COURT, TASK FORCE ON DELIVERY OF LEGAL SERVICES REPORT AND RECOMMENDATIONS 1-5 (2019), https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750; THE UTAH WORK GROUP ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf; *Committee on Technologies Affecting the Practice of Law*, FLA. BAR, https://www.floridabar.org/about/cmtes/cmte-me104/ (last visited Feb. 10, 2020); *Legal Innovation Regulatory Survey*, AM. BAR ASS'N CTR. FOR INNOVATION, https://legalinnovationregulatorysurvey.info/ (last visited Feb. 10, 2020); Press Release, State of N.M. Supreme Court Admin. Office of the Courts, Supreme Court Work Group to Consider Non-Attorney Option for Providing Civil Legal Services in New Mexico (May 21, 2019), https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71caea83/News_Release_Working_Group_to_Consider_Licensed_Legal_Technicians.pdf; *Task Force on Access Through Innovation of Legal Services,* ST. BAR CAL., http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services (last visited Feb. 10, 2020).

rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public and clients.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with public protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA models rules, such as the Model Rules of Professional Conduct or other policies. The ABA should nevertheless play a leadership role by encouraging states to consider jurisdictionally tailored regulatory innovations that are consistent with public and client protection, collect and analyze relevant data both before and after the implementation of any innovations, and use the data to shape future reform efforts. Such state-based reviews should engage broad and diverse stakeholders, including bar associations and client communities.

II. Data Should Be Collected and Analyzed

The third Resolved clause calls for the collection and assessment of data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of clients and the public. The collection of such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public's growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, best provide continuing and necessary protections for those in need of legal services, and best serve the interest of clients and the public.

One example of such an effort is the recently launched *Unlocking Legal Regulation* project of the Institute for the Advancement of the American Legal System.[16] Among other initiatives, the project will "[a]ssess and support pilot projects for risk-based regulation in Utah and other states, including identifying metrics and conducting empirical research to evaluate outcomes."[17]

III. Conclusion

Justice Louis Brandeis once wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[18] The Resolution calls for precisely this kind of courageous experimentation.

Respectfully submitted,

Don Bivens
Chair, Center for Innovation
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[16] *Unlocking Legal Regulation*, U. DENVER INST. FOR ADVANCEMENT OF AM. LEGAL SYS., https://iaals.du.edu/projects/unlocking-legal-regulation (last visited Feb. 10, 2020).
[17] *Id.*
[18] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

DEMOCRATIZING THE RULE OF LAW

Hon. Deno G. Himonas* & Tyler J. Hubbard**

Year in and year out, Americans face a mountain of unmet civil legal needs. To combat this access-to-justice crisis, the Utah court system has introduced a number of changes. These changes cover the spectrum, from common improvements like making standardized forms available online, to pioneering advancements, such as introducing a legal regulatory sandbox. In this Article, we explore many of the reforms that the Utah courts have embraced, their underlying rationales, and the pushback the reforms have faced.

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INTRODUCTION

A recurrent refrain in our public discourse these days is the "rule of law," the reassuring concept that the law is neutral and applies equally to all. Be that as it may, the rule of law offers little succor to those who are unable to access or afford our civil legal system. And as things presently stand in the United States, that group includes all but the very wealthiest of individuals and moneyed interests. The rest of us do not have the ability to adequately understand our civil legal issues, to access our civil legal system, or both.

Study after study has documented the disparity in access to and the affordability of civil justice in the United States. Although this problem is not unique to the United States, it is particularly acute here: the World Justice Project ranked the U.S. as tied for 99th out of 126 countries in terms of access to and affordability of civil justice.[1] That is why American academics and nonprofit groups have increasingly focused on access to justice. For example, the American Academy of Arts and Sciences recently dedicated an entire issue of its journal, *Daedalus*, to exploring the "national crisis in civil legal services facing poor and low-income Americans."[2] And the Pew Charitable Trusts just released the results of a wide-ranging study that cut "across all income levels" and found that "[a]bout 1 in 3 U.S. households faced housing, family, or debt issues that could result in an interaction with the civil legal system in 2018."[3] Yet at least "80 percent of people living below the poverty line and a majority of middle-income Americans receive no meaningful assistance when facing" these issues.[4]

The empirical and academic work in this space evinces several certainties. Each year, millions of Americans are confronted with civil legal issues. Some face a dilemma: either bring or defend a legal action with the aid of a lawyer and expect to pay more in legal fees than the value of the dispute, or go it alone. Those Americans are fortunate; they have a choice. Others do not. Many Americans lack the means to afford a lawyer and face the overwhelming prospect of going it alone, with little or no understanding of what they are up against.[5]

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1. UTAH WORK GRP. ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION 1 (2019), https://perma.cc/HJP8-AQ5M.

2. *See generally Access to Justice*, DAEDALUS, Winter 2019.

3. Erika Rickard, *Many U.S. Families Faced Civil Legal Issues in 2018*, PEW CHARITABLE TR. (Nov. 19, 2019), https://perma.cc/R3LS-BRDH.

4. Andrew M. Perlman, *The Public's Unmet Need for Legal Services & What Law Schools Can Do About It*, DAEDALUS, Winter 2019, at 75, 75.

5. AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 8 (2016), https://perma.cc/C3QL-AV8Q ("[L]egal services are growing more expensive, time-consuming, and complex, making them increasingly out of reach for most Americans. Many who need legal advice cannot afford to hire a lawyer and are forced to either represent themselves or avoid accessing the legal system altogether."). This all assumes that those Americans confronting legal issues understand in the first instance that the issue has a justiciable element, which is often not the case. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 30 (2017),

The Utah judiciary has sought to level the playing field for those who have no access to justice. This Article frames the Utah judiciary's efforts to transform the civil legal system to combat these inequalities or, put differently, to democratize the rule of law by making an understanding of the law and access to our civil legal system more widely affordable and available. It closes by responding to criticism of these reform efforts.

I. CLOSING THE ACCESS-TO-JUSTICE GAP IN UTAH

Closing the access-to-justice gap requires both incremental improvement and breakthrough change.[6] Indeed, "long-term success" in our legal system "depends on the ability to do two seemingly contradictory things at the same time: improve existing processes and products (continuous, incremental change) and invent totally new, better processes and products (discontinuous, breakthrough change)."[7] For years we in the legal profession in the United States have been making incremental improvements—tinkering around the edges—but fear, inertia, and captive or insider sub-regulators (*i.e.*, state bar associations)[8] have often stymied breakthrough change.[9] As discussed below, we need both

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https://perma.cc/HR5S-W6NV.

6. *Cf.* GEORGETOWN LAW CTR. ON ETHICS & THE LEGAL PROFESSION, 2020 REPORT ON THE STATE OF THE LEGAL MARKET 2-3 (2020).

7. *See id.* at 2.

8. A sub-regulator becomes captive when it "ends up advancing the political or commercial concerns of the very people . . . it is supposed to be regulating" instead of the public interest. *Regulatory Capture—Definition and Meaning*, MARKET BUS. NEWS, https://perma.cc/W2WC-78DD. So, for example, if a state bar association advances the political or commercial concerns of lawyers—instead of the public interest—it would be a captive sub-regulator.

9. Members of the legal profession recognized the disparity in access to justice as far back as 1938, when the "the Dean of Yale Law School[] bemoaned the failure of lawyers to 'meet the social needs which justify the existence of his profession' and urged the organized bar to 'meet the issue of maldistribution of legal service.'" Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 64 (2016) (citing Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1275 (1938)). And so began this "tinkering around the edges"—which includes a potpourri of access-to-justice efforts that cannot all be listed here. Some jurisdictions have experimented with ethical rules to increase attorneys' pro bono legal service. *Pro Bono Reporting*, AM. B. ASS'N, https://perma.cc/F8GY-4G8S (last updated Mar. 19, 2020). Florida was the first state to *mandate* pro bono reporting, which has "brought about significant increases in participation, the number of volunteer hours and monetary contributions." *Id.* Some jurisdictions, including Arizona and California, have for many years allowed nonlawyers to become certified to prepare legal documents for people. *What Is a Legal Document Assistant?*, CAL. ASS'N OF LEGAL DOCUMENT ASSISTANTS, https://perma.cc/2NQ7-NMXD; *Legal Document Preparer Program*, AZCOURTS.GOV, https://perma.cc/6XWL-N6MG. And New York has a Navigator Program, in which nonlawyers known as 'navigators' provide "to unrepresented litigants the services of information, moral support, and accompaniment to negotiations with the other side's attorneys and into courtrooms." REBECCA L. SANDEFUR & THOMAS M. CLARKE, AM. BAR FOUND., ROLES BEYOND LAWYERS 4 (2016),

types of progress to democratize the rule of law. Erika Rickard, Project Director for Civil Legal System Modernization at the Pew Charitable Trusts, put it this way: "The broad impact of civil legal problems confirmed by [a Pew] survey suggests that the nation needs new solutions to the problems frequently encountered by U.S. households."[10] And the Conference of Chief Justices (CCJ) agrees: "[T]raditional solutions to reducing the access to justice gap, such as increased funding for civil legal aid, more pro bono work, or court assistance programs have had some success, but are not likely to resolve the gap, which is only increasing in severity."[11] Indeed, the CCJ recently adopted a resolution encouraging "regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public."[12] This Part discusses both the incremental improvements and breakthrough changes that the Utah judiciary has made and is making in trying to close the access-to-justice gap.

A. Incremental Improvements

For decades the United States has sought to bridge the access-to-justice gap through incremental improvement, such as volunteerism (*i.e.*, pro bono work) and legal aid.[13] This Subpart documents some of the efforts that have been made in Utah—other than pro bono work and legal aid—to improve access to justice little by little: form reform, the Online Court Assistance Program (OCAP), and the Utah Courts Self-Help Center. These efforts are important to improving access to justice and must continue.

1. Form reform

In 2016, the Utah Judicial Council created "a Forms Committee to examine the multitude of forms used in the courts."[14] Although this effort might seem

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https://perma.cc/JMS2-MBE3. All of these efforts are incremental, however, because neither document preparers nor the New York Navigators "are licensed to give legal advice." Stephen R. Crossland & Paula C. Littlewood, *Washington's Limited License Legal Technician Rule and Pathway to Expanded Access for Consumers*, 122 DICK. L. REV. 859, 862 (2018).

10. Rickard, *supra* note 3.

11. Conference of Chief Justices, Resolution 2, Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services (Feb. 5, 2020), https://perma.cc/7Q5N-9YKD.

12. *Id*.

13. *See id*.; Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, DAEDALUS, Winter 2019, at 177, 178 ("In the last century, legal professions, governments, and charitable providers have taken small, partial steps to provide access to legal processes and legal advice to people who could not otherwise afford them. By doing so, they have inched closer to the ideals of universal justice.").

14. Catherine J. Dupont, *Licensed Paralegal Practitioners*, UTAH B.J., May-June 2018, at 16, 18; UTAH CODE JUD. ADMIN. r. 3-117 (establishing the committee on court forms).

insignificant at first glance, it is an incremental advance that greatly narrows the access-to-justice gap. That is because "[o]ne of the most basic needs of [unrepresented] litigants is access to the forms that they need to carry their legal dispute from conception to resolution in the courts."[15] Unrepresented litigants need help to convey legally relevant facts; forms are designed to draw out details that an authority has predetermined are "necessary to achieve a particular objective."[16] Indeed, "[s]trong qualitative evidence shows that forms help litigants to prepare legally sufficient paperwork."[17]

Despite the importance of standardized forms, they are often neglected. Although most states make at least some standardized state forms available, the forms may be difficult to obtain.[18] The forms can also be riddled with legalese and laden with complex instructions, making them confusing and difficult to fill out correctly.[19] Perhaps worst of all, standardized forms can be "just plain wrong," based on outdated statutes or other law.[20]

To rid the court system of erroneous and non-user-friendly forms, the Court Forms Committee in Utah has been charged with "the herculean task of updating court forms, creating new forms, and deleting obsolete forms."[21] Importantly, the Committee is also working to put the forms in plain language.[22]

The Utah State Courts website currently offers about 150 updated and approved forms.[23] The Court Forms Committee is just getting started and still

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15. Mark G. Harmon et al., *Remaking the Public Law Library into a Twenty-First Century Legal Resource Center*, 110 L. LIBR. J. 115, 129 (2018).

16. SELF-REPRESENTED LITIG. NETWORK, DESIGN THINKING & AGILE DEVELOPMENT 5 (2017), https://perma.cc/7JU2-DUJ7; SUPREME COURT TASK FORCE TO EXAMINE LIMITED LEGAL LICENSING, REPORT AND RECOMMENDATIONS 19 (2015), https://perma.cc/HXQ2-FS4W [hereinafter TASK FORCE REPORT].

17. SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED 44 (2008), https://perma.cc/7JU2-DUJ7.

18. Harmon et al., *supra* note 15, at 129 (discussing a 2012 survey that found "that forty-eight states and the District of Columbia have standardized state forms available").

19. *See, e.g.*, Deno Himonas, *Utah's Online Dispute Resolution Program*, 122 DICK. L. REV. 875, 877 (2018); Harmon, *supra* note 15, at 143. Recently, a 'Plain Language Movement' has taken hold in the United States. Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 1065, 1069 (2013). The movement recognizes that forms—if they are written in plain language—can be instrumental in access to justice, allowing litigants to provide "clear and relevant information" to the court. *Id.* at 1072-73.

20. Himonas, *supra* note 19, at 877, 880.

21. Dupont, *supra* note 14, at 18.

22. For example, the Summons form reads "Deadline!" before telling the defendants that they must answer the summons within twenty-one days; directs the defendant to read and answer the relevant complaint or petition; and tells defendants that they can go to the court's Finding Legal Help webpage for help. *Summons*, UTAH COURTS, https://perma.cc/6PJL-94TS. It does all of this in English and Spanish, and also notes that there are simplified Chinese and Vietnamese versions available online. *Id.*

23. *See* Comm. on Court Forms, Meeting Minutes (Apr. 13, 2020),

has hundreds of forms left to review.[24] Further, the Committee will create new forms for the many areas of law that have not traditionally had forms.[25] Thus litigants will have access to hundreds of forms—and by that, access to justice—that they previously did not have.

2. Online Court Assistance Program (OCAP)

Utah launched the Online Court Assistance Program (OCAP) around two decades ago. OCAP is software that increases access to legal services by helping "court users who do not have an attorney to prepare court documents."[26] It does so by conducting an interactive online interview and producing a downloadable document to file with the court.[27]

OCAP is a simple but powerful tool that is operationally similar to common online resources like TurboTax. After logging in, users choose the type of interview they want. There are forty-nine interviews to choose from in five broad legal areas: family law, garnishment, protective orders, landlord and tenant, and small claims.[28] The interviews cover sophisticated matters within those areas. For instance, in an answer to a petition for divorce, the user can use OCAP to make a counterclaim against the petitioner.

To illustrate how OCAP works, imagine a user who is filing for a divorce. To do so, they would create an OCAP account, log in, and select the 'Divorce–Petitioner' interview.[29] The user would then complete the interview by typing in or selecting their answers to the questions.[30] When the interview is over, the software generates a PDF document, which the user can then file with the court.

In fiscal year 2019, OCAP generated 7,376 forms that were used to initiate cases in Utah.[31] Nearly half—41 percent—of all divorce and annulment filings and 19 percent of custody and support and paternity filings were made using OCAP.[32] OCAP has thus increased access to the legal system in Utah by allowing self-represented litigants, attorneys, and LPPs to prepare and file documents with

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https://perma.cc/668E-MWBT (listing the approved forms); *Approved Forms*, UTAH COURTS, https://perma.cc/XFP4-UJTB (listing categories of approved forms and providing links to the forms).

24. Email from Brent Johnson, Gen. Counsel, Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Feb. 13, 2020, 14:49 MST) (on file with author).

25. *Id*.

26. UTAH CODE § 78A-2-501 (2019); *Online Court Assistance Program*, UTAH COURTS, https://perma.cc/J27B-ZDMR.

27. *See* TASK FORCE REPORT, *supra* note 16.

28. *Online Court Assistance Program*, *supra* note 26.

29. *Id.*

30. *Id.*

31. Email from Clayson Quigley, Court Serv. Dir., Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Jan. 21, 2020, 10:13 MST) (on file with author).

32. *Id.*

the court.

3. Utah Courts Self-Help Center

Self-help centers are essential to access to justice because "[a]ccess to justice requires the ability to find the law."[33] Self-help centers facilitate just that by providing attorneys and resources to the public.[34]

The Utah Courts Self-Help Center currently has six attorneys who help unrepresented litigants with their cases in any way possible, short of giving legal advice.[35] These attorneys accept "the self-represented as equal to licensed attorneys" and serve them accordingly.[36] They "answer questions about the law, court process and options; provide court forms and instructions and help completing forms; provide information about [one's] case; provide information about mediation services, legal advice and representation through pro bono and low cost legal services, legal aid programs and lawyer referral services; [and] provide information about resources provided by law libraries."[37] And unlike some self-help centers, the Utah Courts Self-Help Center is not limited to a specific area of law (*e.g.*, family law). Instead, it can help with any case type at any procedural level—even state administrative processes.[38]

The Self-Help Center can assist any Utah resident; it currently receives about 21,000 contacts per year.[39] The Center allows a person to call, text, or email to receive help,[40] so that services are available to rural residents, or those in prison or jail.[41] And because the Self-Help Center can help people throughout the state with all manner of legal problems, it has a unique perspective on legal needs in the state. The Self-Help Center shares that perspective with various court committees, the executive branch, and legal aid organizations to help them

33. Harmon et al., *supra* note 15, at 137.

34. *Id*. at 127-28.

35. Interview with Nathanael Player, Dir., Self-Help Ctr., Utah State Courts, in Salt Lake City, Utah (Jan. 17, 2020).

36. Harmon et al., *supra* note 15, at 136.

37. *Self-Help Center*, UTAH COURTS, https://perma.cc/7MGT-T4GA; *see also* UTAH CODE § 9-7-313 (2012).

38. Interview with Nathanael Player, *supra* note 35.

39. The Self-Help Center received 21,495 contacts in 2019, averaging 109.11 contacts per service day. Email from Nathanael Player, Dir., Self-Help Ctr., Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Jan. 22, 2020, 11:13 MST) (on file with author). A 'contact' is "an interaction with a patron" such as "one phone call, one email or one text exchange over the course of the day." Email from Nathanael Player, Dir., Self-Help Ctr., Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (Feb. 18, 2020, 08:16 MST) (on file with author).

40. *Self-Help Center*, *supra* note 37.

41. There are no legal libraries in Utah prisons, but prisoners can contact the Self-Help Center, making it a crucial resource to Utah's inmates—the people who arguably need access to the law the most. Interview with Nathanael Player, *supra* note 35.

improve their processes in ways that increase access to justice.

Besides helping people through call, text, and email, the Self-Help Center also curates extensive online resource pages that give users easily understandable information on certain legal topics, forms, and directions about finding legal help.[42] For example, the 'Eviction' page gives general information about the eviction process, diagramming it with a flowchart.[43] The page lets the reader know—using large, bold font—that it is illegal to evict a tenant without a court order.[44] The page also spells out eviction procedures and court proceedings.[45] At the bottom, the page steers readers toward other resources such as the Mobile Home Park Helpline and information about homeless shelters.[46]

The Utah Courts Self-Help Center has helped carry the access-to-justice baton since 2007.[47] Every day it carries that baton a step further through meaningful contact with those in need of legal help, the resources on its website, and its statewide perspective on legal issues.

B. Breakthrough Change

Incremental improvements are critical to access to justice. But these improvements have only slowed the rate at which the access-to-justice gap has grown. Empirical results conclusively demonstrate that we can neither volunteer ourselves across the gap nor rely on public services.[48] And that is why, besides continuing to improve aspects of the legal system bit by bit, we need breakthrough change—change that includes institutional modifications and market-driven solutions—to bridge the access-to-justice gap.[49] In Utah, recent breakthrough changes include creating Licensed Legal Practitioners, enabling online dispute resolution (ODR) systems, and launching regulatory reforms.

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42. *Self-Help Resources/Self-Represented Parties*, UTAH COURTS, https://perma.cc/4KWC-R4DE.

43. *Eviction*, UTAH COURTS, https://perma.cc/QA9X-L3JU.

44. *Id.*

45. *Id.*

46. *Id.*

47. Daniel J. Hall & Lee Suskin, *Responding to the Crisis—Reengineering Court Governance and Structure*, 47 NEW ENG. L. REV. 505, 524 (2013).

48. Data from a 2014 study show that "annually 'U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with legal needs.'" AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016) (citation omitted), https://perma.cc/JGF3-J9EM.

49. "Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction." *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 257 (2019).

1. Licensed Paralegal Practitioners program

Utah recently created the Licensed Paralegal Practitioner (LPP) program, under which nonlawyers may engage in some activities traditionally reserved for lawyers without violating the prohibition against the unauthorized practice of law.[50] The LPP program is designed to be a "market-based solution" for access to justice.[51] The idea is that this new profession will increase the supply of certain legal services, which will in turn make those services more affordable. The medical profession took a similar route many years ago with "the advent of the nurse practitioner, physician assistants, and other qualified and regulated medical providers."[52]

LPPs increase the supply of legal services by engaging in the "limited practice of law" in their specialty area.[53] Right now there are three specialty areas: certain family law matters, evictions, and debt collection in small claims cases.[54] Because "[t]here are many areas of practice in which specialized paraprofessional providers could give better service than . . . generalist graduates of law schools,"[55] going forward, Utah should consider expanding the areas of law in which LPPs can practice. For example, in Ontario, Canada, paralegals can independently offer services for some minor criminal offenses.[56]

Within each specialty area, LPPs can do certain tasks for their clients. Those include interviewing clients; completing forms approved by the Judicial Council; advising clients which forms to use and how to fill them out; obtaining, explaining, and filing any documents needed to support the forms; reviewing the

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50. "Model rules and most statutes today preclude persons not licensed by a state from practicing law in that state." Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 130 (2000) (internal citation omitted). *See also* UTAH ADMIN. CODE r. 14-802(a) ("[O]nly persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah."). In creating the LPP profession, Utah followed in the regulatory footsteps of Washington State, which was the first state to authorize an "independently licensed legal paraprofessional in the United States." Crossland & Littlewood, *supra* note 9, at 862. In Washington, those paraprofessionals are known as Limited License Legal Technicians (LLLTs), and may give limited legal advice in certain practice areas. *Id.*

51. Dupont, *supra* note 14, at 16.

52. Crossland & Littlewood, *supra* note 9, at 862.

53. UTAH ADMIN. CODE r. 14-802.

54. UTAH ADMIN. CODE r. 14-802(c).

55. Gordon, *supra* note 13, at 186.

56. DAVID J. MORRIS, ONTARIO MINISTRY OF THE ATTORNEY GEN., REPORT OF APPOINTEE'S FIVE-YEAR REVIEW OF PARALEGAL REGULATION IN ONTARIO 2-3, 11 (2012), https://perma.cc/7NS9-MX9J; Lisa Trabucco, *Lawyers' Monopoly? Think Again: The Reality of Non-Lawyer Legal Service Provision in Canada*, 96 CAN. B. REV. 460, 469 (2018) ("In Ontario, licensed paralegals may provide legal services with respect to . . . provincial court matters for provincial offences and summary conviction offences under the *Criminal Code* . . . ."); *see also* Law Society Act, R.S.O. 1990, c L.8, By-laws 4, 4.1 (Can.) (authorizing qualified licensees to provide certain legal services in accordance with the act).

documents of another party and explaining them; advocating for a client in mediated negotiations; communicating with another party about the relevant form; and explaining a court order that affects the client's rights and obligations.[57]

To become an LPP, one must meet certain requirements.[58] Some of those requirements are educational: LPPs must have (1) graduated from law school, (2) graduated with an associate or bachelor's degree in paralegal studies, or (3) graduated with a bachelor's degree in any field plus completed a paralegal certificate or fifteen credit hours of paralegal studies.[59] If the applicant has not graduated from law school, they must also meet experiential requirements (1,500 hours of substantive law-related experience within the last three years, including a certain number of hours in the area of law in which the applicant wants to be licensed); must have a credential as a paralegal; and must complete specialized courses about ethics and about each specialty area in which the applicant wants to be licensed.[60] All applicants must also pass an ethics examination and an examination for the practice area in which they will be licensed and prove their good moral character.[61]

In October 2019, the first four LPPs in Utah were sworn in.[62] It is anticipated that the program will grow slowly over the next few years and then exponentially over the next decade.[63] And although Utah does not yet have data about the LPP program (*e.g.*, consumer satisfaction, legal outcomes), Professor Anna Carpenter of the University of Utah and Dr. Alyx Mark of Wesleyan University will study the program in the coming months and years.[64]

To help the LPP program grow at a faster pace, Utah should consider allowing LPPs to represent clients in court to some extent—something they cannot currently do—and easing the experiential requirement. Utah should also strongly consider broadening the educational requirement. Educational reform may play a role in that expansion, given that state educational institutions have started creating legal education programs apart from full-blown Juris Doctorate programs. For instance, the S.J. Quinney College of Law at the University of Utah launched a Master of Legal Studies degree program in the fall of 2018, and

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57. UTAH ADMIN. CODE r. 14-802(c)(1)(A) to -(c)(1)(L).

58. UTAH ADMIN. CODE r. 15-703.

59. UTAH ADMIN. CODE r. 15-703(a)(4).

60. UTAH ADMIN. CODE r. 15-703(a)(5).

61. UTAH ADMIN. CODE r. 15-703(a)(6) and (a)(7).

62. Licensed Paralegal Practitioner Steering Comm., Meeting Minutes 1-2 (Oct. 17, 2019), https://perma.cc/U82M-3XK2.

63. Email from Scotti Hill, Associate Gen. Counsel and LPP Admin., Utah State Bar, to Justice Deno Himonas, Utah Supreme Court (Jan. 14, 2020, 11:34 MST) (on file with author).

64. Licensed Paralegal Practitioner Steering Comm., Meeting Minutes 3 (Oct. 17, 2019), https://perma.cc/49K7-NWG2; *Alyx Mark*, WESLEYAN UNIV., https://perma.cc/PRS6-G4JT.

the University of Arizona offers a Bachelor of Arts in law.[65] Arizona may eventually allow those who want to become limited licensed legal practitioners to use that degree to help them qualify.[66] Utah should consider doing the same.

2. Online Dispute Resolution (ODR)

The internet has long allowed "people to shop, socialize, and pay bills from any location at any time of day or night."[67] But the internet can also be used "to improve access to justice."[68] Indeed, every smartphone and computer "should be a point of access to justice—the multidoor courthouse of tomorrow."[69] With that goal in mind, the State of Utah in 2018 began to pilot online dispute resolution (ODR) in small claims cases at a few state courts.[70]

ODR is a communication platform that allows parties to communicate in an attempt to settle their dispute without any intervention from the court.[71] Utah was "the first U.S. state to deploy an ODR system capable of handling an entire dispute, as opposed to a discrete part of a dispute such as mandatory mediation."[72] Some people call ODR "pajama court,"[73] since users can use it at home in pajamas at 3:00 a.m. Although this example is somewhat absurd, it illustrates an important point. By participating in ODR, litigants need not come to the courthouse to participate in their cases; nor do they have to participate during typical business hours. Thus people who cannot come to the courthouse—because of disability, needing to be at work, or having to take care of children—can litigate their cases from home and avoid a default judgment.

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65. Alexis Blue, *Nation's First B.A. in Law Now a Model*, UNIV. ARIZ. (July 11, 2017), https://perma.cc/8AWU-M292; *University of Utah S.J. Quinney College of Law Launches New Master of Legal Studies Degree Program*, UNIV. UTAH S.J. QUINNEY C.L. (Jan. 22, 2018), https://perma.cc/8BFH-U982; *Bachelor of Arts: Law*, UNIV. ARIZ., https://perma.cc/FRM3-Y6TP.

66. ARIZ. CODE OF JUD. ADMIN. § 7-210 (proposed Mar. 12, 2020), https://perma.cc/UT5U-WNKJ (allowing a "four-year Bachelor of Arts degree in Law" that includes certain coursework to fulfill the educational requirement to become a Limited License Legal Practitioner).

67. PEW CHARITABLE TR., ONLINE DISPUTE RESOLUTION OFFERS A NEW WAY TO ACCESS LOCAL COURTS (2019), https://perma.cc/2YPM-GL5M.

68. Utah Supreme Court Standing Order No. 13 (effective Sept. 19, 2018).

69. Colin Rule, *Using Online Dispute Resolution to Expand Access to Justice*, OKLA. B.J., https://perma.cc/4T5Z-PCUT.

70. *Online Dispute Resolution (ODR) Pilot Project*, UTAH COURTS, https://perma.cc/Z9YB-8M7S.

71. Himonas, *supra* note 19, at 882.

72. *Id.* at abstract, 880 ("We're going to be, I believe, the first in the country to launch this soup-to-nuts approach."). As of July 2019, at least twelve states were using some form of ODR. NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION AND COURT-SPONSORED ONLINE DISPUTE RESOLUTION IN COLLECTION LAWSUITS 1 (2019), https://perma.cc/ENG7-VPHE.

73. Zack Quaintance, *SXSW 2019: Utah, 'Pajama Court' and Resolving Cases Online*, GOV'T. TECH. (Mar. 11, 2019), https://perma.cc/FF38-BGJE.

Here is how ODR works. A plaintiff files a small claims case and registers for the ODR system.[74] The defendant is then served with a copy of the ODR summons and the claim.[75] Having been served, the defendant has fourteen days to register for an ODR account.[76] After the defendant has answered, the parties must participate in ODR, absent an exemption.[77] In ODR, a trained ODR facilitator "guide[s] the parties" and "assist[s] them in reaching a settlement."[78] As they work toward that goal, the parties can communicate online—"asynchronously or in real time"[79]—with the facilitator and each other and can upload documents to become part of their files.[80] If the parties settle the claim, the facilitator prepares an online settlement agreement, which the parties then execute. If the parties cannot reach a settlement, the facilitator terminates the ODR process, notifies the court to set a trial date, and creates a trial preparation document (which whittles down the issues for trial).[81] The judge and the parties can then choose to have a live hearing or to have the trial electronically.[82]

Preliminary data show that ODR expedites access to justice. Before ODR, it took an average of 144 days for small claims cases in the pilot courts to be disposed. Cases that went through ODR, however, had an average time of disposition of just 84 days.[83] The overall default rate also fell roughly 4 percent, from about 71% to about 67%.[84] But this overall number understates the reduction in informed defaults—those cases in which a party has touched the court system, gained some insight into their matter, and then elected not to proceed. Three percent of the defaults are of this variety—in other words, defaults in name only.[85] And the settlement rate of the cases increased about four percent while the trial rate has decreased in the neighborhood of one percent.[86]

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74. Standing Order No. 13, *supra* note 68 (effective Sept. 19, 2018).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Himonas, *supra* note 19, at 880.

80. *Id.* at 881.

81. Standing Order No. 13, *supra* note 68; Himonas, *supra* note 19, at 894.

82. Himonas, *supra* note 19, at 894.

83. Email from Paula Hannaford, Dir., Ctr. for Jury Studies, Nat'l Ctr. for State Courts, to Justice Deno Himonas, Utah Supreme Court (Oct. 21, 2019, 10:40 MST) (on file with author).

84. Email from Jeff Hastings, Mgmt. Analyst, Utah State Courts, to Justice Deno Himonas, Utah Supreme Court (May 14, 2020, 12:38 MST) (on file with author).

85. *Id.* Hannaford notes that her own research, in contrast, indicates that the overall rate rose by 1 percent and that the rate of default after the party touched the system fell by over 4 percent. Overall, there is about a 3 percent difference between the data. This difference is likely explained by Hannaford's more limited data set, which does not include a full year's worth of data. Telephone Interview with Paula Hannaford, Dir., Ctr. for Jury Studies, Nat'l Ctr. for State Courts (May 26, 2020).

86. Hastings, *supra* note 84.

The mean number of hearings per case has dropped from 2.66 to 1.5.[87] These results, while not yet fully validated, are extremely promising, and indicate that online platforms can do much to democratize the rule of law.

3. Regulatory reform

Utah also seeks to narrow the access-to-justice gap through regulatory reform. To that end, the Utah Supreme Court has authorized the creation of a legal regulatory sandbox—overseen by a regulator—in which legal entities can experiment with consumer-focused innovations.[88] Those innovations will undoubtedly advance access to justice in countless ways. This Subpart details how regulatory reform was launched in Utah and how it is intended to work.

Regulatory reform kicked off in 2018 when the Utah Supreme Court, at the request of the Utah Bar, authorized a work group to study how to optimize the regulatory structure for legal services in Utah and to make recommendations accordingly.[89] The next year, the work group issued a report,[90] which the Utah Supreme Court adopted,[91] proposing a path to regulatory reform. The Court has charged a task force with carving that path, which will be done in two somewhat overlapping tracks.

One track will explore increasing access to justice by revising certain rules of professional conduct. Specifically, it will explore loosening "[r]estrictions on lawyer advertising, fee sharing, and ownership of and investment in law firms by non-lawyers."[92] The goal is for new rules surrounding these activities to balance the risk of harm to clients from these activities with their benefits to clients and to lawyers, rather than broadly prohibiting them.[93]

Much progress has already been made toward this goal. For example, the Utah Supreme Court recently proposed repealing rule 5.4 of the Utah Rules of Professional Conduct—the rule that prohibits lawyers from sharing legal fees with a nonlawyer, from forming a partnership with a nonlawyer, and from practicing law for an entity that is owned or managed by nonlawyers—and replacing it with rules 5.4A and 5.4B.[94] Proposed rule 5.4A is similar to rule 5.4, with the main difference being that proposed rule 5.4A allows lawyers to share

87. Hannaford, *supra* note 83.

88. Utah Supreme Court Standing Order No. 14 (effective Sept. 9, 2019).

89. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 1-2.

90. *Id.* at 2.

91. Standing Order No. 14, *supra* note 88 ("The Task Force shall pursue and implement the recommendations set forth in the Narrowing the Access-to-Justice Gap by Reimagining Regulation report of the Utah Work Group on Regulatory Reform.").

92. *Id.* at 12.

93. *Id.* at 13-15.

94. *Utah Court Rules—Published for Comment*, UTAH COURTS (Apr. 24, 2020), https://perma.cc/7BPD-ZAJT.

legal fees with nonlawyers if they provide notice to the client.[95] Proposed rule 5.4B, on the other hand, differs greatly from rule 5.4. It allows a lawyer to "practice law with nonlawyers, or in an organization" owned or managed by a nonlawyer as long as the lawyer (1) gives notice to the client and (2) is permitted to do so by Utah Supreme Court Standing Order No. 15, which is explained below.[96] This change would allow the legal profession to "leverage the skills, capital, and innovations that . . . come from partnering with other industries like finance, technology, [and /] or retail."[97]

Working in conjunction with these rule changes, the second track of regulatory reform, which will be divided in two phases, will focus on solving the access-to-justice problem through innovation and evidence-based regulation.[98] As detailed in proposed Standing Order No. 15, which the Utah Supreme Court recently released for public comment, the Utah Supreme Court plans on moving toward this goal in Phase 1 by (1) establishing an Office of Legal Services Innovation (Innovation Office), (2) creating a "pilot legal regulatory sandbox," and (3) allowing legal services providers to innovate within the sandbox.[99] The Innovation Office will oversee the sandbox, taking an "objectives-based and risk-based approach to regulation."[100] The sandbox will be a place in which entities will be able—with the Innovation Office's permission—to try out "new consumer-centered innovations" that are perhaps "illegal (or unethical) under current regulations."[101] In other words, if approved to do so by the Innovation Office, "traditional providers using novel approaches and means" and "nontraditional providers" will be able "offer nontraditional legal services to the public."[102]

To try out these innovations in the sandbox, providers must notify the Innovation Office and provide it with information about the innovation.[103] The

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95. UTAH RULES OF PROF'L CONDUCT r. 5.4A (proposed), https://perma.cc/3PGT-KDMP.

96. UTAH RULES OF PROF'L CONDUCT r. 5.4B (proposed), https://perma.cc/XYU7-2EQZ.

97. Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1, 68. Justice Neil Gorsuch has advocated for courts to take a fresh look at the rules of professional conduct in this sphere: "It seems well past time to reconsider our sweeping unauthorized practice of law prohibitions. The fact is, nonlawyers already perform—and have long performed—many kinds of work traditionally and simultaneously performed by lawyers." GORSUCH, *supra* note 49, at 257.

98. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 11-12.

99. *Utah Court Rules—Published for Comment*, UTAH COURTS (Apr. 24, 2020), https://perma.cc/Q4NH-RU6U; Utah Supreme Court Standing Order No. 15, at 2-3 (proposed), https://perma.cc/N56N-PBJL.

100. Standing Order No. 15, *supra* note 99, at 4.

101. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 18.

102. Standing Order No. 15, *supra* note 99, at 4.

103. *Id.* at 8; UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, PROPOSED REGULATORY SCOPE FOR TASK FORCE ON REGULATORY REFORM AND SANDBOX 1, https://perma.cc/6U6E-NFUZ (2019).

Innovation Office will then decide whether to allow the innovation, and, if so, what requirements the provider must meet (*e.g.*, reporting or risk mitigation requirements).[104] Potential providers will need to notify the Innovation Office in at least three general situations. First, traditional law firms and lawyers will need to notify the Innovation Office if they want to "partner[] with a nonlawyer-owned entity to offer legal services as contemplated by Rule 5.4B."[105] Second, entities that are at least partially owned by nonlawyers must notify the Innovation Office if they want to "offer[] legal practice options . . . not authorized" under current rules.[106] Third, entities that are at least partially owned by nonlawyers must notify the Innovation Office if they want to "practic[e] law through technology platforms, or lawyer or nonlawyer staff, or through an acquired law firm."[107]

Here are some illustrations of what innovations in the regulatory sandbox might look like:

- A law firm wants to partner with a nonlawyer-owned entity.[108] It creates a new, co-owned entity that operates a kiosk in a box store and offers legal services through that kiosk.
- A social worker works with the elderly. The elderly face not only "social work issues" such as "loneliness, fear, anxiety, illness, mental impairment and disability claims, and health care financing" but also "legal issues such as financial planning, wills, guardians, and advance directives."[109] The social worker is authorized to help with at least some of these legal issues, depending on the Innovation Office's evaluation of risk and benefit.
- A smartphone app "permits social workers who serve the home-bound elderly to conduct 'legal health checks' to identify their clients' potential legal problems."[110] By answering the app's questions, a social worker can "determine whether a client has a landlord-tenant, health care, or consumer-debt problem, or is a victim of financial exploitation or physical abuse."[111] Once the social worker identifies one of these issues using the app, he or she can then point the client toward helpful legal

104. Standing Order No. 15, *supra* note 99, at 10.

105. *Id.* at 7-8.

106. *Id.*

107. *Id.*

108. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, PROPOSED REGULATORY SCOPE FOR TASK FORCE ON REGULATORY REFORM AND SANDBOX 2 (2019), https://perma.cc/A9JY-TF6M.

109. Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL'Y 131, 141-42 (2001).

110. Tanina Rostain, *Techno-Optimism & Access to the Legal System*, DAEDALUS, Winter 2019, at 93, 95.

111. *Id.*

resources.

- A small law firm that serves "ordinary individuals and small businesses" wants to spend less time running the business—*i.e.*, "finding clients, managing administrative tasks, and collecting payment."[112] So it partners with "a large-scale business" that "build[s] a service platform, research[es] the market, figure[s] out pricing, handle[s] billing, manage[s] customer complaints, optimize[s] the use of nonlawyer staff, and arrange[s] financing."[113] The law firm's attorneys are thus left to do what they do best—give legal advice—while the cost of that advice for their clients decreases.[114]
- A law firm buys a business that offers helpful technology or services. For example, DWF Law—Britain's largest publicly traded law firm—recently bought Mindcrest, a company that offers affordable document review and legal process outsourcing.[115] Alternatively, attorneys launch a start-up with computer programmers and work with them to develop and offer a cornucopia of tech products that offer legal advice (*e.g.*, estate planning, e-discovery).
- A nonprofit legal service entity "offers an online tool providing guidance, form completion, and legal advice on eviction defense via its website."[116] The entity "also uses its non-licensed eviction defense experts to provide legal assistance, including advice, to supplement the online tool."[117]

Although the innovative services offered in these examples would be unethical under current regulations, potential providers could request permission to test them in the sandbox.[118] And the Innovation Office—not some blunt rule of professional conduct—will determine whether the service is worth trying in the sandbox.

Once the Innovation Office admits a legal entity into the sandbox to experiment with an innovation, the sandbox will then act as a highly monitored

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112. Gillian K. Hadfield, *More Markets, More Justice*, DAEDALUS, Winter 2019, at 37, 45-46.

113. *Id.*

114. *Id.*

115. Alan Freeman, *A World of Opportunity*, NAT'L MAG. (Feb. 18, 2020), https://perma.cc/7P4Q-6Q7Y.

116. Memorandum from Joanna Mendoza to the State Bar of Cal. Task Force on Access Through Innovation of Legal Serv. 3 (Jan. 31, 2020) (on file with author).

117. *Id.*

118. Many of these arrangements would be unethical because Rule 5.4 of the Utah Rules of Professional Conduct forbids a lawyer to "share legal fees with a nonlawyer" and to "form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." UTAH RULES OF PROF'L CONDUCT r. 5.4. Others would be unethical because "only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah." UTAH ADMIN. CODE r. 14-802(a).

environment in which the innovation can be piloted and evaluated.[119] The task force has indicated that in evaluating the legal services provided by sandbox participants, the Innovation Office will focus on three possible harms to consumers: (1) "[r]eceiving inaccurate or inappropriate legal services," (2) "[f]ailing to exercise legal rights through ignorance or bad advice," and (3) "[p]urchasing unnecessary or inappropriate legal services."[120] By evaluating these harms, the Innovation Office will be able to protect consumers while fostering the type of innovation we need to increase access to justice. Figure 1 illustrates how the sandbox will operate in Phase 1.

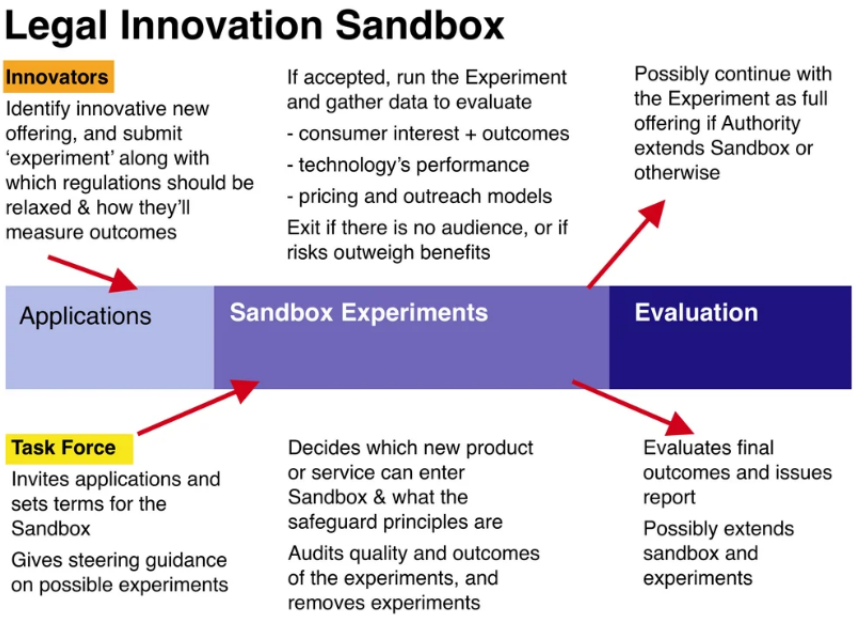

Figure 1: Process overview for Phase 1 regulatory sandbox.[121]

Once Phase 1 is completed, Phase 2 will likely see "some form of an independent, non-profit regulator [like the Utah Bar] with delegated regulatory authority over some or all legal services."[122] But because what happens in Phase 2 depends so much upon the results of Phase 1, its form will be decided after Phase 1 is evaluated.[123]

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119. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 18.

120. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, DATA COLLECTION REQUIREMENTS FOR SANDBOX PARTICIPANTS 1 (2019), https://perma.cc/Q99N-VV2L.

121. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION 21 (2019), https://perma.cc/A9JY-TF6M.

122. UTAH WORK GRP. ON REGULATORY REFORM, *supra* note 1, at 21.

123. *See id.*

This regulatory reform is a huge step in the right direction for access to justice. It harnesses experimentation and data to decide how to regulate the practice of law, instead of relying on the fear of unknown danger. It will allow for regulation that "fosters innovation and promotes other market forces so as to increase access to and affordability of legal services."[124]

II. ADDRESSING PUSHBACK

Some access-to-justice efforts are easily accepted but others receive pushback. The criticism, however, tends to rest on an understanding that is not data-driven. This Part first addresses the main resistance to ODR. It then discusses pushback to the LPP program and regulatory reform.

A. Online Dispute Resolution

Critics have identified a few potential issues with ODR systems. Courts should consider and address these points to assuage any public concerns.

To begin with, the National Consumer Law Center (NCLC) points out that not everyone can access online resources.[125] This is undoubtedly true, and is why litigants can opt out of the Utah ODR system if they have a language barrier, disability, or lack access to the internet.[126]

Next, critics such as the NCLC worry that "[u]nsupervised chatroom spaces in ODR platforms" may lead to abusive practices by debt collection attorneys.[127] The NCLC also warns that there will be a "power imbalance" between consumers and experienced debt collection attorneys.[128] But Utah's ODR system is built to monitor and thwart abusive practices. A court facilitator monitors interactions between the litigants and can intervene when necessary.[129]

Besides worrying about unsupervised ODR chatrooms, some critics also worry that the efficiencies of ODR "may come at the cost of procedural quality."[130] Some critics, for example, worry that ODR will just be a pipeline for money lenders, such as payday loan companies, to collect on small claims.[131]

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124. *Id.* at 1-2.

125. NAT'L CONSUMER LAW CTR., *supra* note 72, at 2.

126. NAT'L CTR. FOR STATE COURTS, UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT 10 (2017).

127. NAT'L CONSUMER LAW CTR., *supra* note 72, at 6.

128. *Id.* at 5-6.

129. *See* NAT'L CTR. FOR STATE COURTS, *supra* note 126, at 11. The ODR system will also help level the playing field between parties by giving plaintiffs and defendants relevant legal information so they can evaluate their claims and possible defenses. *See id.* at 9.

130. Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 634, 641 (2017).

131. This concern has been raised with one of the authors during his work on Utah's

These are important concerns.

So far, the data show no signs that Utah's ODR system creates procedural defects or that it gives money lenders an advantage. In fact, the default rate in small claims has fallen in the ODR pilot courts, and there has been an uptick in settlement rates.[132] And there has been no increase—indeed, there has been a small decrease—in the number of debt collection cases filed in the primary pilot court.[133] Last, but perhaps most tellingly, virtually no one—plaintiff or defendant—has sought to opt out of the ODR system even though doing so is a relatively simple process. To date, plaintiffs and defendants have joined issue in nearly 1,400 cases and only twenty-three defendants and eleven plaintiffs have opted out.[134]

Besides knowing that there are no signs of procedural defects in Utah's ODR, citizens can take comfort in understanding that ODR is a pilot. And because it is a pilot, Utah collects data about the outcomes of cases that go through the ODR system and compares them with outcomes of cases that go through court. Utah also regularly collects feedback from ODR users and facilitators.[135] Armed with that information, the Utah court system can spot procedural defects and address them. Even if an unforeseen problem arises with ODR, Utah is equipped to detect it and fix it.

B. Regulatory Reform and the Licensed Paralegal Practitioners Program

Critics also find fault with regulatory reform and the LPP program. Two fears are prevalent here: the demise of lawyers and second-rate representation for clients.[136]

ODR system. Other scholars have similarly worried that ODR systems will become biased toward repeat players. *See, e.g.*, Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 722 (2017) (expressing concern that ODR could be "just another form of bureaucratic processing, the resolution of disagreements according to a set of tacit, often biased, intra-organizational, administrative norms (*e.g.*, seller is always correct), that are defined by repeat players who 'capture' the system and use it for their private ends").

132. Hastings, *supra* note 84.

133. *Id.*

134. *Id.*

135. NAT'L CTR. FOR STATE COURTS, *supra* note 126, at 14.

136. Jane Kaplan, *Breaking Down the Barriers: Bringing Legal Technicians into Immigration Law*, 32 GEO. J. LEGAL ETHICS 703, 713 (2019) ("Lawyers (and scholars) who oppose the implementation of non-lawyer services often argue that such programs would take jobs away from lawyers. . . ."); Julian Aprile, *Limited License Legal Technicians: Non-Lawyers Get Access to the Legal Profession, but Clients Won't Get Access to Justice*, 40 SEATTLE U. L. REV. 217, 238 (2016) (arguing that limited license legal technicians do not "provide quality legal services because they have substantially less training than lawyers."). Some resistance to the LPP program is more appropriately conceptualized as pettiness. One LPP has reported that, although most attorneys treat LPPs professionally and appropriately, one lawyer refused to speak with the LPP directly and communicated with her only through

Regulatory reform and the LPP program will not be the beginning of the end for lawyers. Similar legal market reforms enacted in England and Wales have not decreased the number of solicitors.[137] There, the Legal Services Act of 2007[138] reduced "the number of activities that only a lawyer may do" and authorized nonlawyer ownership of legal firms.[139] But this reform did not decrease the number of solicitors; the number of practicing solicitors grew from 112,063 in October 2007 (around the time the legal reform took place) to 149,005 in November 2019.[140] Perhaps that is because regulatory reform allows nonlawyers and innovative legal services to tap into a market that lawyers have not historically been able to reach.[141] In other words, nonlawyers generally do not take a slice of attorneys' market pie; the pie itself gets bigger. Thus, more nonlawyers involved in legal services does not necessarily mean fewer lawyers. As has been pointed out elsewhere, "it is entirely reasonable for lawyers and non-lawyers to coexist in the legal market."[142]

Neither will regulatory reform or the LPP program lead to second-class representation for clients. First, it is important to note that even if these reform efforts would result in second-rate representation for some, that may be better than the current state of affairs, which is no representation at all.[143] Second, evidence

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the lawyer's paralegal. Licensed Paralegal Practitioner Steering Committee, Meeting Minutes 1-2 (Feb. 18, 2020), https://perma.cc/QD5E-UU4L.

137. DAVID DIXON, THE LAW SOCIETY, ENTRY TO THE SOLICITOR'S PROFESSION 1980-2011 3 (2012), https://perma.cc/HQZ4-49SZ; *Population of Solicitors in England and Wales*, SOLICITORS REGULATION AUTH., https://perma.cc/DJ2T-KWN7. In England and Wales, practicing lawyers fall into two groups: solicitors and barristers. *Solicitor*, ENCYCLOPAEDIA BRITANNICA, https://perma.cc/PM55-PB7L. We focus on the number of solicitors rather than on the number of barristers here because solicitors "form the largest part of the legal profession and often have direct contact with their clients, providing legal advice and assistance on a range of matters." Suzanne Rab, *Regulation of the Legal Profession in the UK (England and Wales): Overview*, Thomson Reuters Practical Law (database updated Jan. 2020), https://uk.practicallaw.thomsonreuters.com/7-633-7078.

138. Legal Services Act 2007, c.29 (Eng.), https://perma.cc/7PLF-77A3.

139. Thomas D. Morgan, *On the Declining Importance of Legal Institutions*, 2012 MICH. ST. L. REV. 255, 268 (2012).

140. *Compare* DIXON, *supra* note 137, at 3, *with* Population of Solicitors in England and Wales, *supra* note 137.

141. Notably, "[s]egments of the organized bar . . . have begun to perceive the inutility and bad public relations of resisting nonlawyer involvement in markets its monopoly does not serve." Gordon, *supra* note 13, at 186.

142. Kaplan, *supra* note 136, at 713.

143. Rebecca L. Sandefur, *Access to What?*, DAEDALUS, Winter 2019, at 49, 49 ("Most of the civil justice problems that Americans experience receive no legal attention of any kind, ever. They never make it to court. They never receive consideration from any kind of legal professional such as a lawyer."); Sandefur & Clarke, *supra* note 9, at 4-5 (discussing the Navigators Program and explaining that litigants assisted by nonlawyers were 56% more likely than unassisted litigants to say they were able to tell their side of the story in housing court, 87% more likely than unassisted tenants to have their defenses recognized and addressed by the court, and less likely to be evicted from their homes by a marshal).

indicates that there are legal tasks that nonlawyers can do as well as—if not better than—lawyers. For example, a study comparing the legal work of solicitors and nonlawyers in the United Kingdom found that lawyers and nonlawyers were equally likely to do competent legal work and that nonlawyers were 600% more likely to do legal work that peer reviewers rated as excellent quality.[144] In another U.K. study, specialist will-writers, who had no law degree, were more likely to draft a high-quality simple will than solicitors were.[145]

More important than data from studies in other jurisdictions is the fact that the Utah judiciary will evaluate regulatory reform using the regulatory sandbox and outside evaluators.[146] As mentioned above, Utah's Innovation Office will use data to evaluate whether consumers are harmed by sandbox participants' products and services.[147] If consumers are harmed, the Innovation Office will intervene. And if nonlawyers provide subpar services, the Innovation Office will prevent them from continuing.

The takeaway is that in assessing access-to-justice efforts, attorneys, bar associations, judges, and the public should look beyond critiques that are unsupported by data. The current data does not support these concerns. Rather than regulating based on fear, authorities should regulate based on data. Data is the clay with which regulators can work to create a system that affords justice to all. State courts and legislatures must strive toward that goal. They have long delegated day-to-day legal regulatory authority to other entities—*i.e.*, state bar associations.[148] But if those entities put the lawyers' interests ahead of the public's, then courts and legislatures must promptly reconsider that delegation of authority.[149]

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144. Stanford Law School, *Will Changing Legal Services Regulation Increase Access to Justice?*, YOUTUBE, at 16:25 (Nov. 1, 2019), https://perma.cc/NY7G-6DLH.

145. LEGAL SERVICES CONSUMER PANEL, REGULATING WILL-WRITING 20-22 (2011), https://perma.cc/2P6R-7YNG.

146. The Conference of Chief Justices (CCJ) of the state supreme courts recently recognized that "experimentation with different approaches to regulatory innovation provides a measured approach to identify and analyze the best solutions to meeting the public's growing legal needs." *See* Conference of Chief Justices, *supra* note 11. Likewise, the ABA has "encourage[d] U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the public interest." *See* ABA Comm'n on Ethics and Prof'l Responsibility, Revised Resolution 115 (2020), https://perma.cc/3FAL-EUSR.

147. UTAH IMPLEMENTATION TASK FORCE ON REGULATORY REFORM, *supra* note 120.

148. Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267, 276 (2017) ("State supreme courts control lawyer regulation to a lesser or greater extent in all fifty states. These courts typically have demanding caseloads, so they delegate their bar governance authority to other entities. Exactly which entities differs across jurisdictions. In some states, the supreme court has given all three responsibilities [admission, discipline, and the UPL] to one entity, often a state bar association. In other states, these regulatory duties are handled by different entities.").

149. Bar associations have started to show their support for regulatory reform. The ABA recently adopted a resolution that "encourages U.S. jurisdictions to consider regulatory

CONCLUSION

It is time for the rule of law to be equally accessible and affordable to all. The Utah judiciary has worked toward that goal through incremental improvements and breakthrough change. Using an empirical approach, it must continue to do so until the access-to-justice gap is eliminated. Only then will we truly have a system that puts the rule of law first. Only then will all citizens have the protection of their own laws.

innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public . . . ." ABA Comm'n, *supra* note 146. According to the president of the New York Bar Association, the resolution—which passed by a near-unanimous vote—"is not just the right thing to do, the moral thing to do for our clients, but for the profession it's the right thing to do." Brenda Sapino Jeffreys, *ABA Approves Innovation Resolution, With Revisions to Limit Regulatory Changes*, AM. LAWYER (2020), https://perma.cc/C34W-W7Y6. The resolution did not recommend any changes to the "ABA Model Rules of Professional Conduct, including Rule 5.4, as they related to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject." *Id.* But that is because the ABA wants U.S. jurisdictions to experiment with their own changes to Rule 5.4 before it changes the *model* rules. Telephone Interview with Andrew M. Perlman, Dean, Suffolk Law Sch. (Feb. 19, 2020). Once the ABA has more information from these experiments, it can decide whether to change the model rules.

The Public's Unmet Need for Legal Services & What Law Schools Can Do about It

Andrew Perlman

Abstract: Civil legal services in the United States are increasingly unaffordable and inaccessible. Although the causes are complex, law schools can help in three ways beyond simply offering free legal clinics staffed by lawyers and students. Law schools can teach the next generation of lawyers more efficient and less expensive ways to deliver legal services, ensure that educational debt does not preclude lawyers from serving people of modest means, and conduct and disseminate research on alternative models for delivering legal services. These strategies will not solve all of the problems that exist, but they hold the promise of meaningfully improving the affordability and accessibility of civil legal services.

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Access to affordable legal services is increasingly out of reach in the United States.[1] More than 80 percent of people living below the poverty line and a majority of middle-income Americans receive no meaningful assistance when facing important civil legal issues, such as child custody, debt collection, eviction, and foreclosure. These and many related problems have numerous causes,[2] but the cumulative effect is a legal system that is among the most costly and inaccessible in the world.[3]

Law schools can help. They can teach the next generation of lawyers more efficient and less expensive ways to deliver legal services, ensure that educational debt does not preclude lawyers from helping people of modest means, and conduct and disseminate research on alternative models for delivering legal services. These strategies are not a panacea, but they can help to improve access and affordability.

Traditionally, law schools have not prepared students to deliver legal services as efficiently as pos-

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sible. Rather, they have trained students to engage in highly customized and expensive forms of lawyering, leaving them ill-equipped to keep costs low, reduce prices, and increase access to legal services.

For more than a century, law schools have relied on an educational model developed by Harvard Law School's Christopher Columbus Langdell. The model requires students to read court opinions, extract from those opinions basic legal doctrines and principles, and apply those doctrines and principles to new fact patterns. Through this process, students learn important legal reasoning and analytical skills, but they do not learn how to represent clients.

In recent decades, law schools have usefully supplemented the traditional method by teaching a wider range of skills. For example, most law schools now offer clinics where students learn important lawyering competencies while representing clients under the supervision of experienced clinical faculty. Students learn fact investigation, negotiation, oral and written advocacy, document drafting, client counseling, and other critical skills. Law schools have also introduced more legal research and writing instruction, various types of simulation courses, and other opportunities to gain practical experiences before graduating.

The expansion of experiential education has better prepared students to represent clients, but the curriculum contains a notable omission: it fails to teach students how to deliver services *efficiently*. Instead, most law schools and most clinical programs continue to teach a predominantly bespoke model of representation, in which each client receives highly tailored and time-consuming assistance that is necessarily expensive.

Law schools can teach their students how to drive down the cost and price of legal services by introducing a wider array of knowledge and skills into the curriculum. For example, law schools are starting to teach concepts long used in the business world to improve effectiveness and efficiency, such as project management, process improvement, design thinking, and data analytics. Other schools are teaching students how to use technologies that can reduce costs, such as automated legal document assembly, online law practice management tools, and the effective use of basic law office software, such as Microsoft Word and Excel.

This kind of training can lead to innovative methods of legal services delivery. For example, one law school – Chicago-Kent College of Law at the Illinois Institute of Technology – partnered with the Center for Computer Assisted Legal Instruction in the early 2000s to create a web-based platform called A2J Author (A2J refers to Access to Justice) that allows legal professionals to prepare online "guided interviews" for self-represented litigants.[4] The guided interviews consist of easy-to-understand questions that, once answered, produce automatically generated legal forms. By 2018, more than 3 million people had used an A2J-Author guided interview and generated more than 1.8 million court documents. This effort has helped people gain access to effective self-help legal services and enabled courts to spend less time and money assisting self-represented litigants.

Other law schools have engaged in conceptually similar work. For instance, at Suffolk University Law School, where I serve as dean, we created the Legal Innovation and Technology Lab (LIT Lab), a new kind of clinical program that helps organizational clients, such as courts and legal-aid offices, make more efficient use of limited resources.[5] Illustrative LIT Lab projects include the creation of an app that uses a TurboTax-like interface

to generate letters for tenants to send to their landlords about a range of housing law-related issues and a tool that can help people identify public benefits to which they are legally entitled. We also established a first-of-its-kind three-year course of study that teaches students how to use technology and sound law-practice management to start or join law firms that can profitably represent underserved clients.[6]

These kinds of programs teach students skills that employers increasingly need yet often lack. In recent years, more clients have begun to demand alternative fee arrangements that are not tied to the amount of time lawyers spend on a matter. With this shift, some legal employers have begun to look for lawyers who understand how to deliver high-quality services more efficiently. The problem is that law firms, which have traditionally prized billable hours, do not have this native capacity and need to seek lawyers who have some of these competencies.[7] Law schools have an opportunity to meet this demand by giving their graduates a knowledge base and skill set that clients and employers increasingly expect while simultaneously helping to reduce the cost of legal services.

Law schools can have an even larger impact on the affordability and accessibility of legal services by teaching cutting-edge knowledge and expertise to more experienced legal professionals. Law schools have long helped the profession remain up-to-date on changes in the law, but law schools can also contribute to reducing the cost of legal services through continuing–legal education programs, certificates, and new degrees offered to those who want to deliver their services more efficiently.[8]

Teaching law students and existing lawyers to be more efficient will not solve the access-to-justice crisis. Because of deep structural problems identified elsewhere in this issue of *Dædalus*, there will be significant unmet legal needs even if all lawyers become much more cost effective. Nevertheless, by supplementing the standard law-school curriculum and encouraging (or even requiring) students to learn new knowledge and skills, law schools can equip the profession with the tools needed to make legal services more affordable and accessible.

Law schools can also improve access to justice by making legal education more affordable. By reducing graduates' educational debt, a larger number of lawyers should be able to afford to lower their fees, perform more pro bono and "low bono" work, and pursue less lucrative careers serving the public.[9]

Educational debt is significant for this reason (and many others), but the relationship between law school loans and access to justice should not be overstated. Consider what would happen if someone were to borrow $30,000 to attend law school instead of $130,000 (the average amount that students at private law schools borrow today).[10] Assuming a twenty-year payment plan and an interest rate of 6 percent, this large reduction in debt would save the average lawyer approximately $8,600 per year.[11]

This is a considerable reduction, yet it is unlikely that all, or even most, of this money would be passed along to the public in the form of lower prices or more low bono and pro bono work. For lawyers in larger law firms and corporate legal departments, their ability to perform pro bono work or to discount their fees has more to do with their employers' finances and policies than their own personal financial circumstances. As for lawyers in solo or small firm settings (whose personal finances are more directly related to the fees they collect), they may very

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well pass along some of the savings to the public. That said, lawyers in these firms often face significant financial pressures, so many of them are likely to use substantial portions of the savings to improve their financial bottom lines rather than lower their prices.

Another possible benefit of lower debt is that law school graduates who currently feel compelled to pursue higher paying jobs might decide to start firms serving people of modest means. The size of this possible effect is unclear, but given the difficulty of sustaining law firms of this sort regardless of educational debt, the impact is likely to be modest rather than transformative.

Making law school more affordable is also unlikely to increase significantly the number of public-interest and legal-aid lawyers who are available to provide civil legal services to people of modest means. The staffing of legal-aid offices typically turns on outside (often government) funding, and that funding supports only a certain number of lawyers, even at modest salaries. Although a reduction in educational debt might increase the number of people who are willing and financially able to accept these typically lower-paying legal-aid jobs, the reduction in debt is unlikely to affect how many legal-aid positions exist or how many clients receive access to a legal-aid lawyer.

A substantial reduction in educational debt, in other words, should have some impact on access to justice, but the cumulative effect is likely to be more modest than the impact of teaching lawyers how to deliver their services more efficiently. Consider that, by reducing the median lawyer's educational debt by $100,000 and increasing that lawyer's take home pay by $8,600, law schools can improve the median junior lawyer's post-tax income by approximately 18 percent and the median post-tax income of all lawyers by about 11 percent.[12] Even if all of these savings were passed along to the public in the form of cheaper access to legal services or pro bono work (which is highly unlikely for the reasons described above), innovations in the delivery of legal services hold the promise of a much larger percentage improvement in prices and access.

The debt-reduction approach is also likely to be considerably more difficult to implement than incorporating new knowledge and skills into the law school curriculum. The latter can be achieved through relatively modest new costs, such as the use of adjunct faculty or reassigning existing faculty to teach new kinds of classes. In contrast, a reduction in educational debt by the amounts needed to have even a modest effect on the access-to-justice crisis is likely to be much more challenging. Options include shortening law school to two years, greatly enhancing and expanding income-based loan forgiveness programs (law school programs and government alternatives), liberalizing accreditation standards to allow for more flexibility in how legal education is delivered (such as permitting entirely online legal education), and making greater use of adjuncts and other part-time faculty. A combination of many or most of these changes would probably be necessary, but for a variety of political, pedagogical, and financial reasons, they are unlikely to be achieved in the near term.

This is not an argument for ignoring educational debt as one of many solutions to the access-to-justice problem. Law schools should work to make a legal education as affordable as possible, and schools have recently made progress toward this goal.[13] But while a massive reduction in the cost of legal education would certainly be helpful, such a reduction might not have the impact on access to justice that is sometimes assumed.

The most effective ways to address the access-to-justice crisis might involve permitting professionals other than lawyers to participate more meaningfully in the delivery of legal services.[14] Just as health care providers other than doctors now deliver a wide range of services and help to minimize costs, there is growing evidence that an array of legal-service providers other than lawyers can have the same effect.[15] Additional benefits may come from permitting professionals other than lawyers to have an ownership stake in law firms.

Several developments are noteworthy. An increasing number of courts are authorizing and regulating new categories of legal-services providers, such as document preparers, courthouse navigators, and limited license legal technicians.[16] Entrepreneurs have started companies that provide legal services and information to the public, often drawing on the expertise of professionals other than lawyers to develop new cost-effective delivery models. In an increasing number of countries, legal services are delivered through "alternative business structures" that include owners and partners who are not lawyers, and those arrangements may help to reduce prices in some areas of law.[17]

Through research and scholarship, law professors can play an important role in uncovering the extent to which these innovations are improving access to legal services, affecting the quality of outcomes, and influencing client attitudes about the legal system. Such research can also explore procedural and regulatory reforms that are necessary to accelerate these changes and ensure that discussions about such reforms are grounded in evidence and reasoned discourse rather than speculation and self-interest. Through this scholarship, law schools can help to foster the replication of regulatory and market-based innovations that show great promise in helping to address the public's unmet legal needs.

The access-to-justice crisis has many causes, including the government's underfunding of civil legal aid, the limited right to counsel for people who need essential legal services, and the procedural complexity and expense of the American system of dispute resolution. Although law schools are relatively small players in a system with profound structural problems, they nevertheless have an important role to play beyond offering free legal services through clinics and encouraging more pro bono work. By reimagining the curriculum, helping minimize law school debt, and producing research on new models of legal-services delivery, law schools can better prepare students for professional success and make progress in addressing the public's legal needs.

ENDNOTES

[1] American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016). For additional problems, see Rebecca L. Sandefur, "Civil Legal Needs and Public Legal Understanding" (Chicago and Champaign: American Bar Foundation and University of Illinois at Urbana-Champaign), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf.

[2] Regularly cited contributing factors include the procedural complexity of the U.S. court system, the limited government support for civil legal services, the absence of a government-recognized right to legal assistance in most essential civil legal matters, the legal profession's monopoly over the delivery of legal services, the prohibition against lawyers partnering or sharing fees with other kinds of professionals, and the cost of legal education.

[3] The World Justice Project ranks the United States 95th out of 113 countries with regard to the accessibility and affordability of civil legal services. World Justice Project, *World Justice Project Rule of Law Index 2017–2018* (Washington, D.C.: World Justice Project, 2018), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

[4] Jessica Frank, "A2J Author, Legal Aid Organizations, and Courts: Bridging the Civil Justice Gap Using Document Assembly," *Western New England Law Review* 39 (2) (2017): 251–261.

[5] "Legal Innovation and Technology Lab," Suffolk University Law School, http://suffolklitlab.org/ (accessed July 11, 2018).

[6] "Accelerator-to-Practice Program," Suffolk University Law School, https://www.suffolk.edu/law/academics/31538.php (accessed July 11, 2018).

[7] Center for the Study of the Legal Profession at Georgetown University Law Center and Thomson Reuters Legal Executive Institute, *2018 Report on the State of the Legal Market* (Washington, D.C. and Eagan, Mn.: Center for the Study of the Legal Profession at Georgetown University Law Center and Thomson Reuters Legal Executive Institute, 2018), 18, http://www.legalexecutiveinstitute.com/2018-legal-market-report/.

[8] "Graduate Program in Legal Innovation and Technology," Illinois Institute of Technology Chicago-Kent College of Law, https://www.kentlaw.iit.edu/academics/llm-programs/legal-innovation-technology (accessed July 11, 2018); and "Suffolk University Law School's Legal Innovation & Technology Certificate Program," Suffolk University Law School, https://www.legaltechcertificate.com/ (accessed July 11, 2018).

[9] "Low bono" refers to services at below-market prices or below cost to those in need.

[10] "Law students who graduated in 2016 incurred an average debt of $90,217 by the time they completed their degree from a public school, compared with $130,349 for those who attended a private school, according to data reported by 181 ranked law schools to *U.S. News and World Report* in an annual survey." Farran Powell, "Infographic: Compare Different Types of Law School Loans," *U.S. News and World Report*, https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2017-03-30/infographic-compare-different-types-of-law-school-loans (last modified March 30, 2017); and Katie Lobosco, "Students are Graduating with $30,000 in Loans," CNN Money, October 18, 2016, http://money.cnn.com/2016/10/18/pf/college/average-student-loan-debt/index.html.

[11] The average monthly payment on the "high debt" graduate's loans ($30,000 in undergraduate debt and $130,000 in graduate school debt) would be approximately $1,150 (assuming 6 percent interest spread over twenty years). Now compare that lawyer with one who has borrowed the same amount to attend law school as to attend college (that is, $30,000). That graduate would have $60,000 in total educational debt, and the graduate's monthly loan payments would be approximately $430 (again, assuming 6 percent interest spread over twenty years). In short, the "low debt" lawyer's monthly loan payments would be approximately $720 lower than the "high debt" graduate's monthly loan payments, which works out to about $8,600 per year.

[12] The median starting salary among graduates in the class of 2017 with long-term full-time jobs was $70,000; National Association for Law Placement, "Overall Employment Rate Up Modestly, Employment in Legal Jobs Up More" (Washington, D.C.: National Association for Law Placement, 2018), http://www.nalp.org/uploads/SelectedFindingsClassof2017.pdf. Because this figure does not include information about unemployed and underemployed graduates, the median salary of all graduates is undoubtedly lower. This article assumes that the median salary of all graduates from the class of 2017 is $63,000 and that their take-home pay is approximately $48,000, after taxes; see Tax Form Calculator, "$63,000.00 Tax Calculation based on 2018 Tax Tables," https://www.taxformcalculator.com/tax/63000.html. The median salary for all lawyers is approximately $118,000, and their take-home pay is approximately $81,000, after taxes; "How Much Do Lawyers Make?" *U.S. News and World Report*, https://money.usnews.com/careers/best-jobs/lawyer/salary (accessed July 11, 2018);

and Tax Form Calculator, "$118,000.00 Tax Calculation Based on 2018 Tax Tables," https://www.taxformcalculator.com/tax/118000.html.

[13] Derek T. Muller, "Most Law Schools Have Become More Affordable in the Last Three Years," Excess of Democracy, March 20, 2017, http://excessofdemocracy.com/blog/2017/3/most-law-schools-have-become-more-affordable-in-the-last-three-years.

[14] Andrew M. Perlman, "Towards the Law of Legal Services," *Cardozo Law Review* 37 (1) (2015): 49–112.

[15] Thomas Clarke and Rebecca L. Sandefur, "Preliminary Evaluation of the Washington State Limited License Legal Technician Program" (Chicago: American Bar Foundation, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949042.

[16] American Bar Association Commission on the Future of Legal Services, "Issues Paper Concerning New Categories of Legal Services Providers" (Chicago: American Bar Foundation, 2015), https://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services_completed_evaluation.pdf.

[17] Centre for Strategy and Evaluation Services, *Impact Evaluation of SRA's Regulatory Reform Programme: A Final Report for the Solicitors Regulation Authority* (Otford, United Kingdom: Centre for Strategy and Evaluation Services, 2018), https://www.sra.org.uk/documents/SRA/research/abs-evaluation.pdf; OMB Research, *Prices of Individual Consumer Legal Services* (East Malling, United Kingdom: OMB Research, 2016), https://research.legalservicesboard.org.uk/wp-content/media/Prices-of-Individual-Consumer-Legal-Services.pdf; and Perlman, "Towards the Law of Legal Services," 84.

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TOWARDS THE LAW OF LEGAL SERVICES

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INTRODUCTION

Imagine that someone asks you how legal services are regulated in the United States. You might answer that lawyers need a license in the jurisdictions where they intend to practice, typically after graduating

from an ABA-accredited law school and passing the bar examination.[1] You could explain that lawyers are governed by rules of professional conduct and subject to discipline, including disbarment, for failing to comply.[2] You also might mention the growing patchwork of state and federal regulations that govern lawyers' behavior.[3] Each of these answers offers a slightly different perspective on the regulation of legal services, but they share one common feature: they are all about lawyers.

This Article contends that the current lawyer-based regulatory framework should be reimagined if we hope to spur more innovation and expand access to justice.[4] Rather than focusing on the so-called "law of lawyering"[5]—the body of rules and statutes regulating lawyers—this Article suggests that we need to develop a broader "law of legal services" that authorizes, but appropriately regulates, the delivery of more legal and law-related assistance by people who do not have a Juris Doctor (J.D.) degree and do not work alongside lawyers. For example, the Washington Supreme Court recently adopted a framework for allowing specially educated and separately regulated professionals—Limited License Legal Technicians (LLLTs)—to deliver a narrow range of family law services without a traditional law license.[6] Some observers predict

1 *See generally* NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Erica Moeser & Claire Huismann eds., 2015), http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf. Of course, there are some exceptions to the general rule. For example, some states permit lawyers to gain admission without attending an ABA accredited law school. *Id.* at 8–11. Moreover, many states allow experienced lawyers from other jurisdictions to gain admission by motion. *Id.* at 34. Additionally, Wisconsin has the so-called diploma privilege, which allows lawyers to gain admission to the bar merely by graduating from a law school in the state. *See* WIS. SUP. CT. R. 40.03. New Hampshire has a more limited version of the diploma privilege. *See* N.H. SUP. CT. R. 42(XII).

2 *See generally* AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY & AM. BAR ASS'N STANDING COMM. ON PROF'L DISCIPLINE, 2013 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2013_complete_sold_results.pdf.

3 *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 961 (2009) (describing growth in legislative and administrative regulation of lawyers); Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1965–66 (2011) (discussing how parallel rules, such as Federal Rules of Civil Procedure, may conflict with Model Rules of Professional Conduct).

4 The term "access to justice" is often used in this context, *see, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE (2004), but it may be more appropriate in some situations to say that the public needs better "access to legal services." After all, many important legal and law-related services (e.g., getting a will or health care proxy) are not necessarily about "justice," at least not in the usual sense of the word. That said, a significant percentage of legal services have a strong relationship to justice, so the phrase "access to justice" is appropriate in most circumstances. The terms are used interchangeably in this Article.

5 *See generally, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. 2014).

6 *See* WASH. SUP. CT. R.: ADMISSION & PRACTICE r. 28; *see also* Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program:*

that LLLTs will be able to offer assistance at a lower cost than lawyers and improve access to legal services.[7] This type of regulatory reform,[8] which falls outside the law of lawyering, illustrates the growing importance and potential utility of the law of legal services.

The idea of looking beyond the law of lawyering for ways to encourage innovation is conceptually different from many recent calls for regulatory reforms, which focus on expanding opportunities for lawyers and people without a law degree to work together through alternative business structures (ABSs).[9] To be sure, ABSs are a potentially important development, but they are necessarily creatures of the law of lawyering. Consider, for example, the authorization of ABSs under the United Kingdom's Legal Services Act (LSA).[10] Passed in 2007, the LSA requires ABSs to have a lawyer manager,[11] provides detailed regulations about a lawyer's role in the ABS, and explains the role that people without a law degree can play relative to lawyers.[12] The LSA does not purport to regulate other professionals who want to deliver legal services completely apart from the legal profession. In other words, reforms focused on ABSs overlook regulatory innovations outside the

Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession, 65 S.C. L. REV. 611, 616 (2014).

7 *See, e.g.*, Crossland & Littlewood, *supra* note 6, at 622; Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 90 n.62, 120 (2013), http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf; Jack P. Sahl, *Cracks in the Profession's Monopoly Armor*, 82 FORDHAM L. REV. 2635, 2662 (2014).

8 For other useful examples, see Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2615–16 (2014).

9 *See, e.g.*, Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3089 (2014); Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2845 (2012); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 37–45 (2012); Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 197, 234 (2014); *see also* William Henderson, *Connecting the Dots on the Structural Shift in the Legal Market*, LEGAL WHITEBOARD (Aug. 3, 2012), http://lawprofessors.typepad.com/legalwhiteboard/2012/08/connecting-the-dots-on-the-structural-shift-in-the-legal-market.html. *But see* Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 44–46 (2014) (calling for greater attention to the myriad ways in which legal services could be delivered outside of ABSs); Levin, *supra* note 8, at 2615–17 (same).

10 Legal Services Act 2007, c. 29, §§ 71–111 (U.K.), http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf.

11 *See id.* § 83, sched. 11; SOLICITORS REGULATION AUTH., SRA PRACTICE FRAMEWORK RULES r. 14 (12th ed., 2014), http://www.sra.org.uk/solicitors/handbook/practising/content.page; *Practice Notes: Alternative Business Structures*, L. SOC'Y, § 5.1 (July 22, 2013), http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures.

12 *See* Legal Services Act, *supra* note 10, at § 82, sched. 11.

law of lawyering—like the LLLT program—that hold the promise of an even greater impact on legal services.

Part I explains the distinction between the law of lawyering and the law of legal services in more detail. I contend that most regulatory reform proposals are directed at the law of lawyering and that even seemingly radical proposals, such as those related to ABSs, are fundamentally lawyer-based regulations.

Part II describes the most recent law of lawyering reform effort in the United States—the ABA Commission on Ethics 20/20.[13] Drawing on my experience as the Commission's Chief Reporter, I review the changes that resulted from the Commission's work and argue that they illustrate the limited scope of the law of lawyering.

Part III responds to common criticisms of the Commission—that it had an unduly narrow view of what was possible within the law of lawyering and that the Commission failed to achieve needed change.[14] I argue that these criticisms are misplaced for two reasons. First, the Commission was created to examine how the law of lawyering should be updated in light of technological change and globalization, and the Commission largely achieved that goal. It addressed quite a few practical new ethics issues that lawyers regularly encounter.[15]

Second, and more fundamentally, there was relatively little the Commission could have accomplished within the law of lawyering that would have had any meaningful effect on the delivery of legal services in the United States.[16] The only possible exception would have been a liberalization of Model Rule 5.4, which currently prohibits ABSs. Any such proposal at that time, however, was facing near certain defeat in the ABA's policymaking body, the House of Delegates.[17] More importantly, and less intuitively, preliminary evidence suggests that ABSs by themselves may not catalyze the bold changes that some have predicted.[18] I conclude that we can more effectively advance the interests of justice by authorizing people without a law degree to participate in the legal marketplace with some form of regulatory oversight. To do so, we need to focus on developing the law of legal

13 *See ABA Commission on Ethics 20/20*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Jan. 21, 2015).

14 *See, e.g.*, Hadfield, *supra* note 9, at 44; James E. Moliterno, *Ethics 20/20 Successfully Achieved its Mission: It "Protected, Preserved, and Maintained"*, 47 AKRON L. REV. 149, 152–53 (2014).

15 *See infra* Part II.

16 *See infra* Part III.A.

17 *See infra* Part III.B.2.a.

18 *See infra* Part III.B.2.b.

services rather than fixating exclusively on the law of lawyering and issues like ABS.

Part IV offers some preliminary thoughts on the regulatory objectives that should inform the law of legal services, such as ensuring competence, facilitating consumer choice, requiring transparency, providing remedies for misconduct, ensuring professional independence, and fostering faith in the justice system and the rule of law. I then describe two types of regulatory innovations that would satisfy these regulatory objectives and achieve significant change. First, new market actors should be authorized to participate in a market that has historically excluded them. For instance, Washington State's LLLT program is creating a new, and likely lower-cost, option for consumers by allowing appropriately trained and regulated professionals to engage in some kinds of law practice without a law degree.[19] Second, by explicitly authorizing but appropriately regulating existing service providers, such as those offering automated legal document assembly (e.g., LegalZoom), these providers will have less to fear from restrictions on the unauthorized practice of law and have a greater incentive to innovate and expand.[20]

For too long, regulatory reforms have focused primarily on the limited options available within the law of lawyering. By looking beyond that body of law, we can unlock the innovative potential of new providers who are capable of delivering legal services to those who need them. In this way, the law of legal services can safely expand the public's options for addressing many legal needs, and it can do so in ways overlooked by conventional regulatory reform efforts.

I. DISTINGUISHING THE "LAW OF LAWYERING" AND THE "LAW OF LEGAL SERVICES"

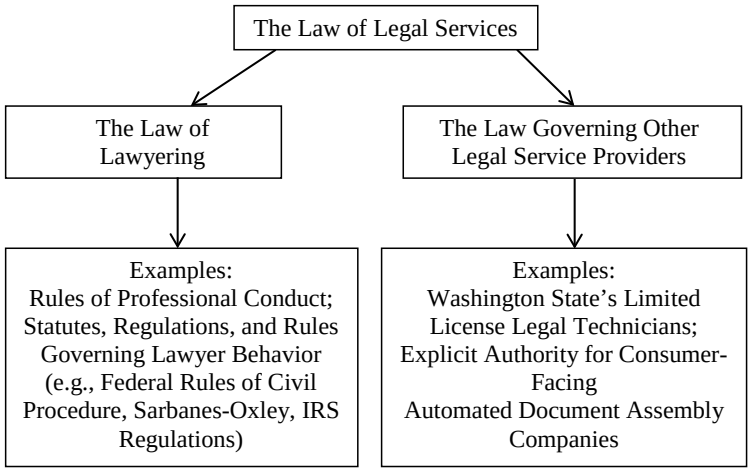
A central contention in this Article is that the law of lawyering is inherently limited in scope and that regulatory innovations must

19 *See* Elizabeth Chambliss, *Law School Training for Licensed "Legal Technicians"? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 587–89 (2014) (offering an overview of the program); Crossland & Littlewood, *supra* note 6, at 612–13, 622 (same).

20 Evidence suggests that enforcement of unauthorized practice provisions is commonplace. *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2592–93 (2014). There is also evidence that automated legal document assembly companies are often the target of these enforcement actions. *See* Robert Ambrogi, *LegalZoom Suffers Setback in North Carolina*, L. SITES (May 19, 2014), http://www.lawsitesblog.com/2014/05/legalzoom-suffers-setback-north-carolina.html; *see also* Medlock v. LegalZoom.com, Inc., No. 2012-208067 (S.C. Oct. 18, 2013) (Report & Recommendation), http://www.abajournal.com/files/SC_Supreme_Court_report_findings_fact_and_settlement_agreement.pdf.

emerge from what I call the law of legal services. The differences between these two concepts are not self-evident and require some explanation.

The law of lawyering, as its name suggests, concerns the law governing *lawyers*. It includes the rules of professional conduct as well as the growing number of laws, regulations, and rules (both state and federal) that govern lawyer behavior,[21] such as the Sarbanes-Oxley Act,[22] related Securities and Exchange Commission regulations,[23] IRS regulations,[24] federal and state rules of civil procedure and evidence,[25] and data privacy and security laws.[26] In contrast, the law of legal services is much broader. It includes the law of lawyering as well as regulations governing the roles that others might play in the delivery of legal services, or what one might call the law governing other legal services providers.



21 *See* Leubsdorf, *supra* note 3, at 981–82 (cataloging various ways in which lawyers are now regulated).

22 *See* Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2012).

23 *See* Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. §§ 205.1–205.7 (2015).

24 *See* Treas. Circular No. 230, *codified at* 31 C.F.R. § 10 (2011); *see also* Leubsdorf, *supra* note 3, at 981–82.

25 Rules of civil procedure often govern the work product doctrine as well as frivolous pleadings. *See, e.g.*, FED. R. CIV. P. 11, 26(b)(3). Rules of evidence typically govern the attorney-client privilege. *See, e.g.*, FED. R. EVID. 502.

26 *See, e.g.*, NEV. REV. STAT. § 603A.010 et seq. (2014) (setting out requirements for the protection of personally identifiable information with no exceptions for law firms); 201 MASS. CODE REGS. 17.01 et seq. (2015) (same).

Historically, regulators and scholars have focused much of their attention on the law of lawyering. Consider, for example, the names of leading professional and academic centers in this area: the American Bar Association's Center for Professional Responsibility, Harvard's Center on the Legal Profession, Stanford's Center on the Legal Profession, and Georgetown's Center for the Study of the Legal Profession. A leading treatise has the title "The Law of Lawyering,"[27] and there is a Restatement of the "Law Governing Lawyers."[28] Many widely used casebooks have similar names and a similar orientation.[29]

The focus on the law of lawyering is not surprising. Until recently, the law governing other legal service providers has consisted primarily of unauthorized practice statutes and rules that have prohibited people who are not lawyers from playing any meaningful role in the delivery of legal services. As a result, the law in this area has traditionally received little attention beyond some important and longstanding efforts to liberalize unauthorized practice provisions (e.g., the work of Professor Deborah Rhode)[30] and a few other ways in which people without a law degree have been permitted to deliver legal or law-related services.[31]

To be sure, the law of lawyering addresses some issues that involve the work of people who do not have a law license. For example, Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) imposes on a lawyer the duty to supervise "nonlawyers"[32] within the lawyer's firm or

27 *See* HAZARD & HODES, *supra* note 5.

28 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

29 *See, e.g.*, STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (9th ed. 2012); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING (5th ed. 2010); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (3d ed. 2012).

30 *See* RHODE, *supra* note 4, at 87–91; Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 123–29 (1976); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) [hereinafter Rhode, *Professionalism in Perspective*]; Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) [hereinafter Rhode, *The Delivery of Legal Services*]; Rhode & Ricca, *supra* note 20, at 2607–08.

31 *See, e.g.*, Chambliss, *supra* note 19, at 582 n.16; Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 414 (2013); Levin, *supra* note 8, at 2614.

32 The word "nonlawyer" is often and appropriately criticized because it suggests that the world is defined relative to lawyers. Alternative phrases, however, have their own problems. For example, it may be appropriate in some situations to refer to "other professionals," but sometimes the word "nonlawyer" is used to refer to people who are not necessarily professionals in other fields. The phrase "people who are not lawyers" is also problematic, because it is both bulky and still defines the world relative to lawyers. Nevertheless, this Article avoids the word "nonlawyer."

to monitor nonlawyers outside the firm who work on client matters,[33] and Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) instructs lawyers that they are not permitted to facilitate the unauthorized practice of law.[34] These provisions, however, do not directly regulate people who are not lawyers.

Even in jurisdictions that allow ABSs, the regulatory attention is on lawyers. For instance, Washington, D.C. permits alternative business structures, but the relevant rule focuses primarily on the lawyer's role in supervising people who do not have a law license.[35] When the rule addresses the responsibility of these "nonlawyers," it merely instructs them to "abide by these Rules of Professional Conduct."[36]

Similarly, and as explained earlier, the United Kingdom's seminal LSA requires an ABS to have a lawyer manager, provides detailed regulations about a lawyer's role in the entity, and explains the role that others can play relative to lawyers.[37] The LSA, however, does not offer much guidance to people who want to deliver legal services without the involvement of lawyers. Although the LSA does leave significant market opportunities for people who are not lawyers by narrowly defining the "reserved" services that only lawyers are permitted to offer,[38] the LSA does not provide any regulatory structure, guidance, or oversight regarding these non-reserved services. People who offer them are largely on their own from a regulatory perspective.[39]

The Canadian Bar Association recently issued a Futures Report that reflects a similar lawyer-centric approach.[40] The Report recommends ABSs and suggests a number of related regulatory innovations, but the Report expressly declines to address whether people without a law license should be permitted to deliver legal services in settings other than law firms or ABSs. The Report concludes that "[i]t is outside the scope of Futures' work to determine whether some legal

33 *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2013).

34 *Id.* r. 5.5.

35 *See* D.C. RULES PROF'L CONDUCT r. 5.4(b)(3) (D.C. BAR ASS'N 2007).

36 *Id.* r. 5.4(b)(2).

37 *See* sources cited *supra* notes 10–12.

38 Legal Services Act, 2007, *supra* note 10, §§ 13–17.

39 *See* LEGAL SERVS. INST., THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE 2, 32 (2010), https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf; *see also Will-Writing and Estate Administration*, LEGAL SERVS. BD., http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm (last visited Jan. 21, 2015) (explaining concerns that some unreserved activities are unregulated).

40 CANADIAN BAR ASS'N, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA (2014), http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf [hereinafter CBA FUTURES].

activities should no longer be reserved [for lawyers] or what further role might be played by other regulated professionals."[41]

Australia has permitted ABSs for more than a decade. It even allows publicly traded legal practices,[42] making it one of the most liberal regimes in the world in this regard. But again, the regulatory structure for these arrangements is focused on either regulating lawyers, or the role that people without a law license can play relative to lawyers.[43]

All of these liberalizations are not unimportant, but they are fundamentally law of lawyering reforms. As the discussion below suggests, the law of lawyering is necessarily limited in terms of its potential to bring about significant change. A different conceptual focus may help to drive even more fundamental innovations in the delivery of, and the public's access to, legal and law-related services.

II. THE LIMITS OF THE LAW OF LAWYERING: THE ABA COMMISSION ON ETHICS 20/20 IN HINDSIGHT

The ABA Commission on Ethics 20/20 undertook the most recent law of lawyering reform effort in the United States. Created in 2009 by then-ABA President Carolyn B. Lamm, the Commission was tasked with studying how the ABA Model Rules of Professional Conduct should be updated to address increasing globalization and changes in technology.[44] The Commission completed its work in February 2013,

41 *See id.* at 19.

42 *See* Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45, 47–50 (2009).

43 *See id.*; *see also Legal Profession Act 2008* (WA) pt. 3 (Austl.), http://www5.austlii.edu.au/au/legis/wa/consol_act/lpa2008179.

44 *See* Press Release, Am. Bar Ass'n, ABA President Carolyn B. Lamm Creates Ethics Commission To Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730. "The ethics commission will review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace." *Id.* To ensure a diversity of perspectives, President Lamm appointed commissioners from the judiciary, large law firms, small law firms, in-house legal departments, and academia. *See id.*; *see also ABA Commission on Ethics 20/20: About Us*, AM BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Jan. 21, 2015) (listing Commission members). The Commission was co-chaired by Jamie Gorelick, a partner at WilmerHale and former deputy attorney general under President Clinton, and Michael Traynor, former President of the American Law Institute. *Id.* The Commission had several law professor "reporters" who advised the Commission on the law of lawyering. Paul Paton served as the reporter for the Alternative Business Structures working group, and Anthony Sebok and Bradley Wendel served as the reporters for the Alternative Litigation Finance working group. *Id.* They helped to draft the Commission's work product (including proposals, white papers, and explanatory memoranda), and guided substantive deliberations during working group discussions and Commission meetings. *Id.* The Commission was aided by the ABA Center for Professional Responsibility, particularly Ellyn Rosen, who served as the Commission's lead

after successfully proposing numerous amendments to the Model Rules of Professional Conduct,[45] developing a new model court rule and amending another,[46] releasing a white paper on alternative litigation financing,[47] submitting an informational report on lawyer rankings,[48] and referring several discrete topics to other ABA entities.[49]

As described below, the Commission accomplished the narrow objective it was given: updating the law of lawyering to give lawyers the guidance they need to address twenty-first century legal ethics issues. It did so by focusing on four important developments in the practice of law: (1) the increased use of technology in the delivery of legal services; (2) the advent of Internet-based client development tools; (3) the frequent disaggregation of law and law-related legal services through outsourcing; and (4) greater demand for lawyer mobility.[50]

counsel and helped the Commission navigate the ABA's political structure. *Id.* In my view, one fair criticism of the Commission and related legal ethics reform efforts is that they have failed to include people who are not lawyers. *See* Gillers, *supra* note 31, at 410; Moliterno, *supra* note 14, at 152.

45 *See ABA Commission on Ethics 20/20 Work Product*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Jan. 21, 2015). For two reports summarizing the Commission's work, see ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INTRODUCTION AND OVERVIEW (2012) [hereinafter ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.pdf and ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INTRODUCTION AND OVERVIEW (2013) [hereinafter ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.pdf.

46 The Commission successfully proposed a new Model Rule on Practice Pending Admission and amended the Model Rule on Admission by Motion. *See* AM. BAR ASS'N, 2012 ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION AND MEETING OF THE HOUSE OF DELEGATES 12 (2012) [hereinafter ABA 2012 ANNUAL MEETING REPORT], http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2012_hod_select_committee_report_annual_meeting.doc.

47 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES: ALTERNATIVE LITIGATION FINANCE (2012) [hereinafter ABA COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

48 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATION REPORT TO THE HOUSE OF DELEGATES NO. 7 (2011) [hereinafter ABA COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT NO. 7], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rankings_2011_hod_annual_meeting_informational_report.pdf.

49 *See infra* Part II.E.

50 The Commission's reports reveal far more detail about the nature of (and reasons for) the changes than what appears below. Those reports can be found at *ABA Commission on Ethics 20/20, House of Delegates Filings,* AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html (last visited Jan. 21, 2015).

To be clear, the Commission's work was not transformative, but that is exactly the point. The law of lawyering is primarily concerned with ethics issues arising for lawyers in their everyday practices. As explained in more detail in Part III.B, it does not offer many options for transforming the delivery of legal services.

A. *Technology and the Delivery of Legal Services*

The Commission's work produced several changes to the Model Rules that address issues arising out of technology's transformation of the delivery of legal services, including the duty of confidentiality, technological competence, and the inadvertent disclosure of information.[51]

1. The Duty of Confidentiality in a Digital Age

The Commission found that data security is playing an increasingly important role in modern law practice. In the past, lawyers could easily protect a client's confidential information by placing it in a locked file cabinet behind a locked office door. But today, lawyers store a range of information in the "cloud" (both private and public), as well as on the "ground," using smart phones, laptops, tablets, and flash drives.[52] This information is easily lost or stolen; it can be accessed without authority (e.g., through hacking); it can be inadvertently sent; and it can be intercepted while in transit.[53]

To address these issues, the Commission proposed—and the ABA's 560 member policymaking body, the House of Delegates, adopted—Model Rule 1.6(c).[54] The Model Rule now requires lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation

51 ABA Comm'n on Ethics 20/20, Res. No. 105A rev. 3–4 (2012) [hereinafter ABA Comm'n on Ethics 20/20 Res. No. 105A], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf; *see also* ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12 (noting the adoption of Resolution 105A, as revised, by House of Delegates).

52 *See* Andrew Perlman, *Protecting Client Confidences in a Digital Age: The Case of the NSA*, JURIST (Mar. 5, 2014, 12:00 AM), http://jurist.org/forum/2014/03/andrew-perlman-client-confidences.php.

53 *See* Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 THE PROF. LAW., no. 4, 2014, at 24.

54 *See* ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 4; *see also* ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

of a client."[55] New comment language identifies a number of factors lawyers should consider when determining whether their efforts have been "reasonable," including, but not limited to

> the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[56]

2. Technological Competence

Prior to the Commission's work, the Model Rules had not made any explicit reference to the word "technology."[57] The Commission concluded that today's lawyers need to remain apprised of relevant technology, including the benefits and risks of its use.[58] An amendment to what is now Comment 8 to Model Rule 1.1 (Competence) captures this new reality (italicized language is new): "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[59]

The Commission did not try to define technological competence, recognizing that a lawyer's skillset necessarily needs to evolve along with technology itself.[60] But the change has underscored the evolving nature

55 MODEL RULES OF PROF'L CONDUCT r. 1.6(c) (AM. BAR ASS'N 2013).

56 *Id.* cmt. 18. The Commission decided not to propose more detailed guidance, concluding that many specific recommendations, such as how to safeguard information stored on a mobile device, are likely to be outdated within a few years. *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105A 5 (2012) [hereinafter ABA REPORT ON RES. NO. 105A], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

57 *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2011).

58 ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 3.

59 MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2013) (emphasis added); *see also* ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 3; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

60 *See generally* RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2013) (explaining various ways in which legal education will need to evolve to respond to the 21st century legal marketplace).

of a lawyer's ethical duty of competence and has proven to be among the most discussed pieces of the Commission's work.[61]

3. The Increased Frequency of Inadvertent Disclosures

In the past, the inadvertent disclosure of confidential information was relatively rare,[62] but digital communications and the rise of electronic discovery have made this issue considerably more common.[63] To address this concern, Model Rule 4.4 (Respect for Rights of Third Persons) was amended in 2002 to instruct lawyers that they should notify senders of inadvertently disclosed information about their mistakes.[64]

In light of the rapidly changing nature of the problem, the Commission concluded that the Model Rule and its accompanying comments could be usefully updated.[65] For example, the Model Rule had previously described a lawyer's duties when receiving inadvertently disclosed "documents," a word that offered limited guidance when the disclosure involved electronic information.[66] The Model Rule was amended to clarify that "electronically stored information," not just information in tangible form, can trigger Model Rule 4.4(b)'s notification requirements.[67] Moreover, the phrase "inadvertently sent" is now defined to give lawyers more guidance as to its meaning.[68] And new comment language addresses the particular problem of metadata, noting that the receipt of metadata—embedded electronic data that is not visible on the face of a file or document—triggers the Model Rule's

61 A search for "'rule 1.1' /s competence /s technology and da(aft 08/01/2012 and bef 08/01/2014)" in Westlaw's Journals and Law Reviews database yields more than forty references to the new provision within the two years since it was adopted.

62 *See* ABA Comm'n on Ethics 20/20, Res. No. 105A, *supra* note 51, at 5–6.

63 *See id.*

64 *See* ABA HOUSE OF DELEGATES, AM. BAR ASS'N, EVALUATION OF RULES OF PROFESSIONAL CONDUCT (REPORT NO. 401) (2002), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics2000_report_hod_022002.authcheckdam.pdf (noting adoption of proposed changes to Rule 4.4); ABA ETHICS 2000 COMM'N, AM. BAR ASS'N, REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2000), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html (providing Ethics 2000 Commission's proposed changes to the Model Rules of Professional Conduct).

65 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 2–3, 6–7 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_technology_and_confidentiality_posting.authcheckdam.pdf.

66 *See id.* at 6.

67 *See* ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 5–6; *see also* ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

68 *See* MODEL RULES OF PROF'L CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS'N 2013).

notification duties, but only if the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.[69]

4. Odds and Ends

The Commission's work produced several other minor amendments that responded to changes in law practice technology. Amendments to Comment 9 of Model Rule 1.0 (Terminology) now make explicit that conflicts screens should prevent the sharing of both tangible and electronic information.[70] The definition of a "writing" in paragraph (n) of Model Rule 1.0 was updated to replace the word "e-mail" with the broader phrase "electronic communications," ensuring that the definition captures the different ways a "writing" can occur.[71] Finally, the last sentence of Comment 4 to Model Rule 1.4, which had said that, "[c]lient telephone calls should be promptly returned or acknowledged,"[72] was replaced with an admonition that more accurately reflects the increasingly varied ways in which lawyers and clients communicate: "A lawyer should promptly respond to or acknowledge client communications."[73]

In sum, these amendments address technology-driven changes to the practice of law and offer lawyers needed guidance on issues they commonly encounter. Put another way, the amendments reflect the relatively limited potential of the law of lawyering to change how legal services are delivered.

B. *Technology and Client Development*

The law of lawyering's banality is similarly illustrated by the Commission's work on ethics issues arising from new client development tools. The Commission found that a growing number of lawyers now use online marketing methods, including law firm websites, blogs, social and professional networking sites, pay-per-click

69 *See id.*

70 *See id.* at r. 1.0 cmt. 9; *see also* ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 2–3; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

71 *See* MODEL RULES OF PROF'L CONDUCT r. 1.0(n) (AM. BAR ASS'N 2013); *see also* ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 1–3; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

72 MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 4 (AM. BAR ASS'N 2011).

73 MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 4 (AM. BAR ASS'N 2013); *see also* ABA Comm'n on Ethics 20/20 Res. No. 105A, *supra* note 51, at 4; *see also* ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

ads, and lead generation services.[74] Although these tools are new and evolving, the Commission concluded that basic "principles underlying the existing Rules—preventing false and misleading advertising, protecting the public from the undue influence of solicitations, and safeguarding the confidences of prospective clients—remain valid."[75] For this reason, the Commission's proposals focused on explaining how the Model Rules should apply to new settings rather than developing an entirely new regulatory structure. The proposals addressed several common practical problems.

1. Prospective Clients in a Digital Age

Model Rule 1.18 (Duties to Prospective Client) recognizes that lawyers have ethical duties not just to clients, but to "prospective clients" as well.[76] For example, when someone shares confidential information with a lawyer in the lawyer's office about a possible legal matter and the lawyer refuses the case, the lawyer still owes the person—the "prospective client"—a number of ethical duties, including the duty of confidentiality and a modified duty to avoid conflicts of interest.[77] The problem is that people now interact with lawyers in new ways, such as through websites, social media, and online lead generation tools, making it difficult to determine when someone becomes a "prospective client." The Commission concluded that the definition of a "prospective client" should reflect how lawyers and the public interact,[78] so Model Rule 1.18(a) and the accompanying comments were amended to clarify when a lawyer's interactions with the public, including online interactions, give rise to a "prospective client" relationship.[79]

74 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105B, 1–5 (2012) [hereinafter ABA REPORT ON RES. NO. 105B], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.pdf.

75 ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012, *supra* note 45, at 9.

76 *See* MODEL RULES OF PROF'L CONDUCT r. 1.18(b)–(d) (AM. BAR ASS'N 2013).

77 *See id.*

78 *See* ABA REPORT ON RES. NO. 105B, *supra* note 74, at 2–3.

79 *See* MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 2013); ABA REPORT ON RES. NO. 105B, *supra* note 74, at 1–2; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

2. Paying for "Recommendations"

Model Rule 7.2(b) prohibits a lawyer from giving someone anything of value (e.g., money) for recommending the lawyer's services, but it allows lawyers to pay for advertisements.[80] Until recently, lawyers had relatively little trouble distinguishing between these two kinds of payments.[81] The Internet, however, has blurred these traditional lines, so the definition of the word "recommendation" was updated to reflect modern forms of marketing.[82] Moreover, additional guidance was offered to help guide the growing industry of lead generation services (and the lawyers who use those services) to ensure reasonable consumer protections without unnecessarily impeding this new method for matching clients and lawyers.[83]

3. Defining Solicitations in the Internet Era

Model Rule 7.3(a) prohibits most kinds of in-person solicitations, but the Model Rule permits (yet regulates) less intrusive forms of solicitations, such as those sent by direct mail and e-mail.[84] This distinction used to be reasonably clear, but new forms of marketing, once again, have blurred the traditional lines. The Commission sought to address some of these ambiguities by creating a new definition of a "solicitation."[85]

All of these changes have contributed to the law of lawyering by giving lawyers the guidance they need to use new forms of client development. But again, the law of lawyering in this area offers few, if any, ways to transform the delivery of legal services.

80 MODEL RULES OF PROF'L CONDUCT r. 7.2(b) (AM. BAR ASS'N 2013).

81 ABA REPORT ON RES. NO. 105B, *supra* note 74, at 3–4.

82 *See* MODEL RULES OF PROF'L CONDUCT r. 7.2 cmt. 5 (AM. BAR ASS'N 2013); ABA REPORT ON RES. NO. 105B, *supra* note 74, at 4–5; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

83 *See* MODEL RULES OF PROF'L CONDUCT r. 7.3, cmt. 7, 9 (AM. BAR ASS'N 2013); ABA REPORT ON RES. NO. 105B, *supra* note 74, at 6–8; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12. There was some discussion about liberalizing Rule 7.2 and lifting all restrictions on paying for recommendations. *See* ABA REPORT ON RES. NO. 105B, *supra* note 74, at 6. It was ultimately rejected, but even if adopted, the change would have had a relatively limited impact on the delivery of legal services.

84 *See* MODEL RULES OF PROF'L CONDUCT r. 7.3 (AM. BAR ASS'N 2013).

85 *See id.* r. 7.3 cmt. 1; ABA Comm'n on Ethics 20/20 Res. No. 105B, at 6 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.authcheckdam.pdf; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12; *see also* ABA REPORT ON RES. NO. 105B, *supra* note 74, at 7–8.

C. *The Disaggregation of Law and Law-Related Work (Outsourcing)*

The Commission found that lawyers are "increasingly outsourcing legal and law-related work, both domestically and offshore" and that these practices should be permissible as long as lawyers follow certain guidelines.[86] With regard to the outsourcing of work to other lawyers, the comments to Model Rule 1.1 (Competence) were amended to identify the considerations lawyers should consider, such as the competence of the lawyers in the other firm.[87] With regard to work outsourced to people without a law license, the title and comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) were amended to emphasize that lawyers should make reasonable efforts to ensure that outsourced work is performed in a manner compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.[88]

To be sure, outsourcing does have the potential to shape how legal services are delivered, at least to some degree. For example, legal services would probably be more expensive in certain contexts if outsourcing were unavailable. That said, the changes in this area largely codified existing practices and are unlikely to have much of an effect on the delivery of legal services.[89]

86 ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105C 1 (2012) [hereinafter ABA REPORT ON RES. NO. 105C], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.pdf.

87 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (AM. BAR ASS'N 2013); ABA Comm'n on Ethics 20/20, Res. No. 105C, at 2 (2012) [hereinafter ABA Comm'n on Ethics 20/20 Res. No. 105C], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.pdf; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

88 *See* MODEL RULES OF PROF'L CONDUCT r. 5.3, cmts. 3–4 (AM. BAR ASS'N 2013); ABA Comm'n on Ethics 20/20 Res. No. 105C, *supra* note 87, at 2–3; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

89 *See, e.g.*, ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 08–451 (2008); Cal. Bar Comm'n on Prof'l Responsibility & Conduct, Formal Op. 2004–165 (2004); Colo. Bar Ass'n, Formal Op. 121 (2009); Fla. Bar Ass'n Comm'n on Prof'l Ethics, Op. 07–2 (2008); N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 762 (2003); N.Y.C. Bar Ass'n Comm'n on Prof'l & Jud. Ethics, Formal Op. 2006–3 (2006); N.C. State Bar, 2007 Formal Op. 12 (2008); Ohio Ethics Comm'n, Advisory Op. 2009–06 (2009); COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR ASS'N, REPORT ON THE OUTSOURCING OF LEGAL SERVICES OVERSEAS (2009), http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf; COUNCIL OF BARS & LAW SOC'YS OF EUR., CCBE GUIDELINES ON LEGAL OUTSOURCING (2010), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf.

D. *The Globalization of Legal Services*

Lawyers traditionally practiced in a single jurisdiction for their entire careers and had little need to relocate.[90] Times have changed. Globalization and technology have transformed the legal marketplace and fueled considerably more cross-border practice and lawyer mobility.[91] The Commission's resolutions addressed some of these issues by creating a more permissive model for cross-border practice and mobility for both domestic and foreign lawyers.

1. Liberalizing the Model Rule on Admission by Motion

The ABA Model Rule on Admission by Motion, which was adopted in 2002,[92] allows licensed lawyers to gain admission to a new jurisdiction without having to sit for another bar examination. The Commission concluded that the Model Rule should be liberalized to allow lawyers to become eligible for this admission procedure after fewer years in practice (three years instead of five).[93] The ABA House of Delegates agreed and adopted the recommendation.[94] The Commission also successfully proposed a resolution that urged "jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urge[d] jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion."[95]

2. The Model Rule on Practice Pending Admission

The Commission found that lawyers increasingly need to relocate to a new jurisdiction and begin practicing there on shorter notice than

90 *See* ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012, *supra* note 45, at 6–7.

91 *See id.*

92 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105E 2 (2012) [hereinafter ABA REPORT ON RES. 105E], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e_filed_may_2012.authcheckdam.pdf.

93 *See id.*

94 *See* MODEL RULES ON ADMISSION BY MOTION r. 1(c) (AM. BAR ASS'N 2012); ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

95 ABA Comm'n on Ethics 20/20, Res. No. 105E, at 2 (2012) [hereinafter ABA Comm'n on Ethics 20/20 Res. No. 105E], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e.authcheckdam.pdf; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

an admission by motion procedure allows, and that a temporary and more immediate practice authority would provide a useful bridge.[96] The new Model Rule on Practice Pending Admission was adopted to enable lawyers who have been engaged in the active practice of law for three of the last five years to practice from an office in a new jurisdiction while pursuing admission through an authorized procedure, such as admission by motion or passage of that jurisdiction's bar examination.[97]

3. Greater Mobility for Foreign Lawyers

In a globalized world where a growing number of legal matters implicate the laws of other countries, the Commission found that clients often need the expertise of lawyers licensed abroad.[98] The Commission's work has made it easier for lawyers licensed in foreign jurisdictions to practice in the United States. In particular, the Model Rule on Pro Hac Vice Admission was amended to permit judges, at their discretion and subject to numerous limitations, to authorize foreign lawyers to appear *pro hac vice* in U.S. courts.[99] Amendments to Model Rule 5.5(d) authorize foreign lawyers to serve as in-house counsel from within the United States,[100] and corresponding amendments to the Model Rule for Registration of In-House Counsel provide a mechanism to identify and monitor these lawyers, and hold them accountable.[101]

96 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105D 1 (2012) [hereinafter ABA REPORT ON RES. 105D], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d_filed_may_2012.pdf.

97 *See id.* at 2; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

98 *See* ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013, *supra* note 45, at 3.

99 *See* ABA Comm'n on Ethics 20/20, Res. No. 107C (2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107c_redline_with_floor_amendment.authcheckdam.pdf; AM. BAR ASS'N, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES: 2013 MIDYEAR MEETING 6 (2013) [hereinafter ABA, SUMMARY OF ACTION: 2013 MIDYEAR], http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_midyear_summaryofaction.authcheckdam.pdf.

100 *See* ABA Comm'n on Ethics 20/20, Res. No. 107A rev. 2 (2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.authcheckdam.pdf; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 5–6.

101 *See* ABA Comm'n on Ethics 20/20, Res. No. 107B rev. (2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 6.

4. Choice of Rule Provisions

The increasing globalization of law practice has made it difficult for lawyers in certain contexts to determine which jurisdiction's ethics rules apply when deciding whether a conflict of interest exists.[102] This problem is particularly pronounced for law firms with offices abroad, where the rules on conflicts are considerably different from those found in the United States.[103] To address this issue, new language was added to Comment 5 of Model Rule 8.5 (Choice of Law) to expressly authorize lawyers and clients, subject to numerous restrictions, to specify which jurisdiction's conflict rules will apply to the lawyer-client relationship.[104]

5. Conflicts Checking When Moving Firms

Greater lateral movement among law firms and increased merger activity among firms have made it necessary for lawyers to disclose some types of confidential information to lawyers in other law firms in order to identify potential conflicts of interest.[105] The Commission found that the Model Rules did not reconcile these necessary disclosures with the duty of confidentiality.[106] To address this problem, Model Rule 1.6 (Confidentiality of Information) was amended to clarify that lawyers have the authority to disclose discrete categories of information to other firms to ensure that conflicts of interest are detected before lawyers are hired or before firms merge.[107] At the same time, the amendments make clear that such disclosures are impermissible if they would "compromise the attorney-client privilege or otherwise prejudice the client."[108]

102 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES ON THE RESOLUTION TO AMEND MODEL RULE 8.5 1–2 (2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_choice_of_rule_resolution_and_report_final.pdf.

103 *See id.*

104 *See* ABA Comm'n on Ethics 20/20, Res. No. 107D, at 2–3 (2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107d.authcheckdam.pdf; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 7.

105 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105F 1 (2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105f.pdf.

106 *See id.*

107 *See* ABA Comm'n on Ethics 20/20, Res. No. 105F rev. (2012) [hereinafter ABA Comm'n on Ethics 20/20 Res. No. 105F], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105f.authcheckdam.pdf; ABA 2012 ANNUAL MEETING REPORT, *supra* note 46, at 12.

108 ABA Comm'n on Ethics 20/20 Res. No. 105F, *supra* note 107, at 2.

Comment language was revised to provide even more detailed guidance.[109]

E. *Other Work Product and Referred Issues*

In addition to recommending changes to the Model Rules, the Commission produced reports on lawyer rankings and alternative litigation finance.[110] The Commission also referred specific topics to ABA entities with the necessary expertise to address them. For example, the Commission asked the Standing Committee on Ethics and Professional Responsibility to develop ethics opinions on several topics, including two choice of law issues associated with ABSs (one of which led to an important ethics opinion),[111] as well as various issues arising from virtual law practice and other topics related to the increasing importance of technology in practice today.[112]

III. RESPONDING TO CRITICS OF THE COMMISSION

Some commentators have criticized the modest scope of the Commission's work, claiming that the Commission should have done more to achieve needed reforms within the law of lawyering.[113] I believe that these criticisms are misplaced for two reasons. First, as the preceding discussion suggests, the Commission fulfilled its charge by generating needed guidance on a number of important everyday practice and ethics issues. Second, and more importantly, the critics overestimate the extent to which the law of lawyering can produce

109 *See id.* at 2–3.

110 *See* ABA COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE, *supra* note 47; ABA COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT NO. 7, *supra* note 48.

111 *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 13-464 (2013).

112 *See* Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, to Paula Frederick, Chair, Standing Comm. on Ethics & Prof. Responsibility (Sept. 6, 2011) (on file with author); Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, to Paula Frederick, Chair, Standing Comm. on Ethics & Prof. Responsibility (Nov. 22, 2011) (on file with author).

113 *See, e.g.*, Nathan M. Crystal & Francesca Giannoni-Crystal, *"One, No One and One Hundred Thousand" . . . Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 MISS. C. L. REV. 283, 283 (2013) (criticizing Commission for failing to develop rules to address conflicting rules in international arbitrations); John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 71, 91 (2013) (suggesting that many scholars believed the Commission did not produce needed changes and "that the final work product of Ethics 20/20 was a major disappointment to those who believed that the Model Rules needed significant revision in light of the changes in the legal profession"); Moliterno, *supra* note 14, at 153–60.

meaningful reform. The reality is that bold changes like ABS may actually be less significant than proponents believe, and truly meaningful changes need to take place entirely outside of the law of lawyering.

A. *The Commission Offered Needed Guidance*

One commentator has provocatively suggested that the changes resulting from the Commission's work were so inconsequential that "casebook and treatise writers can make the Ethics 20/20 induced changes to their next editions in thirty minutes or less."[114]

This criticism contains more rhetoric than reality. As Part II describes, the Commission has helped lawyers navigate the increasingly common ethical issues associated with legal process outsourcing, Internet-based advertising, confidentiality obligations when changing employment, the receipt of inadvertently sent information, and cybersecurity, among many other issues. The Commission has also enabled more lawyer mobility by liberalizing the Model Rule on Admission by Motion, creating a new Model Rule on Practice Pending Admission, and facilitating clients' use of foreign lawyers.[115] These changes have not produced a fundamental structural shift in the law of lawyering, but they do address important practical issues that lawyers regularly encounter in the twenty-first century.

Another reading of the criticism is that, even if the issues the Commission addressed are useful, the Commission's work merely reflected housekeeping or codifications of existing law.[116] The reality, however, is that some of the changes broke new ground. For example, the amended Rule 1.6(c) regarding a lawyer's duty to protect confidential information is new,[117] as are the Comments relating to the definition of a solicitation,[118] the definition of a "recommendation" in Rule 7.2,[119] the emphasis on technological competence,[120] and the use of choice of rule agreements.[121]

114 Moliterno, *supra* note 14, at 160.
115 *See supra* Part II.D.
116 Moliterno, *supra* note 14, at 153–54.
117 *See supra* Part II.A.1.
118 *See supra* Part II.B.3.
119 *See supra* Part II.B.2.
120 *See supra* Part II.A.2.
121 *See supra* Part II.D.4.

Other changes produced guidance that had been available only in non-binding (and, in the case of ABA Formal Opinions, non-public)[122] ethics opinions. These changes included the amendments to Rule 1.6 authorizing the disclosure of confidential information to identify conflicts of interest,[123] the guidance on outsourcing,[124] and the definition of a prospective client.[125] The elevation of this preexisting guidance to the Model Rules of Professional Conduct will give lawyers clearer, more reliable, and more accessible guidance than previously existed.

Still other changes reflect regulatory approaches that had existed in only a small number of states. The new Model Rule on Practice Pending Admission, the liberalized Model Rule on Admission by Motion, and the rules relating to foreign lawyers all fit this description.[126]

The helpfulness of these changes is illustrated by their relatively rapid adoption around the country. Only two years after the Commission completed its work, more than a dozen jurisdictions had adopted a significant portion of the changes.[127] The vast majority of states differ from the Model Rules in important respects, so states often ignore changes to the Model Rules in whole or in part.[128] The adoptions to date suggest that a large number of states find the changes to be more useful than critics have suggested.

Finally, the Commission's work has proven to be helpful even when it did not produce any doctrinal changes. For example, the

122 These opinions are publicly available for a period of time after they are released, but they are then placed behind a paywall. *See* Daniel Fisher, *ABA Asserts Copyright on its Lawyer-Advertising Rules*, FORBES (Sept. 29, 2010, 11:24 AM), http://www.forbes.com/sites/danielfisher/2010/09/29/aba-asserts-copyright-on-its-lawyer-advertising-rules.

123 *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009); discussion *supra* Part II.D.5.

124 *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); discussion *supra* Part II.C.

125 *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010); discussion *supra* Part II.B.1.

126 *See* ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013, *supra* note 45, at 5–7 (documenting U.S. jurisdictions with already-liberalized rules allowing foreign lawyers greater authority to practice in the United States); ABA REPORT ON RES. 105D, *supra* note 96, at 2–3 (identifying several jurisdictions that have adopted approaches similar to the Model Rule on Practice Pending Admission); ABA REPORT ON RES. 105E, *supra* note 92, at 1 n.5 (noting the widespread adoption of the Model Rule on Admission by Motion).

127 *See* POLICY IMPLEMENTATION COMM., CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, STATE BY STATE ADOPTION OF SELECTED ETHICS 20/20 COMMISSION POLICIES AND GUIDELINES FOR AN INTERNATIONAL REGULATORY INFORMATION EXCHANGE (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.pdf (revealing a significant number of additional jurisdictions studying the Commission's changes).

128 *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2015) (containing a chapter that documents numerous variations to each Model Rule).

Commission's report on the ethics of alternative litigation finance has been a valuable resource for lawyers, clients, and litigation funders on how to identify and avoid the various ethics-related issues arising in this context.[129] The Commission's work on ABSs could serve as a blueprint for future efforts in this area, either within the ABA or at the state level.[130] And referrals to other ABA entities have led to useful outcomes, such as a recently issued Formal Opinion that addresses a choice of law problem relating to ABSs.[131] In sum, the claim that the Commission's work was inconsequential understates the Commission's accomplishments or fails to appreciate the breadth of new issues that lawyers now face.

B. *The "Law of Lawyering" Offers Few Bold Reform Options*

A related, and more important, criticism is that the Commission should have sought "bolder" structural changes.[132] Critics, however, typically cite only two "bold" changes the Commission should have pursued within the law of lawyering: (1) further liberalizing the rules on multijurisdictional practice and (2) easing restrictions on the rules prohibiting ABSs.[133] As explained below, the Commission actually helped to liberalize the multijurisdictional practice rules, and additional changes would have had relatively little practical effect on the delivery of legal services.[134] With regard to ABSs, any proposals in this area were unlikely to be adopted by the House of Delegates at that time, and even less intuitively, such a change may not have been as transformative as proponents claim.[135]

129 *See* ABA COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE, *supra* note 47.

130 *See* Letter from Jamie S. Gorelick & Michael Traynor, Co-Chairs, Comm'n on Ethics 20/20, to ABA Entities et al. (Dec. 2, 2011) [hereinafter Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al.], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf.

131 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 13-464 (2013).

132 *See* Moliterno, *supra* note 14.

133 *See, e.g.*, Moliterno, *supra* note 14, at 155. To be sure, some have argued that the Commission should have sought other kinds of reforms, such as the development of rules for international arbitrations, *see* Crystal & Giannoni-Crystal, *supra* note 113, at 283, or greater clarity regarding the mens rea requirements in the Model Rules, *see* Dzienkowski, *supra* note 113, at 95 (citing Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010)), but these kinds of changes would not have had any significant effect on the delivery of legal services.

134 *See infra* Part III.B.1.

135 *See infra* Part III.B.2.b.

1. Multijurisdictional Practice as Marginalia

The Commission moved the ball forward in this area in several important respects. First, the Model Rule on Admission by Motion was liberalized to allow lawyers to relocate to another jurisdiction without taking the bar examination after three years of practice (instead of five).[136] Second, a resolution was adopted encouraging states to drop restrictions on admission by motion that do not appear in the Model Rule and that unnecessarily hinder mobility (e.g., reciprocity requirements that restrict admission by motion to lawyers who are coming from jurisdictions that offer admission by motion on a reciprocal basis).[137] Third, foreign lawyers were given clearer and expanded practice authority when coming to the United States to serve clients.[138] And finally, a new Model Rule on Practice Pending Admission was created to authorize lawyers to practice immediately upon arriving in a new jurisdiction, thus helping lawyers who have to relocate with little advance notice.[139]

To be sure, it could be useful to further expand and clarify multijurisdictional practice authority in the future, such as by making it even easier for lawyers to practice temporarily in jurisdictions where they are not licensed. For example, the Model Rules might be amended to offer the clarity and simplicity of states like Colorado, where lawyers from other U.S. jurisdictions are permitted to practice on a temporary basis with very few limitations.[140] That said, the Model Rules were liberalized significantly in 2002 by the ABA Commission on Multijurisdictional Practice,[141] and the practice authority given to lawyers in states like Colorado is not much more expansive than the Model Rules already provide as a practical matter.[142] Thus, there is little

136 *See supra* Part II.D.1.

137 *See supra* Part II.D.1.

138 *See supra* Part II.D.3.

139 *See supra* Part II.D.2.

140 *See* COLO. REV. STAT. ANN. §§ 204–205 (West 2014); ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 107A 2–3 (2014), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_model_rule_5_5_foreign_in_house_resolution_report_final.authcheckdam.pdf.

141 *See generally* AM. BAR. ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (2002), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/intro_cover.pdf; ABA COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: REPORT 201B (2002), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201b.pdf.

142 *See* MODEL RULES OF PROF'L CONDUCT r. 5.5(c) (AM. BAR ASS'N 2013). Model Rule 5.5(c) provides fairly expansive authority to practice temporarily in a jurisdiction where a lawyer is not licensed. *See id.* Although it contains more ambiguities than the Colorado Rule, particularly in Model Rule 5.5(c)(4), there is no evidence that significant innovations in the delivery of legal services are adversely affected because of the rules in this area.

reason to believe that any additional temporary practice authority in the Model Rules will have any significant effect on the delivery of legal services or the structure of the profession. Put simply, additional changes in this area would not have produced any "bold" changes in the practice of law or the delivery of legal services.

2. ABSs ("Nonlawyer Ownership") as a Nonstarter

A change to the Model Rule prohibiting alternative business structures would certainly have been perceived as bold, but criticisms of the Commission in this area are overstated for two reasons. First, as explained below, such a proposal faced near certain defeat in the ABA House of Delegates, at least at that time. More importantly, and less intuitively, there are reasons to question whether ABSs will bring about the "bold" changes the public really needs.

a. Any Proposal to Allow ABSs Would Likely Have Failed

History offers a useful guide as to why the ABA House of Delegates was highly likely to reject any changes proposed by the Commission in this area. Since the Model Rules were adopted more than thirty years ago, the House of Delegates has repeatedly indicated its strong opposition to the idea of ABSs.

The Kutak Commission was responsible for drafting the Model Rules in the late 1970s and early 1980s, and its initial proposed draft of Model Rule 5.4 allowed for the creation of an ABS.[143] The ABA House of Delegates rejected the idea for a variety of reasons, but concerns about competitive threats to the profession loomed large.[144] For example, during the House debate, a member asked whether the proposal would have allowed Sears Roebuck to open a law office in each of its stores.[145] The Commission's reporter—Professor Geoffrey Hazard—answered "yes," and the proposal was promptly defeated.[146] Contemporaneous accounts suggest that the House's vote was strongly motivated by

143 *See* MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N, Proposed Final Draft May 30, 1981), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.authcheckdam.pdf.

144 *See* Laurel S. Terry, *A Primer on MDPS: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 876–77 (1999).

145 *See id.*

146 *See* JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 165–66 (2013).

concerns about competition from "nonlawyers"—the so-called "fear of Sears."[147]

More recently, the ABA Commission on Multidisciplinary Practice (MDP Commission) faced similar resistance.[148] Created in 1998, the MDP Commission conducted numerous hearings, studied the issues, and concluded that lawyers and other professionals should be permitted to share fees as part of a multidisciplinary practice—a practice that delivers both legal and non-legal services.[149] The Commission's recommendation contained numerous restrictions, including careful regulations of MDPs that were designed to ensure client protection.[150] Nevertheless, in August 1999, by a vote of 304 to 98, the ABA House of Delegates effectively rejected the idea, concluding that it should not be pursued again "until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[151]

The MDP Commission responded by trying to conduct the requested "additional study" and released a revised recommendation and report the following year.[152] The House again rejected the recommendation by a three to one margin and adopted a resolution stating that MDPs were inconsistent with the profession's "core values."[153] Signaling that it did not want to revisit the issue, the House concluded flatly that "[t]he law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities

147 *Id.* Today, the fear would undoubtedly be of Walmart. Indeed, in Canada, lawyers have stalls at an increasing number of stores. *See* Debra Cassens Weiss, *Is Wal-Mart Law Coming to the US? Retailer Adds Lawyers on Site for Toronto-Area Shoppers*, A.B.A. J. (May 8, 2014), http://www.abajournal.com/news/article/is_walmart_law_coming_to_the_us_retailer_adds_lawyers_on_site_for_canadian_. Similarly, Sam's Club has struck a deal with LegalZoom to offer Sam's Club members a special discount. *See* Debra Cassens Weiss, *LegalZoom Products Will Be Sold at a Discount Through Sam's Club*, A.B.A. J. (Oct. 27, 2014), http://www.abajournal.com/news/article/legalzoom_products_will_be_sold_at_a_discount_through_sams_club. What is notable about these developments is that the rules on ABSs are not an impediment. Lawyers in Canada are not controlled by Walmart, and LegalZoom is not a law firm. Thus, despite all of the concern about changes to Model Rule 5.4, legal services are creeping into chain stores through the back door (or the front sliding door).

148 *See generally Commission on Multidisciplinary Practice*, *Ctr. for Prof'l Responsibility*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html (last visited Jan. 31, 2015).

149 *See* Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, *in* STEPHEN J. MCGARRY, MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS 2-1 (2002).

150 *See id.* at 2-13.

151 *Id.* at 2-4.

152 *See id.* at 2-5.

153 *Id.* at 2-5 to -6.

practicing law, should not be revised."[154] The House also passed a separate resolution that "discharged" the MDP Commission, preventing the MDP Commission from bringing any additional work to the House for its consideration.[155]

The Ethics 20/20 Commission came to the topic of ABSs with this history firmly in mind. Early in its work, the Commission decided not to propose multidisciplinary practices—lawyers and other professionals working together to deliver both legal and nonlegal services within a single practice—and instead developed a discussion draft containing a much more modest potential framework.[156] This framework would have allowed someone who did not have a law license to have an ownership interest in a law firm, but only if that person assisted the law firm in providing legal services to its clients and the law firm's "sole purpose" was to provide legal services.[157] For example, accountants could become partners in a law firm and share in the legal fees the firm generated, but the accountants could not have their own separate accounting practices within the law firm. They only would be permitted to assist the firm's lawyers in the delivery of legal services, thus reducing the risk that a practice area other than law might unduly influence the professional independence of lawyers. In this way, the discussion draft avoided the "Sears" scenario by prohibiting a single entity from offering legal and nonlegal services.

The discussion draft contained numerous other restrictions as well, such as caps on the percentage of ownership that other professionals could have and making lawyers responsible for ensuring that the other professionals' behavior was consistent with the rules of professional conduct.[158] In essence, this structure would have been more restrictive than the approach the District of Columbia has taken for more than twenty years.[159] It also would have been much more modest than the proposals put forward by the MDP Commission or the Kutak Commission before it.

Despite the incremental nature of the discussion draft, it prompted a markedly negative reaction.[160] The Commission received twenty-nine

154 *Id.* at 2-6.

155 *See id.* at 2-7.

156 *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130. Even the name of the document—a discussion draft—reflected the contentious nature of the issue. Other draft proposals were released as "draft resolutions," but the controversy surrounding ABS was so intense that the Commission decided to call its initial draft a "discussion draft" to minimize the implication that it might become an actual proposal.

157 *See id.* at 2.

158 *Id.*

159 *Id.*

160 *See Alternative Law Practice Structures Comments Chart*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_

comments in response to the discussion draft, and only six of those comments supported changes in this area.[161] Opposition came from important constituencies, including state bar associations,[162] and they began mounting a significant political effort to oppose any changes in this area.[163] The voices in support of change could best be characterized as lukewarm.[164]

At the same time, the Commission could not uncover empirical support for the idea that ABSs would benefit the public.[165] There is considerable academic speculation that changes in this area will have a beneficial effect,[166] but hard data to support this conclusion did not exist, either in the District of Columbia or in countries that currently allow ABSs.[167] As a result, the Commission would have found it difficult

comments_chart.authcheckdam.pdf (last updated Aug. 28, 2012) (providing a list and links to comments on Discussion Paper).

161 *See id.*

162 *See* Letter from Susan A. Feeney, President, N.J. State Bar Ass'n, to Natalia Vera, Senior Research Paralegal, ABA Comm'n on Ethics 20/20 (Jan. 31, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/njstatebarassociation_alpsdiscussiondraft.authcheckdam.pdf; Letter from Joseph A. Kanefield, President, State Bar of Ariz., to Natalia Vera, Senior Research Paralegal, ABA Comm'n on Ethics 20/20 (Mar. 12, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/statebarofarizona_alpsdiscussiondraft.authcheckdam.pdf; Letter from John G. Locallo, President, Ill. Bar Ass'n, to Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20 (Mar. 19, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/isba_comments_alpsdiscussiondraftandalpschoiceoflawinitialdraftproposal.authcheckdam.pdf; Letter from Joseph E. Neuhaus, Chair, Comm. on Standards of Attorney Conduct, N.Y. State Bar Ass'n, to ABA Comm'n on Ethics 20/20 (June 9, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/newyorkstatebarassociationcommitteeonstandardsofattorneyconduct_issuespaperconcerningalternativebusinessstructures.authcheckdam.pdf.

163 *See* ILL. STATE BAR ASS'N & SENIOR LAWYERS DIV., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 10A (2012) [hereinafter ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A], http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_annual_meeting_10a.doc.

164 The experience brings to mind Niccolò Machiavelli's famous quote:

> [T]here is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order, this lukewarmness arising partly from fear of their adversaries . . . and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience of it.

NICCOLÒ MACHIAVELLI, THE PRINCE 22 (Luigi Ricci trans., Grant Richards 1903).

165 *See* Ellyn S. Rosen, *The Art of the Possible: Mississippi Law Review Symposium Key Note Address*, 32 MISS. C. L. REV. 237, 245 (2013).

166 *See, e.g.*, Knake, *supra* note 9, at 45 (observing that "[p]roponents of corporate law practice ownership and investment maintain that this will bring affordable representation to the general population and address the well-documented, unmet need for lawyers").

167 *See infra* Part III.B.2.b (explaining that data is now starting to emerge, but does not support the conclusion that ABS by itself is the key to significant innovation).

to satisfy the House's request from a decade earlier to "demonstrate[] that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[168] The Commission ultimately cited this paucity of evidence as one of the primary reasons it decided to drop further efforts to amend Model Rule 5.4, explaining that it had "considered the pros and cons . . . and concluded that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model."[169]

Notably, any proposal would have been met with considerable resistance even if the Commission had been able to produce evidence that a change would benefit the public without attendant harms.[170] Indeed, the Commission learned that some members of the House of Delegates were opposed to change as a matter of principle.[171]

The opposition was so intense that it continued even after the Commission announced that it would not propose any changes in this area. The opposition centered on the Commission's ongoing study of two discrete choice of law issues relating to ABSs. The first issue, which the Commission called the "inter-firm fee division" issue,[172] was whether a lawyer in a jurisdiction that prohibited ABSs could divide a fee with a *different* law firm that happened to be structured as an ABS and located in a jurisdiction where such ABSs were permissible.[173] The Commission developed a proposal to amend a Comment to Model Rule 1.5 to say that such fee divisions are permissible.[174]

The second issue, which the Commission called the "intra-firm fee sharing" issue,[175] concerned the problem of a law firm with multiple offices, at least one of which was located in a jurisdiction that prohibited ABSs, and at least one of which was located in a jurisdiction (such as the District of Columbia or England) that permitted ABSs and where the

168 Terry, *supra* note 149, at 2–4.

169 Press Release, ABA Comm'n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

170 *See* Joan C. Rogers, *Speakers Debate Nonlawyers' Role in Firms at First Ethics 20/20 Commission Hearing*, 26 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 110 (Feb. 17, 2010).

171 *See id.*

172 *See* ABA COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INITIAL DRAFT PROPOSAL FOR COMMENT: CHOICE OF LAW-ALTERNATIVE LAW PRACTICE STRUCTURES 2 (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.pdf.

173 *See id.* at 2–3.

174 *Id.*

175 *Id.* at 3.

firm had owners who were not lawyers.[176] The Commission developed a proposal that would have amended a Comment to Model Rule 5.4 to say that, as a matter of choice of law principles, such fee sharing should be permissible.[177]

There was a concerted effort within the House to stop the Commission from the mere study of these two narrow choice of law issues. A group spearheaded by the Illinois State Bar Association sought to pass a resolution—Resolution 10A—that would have reaffirmed the resolution passed in 2000 in response to the MDP Commission's work, asserting that MDPs are "inconsistent with the core values of the legal profession" and that "[t]he law governing lawyers [in this area] . . . should not be revised."[178] Proponents of Resolution 10A apparently believed that the earlier resolution meant that no rule relating to "nonlawyer ownership"—even rules relating to choice of law principles concerning existing jurisdictional variations in the area—should be revised. The Report accompanying Resolution 10A revealed this objective:

> The Commission has indicated that it intends to continue its consideration of the previously recommended amendments to Model Rule 1.5 and 5.4 which if adopted would change the current policy. Because of that intention, it is imperative that the House give its guidance and unambiguous direction as to how the Commission should proceed. A reaffirmation of the existing policy will make it clear that any forthcoming proposal should meet the test of the policy reaffirmed. The proposals that have been offered for consideration have been given great public distribution encouraging the public perception that the profession is interested in allowing nonlawyers to invest in and own law firms. *The American Bar Association should wait no longer to make it clear to the public that this is not going to happen. The evils of fee sharing with nonlawyers* in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.[179]

Resolution 10A was postponed indefinitely after a hotly contested debate,[180] but the attempt to short-circuit the Commission's

176 *Id.*

177 *Id.* at 6.

178 *See* ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163.

179 *See id.* at 4 (emphasis added).

180 Debra Cassens Weiss, *ABA House Postpones Resolution Reaffirming Opposition to Nonlawyer Ownership of Law Firms*, A.B.A. J. (Aug. 6, 2012), http://www.abajournal.com/news/article/resolution_confirms_aba_stance_against_nonlawyer_ownership_of_law_firms; Minutes

deliberations of the modest choice of law issues related to ABSs nicely illustrates the opposition to the Commission's position in this area.[181]

The Commission ultimately decided to drop both choice of law proposals—one (the intrafirm fee sharing issue) due to reasonable substantive concerns—so it is not clear how the proposals would have fared in the House. But this history strongly suggests that efforts to allow ABSs generated enormous resistance at that time.

Having said all of this, I do agree with critics who say that the Commission should have at least tried to propose some changes to the Model Rules in this area. First, there is always a chance that a modest proposal similar to the discussion draft would have succeeded. Second, even though the Commission lacked empirical data to show that such a change would have been beneficial, it could have generated useful new ideas about structuring law firms in innovative ways without any serious risks. After all, the discussion draft reflected an approach more restrictive than the one in place for more than twenty years in the District of Columbia, where there have been no reports of harm.[182] Moreover, far more permissive approaches have emerged abroad, again without any evidence of harm.[183] Third, I do not believe that such a proposal would have jeopardized the Commission's other proposals, especially if it had been offered in February 2013 after the Commission's other work already had been approved. Indeed, a much more aggressive proposal had not undermined the work of the Kutak Commission thirty years earlier. Finally, even if the proposal failed, I believe it would have prompted a useful discussion about ABSs. But again, it is highly unlikely that the Commission could have brought about any significant change at that time.

In light of these experiences, I believe that there are two ways to facilitate reform in this area. First, the ABA can encourage states to experiment with variations to their versions of Model Rule 5.4. History

of the Meeting, CPR/SOC Joint Comm. on Ethics & Professionalism (Aug. 4, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/cpr_soc_minutes_08_04_12_chicago.authcheckdam.pdf.

181 Notably, the defeat of Resolution 10A did not signal support for the Commission's proposed approach to the choice of law problems. A number of people who opposed Resolution 10A went on the record to say that they were skeptical of any proposal from the Commission to address the choice of law issues and that they opposed Resolution 10A only on procedural grounds. For more background on Resolution 10A, see Gillers, *supra* note 31, at 396–403.

182 *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6.

183 Legal Servs. Consumer Panel, Consumer Impact Report 15 (2014), http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf (explaining, in the U.K., "[t]here have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data").

reveals that the ABA does not typically initiate controversial changes to the Model Rules of Professional Conduct. For example, the liberalization of the advertising rules, expanded confidentiality disclosure options when clients commit crimes and frauds, and screening for laterally hired lawyers to prevent the imputation of conflicts of interest were incorporated into the Model Rules only after numerous states had made similar changes.[184] Of course, there is some value in having a nationally uniform body of ethics rules,[185] but there are strong arguments against a rigid adherence to uniformity.[186] After all, states regularly adopt variations to the Model Rules.[187] There is no reason why states should refrain from developing variations to the rules on ABSs. The District of Columbia has experimented in this area without any adverse consequences,[188] and the State of Washington recently took a step in this direction as well.[189] Greater state-based experimentation could produce additional information about possible benefits. Taking advantage of the states as the so-called "laboratories of democracy"[190] would produce invaluable information about how useful ABSs actually are and could lead to changes in the Model Rules in the future.

The second approach is to focus reform efforts on the law of legal services. Once the law in this area is more fully developed, I believe the legal profession's resistance to ABSs will eventually wane. Lawyers will have less to fear from people who do not have a law license after those people are appropriately regulated and shown to help the public. Moreover, as professionals without a law degree play a more prominent role in the delivery of those services outside of law firms, lawyers will recognize that they have much to lose if the traditional and strict prohibitions on partnering with people who lack a law license continues. Put another way, a loosening of restrictions on ABSs—a change in the law of lawyering—will not by itself drive dramatic changes to the

184 *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 (Arthur H. Garwin ed., 2013).

185 *See, e.g.*, Robert A. Creamer, *Uniform Legal Ethics Rules? Yes—National Norms for a National Economy*, 22 PROF. LAW., no. 2 (A.B.A. Ctr. for Prof. Resp., Chi., Ill.), 2014, at 29, 30–31.

186 *See, e.g.*, Stephen Gillers, *Uniform Legal Ethics Rules? No—An Elusive Dream Not Worth the Chase*, 22 PROF. LAW., no. 2 (A.B.A. Ctr. for Prof. Resp., Chi., Ill.), 2014, at 33, 35–36.

187 *See* STEPHEN GILLERS ET AL., *supra* note 128 (containing a chapter that documents the numerous variations to each Model Rule).

188 *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6.

189 *See* WASH. RULES OF PROF'L CONDUCT r. 5.9 (2015) http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=garpc5.09&pdf=1.

190 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

delivery of legal services. Rather, the reverse may be true. Liberalizing and appropriately regulating how people without a law license deliver legal and law-related services (the development of the law of legal services) will ultimately spur changes to the law of lawyering and the delivery of legal services in the United States.

In sum, there is little question that the Commission could not have achieved bold changes in this area. Although I personally believe the Commission should have proposed at least some modest reform and that there may be ways to facilitate such changes in the future, the Commission faced resistance that was quite consistent with past efforts and revealed that the ABA's policymaking body was not prepared at that time to liberalize the rules on ABSs.

b. Limited Data on the Transformative Potential of ABSs

A less intuitive and more important reason to be skeptical of the "boldness" criticism is that, at the time of the Commission's deliberations, there was far less evidence supporting the idea that ABSs would produce helpful transformative change than many proponents of ABSs have implied. For example, in a 2014 article in the *American Lawyer*, Professor Gillian Hadfield was quoted as saying that, "[w]hen the 20/20 Commission concluded there was no compelling need for reform [regarding ABSs], it didn't research the public interest . . . . The only research it did was to survey lawyers and ask them if they wanted rule changes. That's not defensible."[191]

Hadfield's quote reflects a misunderstanding of the Commission's process and the actual evidence it sought. The Commission engaged in a significant effort to try to uncover empirical data on this subject, an effort that was ably led by Professor Paul Paton (now the Dean of the University of Alberta Faculty of Law). Paton was the Commission reporter who had primary responsibility for this area, and importantly, he was a proponent of change.[192] He and the Commission's lead counsel, Ellyn Rosen (now the Deputy Director of the ABA Center for Professional Responsibility), searched in vain for empirical or experiential evidence from the United Kingdom, Australia, and the District of Columbia regarding public benefits from ABSs. They found

191 *See* Susan Beck, *Emerging Technology Shapes Future of Law*, AM. LAW. (Aug. 4, 2014), http://www.neotalogic.com/assets/resources/American-Lawyer-The-Future-of-Law-August-2014-Neota-Logic.pdf; *see also* Hadfield, *supra* note 9, at 44 (making a similar observation).

192 *See* Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2194 (2010) (arguing that the Commission's discussion of MDP was "essential" to refute the contention that the profession is inherently protectionist).

little to none.[193] This is not to suggest that ABSs will not ultimately be helpful, but it is inaccurate to suggest that the Commission did not try to uncover the evidence about how ABSs might affect the public interest.

Significantly, preliminary data from abroad has been released since the Commission finished its work, and it suggests that the effects of change in this area may not be the panacea that proponents of ABSs make them out to be. For example, early evidence from the United Kingdom suggests that ABSs have not yet had a significant effect on how legal services are delivered there. The United Kingdom authorized ABSs in 2007 by statute and has allowed firms to register as an ABS since 2012.[194] As of January 2015, approximately 350 firms had taken advantage of the opportunity,[195] and there is limited evidence that these entities have appreciably changed the legal services market in the United Kingdom.[196] A 2013 survey reveals that seventy-seven percent of entities registering as an ABS had not changed how they marketed themselves after becoming an ABS;[197] ninety-one percent had not changed their target client base;[198] and eighty-three percent had not changed their practice areas.[199] When asked how they differ from firms that are not an ABS, forty-one percent said that they did not differ at all.[200] Only twenty-two percent said that being an ABS enabled them to be more competitively priced.[201]

Drawing on this data, Robert Cross, a member of the U.K. Legal Services Board, concluded in June 2014 that "[v]ery little has changed as far as the types of services they provide or whom they provide them to. The answer whether the ABS revolution has driven change would appear to be no."[202] He believes that recent innovations in the United

193 *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6–8.

194 *See* sources cited *supra* notes 11, 38–39 and accompanying text.

195 *See Register of Licensed Bodies (ABS)*, SOLICITORS REGULATION AUTH., http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page (last visited Feb. 1, 2015); *see also* LEGAL SERVS. CONSUMER PANEL, *supra* note 183, at 14 (noting that "there has been frustration about the take up of ABS, particularly the small numbers of multi-disciplinary practices").

196 *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 183, at 14.

197 *See* LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS: AN EMPIRICAL ANALYSIS 55 (2013), https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-ANNEX.pdf.

198 *See id.* at 56.

199 *Id.*

200 *See id.* at 58.

201 *Id.*

202 Robert Cross, Research Manager, Legal Servs. Bd., Presentation at UCL International Access to Justice Conference: Balancing Regulatory Risk, at 20 (June 20, 2014), https://

Kingdom are not the result of ABSs, but rather a product of broader and largely unrelated economic trends, such as advances in technology and globalization.[203] A recent Consumer Impact Report reaches a similar conclusion, asserting that there have been "[m]any examples of innovation following the liberalisation measures, although no single transformative change [has occurred] and MDPs are yet to take off as has been hoped."[204] Of course, these results are very preliminary and may change considerably over time, especially if ABS licenses are granted more liberally,[205] but there is currently little evidence supporting the conclusion that ABSs are having a transformative effect on the delivery of legal services in the United Kingdom.[206] And to the extent ABSs are having a significant effect, those effects appear to be disproportionately benefiting business clients, not ordinary consumers.[207]

The Law Society of Upper Canada recently released a report that raises a similar cautionary note.[208] It cites the testimony of scholars who conducted an economic analysis of ABSs and concluded that "the introduction of the ABS model should facilitate innovation, but would not cause dramatic change to the way in which legal services are provided in Ontario."[209] Indeed, the authors of that study explain that "[e]xperience in the UK and Australia suggests that liberalization does invite change, although the pace of change appears to be much more evolutionary than revolutionary, at least to date."[210]

research.legalservicesboard.org.uk/wp-content/media/UCL-AtoJ-Conference-presentation-20-June-2014.pdf.

203 *See id.* at 21.

204 LEGAL SERVS. CONSUMER PANEL, *supra* note 183, at 5. A more recent report, however, suggests that there is now some evidence that ABS licenses are facilitating innovation. *See* STEPHEN ROPER ET AL., SOLICITORS REGULATION AUTHORITY, INNOVATION IN LEGAL SERVICES 4 (2015), http://www.sra.org.uk/sra/how-we-work/reports/innovation-report.page#findings.

205 *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 183, at 10 (explaining that "[t]here have been concerns about the [U.K. Solicitors Regulation Authority's] licensing process holding back new entrants, particularly multi-disciplinary practices").

206 *See* Noel Semple, *Access to Justice: Is Legal Services Regulation Blocking the Path*, 20 INT'L J. LEGAL PROF. 267 (2013); *see also* LEGAL SERVS. BD., *supra* note 197, at 82.

207 *See* LEGAL SERVS. BD., *supra* note 197, at 6.

208 ALT. BUS. STRUCTURES WORKING GRP., LAW SOC'Y OF UPPER CAN., ALTERNATIVE BUSINESS STRUCTURES AND THE LEGAL PROFESSION IN ONTARIO: A DISCUSSION PAPER 14 (2014), http://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf.

209 *Id.*

210 Edward M. Iacobucci & Michael J. Trebilcock, *An Economic Analysis of Alternative Business Structures for the Practice of Law*, LAW SOC'Y UPPER CAN. 59–60 (Sept. 20, 2013), http://www.lsuc.on.ca/uploadedFiles/ABS-report-Iacobucci-Trebilcock-september-2014.pdf; *see also* Malcolm Mercer, *A Different Take on ABS—Proponents and Opponents Both Miss the Point*, SLAW (Oct. 31, 2014), http://www.slaw.ca/2014/10/31/a-different-take-on-abs-proponents-and-opponents-both-miss-the-point.

A research fellow at Harvard Law School recently reached the same conclusion. He conducted "the most extensive empirical investigation to date on the impact of non-lawyer ownership by focusing on its effects on civil legal services for poor and moderate-income populations."[211] He found that, "perhaps counter-intuitively, there is little evidence from the country and case studies to indicate that [ABSs] substantially improved access to civil legal services for poor to moderate-income populations."[212] The author posits four possible reasons for this conclusion:

> First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where non-lawyer ownership is allowed. . . .
>
> Second, many of the legal sectors, like personal injury and social security disability representation, that have seen the greatest investment by non-lawyers will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies. . . .
>
> Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy to standardize or scale. . . .
>
> Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have ability to do so, either because they do not believe they need a legal service or there are cultural or psychological barriers to accessing the service.[213]

The idea that ABSs do not drive transformative change is consistent with developments in the United States, where there has been considerable innovation throughout the legal industry despite the absence of ABSs. These innovations have emerged from startups that offer automated document assembly, expert systems, e-discovery services, legal process outsourcing, online law practice management tools, data analytics, among other services.[214] In other words, significant innovations are simply taking place outside of law firms altogether and,

211 Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism*, GEO. J. OF LEGAL ETHICS (forthcoming) (manuscript at 4) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878&download=yes).

212 *Id.* at 40.

213 *Id.* at 40–41 (footnotes omitted).

214 *See generally* SUSSKIND, *supra* note 60 (offering an overview of a range of new legal industry providers).

as Mr. Cross suggested, are being driven by extant trends, such as rapid advances in technology and globalization, not ABSs.[215]

This background suggests that rather than focusing so fixedly on ABSs as the key to unlocking transformative change, it may be more useful to develop regulations that facilitate, but appropriately regulate, the involvement of more people who do not have a law license in the delivery of legal services. Of course, these two reform options are not mutually exclusive, but if regulatory reform efforts focus on ABSs alone, I believe we will overlook reforms that could produce even more useful changes.

In sum, the Commission can hardly be faulted for failing to produce "bold" reforms, because the law of lawyering is ultimately a poor vehicle for transforming the delivery of legal services. Although ABSs are a possible exception, I believe that bold regulatory reform requires us to think outside the law of lawyering box. We need a law of legal services that can liberate but appropriately regulate new players.

IV. TOWARDS THE LAW OF LEGAL SERVICES

To this point, I have argued that the law of lawyering does not offer significant reform options and that a more promising way to promote innovation is through the development of a parallel regulatory framework that permits, but appropriately regulates, greater involvement in the delivery of legal services by people who do not have a law license.[216]

This new framework is important for two reasons. First, people without a law degree are playing an increasingly valuable and pervasive role in the delivery of legal and law-related services outside of law firms and ABSs.[217] Examples include automated document assembly services, expert systems, electronic discovery, and legal process outsourcing. Labeling these services as the unauthorized practice of law does not make good policy sense and is in many cases inaccurate, but permitting all of them to operate without any regulatory oversight is also potentially problematic, particularly with regard to consumer facing services. It is thus becoming more important to consider the possibility of regulation where it is needed while ensuring that these new services

215 *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 183, at 14 ("[I]t is difficult to separate the impact of the [U.K.'s] competition reforms from other drivers of change such as economic conditions, changes to legal aid availability and litigation funding reforms.").

216 I am not the first person to make the argument for pairing liberalization and regulation in the legal services industry. *See, e.g.*, Gillers, *supra* note 31, at 415 (making a similar suggestion); SUSSKIND, *supra* note 60; Rhode & Ricca, *supra* note 20, at 2607–08.

217 *See* CBA FUTURES REPORT, *supra* note 40, at 19.

can flourish and meet marketplace demands. In other words, it is more necessary today than it was just a couple of decades ago to develop a coherent body of law addressing the role that people without a law license play in the legal industry.

Second, states have begun to experiment with the law governing other legal service providers in ways that extend well beyond mere liberalizations of unauthorized practice provisions. For example, Washington State's LLLTs are not lawyers, but they can deliver some kinds of legal services and advice after obtaining specialized training and licensing.[218] Additional states are considering similar innovations.[219]

These developments suggest that we need to think more holistically about the regulation of legal and law-related services and not focus so exclusively on the law of lawyering. That is, we need to develop a system that falls somewhere between the United Kingdom approach, where people who lack a law license are afforded considerable freedom to operate without any regulatory oversight, and the United States approach, where such individuals are often forbidden to engage in many kinds of law-related work or are challenged if they do.

A. *A Flawed Approach: Trying to Define the "Practice of Law"*

When developing the law in this area, it is important to avoid the Siren call of defining the "practice of law." Such efforts typically result in a division of the world into two groups—those who "practice law" and those who do not. Those who practice law are required to be lawyers, and those who do not are largely free of any direct regulation or oversight.

There are at least two problems with this binary approach. First, we do not always need to choose between highly regulated lawyers and completely unregulated "others." It is possible to have a third group who can deliver legal and law-related services and advice in new ways while being subject to appropriate training and licensing. These kinds of innovations are not possible, or at least made more difficult, if the definition of the "practice of law" is the sole focus of attention.

A second and related problem is the intractability of defining the "practice of law." Numerous scholars have observed that existing definitions are vague and not much more helpful than the standard for

218 *See infra* Part IV.D.2.

219 *See* Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, AM. BAR ASS'N J. (Jan. 1, 2015, 5:50 AM), http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the.

defining obscenity: we know it when we see it.[220] Courts have acknowledged the "impossibility" of defining law practice,[221] and in 2003, an ABA Task Force on the Model Definition of the Practice of Law concluded that it could do no better, effectively giving up on the effort and suggesting that states should come up with their own definitions.[222] Moreover, some efforts to define the practice of law could implicate antitrust and related concerns.[223]

B. *A Better Approach: Defining Who Should Be Authorized*

Rather than trying to define the practice of law, we should ask a fundamentally different question: should someone without a law degree be "authorized" to provide a particular service, even if it might be the "practice of law"? By focusing attention on whether the provider is competent to deliver a service, we can more effectively achieve what really matters: protecting the public.

Consider, for example, the work of accountants. An accountant arguably "practices law" under many plausible definitions of "law practice." Accountants analyze various features of tax law and make customized recommendations to clients based on their particular circumstances.[224] Accountants also produce a wide array of documents for clients that have important legal implications (e.g., tax returns). The reason that accountants are permitted to do their work without a law degree has nothing to do with the definition of "law practice." Rather, accountants are permitted to provide their services without a law degree because the public benefits from it.[225] Put another way, accountants are appropriately "authorized" through an extensive licensing regime that

220 *See* sources cited *supra* note 30.

221 *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *4 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999); Bd. of Comm'rs of the Utah State Bar v. Petersen, 937 P.2d 1263, 1268 (Utah 1997).

222 *See* TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS'N, REPORT (2003), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.pdf; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW ET AL., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION (2003), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.pdf.

223 *See* Letter from R. Hewitt Pate et al., Acting Assistant Attorney Gen., Dept. of Justice, to Task Force on the Model Definition of the Practice of Law, Am. Bar. Ass'n (Dec. 20, 2002), http://www.usdoj.gov/atr/public/comments/200604.htm.

224 CBA Futures Report, *supra* note 40, at 19 (noting that accountants, financial planners, and human resources professionals all "offer guidance and advice to their clients about rights and entitlements").

225 *See, e.g.*, Rhode, *Professionalism in Perspective*, *supra* note 30, at 714.

ultimately benefits (and protects) the public.[226] Financial planners and other kinds of licensed professionals are similar in this regard.[227]

The idea of rejecting a formal definition of the "practice of law" and focusing instead on whether a provider should be authorized to deliver a service (whether or not it is the "practice of law") is not new. The New Jersey Supreme Court has made the point this way:

> [Authorities] consistently reflect the conclusion that the determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking *whether the public interest is disserved* by permitting such conduct. The resolution of the question is determined by *practical, not theoretical,* considerations; the public interest is weighed by analyzing the competing policies and interests that may be involved in the case . . . .[228]

According to this view, we should ask whether the public's interests will be served by permitting someone without a law degree to provide a particular service (whether or not it is the practice of law) and, if so, determining what kinds of oversight or licensing might be necessary.[229] The challenge, of course, is figuring out what the public's interests actually are and (as the New Jersey Supreme Court suggests) identifying and "analyzing the competing policies and interests" at stake.

226 *See id.*

227 *See id.*

228 *In re* Op. 33 of the Comm'n on the Unauthorized Practice of Law, 733 A.2d 478, 484 (N.J. 1999) (emphases added) (quoting *In re* Op. No. 26 of the Comm'n on the Unauthorized Practice of Law, 654 A.2d 1344, 1352 (N.J. 1995)).

229 Other professions adopt a similar approach. For instance, in the medical profession, people other than doctors provide a growing range of medical-related services. *See* 29 C.F.R. § 825.125 (2013); *Types of Health Care Providers*, MEDLINE PLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001933.htm (last updated Aug. 3, 2014).

This pyramid reflects one way to think about the question.[230] The bottom of the pyramid captures very routine law-related needs (e.g., the creation of a living will) that can be addressed by completing blank forms. Regulatory barriers should not prohibit people from making these forms available to the public through websites or otherwise. But as consumers' legal issues become more sophisticated, consumers typically need providers higher up on the pyramid. A central question for the law of legal service is this: at what point must a provider be subject to some kind of regulation?

C. *Identifying Principles for the Law of Legal Services*

The following is a non-exclusive list of possible policies and interests that may be useful to consider when answering this important question. This list is certainly not the first attempt to define "regulatory objectives." Bar associations and scholars have tried to do the same, and the list below is informed by those efforts.[231]

230 I am grateful to Paula Littlewood for conceptualizing the issue this way and creating a slightly different version of this pyramid. Paula Littlewood & Stephen Crossland, *Alternative Legal Service Providers: Filling the Justice Gap, in* THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION 25, 28 (Paul A. Haskins ed., 2015).

231 *See, e.g.*, *Legal Profession Uniform Law Application Bill 2014* (NSW) (Austl.), http://www.parliament.nsw.gov.au/prod/parlment/NSWBills.nsf/1d436d3c74a9e047ca256e690001d75b/07eb41c6b04dca11ca257ca600183bba/$FILE/b2013-122-d11-House.pdf; Legal Services Act 2007, ch. 29 (U.K.), http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_

To be clear, these considerations do not always point in one direction. In some cases, they suggest that additional oversight or regulation might be necessary where it is currently absent. In other cases, they suggest that we should permit people who do not have a law license (or technology-enabled tools developed by such people) to deliver more legal and law-related services than is currently allowed, but with appropriate regulatory oversight. By identifying a list of relevant considerations, we can more effectively determine who should be permitted to provide legal and law-related services and the extent to which those who are so permitted should be subject to regulation.

1. Competence

The public has an obvious interest in ensuring that legal and law-related services are competently delivered. The goal is to figure out which services require a formal legal education (i.e., a J.D.), which services could be performed competently with training short of a law degree, and which ones do not need any specialized training at all.

The question here is not whether people without a law degree can perform a service as well as a lawyer, though there is evidence that they can.[232] The focus should be on whether a particular service can be performed competently by someone who does not have a traditional law license. After all, even when services must be performed by lawyers, we have never concluded that only the most skilled lawyers must handle a matter. The touchstone should be competence.[233]

20070029_en.pdf; Gillers, *supra* note 31, at 371–74; Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 PROF. LAW., no. 1 (A.B.A. Ctr. for Prof. Resp., Chi., Ill.), 2013, at 28; Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012); *Consultation on Proposed Regulatory Objectives—Your Input is Requested*, N.S. BARRISTERS' SOC'Y (June 24, 2014), http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-07-07_ConsultationPartI&II.pdf; *Draft Regulatory Objectives—2014-05-16*, N.S. BARRISTERS' SOC'Y (May 16, 2014), http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-05-16_DraftRegObj_CouncilReview.pdf; Ethics & Prof'l Responsibility Comm., Can. Bar Ass'n, *Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide*, CAN. B. ASS'N, http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf (last visited Feb. 2, 2015); *Regulation of Legal Services in England and Wales: Law Society Response*, THE LAW SOC'Y (Sept. 2, 2013), http://lawsociety.org.uk/representation/policy-discussion/regulation-of-legal-services.

232 RHODE, *supra* note 4, at 15 ("[R]esearch concerning nonlawyer specialists in other countries and in American administrative tribunals suggests that these individuals are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest."); Levin, *supra* note 8, at 2614; Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 58–59 (2003); Rhode, *Professionalism in Perspective*, *supra* note 30, at 709; Rhode, *The Delivery of Legal Services*, *supra* note 30, at 214 n.49.

233 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013).

Another reason to avoid comparing the skills of lawyers and "others" is that it is often a false choice. A significant percentage of the public does not have the ability to pay for a lawyer,[234] so even if lawyers might be able to perform some tasks more effectively than someone without a law degree, the choice for many people is between a person who lacks a law license and no help at all. The ultimate question, therefore, should be whether people who do not have licenses are capable of competently providing assistance in a particular area, not whether lawyers are necessarily better.

Undoubtedly, there will be disagreement about who is competent to provide a particular service. Experimentation outside the United States (such as in the United Kingdom, where very few services are reserved for lawyers) might provide useful insights, but data is often going to be lacking. Moreover, even if there is general agreement that people are *capable* of providing a specific service competently without a law license, there may be disagreement about the likelihood that such people actually provide that service competently and whether (and how) the public needs to be protected against the risk of incompetence. There also may be deep disagreement about how certain we need to be that the legal or law-related service can be performed competently by people who do not have a traditional law license. And even when our confidence level is high, we might still disagree about the extent to which regulation or oversight is necessary to provide the sufficient level of comfort.

In the absence of hard data (e.g., from abroad or from U.S. jurisdictions that already experiment in this area, such as Washington State), it is generally fair to say that the more standardized and repeatable the service, the more likely it is that a person without a law degree should be able to perform it competently, perhaps with some training or regulatory oversight. For example, technology-assisted tools, such as automated document assembly tools and expert systems, can reduce the likelihood of errors by making some services (e.g., the incorporation of a business) highly standardized. Other services may be highly standardized because of how routinely they can be performed (e.g., some areas of domestic relations law),[235] even in the absence of technology. The bottom line is that regulators need to examine the available data (if any) and consider the likelihood that a person without a law license can competently deliver a particular service, the level of training needed to deliver the service, whether any regulation or

234 *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

235 *See, e.g.*, WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28 app. (West 2013).

oversight is necessary to provide the necessary assurance of competence, and the extent to which the process required for delivering the service is highly standardized and easily repeatable.

2. Free Markets and Consumer Choice (and Some Limits)

When the competence factor cannot be clearly resolved, regulators should generally defer to the market by allowing people to make their own choices. The public has a strong interest in freely choosing service providers and taking into account any number of relevant considerations, such as cost, the provider's training and experience, and consumer reviews.

On the other hand, markets can fail, and there are at least two ways they could fail in this context. First, the public is not always going to be able to assess the risk of choosing someone who does not have a law license, because many kinds of legal and law-related services are "credence goods"—services whose quality is difficult to measure or assess.[236] For example, the ordinary consumer can have a difficult time assessing whether some kinds of transactional documents are well drafted and address a reasonable range of contingencies or existing law. If the public has difficulty assessing how well a service is performed, there is a greater need for regulation (though not necessarily a need to use lawyers; people who are not lawyers could be subject to rigorous licensing and regulation). In contrast, if the quality of the service can be readily determined or if the service is delivered to sophisticated clients (e.g., large companies), these types of concerns are less likely to arise.

Another possible problem is that a completely free market could have externalities in certain situations. For instance, if someone who is not a lawyer is permitted to represent people in court without any regulatory oversight or licensing, that person could act in ways that adversely affect third parties or the administration of justice (e.g., asserting frivolous claims).

The point here is that freedom of choice is an important consideration, but regulators also need to consider the extent to which the public can reasonably assess the quality of the services, the extent to which regulations could address any problems with such assessments, the existence of reasonably likely and significant externalities, and whether any regulatory remedies exist to address these possible externalities (e.g., a licensing system that increases the likelihood of quality and provides an administrative remedy for improper conduct).

236 *See* Hadfield, *supra* note 9, at 48 (making a similar observation).

3. Informed Consumer Choice

Regulators have an interest in ensuring that the public has sufficient and accurate information to make an informed choice about whether to use a particular provider. The needed transparency could take a number of forms. For example, regulators could require people who are not lawyers to prominently disclose their status (i.e., that they are not lawyers and are not a law firm), obtain affirmations from consumers that they understand that the service is not being delivered by a law firm and that a lawyer or law firm might be preferable in certain situations, disclose the extent to which a lawyer has been involved in the creation or delivery of the service (and the identity and licensing jurisdiction of any such lawyers), and disclose the implications for protections that might otherwise attach (e.g., the attorney-client privilege, the work product doctrine, the duty of confidentiality). Regulators also could require all advertising materials to satisfy the same standard lawyers follow under Model Rule 7.1, which mandates that advertising be truthful and not misleading.[237]

The particular requirements will necessarily vary depending on the service and type of provider, but if consumers are given a greater range of options for obtaining legal services, it is reasonable to insist that consumers also have access to adequate information to make an informed choice.

4. Accessibility and Availability of Remedies for Incompetence

No matter who performs a legal or law-related service, there is a possibility it will be performed incompetently. In such cases, consumers deserve access to appropriate remedies. For licensed professionals, remedies are readily available through discipline or disbarment. When the provider is not licensed, however, other options may be necessary.

One possibility is litigation. To make this remedy realistic, regulators may need to require some service providers to carry insurance, prohibit them from disclaiming liability (e.g., in a "click through" agreement), or restrict the use of contractual provisions making litigation excessively difficult (e.g., provisions that require arbitration in some distant location or the application of the substantive law of a jurisdiction having nothing to do with the work done). These requirements can help to mitigate some of the concerns about giving the public the freedom to choose non-traditional providers.

237 MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 2013).

One problem is that litigation is not always an available remedy. For example, if someone uses an automated document assembly service to create a will and it turns out to have been negligently created (e.g., it did not reflect important features of state law), the negligence might not be discovered until many years later, perhaps long after the company responsible for the service ceases to exist. Insurance requirements may help to address these kinds of concerns, but the point is that litigation is not a panacea.

The insufficiency of litigation in some contexts does not mean that the public should have to use lawyers. After all, if a lawyer drafts a will incompetently, similar problems can arise. The lawyer or firm responsible for the will may be long gone by the time any negligence is discovered, or the lawyer may not have carried sufficient (or any) malpractice insurance.[238] The point is that after-the-fact negligence lawsuits do not always offer an adequate remedy for incompetence. In these situations, regulators might reasonably conclude that some kind of licensing should be required so that discipline (including the loss of the license) is an available remedy and an additional incentive to ensure competence.

5. Addressing Other Forms of Misconduct

Even if providers of legal services are competent, they may engage in conduct that harms their clients, third parties, or the justice system. For example, if people who are not lawyers are permitted to represent clients in some types of civil cases, we would want to ensure that they follow the same kinds of rules as lawyers, such as rules prohibiting the filing of frivolous claims,[239] making false statements to the court,[240] and

238 Only one state—Oregon—requires lawyers to carry malpractice insurance. *See* STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE 8 (Oct. 16, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.pdf. Additionally, a significant percentage of lawyers carry no malpractice coverage. *See* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 549–50 (1994) ("A significant number of lawyers, especially those struggling to make a living in handling small matters for individual clients, have neither malpractice coverage nor substantial personal assets that could be called upon to satisfy a malpractice judgment."); James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 90–91 (2006) (citing a study suggesting that between 25% and 55% of the bar has no malpractice insurance but contending that the statistics may be overstated); Ron Smith, *Task Force Suggests Malpractice Insurance Plan*, 68 J. KAN. B. ASS'N, Apr. 1999, at 3 (stating that about 35% of Kansas lawyers have no malpractice insurance).

239 *See* FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2013).

240 *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2013).

communicating with represented people.[241] Lawyers are subject to discipline and court sanctions for violating these rules, and regulators should ensure that, in some contexts, mechanisms exist to sanction any other advocates who engage in similar misconduct. This oversight might require the use of a licensing system that facilitates discipline or the loss of a license in appropriate cases. In other contexts, it might be sufficient to allow for monetary penalties. The point here is that regulators should consider whether mechanisms are needed to prevent or address misconduct that is not remediable through litigation.

6. Faith in the Justice System and the Rule of Law

Democratic societies require a widely shared commitment to the rule of law and faith in the system of justice.[242] In some cases, these goals can be more effectively achieved by requiring the use of—and assuring a right to—a lawyer. For example, even if a properly trained person who is not a lawyer could offer the same service as a lawyer in the criminal defense context, the Constitution wisely grants a right to counsel.[243] Without it, a fundamental feature of our system of justice could be legitimately called into question.[244]

It is not possible to address here the much larger debate about the civil *Gideon* movement, including which legal services should be provided as a matter of right,[245] though the meager government support for legal services is a significant problem that needs to be addressed.[246] The point here is that regulators should consider the importance of a

241 *See id.* at r. 4.2.

242 *See generally* THE RULE OF LAW: NOMOS XXXVI (Ian Shapiro ed., 1994) (exploring the relationship between democracy and the rule of law); *see also* STEPHEN MAYSON, LEGAL SERVS. INST., LEGAL SERVICES REGULATION AND 'THE PUBLIC INTEREST' 11 (2011), http://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf (making a similar observation in the context of articulating regulatory objectives).

243 *See* U.S. CONST. amend. VI.

244 Laura I. Appleman, *The Community Right to Counsel*, 17 BERKELEY J. CRIM. L. 1, 2 (2012) (tracing the history of the right to counsel and concluding that "counsel privileges were at least partially intended to stabilize the social order and reinforce community interests").

245 *See* Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013). *Compare* Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503–06 (1998) (summarizing the arguments in favor of expanding the right to counsel), *with* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2121 (2012) (offering empirical data that raises the question of whether a right to counsel actually makes a difference in terms of outcomes and exploring the implications for the civil *Gideon* movement).

246 *See* Gillian K. Hadfield, *Innovating To Improve Access: Changing the Way Courts Regulate Legal Markets*, J. AM. ACAD. ARTS & SCI., Summer 2014, at 83.

particular service when deciding whether to grant a right to it, and if so, whether a lawyer should be the one to provide it. Moreover, assuming a service is not provided as of right, regulators need to consider the extent to which allowing people who are not lawyers to deliver the service will improve access to that service and enhance faith in social institutions by, for example, making the service more affordable and accessible.

7. Professional Independence and Other Client-Related Protections

Some commentators raise the concern that people who are not lawyers cannot offer clients the same protections as lawyers. For example, people who are not lawyers are not bound by the rules of professional conduct, and communications are not necessarily covered by the attorney-client privilege.[247] It is also argued that, in the absence of a law license, people will not exercise professional independence and will cut corners in order to increase profits at the expense of protecting clients.[248]

When evaluating these concerns, regulators should consider three points. First, some of these concerns apply equally to lawyers. For instance, lawyers already have an incentive to prioritize profits over client needs. Lawyers who charge flat fees can make more money if they cut corners.[249] Lawyers who charge contingent fees have an incentive to settle a case before spending a substantial amount of money on trial preparation, even if the client might recover more money by going to trial.[250] And lawyers who bill by the hour regularly spend more time than is necessary to solve a client's problems.[251] In other words, lawyers are also susceptible to the pressures of increased profits at a client's expense.

Second, regulators could address many of the disparities between lawyers and other professionals with regard to client protections. For example, it is possible to impose confidentiality obligations on other

247 *See, e.g.*, ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163, at 1; Lawrence J. Fox, *MDP Redux—Slay the Dragon Again . . . Now!*, A.B.A. 1 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/fox_alpsdiscussiondraft.authcheckdam.pdf.

248 *See* ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163, at 1.

249 *See, e.g.*, Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 118–119 (2003).

250 *See* GEOFFREY C. HAZARD, JR. ET AL., *supra* note 29, at 799–800 (summarizing the ways in which a lawyer's and client's interests are not necessarily aligned when using contingent fees).

251 *See id.* at 789–91 (summarizing the literature on billable hour fraud and fee padding); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008) (offering an overview of the problem and citing numerous authorities documenting the problem).

providers in contexts where they handle particularly sensitive information.[252] Similarly, the attorney-client privilege could be extended to include other licensed legal professionals, as has been done in Washington State.[253] Or rules could preserve professional independence by prohibiting these other professionals from taking instructions from anyone other than clients.[254]

Finally, to the extent that lawyers are able to offer clients more protections in certain contexts does not mean that clients should be *forced* to hire lawyers to solve legal and law-related problems. If someone who is not a lawyer is competent and conflict-free, and if clients are made reasonably aware of the risks of selecting that person, the public should be given a choice of providers.

D. *Illustrating the Law of Legal Services*

To see how the regulatory objectives described above could be used to develop a more robust law of legal services, it is useful to consider two distinct groups of providers: those who are currently offering legal and law-related services and those who could offer those services if they were so authorized.

1. Approaches to Existing Market Actors: Automated Document Assembly as an Example

The number of people who are not lawyers and are already involved in the delivery of legal or law-related services is growing rapidly. Their services include automated legal document assembly for consumers,[255] law firms, and corporate counsel;[256] expert systems that address legal issues through a series of branching questions and answers;[257] electronic discovery; legal process outsourcing;[258] legal

252 *See, e.g.*, WASH. REV. CODE ANN. PT. 1, r. 31.1 (West 2013).

253 *See* WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28. Ct. Admission to Practice Rule 28(k)(3) (2013) (extending attorney-client privilege to LLLTs).

254 *See* WASH. REV. CODE ANN. PT. 1, RULES OF PROFESSIONAL CONDUCT r. 5.4 (West 2013).

255 *See, e.g.*, *Our Products & Services*, LEGALZOOM, http://www.legalzoom.com/products-and-services.html (last visited Feb. 2, 2015).

256 *See, e.g.*, *Document Services*, HOTDOCS, http://www.hotdocs.com/products/document-services (last visited Feb. 2, 2015).

257 *See, e.g.*, *About*, NEOTA LOGIC, http://www.neotalogic.com/about (last visited Feb. 2, 2015).

258 *See, e.g.*, *Legal Process Outsources: A Billion-Dollar Industry, Complete With Trade Shows, Fierce Competition & Risks*, LEXISNEXIS (last visited Aug. 6, 2015), http://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2014/03/17/legal-process-

process insourcing and design;[259] legal project management and process improvement; knowledge management;[260] online dispute resolution;[261] data analytics;[262] and many others.[263] This section explores automated legal document assembly in detail, but the overarching question for all of these new providers is the same: whether they should be subject to regulation or oversight and, if so, what such regulations should look like.

Some background principles should guide the discussion. First, regulations are more likely to be necessary when a service is offered directly to the public. When a service is purchased or used by lawyers, such as when a lawyer uses an electronic discovery service, indirect regulatory oversight already exists. Lawyers have an ethical responsibility to supervise or monitor the "nonlawyer assistance" they use when representing clients.[264]

Second, even when a service is sold directly to the public, we should avoid the binary thinking that has characterized regulatory responses to date. For example, some states have accused automated legal document assembly companies (typically, LegalZoom) of the

outsourcing-a-billion-dollar-industry-complete-with-trade-shows-fierce-competition-amp-risks.aspx. These services include a range of legal processes, including some that are closely related to the delivery of legal services, such as legal research and document preparation. *Id.*

259 This category includes companies that design legal service delivery for corporate legal departments and supply the legal talent to execute the vision under the supervision of in-house counsel. *See* Bill Henderson, *Is Axiom the Bellwether for Disruption in the Legal Industry?*, THE LEGAL WHITEBOARD (Nov. 10, 2013), http://lawprofessors.typepad.com/legalwhiteboard/2013/11/is-axiom-the-bellwether-for-disruption-in-the-legal-industry-look-what-is-happening-in-houston.html; *see also* Jennifer Smith, *Companies Curb Use of Outside Law Firms: Staff Attorneys, Which Don't Bill by the Hour, Are Cheaper, Often More Efficient*, WALL ST. J. (Sept. 14, 2014, 7:00 PM), http://online.wsj.com/articles/companies-curb-use-of-outside-law-firms-1410735625.

260 Knowledge management enables lawyers to find information efficiently within a lawyer's own firm, such as by locating a pre-existing document that addresses a legal issue or identifying a lawyer who is already expert in the subject. *See* Andrew M. Winston, *Law Firm Knowledge Management: A Selected Annotated Bibliography*, 106 LAW LIBR. J., no. 2, 2014, at 175, 176.

261 *See, e.g.*, *About*, MODRIA, http://modria.com (last visited Feb. 2, 2015) (Modria is a company that, prior to being spun off from eBay, helped to develop its online consumer dispute resolution system).

262 *See, e.g.*, *What We Do*, LEX MACHINA, https://lexmachina.com/what-we-do (last visited Feb. 2, 2015) (Lex Machina analyzes large data sets to predict outcomes in certain kinds of cases).

263 *See, e.g.*, John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3002–15 (2014); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3057–58 (2014) (describing the increasingly important role new providers are playing in the delivery of legal services despite the existence of UPL statutes).

264 *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2013).

unauthorized practice of law and sought to shut them down,[265] while other regulators have taken a laissez faire approach and done nothing at all.

A third way is possible and desirable. We can recognize that consumer-facing services are often useful to the public and should be authorized to operate, yet acknowledge that there may be a need for some modest regulation.[266] This approach promotes innovation by giving existing providers and potential newcomers greater assurance that they will not be sued by regulators, while ensuring that consumers are adequately protected.

The automated document assembly industry provides a useful test case for this "third way."[267] The consumer-facing portion of this industry is frequently accused of unauthorized practice, so it has the most to gain if states expressly authorize these kinds of services. At the same time, these services deserve close scrutiny because they sell directly to consumers and do not have lawyers as intermediaries.[268] In the section below, I apply the principles identified in Part IV.C, and then propose a possible regulatory model.

a. Applying the Regulatory Principles

An important initial question for the consumer facing automated document assembly industry is whether it can competently deliver services to consumers. The answer undoubtedly turns on the nature of the service and the sophistication of the provider. For example,

265 *See, e.g.*, Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, A.B.A. J. (May 19, 2014), http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina; Terry Carter, *LegalZoom Business Model Ok'd by South Carolina Supreme Court*, A.B.A. J. (Apr. 25, 2014), http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court; *see also In re* LegalZoom.com, Inc. (Wash. Super. Ct. Sept. 15, 2010) (Assurance of Discontinuance), http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Practice%20of%20Law%20Board/Miscellaneous/LegalZoom%20AOD.ashx (describing a settlement in Washington State).

266 *See* Gillers, *supra* note 31, at 415 (making a similar suggestion).

267 Despite the recent growth of automated legal document assembly, this market segment is hardly new. Pioneers have been developing these kinds of tools since the 1980s. *See, e.g.*, Marc Lauritsen, *Second International Conference on Substantive Technology in the Law School*, 10 No. 6 LAW. PC 9 (1992). What has changed is that these tools are more powerful and pervasive.

268 The idea of pursuing a "third way" regulatory approach in this context is not new. For example, Deborah Rhode and Lucy Buford Ricca have argued that, when thinking about innovative companies, "the key focus should not be blocking these innovations from the market, but rather using regulation to ensure that the public's interests are met." Rhode & Ricca, *supra* note 20, at 2607–08; *see also* Gillers, supra note 31, at 415 (making a similar suggestion); Rhode & Ricca, *supra* note 20, at 2594 (quoting a bar official making the same point).

Consumer Reports asked experts to assess wills generated by three leading online providers and found that:

> Using any of the three services is generally better than drafting the documents yourself without legal training or not having them at all. But unless your needs are simple—say, you want to leave your entire estate to your spouse—none of the will-writing products is likely to entirely meet your needs. And in some cases, the other documents aren't specific enough or contain language that could lead to "an unintended result," in [the] words [of one law professor, who was an expert reviewer].[269]

This report suggests a need for some caution, but at the same, it does not imply that we need an outright ban either. After all, more than one million consumers have used LegalZoom in the last ten years alone,[270] and there is no reliable evidence of incompetence. In fact, the automated nature of the process likely reduces the chance of some kinds of errors.[271] In sum, there is no reason to think that this industry should be banned, but regulators should address concerns about competence and adequate consumer disclosures.

The next consideration is consumer choice. Consumers are overwhelmingly interested in these kinds of services, as evidenced by the sheer number of people who have been willing to pay for them. LegalZoom, which is just one of many players in the industry, filed an S-1 with the Securities and Exchange Commission in 2012, when the company was considering an initial public offering. In 2011, the year prior to the submission, the company had reported $156 million in

269 *Legal DIY Websites Are No Match for a Pro: They Provide Services for a Fraction of What You'd Pay a Lawyer*, CONSUMERREPORTS.ORG (Sept. 2012), http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm. The United Kingdom recently undertook a significant review of will preparers who are not lawyers and concluded that they should not be subject to new regulation. *See* MINISTRY OF JUSTICE, DECISION NOTICE RE: EXTENSION OF THE RESERVED LEGAL ACTIVITIES (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198838/Will_writing_decision_notice.pdf. *But see* LEGAL SERVS. BD., SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES: FINAL REPORTS 14 (2013), http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm (recommending that will preparation services be considered an activity reserved for lawyers); LEGAL SERVS. CONSUMER PANEL, REGULATING WILL-WRITING § 4.47 (2011), http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf (advising that such providers be subject to new regulation, but acknowledging that automated form providers were not carefully studied).

270 *See LegalZoom Celebrates 10 Years*, LEGALZOOM (Feb. 2011), https://www.legalzoom.com/articles/legalzoom-celebrates-10-years.

271 *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 269, § 4.45 (making a similar observation).

revenue.[272] As mentioned above, during its first ten years in business from 2001 to 2011, LegalZoom had served more than one million customers.[273] Because LegalZoom is just one provider in the industry, these statistics suggest that consumers are increasingly aware of automated document assembly products and want to use them.

Regarding the issue of choice, it is important to remember that consumers are not always choosing automated document providers over lawyers. Because lawyers typically charge higher prices, the choice for many consumers is between an automated document assembly service and no service at all. So, even if we assume for the sake of argument that lawyers always deliver higher quality documents than automated document assembly services, many consumers might reasonably decide to select an automated document assembly service, either because they cannot afford a lawyer or because they are willing to sacrifice quality for a lower price. As long as the services are delivered competently, consumers should have the freedom to make this choice.

For similar reasons, new providers are arguably advancing our shared commitment to the rule of law and faith in the system of justice. If more people can afford legal and law-related services because of the existence of consumer facing automated document assembly services, these services ultimately help to preserve the public's faith that our legal system is available to everyone.

Despite these benefits, there are at least two reasons to consider some regulatory oversight. First, as suggested in Part IV.C, many of the services offered are "credence goods,"[274] so the public is not in the best position to assess the quality of the products offered.[275] Second, some products (e.g., simple wills) have important legal effects, so mistakes and negligence can have significant consequences for consumers and third parties.

Together, these considerations suggest that some consumer protections are worth considering. For example, it might be reasonable to ensure that consumers have legal recourse in the event a service is incompetently performed (e.g., via lawsuits). One possibility is to prohibit providers from asking consumers to waive their rights to a lawsuit or resolve disputes in fora having nothing to do with the service

272 *See* Tomio Geron, *LegalZoom Files for IPO of Up to $120 Million*, FORBES (May 11, 2012, 4:15 PM), http://www.forbes.com/sites/tomiogeron/2012/05/11/legalzoom-files-for-ipo.

273 *See LegalZoom Celebrates 10 Years*, *supra* note 270.

274 *See supra* Part IV.C.2.

275 LEGAL SERVS. CONSUMER PANEL, *supra* note 269, § 1.5 (making a similar point in the context of wills).

performed. For similar reasons, it would be reasonable to require providers to carry adequate insurance.[276]

Consumers are also entitled to accurate information about the limitations of the services offered. For instance, companies offering automated document assembly services should have to explain the nature of their products (i.e., that they are not offered by a law firm), whether lawyers were involved in preparing the substantive language for the forms or had a role in determining the questions to be asked, the licensing jurisdictions of any such lawyers, and the implications of using the service for protections that might otherwise attach (e.g., the attorney-client privilege, the work product doctrine, the duty of confidentiality).[277] It also might be reasonable to restrict advertising using the same basic standard lawyers must follow under Model Rule 7.1—i.e., that advertising should be truthful and not misleading.[278]

b. A Potential Regulatory Approach

The draft provision below, which could be promulgated either as a court rule or statute,[279] offers one way to resolve the competing policy considerations at stake.[280] Section 1 authorizes the delivery of automated legal document assembly tools, and Section 2 imposes some modest requirements on people who offer those services. Although the

276 Granted, lawyers in nearly every state (except Oregon) are not subject to the same insurance mandate, *see* sources cited *supra* note 238, but the failure of regulatory authorities to mandate insurance for lawyers is not a justification for failing to impose the obligation in other contexts where it is appropriate.

277 As explained earlier, regulators might be able to address some of the disparity between the protections afforded to the public when they use lawyers as opposed to other service providers. *See supra* Part IV.C.3. For example, regulators could impose confidentiality obligations on other providers in contexts where they handle particularly sensitive information.

278 MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 2013). Another consideration mentioned in Part IV.C is whether providers might cause harm to third parties. To date, there is no evidence of such harms arising from this industry, and there is no reason to expect that automated document assembly services are likely to create these kinds of harms in the future. If this assumption is erroneous, regulators could consider a system of licensure, but in the meantime, such additional oversight seems unnecessary.

279 This Article does not address the question of who should be responsible for producing these reforms. Possible options include state legislatures, state supreme courts, and even Congress. The ABA could produce model rules or provisions, or the American Law Institute could reframe the Restatement of the Law Governing Lawyers to focus on the Law of Legal Services. The Conference of Chief Justices could take on a similar project. The primary goal of this Article is to provide the framework for reimagining the law in this area, not to identify who should be responsible for creating it.

280 Stephen Gillers has recommended a similar approach. *See* Gillers, *supra* note 31, at 417; *see also* Richard Granat, *North Carolina Lawyers Oppose Access to the Legal System*, E-LAWYERING BLOG (July 7, 2014), http://www.elawyeringredux.com/2014/07/articles/unauthorized-practice-of-law/north-carolina-oppose-access-to-the-legal-system.

requirements in Section 2 are arguably more onerous than necessary, they may offer some comfort to those who are skeptical of the benefits of authorizing these providers, and thus, might provide a politically viable way to implement the "third way" approach.[281]

Definition.

A "Legal Forms Provider" is any person or entity offering law-related forms or documents to the public, including forms or documents generated automatically through guided questions and answers.

Section 1. Legal Forms Providers are authorized to operate in this jurisdiction subject to the limitations in Section 2.

Section 2. If a Legal Forms Provider is not otherwise authorized to practice law in this jurisdiction, is offering forms or documents traditionally offered primarily by lawyers, and is automatically generating the forms or documents through guided questions and answers,[282] the Legal Forms Provider must:

a. Disclose prominently that the Legal Forms Provider is not a lawyer or law firm;
b. Require consumers to affirm their understanding that the service is not being offered by a lawyer or law firm before consumers complete any forms or documents;
c. Disclose prominently whether any lawyers participated in the creation of the forms and, if so, identify the names and licensing jurisdictions of any such lawyers;[283]
d. Disclose prominently that the forms are not a substitute for legal advice provided by a lawyer or law firm and that some protections normally afforded to a client's communications with a lawyer or law firm, such as the attorney-client privilege or work product doctrine, may not apply;
e. Maintain insurance coverage against errors and omissions in the amount of at least $500,000 per claim and an aggregate coverage of the greater of either $5

281 At least one jurisdiction has tried this kind of approach. *See* H. 663, 2013–2014 Gen. Assembly, First Sess. (N.C. 2013), http://www.ncga.state.nc.us/sessions/2013/bills/house/html/h663v4.html.

282 The purpose of this phrase is to exclude automated document assembly services that are traditionally provided by other kinds of professionals, like accountants (e.g., TurboTax) and financial services professionals. This provision is also intended to exclude from regulation any services offering do-it-yourself blank forms without any substantive guidance.

283 *See* Gillers, *supra* note 31, at 417 (making a similar recommendation).

million or 5% of annual gross revenue from the sale of forms or documents in the prior calendar year;

f. Allow consumers the right to file a lawsuit against the Legal Forms Provider and not disclaim or limit the Legal Forms Provider's liability or dictate where any lawsuits against the Legal Forms Provider are filed;[284]
g. Disclose prominently whether any personally identifiable information provided by the consumer will be made available to a third party and, if so, obtain the consumer's affirmation that the consumer understands this fact;
h. Employ advertising and marketing methods that are truthful and not misleading.

Section 3. Any person or entity that violates Section 2 is not authorized to provide the services identified in Section 1 and is engaged in the unauthorized practice of law under [jurisdiction's unauthorized practice of law statute].

A few of these provisions require some explanation. First, the phrase "traditionally offered primarily by lawyers" is needed to ensure that the regulation does not apply to services that are already adequately regulated. Consider, for example, automated tax document assembly services, like TurboTax. Arguably, that product fits within Section 1, because it helps consumers to create automated law-related documents (i.e., tax forms) through guided questions and answers. There is no public policy reason to subject these kinds of services to the requirements set out in Section 2, because accounting is already subject to a separate regulatory regime. The goal here is to bring within the scope of regulation any law-related document assembly that has historically been reserved primarily for lawyers and where no other regulation currently exists. It is not intended to regulate services that have long been offered by others.

The word "public" in the definition of "Legal Forms Provider" is intended to exclude any services that are sold exclusively to lawyers or corporate counsel. As explained earlier, lawyers have an ethical duty to select competent providers,[285] so any risks arising from these services are significantly mitigated when lawyers serve as intermediaries. For this reason, Section 2 only applies to services offered directly to the public.

284 *See id.* (making a similar recommendation).
285 *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2013).

In Section 2, the phrase "automatically generating the forms or documents through guided questions and answers" is intended to make clear that the restrictions do not apply to Legal Forms Providers who offer blank legal forms for consumers to complete. The former services raise more consumer protection concerns because they involve some assessment of the questions that should be asked and imply an understanding of relevant laws or regulations.

The insurance provision is designed to ensure that if a form is improperly prepared, there is sufficient insurance coverage to compensate people who might have been adversely affected. Because providers are offering the same form to many people simultaneously, providers should have insurance with sufficiently high single occurrence and aggregate limits.

In the end, this approach is designed to encourage potential innovators who might otherwise fear accusations of unauthorized practice. Indeed, some providers appear to favor regulation in exchange for clearer authority to operate. For example, lawyers for LegalZoom recently submitted comments to the ABA Commission on the Future of Legal Services and argued that "[w]e need to focus on 'right' regulation and not 'over' or 'no' regulation."[286] In short, this approach seeks to accomplish a rare feat for new industry regulations: protecting consumers while spurring innovation and growth.

2. Approaches to New Market Actors: Limited License Legal Technicians as an Example

The law of legal services can also create new delivery options. For example, Washington State's LLLTs have less formal training than lawyers but receive targeted instruction designed to enable them to provide a narrow range of legal and law-related services.[287] In much the same way as healthcare providers other than doctors deliver some services at walk-in pharmacy clinics and in numerous other contexts, LLLTs are legal service providers other than lawyers who have the authority to deliver some legal services and advice outside of a traditional law firm.[288] The question for this group of potential providers is whether they should be given the authority to deliver legal

286 *See, e.g.*, Letter from Chas Rampenthal, Gen. Counsel, LegalZoom.com, Inc. & James Peters, Vice President, New Market Initiatives, LegalZoom.com, Inc., to Comm'n on the Future of Legal Servs., Am. Bar Ass'n, http://www.americanbar.org/content/dam/aba/images/office_president/chas_rampenthal_and_james_peters.pdf.

287 *See* Crossland & Littlewood, *supra* note 6, at 616–18.

288 *See id.* at 613–14 (drawing an analogy to the medical profession).

and law-related services at all and, if so, what the appropriate regulation and oversight should look like.

a. Background on the LLLT Program

In 2012, after a dozen years of study and vigorous debate,[289] the Washington Supreme Court adopted a rule authorizing LLLTs as a new category of licensed legal professionals.[290] The rule establishes a LLLT Board, which is responsible for administering the LLLT program and identifying practice areas suitable for LLLTs.[291] In March 2013, the Washington Supreme Court unanimously approved the Board's recommendation to make domestic relations the first LLLT practice area.[292] In particular, LLLTs will be authorized to participate in child support modification actions, dissolution and legal separation actions, domestic violence actions, committed intimate relationship actions, parenting and support actions, parenting plan modifications, paternity actions, and relocation actions.[293]

To obtain the necessary license, LLLTs are required to obtain at least an associate degree from a community college, receive specific practice area education at a law school, pass three exams (a core education exam, a practice area exam, and an ethics exam), and acquire 3,000 hours of substantive law-related experience (e.g., in a lawyer's office, either before or after passing the examination).[294] The inaugural group of LLLTs completed this program in the spring of 2015.[295]

The LLLT program has helped to generate discussion about the possibility of licensing new categories of legal professionals. A recent report by the ABA Task Force on the Future of Legal Education

289 *See id.* at 612.

290 *See id.* at 611. Washington State actually has three categories of licensed legal professionals: lawyers, LLLTs, and Limited Practice Officers (LPOs). LPOs are "authorized to select, prepare, and complete documents in a form previously approved by the Limited Practice Board for use in closing a loan, extension of credit, sale, or other transfer of real or personal property." *Limited Practice Officers*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Limited-Practice-Officers (last visited Feb. 2, 2015).

291 *See* Crossland & Littlewood, *supra* note 6, at 616.

292 *See id.*

293 *See* WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28 app., Regulation 2 (West 2013).

294 *See* Crossland & Littlewood, *supra* note 6, at 616–18.

295 *See* Chambliss, *supra* note 19, at 580; *see also* Anna L. Endter, *Washington Limited License Legal Technician (LLLT) Research Guide*, GALLAGHER L. LIBR., U. WASH. (Jan. 22, 2015), https://lib.law.washington.edu/content/guides/llltguide; *Limited License Legal Technicians*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians (last visited Feb. 2, 2015).

highlighted the development and recommended greater experimentation in this area:

> *Broader Delivery of Legal and Related Services:* The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services.[296]

Similarly, the new ABA Commission on the Future of Legal Services has created a Regulatory Opportunities Working Group to study developments in Washington State,[297] which is chaired by Washington State Bar Association Executive Director Paula Littlewood and Chief Justice Barbara Madsen of the Washington Supreme Court. Chief Justice Madsen signed the order authorizing LLLTs in Washington State, and Paula Littlewood was instrumental in the program's adoption and implementation.

Washington State is not the only jurisdiction looking at LLLTs. The California State Bar Board Committee on Regulation, Admission and Discipline Oversight created the California State Bar's Limited License Working Group, which on June 17, 2013 recommended that California offer limited-practice licenses.[298] The working group recommended that people without a law degree be authorized to provide "discrete, technical, limited scope of law activities in non-complicated legal matters in 1) creditor/debtor law; 2) family law; 3) landlord/tenant law; 4) immigration law."[299] The recommendation for limited-practice licenses is still in its early stages and will need to work

296 TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 3 (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf.

297 *See* Letter from ABA Comm'n on the Future of Legal Servs., to ABA Entities et al., at 2 (Nov. 3, 2014), http://www.americanbar.org/content/dam/aba/images/office_president/issues_paper.pdf.

298 *See* Memorandum from Staff, Limited License Working Grp., Legal Aid Ass'n of Cal., to Members, Limited License Working Grp., Legal Aid Ass'n of Cal., at 2 (June 17, 2013), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000010723.pdf.

299 *Id.* at 3.

its way through the California State Bar and eventually the California Supreme Court.

b. Application of the Regulatory Principles

The regulatory principles identified in Part IV.C suggest that the LLLT program is well worth considering. With regard to competence, properly trained professionals who do not have a law degree could effectively perform a fair number of legal and law-related services, especially given the level of required training before LLLTs are authorized to deliver services. A useful analogy here is to the medical field, where people who are not doctors deliver a significant percentage of health-related services.[300] Nurses, pharmacists, and medical technicians regularly perform tasks that arguably involve the practice of medicine. Indeed, many states have expanded access to medical services by permitting medical professionals other than doctors to provide routine medical care, such as at "Minute Clinics" in pharmacies.[301] The LLLT model is premised on a similar idea: useful services can be delivered competently in a limited scope by professionals with less extensive training than those who have traditional licenses.

The LLLT program ensures competence by limiting the work that LLLTs can perform.[302] Before a new area of practice is permitted, the LLLT Board must conclude that LLLTs can deliver the services competently, and the Washington Supreme Court must agree.[303] Moreover, the LLLTs must take subject matter-specific coursework before obtaining a LLLTs license, and they must pass a special exam for each practice area in which they want to be licensed.[304] These restrictions and requirements provide a high level of confidence that LLLTs will be competent in their designated areas of specialty.

In many ways, the LLLT training and licensing process is arguably a greater guarantee of competence than the training most law students receive. After all, lawyers are permitted to practice in any area once they obtain a license, even if they have never had any formal training in the

300 *See* Crossland & Littlewood, *supra* note 6, at 613–14 (drawing the analogy to the medical profession).

301 Bruce Japsen, *CVS Doubles Up Walgreen in Retail Clinics as Obamacare Patients Seek Care*, FORBES (June 5, 2014, 1:57 PM), http://www.forbes.com/sites/brucejapsen/2014/06/05/cvs-dominates-walgreen-in-retail-clinics-as-obamacare-patients-seek-care.

302 *In re* Adoption of New APR 28—Ltd. Practice Rule for Ltd. License Legal Technicians, No. 25700-A-1005, at 2, 10-11 (Wash. June 14, 2012) (Order) [hereinafter *Adoption of New APR 28*].

303 *See* WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28(C)(2)(a) (West 2012).

304 *See id.* at r. 28(C)(2)(c); WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28 app., Reg. 8 (West 2013).

subject. In contrast, LLLTs are permitted to deliver services only in the very specific areas where they have had training. Put another way, there is no more reason to be concerned about the competence of LLLTs who practice in a narrow area than the competence of lawyers who only receive very general training and are permitted to practice in nearly any area of their choosing.

Another way to think about the competence issue is that the LLLT program helps to reduce the number of unauthorized providers. As the Washington Supreme Court observed,

> [t]here are far too many unlicensed, unregulated and unscrupulous "practitioners" preying on those who need legal help but cannot afford an attorney. Establishing a rule for the application, regulation, oversight and discipline of non-attorney practitioners establishes a regulatory framework that reduces the risk that members of the public will fall victim to those who are currently filling the gap in affordable legal services.[305]

The facilitation of consumer choice also favors the LLLT program. Just as consumers have benefited from having the option of visiting pharmacies to obtain routine medical care, so too consumers will benefit from having the option of choosing a LLLT to provide some kind of legal services. If a LLLT can perform a legal service competently and at a lower cost than a lawyer, consumers should have the right to select a LLLT.

At the same time, the transparency principle is important in this context to ensure that consumers who use LLLTs are fully aware that LLLTs are not lawyers, that a LLLT's services are necessarily limited, and that a LLLT has training that differs in kind relative to lawyers. For this reason, Washington State currently prohibits LLLTs from advertising in such a way that "could cause a client to believe that the [LLLT] possesses professional legal skills beyond those authorized by the license held by the [LLLT]."[306]

The regulatory principle of ensuring adequate consumer remedies is also easy to satisfy. Because LLLTs are licensed and subject to their own rules of professional conduct, they will be subject to discipline or license revocation if they engage in inappropriate conduct.[307] LLLTs also can be required to carry insurance; indeed, an insurance market has emerged in Washington State to serve the emerging LLLT category.[308]

305 *See Adoption of New APR 28*, *supra* note 302, at 10.
306 WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28(H)(4) (West 2013).
307 *See id.* r. 28(C)(2)(h)(3)(A).
308 *See* WASH. REV. CODE ANN. PT. 1, ADMISSION & PRACTICE r. 28 app., Reg.12.

Finally, the LLLT option also fosters faith in the justice system and the rule of law by expanding the options that people have to access needed legal and law-related services.

In the end, the LLLT program serves the public interest and advances the regulatory objectives that should form the core of the law of legal services. The Washington Supreme Court made the point nicely in its order creating the LLLT program:

> [T]he basis of any regulatory scheme, including our exercise of the exclusive authority to determine who can practice law in this state and under what circumstances, must start and end with the public interest; and any regulatory scheme must be designed to ensure that those who provide legal and law related services have the education, knowledge, skills and abilities to do so. Protecting the monopoly status of attorneys in any practice area is not a legitimate objective.[309]

As the Washington Supreme Court itself conceded, the LLLT program is a relatively modest reform and will not "solve the access to justice crisis for moderate income individuals with legal needs."[310] It nevertheless provides a useful starting place for thinking about how the law of legal services could bring about changes that are qualitatively different from, and potentially more dramatic than, reforms relying solely on the law of lawyering.

Conclusion

The law of lawyering is undoubtedly important, but it offers few options for transforming the delivery of legal services. ABS is one possible exception, but even that reform envisions a world where lawyers remain the exclusive deliverers of legal advice. The law of legal services reflects a different approach to regulatory innovation, one that seeks to authorize, but appropriately regulate, the delivery of legal and law-related assistance by more people who lack a traditional law license. At a time when legal services are increasingly unaffordable, the law of legal services may reflect a promising way to unlock innovation and reimagine the regulation of the twenty-first century legal marketplace.

309 *Adoption of new APR 28*, *supra* note 302, at 7.
310 *Id.* at 11.