

Considering the Future of Rule 5.4

45th ABA National Conference on Professional Responsibility
May 31, 2019, Vancouver, Canada

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Jurisdictions that Currently Are Considering Rule 5.4 Issues:

4. Supreme Court of **Arizona**, *In the Matter of: Establishment of the Task Force on Delivery of Legal Service and Appointment of Members*, Administrative Order No. 2018 – 111 (Nov 21, 2019), <https://perma.cc/WRS3-7698>
5. **Utah** Supreme Court, *A Move Toward Equal Access to Justice* (March 2019), <https://perma.cc/5JBC-TLUH> (announcement of a new task force)
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 - a. William D. Henderson, *Legal Market Landscape Report* (July 2018) (Commissioned by the State Bar of California), <https://perma.cc/X2KM-UTL5>
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Other Initiatives Related to Rule 5.4 Issues:

8. APRL, *The Future of Lawyering* Committee Initiative (see cites in Item #3)
9. IAALS, *Making History: Unlocking Legal Regulation* (includes a description of the April 16-17, 2019 Workshop, its Agenda, and Attendee bios)
10. New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”), *Public Comment Draft of Proposed Changes to Various RPCs, including Rule 5.4* (would add a new Rule 5.4(a)(4) to address a division of fees between New York lawyers)

and out-of-state co-counsel or referring lawyers who work in law firms with nonlawyer owners or supervisors)[to be added once circulated]

11. Laurel Terry, *Back to the Future (Again) Regarding the Regulation of Legal Services*, JOTWELL (April 18, 2019) (reviewing William D. Henderson, Legal Market Landscape Report Commissioned by the State Bar of California (July 2018) & citing other developments), <https://legalpro.jotwell.com/back-to-the-future-again-regarding-the-regulation-of-legal-services/>

Rationale for Rule 5.4

12. Laurel S. Terry, *Examples of Regulatory Objectives for the Legal Profession* (Updated March 2, 2019), https://works.bepress.com/laurel_terry/89/ (lists regulatory objectives adopted by the Supreme Courts of Colorado, Illinois, and Washington, the ABA's Model Regulatory Objectives and those from non-U.S. jurisdiction);

See also Art Lachman Memo on Professional Independence and the history of Rule 5.4, which is Item #2, *supra*

The Nova Scotia Experience with Rule 5.4-Type Issues

13. Nova Scotia Barristers' Society, Regulation Infographic, <https://perma.cc/MP45-KC3H>
14. Nova Scotia Barristers' Society Regulatory Objectives with Commentary, <https://perma.cc/BV8S-NLW8> and #14B: Comparison with UK Solicitors Regulation Authority Regulatory Objectives

Additional Jurisdictions' Experience with Rule 5.4-Type Issues

15. NOBC, *Alternative Business Structures Frequently Asked Questions* (2016), <https://perma.cc/6V29-JVMM>
16. Stephen Mayson, *Independent Review of Legal Services Regulation, The Focus of Legal Services Regulation, Working Paper LSR-3* (March 2019), <https://perma.cc/999Y-KX37>;

See also Darrel Pink, *Canadian Law Societies should pay attention to Stephen Mayson's work* [on Independent Review of UK Experience], <https://perma.cc/2Y2D-LFNX> and the *Resources Relevant to the CPR Rule 5.4 Panel* document, which is Item #3 (includes links to developments in British Columbia, Ontario, and the Prairie Provinces in Canada; additional links to UK developments; and links to developments in Ireland and Singapore)

Miscellaneous

17. New York City Bar Formal Opinion 2014-1: *Ethical Considerations for Lawyers Contemplating Business Arrangements with Non-Legal Organizations*, <https://perma.cc/RJ7F-WQPY>
18. Laurel S. Terry, *International Developments and their Impact on U.S. Lawyer Regulation*, Miller Becker Lecture Handout (April 2019), https://works.bepress.com/laurel_terry/96/ (This document is an 8-page updated summary of the *who-what-when-when-where-why-and-how* regulation issues documented in this Terry/Mark/Gordon *Trends in Global Lawyer Regulation* article; this 2013 Terry [follow-up article](#); and [these slides](#))

Rule 5.4: Professional Independence of a Lawyer

(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) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(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 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.

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).

Lawyer Professional Independence & Rule 5.4: An Overview
Compiled by Art Lachman
ABA National Conference on Professional Responsibility, Vancouver, BC
May 2019

INTRODUCTION

Proposition for Discussion & Debate

Rule 5.4 is not itself a rule of legal ethics, and it does not belong in the Model Rules. While the term “independence” has multiple meanings in the context of lawyer ethics and regulation, the stated purpose of Rule 5.4 is primarily to protect a lawyer’s exercise of professional judgment in providing legal services to clients from interference based on personal interests and improper influences/motivations. It effectively operates as one of the few conflict of interest rules for which informed client consent is not permitted.

It is, at best, questionable to characterize “professional independence” in this context as a core value of the legal profession, but in any event the obligation of client loyalty and avoidance of conflicts of interest derived from agency and fiduciary duty law substantially overlaps with and embodies the concept of lawyer professional independence, and the conflict of interest rules (Rules 1.7 – 1.11) provide sufficient protection for clients and the public in this context. The question of whether any notion of independence should be included as a regulatory objective for regulating legal services by lawyers and nonlawyers is a separate issue that is worthy of discussion.

But because the strict prohibitions in Rule 5.4 are not based on any meaningful, separate ethical or fiduciary principle or principle of professional responsibility not included elsewhere in the ethics rules, but rather reflect a policy choice about with whom lawyers should be permitted to practice and how fees can be shared, as well as the structure of entities permitted to provide legal services, Rule 5.4 should be deleted from the Model Rules of Professional Conduct.

Model Rule 5.4: Professional Independence of a Lawyer

(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) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(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 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.

Other Relevant Rules

- [Rule 1.7](#) (personal interest conflicts)
- [Rule 1.8\(f\)](#) (accepting compensation from non-client)
- [Rule 2.1](#) (requiring lawyers to "exercise independent professional judgment and render candid advise" in representing a client)
- [Rule 1.2\(a\)](#) (client has authority to determine objectives of representation)
- [Rule 7.2\(b\)](#) (prohibition on giving value for recommending the lawyer's services)

The Stated Purpose of [Model Rule 5.4](#): Protecting Professional Independence

- The Rule's title refers only to the lawyer's "professional independence"
- Also, Rule 5.4(c): prohibiting a lawyer from permitting one 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"
- Also, Rule 5.4(d)(3): prohibiting law practice in the form of a professional corporation or association authorized to practice law for a profit if "a nonlawyer has the right to direct or control the professional judgment of a lawyer"
- Rule 5.4, cmt. [1]: the limitations on sharing fees with a nonlawyer "are to protect the lawyer's professional independence of judgment."
- Rule 5.4, cmt. [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."
- Terry, at 874: "Interestingly, the Comment to ABA Model Rule 5.4 provides only one rationale for this rule: it observes that the traditional limitations on sharing fees 'are to protect the

lawyer's independence of judgment.' Commentators cite as additional rationales concerns that fee sharing would undermine lawyer confidentiality and create conflicts of interest."

- Perlman, at 98: "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. 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."

Other Notions of "Independence," Including as a Basis for Self-Regulation

- Model Rule Preamble, ¶¶11, 12:

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

- Wilkins, at 854-74:

"[P]articipants in the various regulatory debates often seek to link their arguments about professional independence to some more general conception of the public good. These arguments fall into two categories. The first posits that an independent legal profession is necessary to maintain the separation of powers among the three branches of government. The second claims that an independent legal profession plays an essential role in preserving the rights of citizens in a democracy. . . . Lawyer independence is frequently linked to the preservation of democracy. The argument takes several forms. In the most familiar claim, opponents of state regulation assert that only an independent legal profession can adequately protect the rights of individuals against state power. . . . At other times, the fact that citizens in a democracy have a right to use the public resources of the state to achieve their private purposes is said to require that lawyers be independent from any source of authority, public or private, that might limit their clients' access to the public goods encoded in law. . . . According to this argument, an independent legal profession acts as a mediating force between the interests of private clients and the public purposes of the legal order. . . .

"According to the traditional view, to exercise [the] form of discretionary [professional] judgment [in which a person has fully integrated the values of the legal system – including all of the conflicts and ambiguities – and is honestly struggling to discover and implement the

approach that best effectuates its underlying purposes], lawyers must be ‘independent’ from all potentially corrupting influences that might cloud or distort their considered assessment of what legality requires. This was generally thought to require ‘self-regulation.’ Once we examine the actual operation of this and other enforcement systems, however, it is clear that additional controls will often promote, rather than undermine, a lawyer’s willingness to take appropriate actions under conditions of uncertainty.

- Robert Gordon on “independence” as “a bundle of several related, and yet very different, notions of how lawyers may be understood to operate independently” (from [May 21, 1999 Letter to MDP Commission](#)):

“First, independence means the bar’s freedom to regulate its own practices without outside interference. . . . Lawyers also traditionally seek to benefit from a second type of independence, the discretion to determine the conditions of their work. Ideally, independent lawyers freely decide which clients and causes they will represent, how to divide their time between paying clients and other commitments, what strategies and tactics to follow in pursuit of the clients’ ends, and so forth. The client dictates (as moderated by the lawyer’s advice) the results to be sought and has the final say on major decisions, but there are large areas of often crucial choices reserved for the professional’s discretion. . . . The most often stressed form of independence, and the most relevant to the issues the [MDP] Commission is considering, is that which enables the lawyer to make an objective and disinterested assessment of the law and facts of the client’s situation, in order to render the best possible legal advice. Disinterested judgment can be compromised when it is unduly distracted or distorted by extraneous concerns, in particular, the universal and unavoidable concern with making a profitable living in competition with other providers. . . . The lawyer also needs to protect his or her ability to represent the law to the client as well as representing the client to the law: that is, to make clear if and when necessary that there may be legal constraints on a client’s course of action that the lawyer cannot, in good faith and consistently with his or her obligations to the legal system, assist the client to transgress, in particular, aiding the client to plan or continue a course of conduct that the lawyer has reason to believe is fraudulent or otherwise unlawful, that stretches the boundaries of applicable law beyond plausible good faith interpretation, or that if pursued would effectively nullify the purposes of a legal regime set up to prevent such conduct. Finally, there is what may be called *political* independence -- the ability of the lawyer, in his or her role as a citizen with special responsibilities to preserve the well-being of the framework of law and regulation, to take an independent position on the merits of existing laws and proposed reforms. . . .”

OVERVIEW OF THE HISTORY OF RULE 5.4

Early Development of the Rule, Including First ABA Canon Provisions in 1928

- Andrews, at 580-81, discussing the early leading N.Y. Court of Appeals case, *In re Co-operative Law Co.*, 198 N.Y. 479, 95 N.E. 15 (1910):

“The petitioner was a business corporation organized for profit to provide legal services to its subscribers by the employment of ‘a staff of competent attorneys and counsellors at law.’ The court concluded that the corporation was illegal even under the law as it existed prior to the

amendment of the 1909 New York statute, which explicitly prohibited corporations from offering such services. The court gave four principal grounds for this conclusion: (1) corporations cannot become members of the bar and they should not be able to do indirectly what they cannot do directly; (2) an attorney employed by a corporation would be responsible to the corporation rather than to the client of the corporation; (3) the corporation might be controlled wholly by nonlawyers and organized simply to make money; (4) the public would have no remedy to protect itself from the corporation. *Co-operative Law* has been widely influential since 1910 both in result and reasoning. Its conclusion that corporations owned or controlled in part by nonlawyers may not offer the services of lawyers to the public has been followed, in one form or another, in practically every American jurisdiction.”

- Green I, at 1136-39:

“Although the original Canons [enacted in 1908] were silent on whether lawyers could be employed by corporations or otherwise collaborate with laymen, this was not an intractable problem. The organized bar devised another vehicle for formally elaborating professional standards: opinions published by a bar association concerning the propriety of specific lawyer conduct. . . . [After New York and ABA ethics opinions were issued on the subject,] [i]n 1928, a special committee appointed to propose supplements to the Canons sought to codify the earlier opinions. Its proposals, which the ABA approved, provided for the adoption of new canons prohibiting a lawyer from entering into a partnership with a nonlawyer, from dividing fees for legal services with anyone other than another lawyer or from being employed by a corporation or other organization to render legal services to others. . . .

“The special committee’s report did not offer much justification for the proposed Canons other than to explain that considerable work went into developing them. However, a member of the special committee . . . offered that the proposals did not embody ‘fundamental ethical principles,’ but comprised ‘rules of conduct which, while they may be advisable, are yet rules of professional policy or expediency which are considered necessary or important to retain and protect the public confidence in the bar as a part of the administration of justice.’”

- Canon 33 (1928): “In the formation of partnerships for the practice of law, no person should be admitted who is not a member of the legal profession, duly authorized to practice, and amenable to professional discipline. No person should be held out as a practitioner or member who is not so admitted Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law.”
- Canon 34 (1928): “No division of fees for legal services is proper, *except with another lawyer*, based upon a division of service or responsibility.”
- Canon 35 (1928): “The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer He should avoid all relations which direct the performance of his duties in the interest of such intermediary.”

Model Code of Professional Responsibility (1969)

- Retained restrictions on dividing fees with nonlawyers (DR 3-102(a)), forming partnerships with nonlawyers (DR 3-103(A)), and practicing in an entity owned by a nonlawyer (DR 5-107(c)) (Canon 3 was titled “A Lawyer Should Assist in Preventing the Unauthorized Practice of Law”; Canon 5 was titled “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client”)
- Also, DR 5-107(B) prohibited a person who recommends, employs, or pays a lawyer to render legal service for another “to direct or regulate his professional judgment.”
- Lawyer are Different/Special Rationale in the Model Code:
 - EC 3-3: “A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. [footnote 1, see below] The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.”
- Andrews, at 589-91:

“An important addition in the Model Code was the attempt to provide some justification for the bans on nonlawyer involvement in the business of law. Because nonlawyers were not subject to ‘the requirements and regulations imposed upon members of the legal profession’ the bans were considered necessary to assure the public of integrity, competence, loyalty, and confidentiality in the delivery of legal services.

...

“[I]n 1975 the Model Code was amended to permit profitmaking entities to furnish legal services to members or beneficiaries *provided that the entity does not derive any profit from the legal services*. . . . According to the drafting committee, however, the prohibition on the derivation of profit by the lay organization was based on a concern that otherwise the lay organization might interfere with the exercise of the lawyer’s professional judgment.”

Kutak Commission Proposal/Adoption of Model Rules (1983)

- Kutak Commission, Proposed Rule 5.4 (quoted in Andrews, at 594):

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

(a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.

- Kutak Report, "Legal Background" (quoted in Andrews, at 594-95):

"To prohibit all intermediary arrangements is to assume that the lawyer's professional judgment is impeded by the fact of being employed by a lay organization The assumed equivalence between employment and interference with the lawyer's professional judgment is at best tenuous Applications of unauthorized practice principles, only tenuously related to substantial ethical concerns raised by intermediary relationships, may be viewed as economic protectionism for traditional legal service organizations

"The exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services."

- HOD Debate on Rule 5.4 Proposed by Kutak Commission (Unofficial Transcript Excerpts, quoted in Andrews, at 595-96, nn.108-110):

Bob Hawkins: "I cannot conceive that a lawyer *can* maintain his independence and his independent judgment over a period of time when he's on a salary from a corporation that's looking over his shoulder at his results in terms of profit. Now if you wish to destroy our profession as we've known it... if you want to destroy it, the young lawyer's opportunities in this country to enjoy the same professional independence that you and I have known, then ... support the Commission."

Al Conant: "The one who has the gold makes the rules, and the one [who] has the gold under [proposed] 5.4, is going to be a non-lawyer. . . . I cannot tell you what [the effects on the profession of enacting proposed rule 5.4] are, but I don't believe anyone can It also authorizes anyone else in the business world to get into the law business. Now is that good or bad? I don't know. Will it result in cheaper services to the consumer? I don't know, but nobody can tell you that it will. Will it result in better services to the consumer? I don't know. I doubt it, but no one can tell you that it will. Will it destroy the economic existence of individual lawyers? I don't know, but nobody can tell you that it won't. Will it affect the lawyer's independence of judgment? I don't know, but nobody can assure that it won't No one can tell you what the impact of 5.4 is going to be on the legal profession, but everyone can assure you, and you can assure yourself merely by reading it, that it is going to have a major impact and mark a fundamental change in the practice of law."

Charles Kettlewell (an APRL Founder): “Is it cost-effect[ive] to provide full representation? Is it cost-effective to zealously represent your client? Is it cost-effective to spend enough time with your client to get the job properly done? I think the answer is no. But clearly as lawyers, as professionals, we must get the job done properly, and we must spend that time and we must do those things. But what about the business venturer who owns this firm, he who hires or fires the lawyers? They needn't view it that way. Now if the safeguards of the Commission were adequate, . . . fine. But [they] won't be, and I submit who is in trouble if there is a violation of these rules? Is it the venturer or the lawyer? It's the lawyer; the venturer isn't even under the jurisdiction.”

Frank Rosiny: “the rule as proposed by the Commission is very unwise policy because if nothing else, it is demeaning to the profession, and this would wound the profession in a way, I submit, very similar to that which is occurring every day by virtue of lawyer advertising, but with a difference ... [t]his Rule 5.4 ... will be a self-inflicted wound.”

- Kutak Proposed Rule 5.4 was rejected by the ABA House of Delegates; Rule 5.4 adopted in Model Rules in 1983 retained the prior Code provisions; still in place in substantially the same form, enacted in virtually every jurisdiction (except the District of Columbia)

“Professional Independence” as a “Core Value” (from the 1999-2000 MDP Commission Debate)

- Paragraph 2 of [MDP Commission's Final Recommendation](#) (2000) (proposing that lawyers be “permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services . . . , provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services”): “This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.”
- Larry Fox on Permitting MDPs and Losing the Soul of the Profession:
 - [Written Remarks to MDP Commission, Feb. 4, 1999](#): “‘It's the money.’ Follow the money and you'll follow the power. Follow the power and you'll know who is in control. And as soon as the power rests with non-lawyers not trained in, not dedicated to, and not subject to discipline for our ethical principles, you will see the independence of the profession fall away. . . . It reminds me of what happens when the biggest company in a town gets purchased by folks from far way. The new buyer may give lip service to giving back to the community. But the reality is the town will soon learn it has lost its soul.”
 - *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1103, 1106 (2000): Rule 5.4 guards against “interference by nonlaw trained masters who wish us to take short cuts to maximize profits”; “We are not just another set of service providers. We are not just another cohort of business consultants. . . [W]e are a priesthood.”

- *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 556 (2002). “The ABA’s Multijurisdictional Practice Commission’s [proposal] depends on the invidious notion, often advanced in the pre-Enron era by the now not-so-Big Five, that lawyers really are just another set of service providers, that there is nothing special – in the sense of special responsibility – about being lawyers, that our rules of professional conduct are not all that important, and that the sooner we lawyers got off our high falutin’ horses the better off we will be.”
- ABA Formal Op. 01-423, at 4, n.6: “In February and August 2000, concern that admission of nonlawyer professionals as partners in law firms would interfere with lawyers’ professional independence and the preservation of the core values of the profession led the House of Delegates to reject proposals to allow partnerships with nonlawyer professionals and to direct that no change be made to Rule 5.4.”
- [Report by Illinois State Bar in Support of 2012 ABA Resolution](#) to preempt consideration of Rule 5.4 reforms (not adopted): “Affirmation of these core principles and values is important now, particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence. ... 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.”
- [ABA Futures Report \(2016\)](#), at 42: “Many of the comments opposing ABS focused on the commenters’ belief that ABS poses a threat to the legal profession’s ‘core values,’ particularly to the lawyer’s ability to exercise independent professional judgment and remain loyal to the client. Specifically, opponents of ABS fear that nonlawyer owners will force lawyers to focus on profit and the bottom line to the detriment of clients and lawyers’ professional values.”
- Wolfram’s Skepticism of Professional Independence as “Core Value,” at 1626-27: “ABA President Philip S. Anderson, who directly appointed the ABA’s MDP Commission, warned early on that while the Commission was considering whether to redo the ABA’s prohibitory rules on lawyer relationships with closely allied professions, they should take great care in their work to preserve the core values of the legal profession. As with many other subsequent orators, Mr. Anderson was suitably vague about what exactly those values might be, exactly what importance they had and to whom, what threats they might confront, and what measured or more radical measures might reasonably be considered necessary to address real risks. The tag-line of ‘core values’ has since been endlessly flung about, by parties including the Commission itself, in an attempt to demonstrate that the utterer has kept well in mind the traditional aspirations of the organized American legal profession.”
- Schneyer’s Skepticism of Professional Independence as “Core Value,” at 1470-71: “The Commission regards loyalty, competence, confidentiality, and independent professional judgment as the legal profession’s ‘core values.’ One can hardly disagree. But core values and useful regulatory concepts are two different things. The bar and the courts have spent decades giving legal meaning and regulatory significance to three of these values but not the fourth. Conflict-of-interest rules and disqualification decisions have defined the lawyer’s duty of loyal and spelled out its implications. Malpractice decisions have fleshed out the duty of competence.

Ethics opinions and case law have elaborated on the duty of confidentiality. By contrast, the regulatory history of 'independent judgment' is so thin that the value is dismissed in some quarters as a professional 'shibboleth.' The sorts of interference lawyers must resist or be shielded from to play their proper role remain particularly unclear. In academic parlance, 'independent judgment' and 'interference' are under-theorized legal concepts."

- Green's Skepticism of Professional Independence as "Core Value," (Green II, at 618):

"First, one can rationalize almost any procedural measure as a safeguard of 'independence.' For example, in England, the requirement that barristers accept all cases, the 'cab rank principle,' without regard to their view of the merits has been justified on this ground: 'The relationship with the independence of the bar lies in the impossibility for the most part of associating certain barristers or chambers with certain causes or attitudes.' In contrast, in the United States, the ability to turn down an unworthy client is regarded as an expression of independence, and lawyers are permitted to ally themselves with particular clients (as in the case of in-house counsel) and causes (as in the case of lawyers for interest groups). Likewise, in England, the requirement that barristers be individual practitioners, not members of partnerships, is thought to promote their independence. In contrast, in the United States, we assume that working in a firm makes lawyers better regulated.

"Second, as I discussed in an article at the time of the MDP debate, what passes as a protection for lawyer independence may largely be designed to protect lawyers' monopoly. Rule 5.4 originated in legislation aimed at forbidding lawyers from being employed by corporations to provide services to members of the public. The proponents of the legislation had no evidence that the corporations then supplying lawyers to clients were harming the public, and the transparent motivation behind the legislation was to protect lawyers' business."

- Perlman's Skepticism of Professional Independence as "Core Value," at 98: "[L]awyers already have an incentive to prioritize profits over client needs. Lawyers who charge flat fees can make more money if they cut corners. 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. And lawyers who bill by the hour regularly spend more time than is necessary to solve a client's problems. In other words, lawyers are also susceptible to the pressures of increased profits at a client's expense."
- Andrews's Skepticism of Professional Independence as "Core Value," at 606-08:

"The possibility of interference with a lawyer's independent judgment cannot be denied. But our present system contains similar possibilities. Many lawyers work for a salary as associates for law firms in which they have no control or ownership interest. Their employers--the partners or lawyer shareholders--may be looking over the shoulders of those associates 'in terms of profit' just as aggressively as would nonlawyers offering the services of these same lawyers. Notwithstanding these pressures, monetary and nonmonetary, we require and expect that such associates will comply with their professional duties. . . . Moreover, nonlawyers are allowed to exercise a comparable kind of control over lawyers in other contexts. Many lawyers working in the private sector, for example, are paid by nonlawyers to provide legal services to another. This

may happen when a parent pays for a lawyer to assist a child; when insurance companies provide counsel to defend an insured; or when corporations pay the legal expenses to defend their employees. In these situations, the attorney looks to one party for payment, but owes her professional duties to another. While these relationships undoubtedly present potential conflicts of interest, they are not prohibited altogether.

...

“Another very different type of control over lawyers by nonlawyers occurs when a law firm in need of capital borrows funds from an institutional lender. Such borrowing on occasion can be vital to the economic survival of a firm. If a debtor firm wished to embark on a potentially costly piece of litigation-perhaps on a *pro bono* or contingency basis-there would be a potential for conflict with an institutional lender who concluded that the costly representation jeopardized the firm's ability to repay the loan. But again, such borrowing is not prohibited. We assume that the general conflicts rules will be sufficient to protect against interference with the lawyer's professional judgment in such cases.”

- Robert Gordon’s Skepticism of Professional Independence in as Basis to Reject MDP Reform (from [May 21, 1999 Letter to MDP Commission](#)): “The independence of lawyers in all its forms, autonomy in work conditions; ability to exercise independent judgment in advising clients, both in their own best interests and that of the integrity of the legal system; the ability as a citizen, official and law reformer to rise above parochial interests, is a social good of potentially high value, and one well worth trying to promote against the many pressures that have combined to erode it. But there are surely better ways of protecting professional independence than by restricting the development of forms of multi-disciplinary practice that promise many benefits in innovative and cost-effective services to clients and consumers.”
- Professional independence as a “core value” is codified in [NY RPC 5.8](#) (which permits strategic alliances with nonlawyer under specified conditions, enacted in 2001): “The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed ‘independent professional judgment and undivided loyalty uncompromised by conflicts of interest.’ Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State. Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values.”
- See *also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §10 & cmts. *b, c* (ALI 2000): Section 10 “is based on lawyer-code limitations on law-firm structure and practices. Those limitations are prophylactic and are designed to safeguard the professional independence of lawyers. A person entitled to share a lawyer’s fees is likely to attempt to influence the lawyer’s activities so as to maximize those fees. That could lead to inadequate legal services. The Section should be construed so as to prevent nonlawyer control over lawyers’ services, not to implement other goals such as preventing new and useful ways of providing legal services or making sure that

nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons. . . . [T]he traditional set of restrictions is intended to protect the professional independence of lawyers. Here also the concern is that permitting such ownership or direction would induce or require lawyers to violate the mandates of the lawyer codes, such as by subjecting the lawyer to the goals and interests of the nonlawyer in ways adverse to the lawyer's duties to a client."

Rule 5.4 Today

- HH&J, §48.10, at 48-18:

Since the MDP effort in 1999 and 2000, "ironically enough, the pressure to adopt MDP arrangements has continued relentlessly, and a variety of 'workarounds' have been developed at the state and local level. For example, although literal 'one stop shopping' for , say, legal and accounting services is still impossible, the rules as they stand permit a law firm to set up shop immediately next door—which today can mean electronically adjacent—to an accounting or financial consulting firm and exchange clients between the two. The two firm simply submit parallel bills to the clients—electronically and seamlessly, no doubt.

"Under the rules as they stand, people who hold law degrees may lawfully work in accounting and financial services firms, so long as they do not hold themselves out as being in law practice and available to provide services to the general public. They may lawfully state that they are providing legal assistance *to their firms*, as their firms provide accounting or financial services to the firm's client—just as in-house lawyers now are engaged by banks, insurance companies and similar organizations. The lawyer-specific conflict of interest rules will continue to apply to lawyers, and will be imputed to other lawyers with whom they associate . . . , but other professions—especially accounting—have no such traditional [rules] and will remain unaffected. The adoption of a more forgiving rule on the provision of law-related services, see Model Rule 5.7, . . . will only accelerate the development of arrangements that are MDP arrangements in everything but name (and sans direct investment by non-lawyers)."

- State variations of Rule 5.4 are rare and very limited; *see, e.g.*, [DC RPC 5.4](#) (permitting lawyer to practice in "a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients" under specified conditions); [NY RPC 5.8](#) (permitting contractual relationships/alliances with nonlawyers under specific conditions, include disclosure and inclusion of nonlawyer on a court-maintained list; expressly overrides RPC 1.7, but Rule 5.4 remains in full force and effect); [GA RPC 5.4\(e\)](#) (permitting lawyers to "[p]rovide legal services to clients while working with other lawyers or law firms practicing in, and organized under the rules of, other jurisdictions, whether domestic or foreign, that permit non-lawyers to participate in the management of such firms, have equity ownership in such firms, or share in legal fees generated by such firms"; the association is not permitted to "compromise or interfere with the lawyer's independence of professional judgment, the client-lawyer relationship between the client and the lawyer, or the lawyer's compliance with these Rules," and the rule does not affect "the lawyer's obligation to comply with other applicable Rules of Professional Conduct, or to alter the forms in which a lawyer is permitted to practice, including but not limited to the creation of an alternative business structure in Georgia").

THE OPERATION OF RULE 5.4 IN PRACTICE

Rule 5.4 as a Conflict of Interest Rule

- Green II, at 616: “Rule 5.4 is essentially a conflict of interest rule.”
- Model Code of Professional Responsibility, EC 3-3, provided that “A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.” A footnote on this proposition in EC 3-3 stated:

“The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests.’ Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 439 (1965).”

- HH&J, §48.03, at 48-7: Concern about lawyer independence for permitting nonlawyer entities to provide legal services is legitimate, “but it has been addressed adequately in several other Rules that could easily be brought to bear. For example, Rule 1.7 on conflict of interest requires fidelity to the client’s interests, and does not allow the interests of others . . . to ‘materially limit’ the representation that will be provided; . . . Rule 1.8(f) specifically addresses the conflicts of interest that can arise when a non-client third party pays for the lawyer’s services. . . . Rule 1.2(a) confirms that the client alone has the final decisionmaking authority as to the objectives of the representation, which should mean that the [non-lawyer] organization could not require a lawyer to pursue different objectives.”
- Andrews, at 610: “Those who claim that lay involvement in the business of law would be attended by grave conflicts of interest and interference with professional judgment, should be challenged to show why the potential problems are any more serious here than they are in the kinds of law practice currently allowed. Absent this showing, there is little reason to suppose that the existing conflicts rules will not serve to police lawyers who would engage in the business of law with nonlawyers.”
- *See also* Rule 1.7(a)(2) (a concurrent conflict of interest exists if there is a significant risk that the lawyer’s representation of a client will be materially limited by, among other things, “a personal interest of the lawyer”); Rule 1.7, cmt. [1] (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”); *id.*, cmt. [8] (the critical questions in determining whether there is a significant risk of a material limitation in a representation under Rule 1.7(a)(2) “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”); *id.*, cmt. [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.” (citing Rule 1.8(f))); Rule 1.8, cmt. [11] (“Because third-party payers frequently have interests

that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." (also citing Rule 5.4(c)).

- See also HH&J, §25.02, at 25-3: "The first sentence of Model Rule 2.1 [that requires a lawyer to exercise independent professional judgment and render candid advice in representing a client] is a mandatory rule of conduct. The language 'shall exercise independent professional judgment' was carried forward from Canon 5 of the Model Code of Professional Responsibility, and also evokes the duty to avoid improper influence by others (Model Rule 1.7 – 1.9), whether those 'others' are other clients, third parties, or the lawyer himself."
- Taking Rule 5.4 as being essentially a conflict of interest rule, it appears that the only other "nonconsentable as a matter of law" conflict in the rules themselves is Rule 1.7(b)(3), which prohibits in all situations a representation involving "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"
- There is precedent for deleting what was essentially a conflict of interest rule as "unnecessary" in ABA Ethics 2000's removal of the Rule 2.2 "Intermediary" rule; See [Reporter's Explanation of Changes](#):

"The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result."

"Burden of Proof" to Ease/Remove/Justify Restrictions

- Andrews, at 607-08 & n.165:

"In order to justify a prophylactic rule prohibiting all involvement by nonlawyers in the business of law, those opposing nonlawyer involvement must show that somehow nonlawyer control is more pernicious, or more efficacious, in interfering with a lawyer's professional independence, than the control by supervising or employer attorneys that is allowed currently. Otherwise the general injunctions on professional independence should suffice. Yet, there is no evidence of such increased power in nonlawyers."

...

"Professor Rhode has observed that attorneys are not 'well, let alone ideally, situated to determine the risk that consumers are willing to assume in return for less expensive services.' . . . Perhaps this is an area in which the burden should be on the profession to show why it should not leave the choice up to the consumer in the marketplace."

- Green I, at 1118, 1157-58:

"Perhaps it would be fair to assign reformers this burden [to ease restrictions] if the applicable disciplinary restrictions had been devised in response to demonstrated harm caused by nonlawyers' exercise of influence over lawyers. A presumption in favor of the existing rules might also be warranted if the actual motivation for the restrictions had been to protect the legal profession's basic values rather than to thwart competition, or if the need for restrictions of this nature could fairly be characterized as a matter of popular wisdom, given the persuasiveness of the core values rationale for the restrictions or, at the very least, the legal profession's undivided and undeviating adherence to this rationale. As this Article discusses, however, the restrictions on multidisciplinary practice and the core values rationale for them have a more equivocal history.

...

"Given this equivocal history, it might be argued that opponents of change should have the burden of proving that the existing provisions are essential in their present form. At the very least, the question ought to be debated openly, honestly and fair-mindedly, without any presumptions one way or the other. At the same time, however, the history suggests that fair-minded debate is not inevitable: when it comes to matters of lawyer self-governance, reason easily becomes the servant of economic self-interest."

- See also Chambliss (2019) (forthcoming), noting the Supreme Court's antitrust decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* as imposing a burden of production to justify regulatory action, and arguing for "evidence-based regulation"

The "Overregulation" Problem: Interpreting Rule 5.4 in Light of its Purpose

- ABA Formal Op. 01-423, at 3-4 & n.7: "The prohibitions in Rule 5.4 are directed mainly against entrepreneurial relationships with nonlawyers and primarily are for the purpose of protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers. This Committee consistently has interpreted Rule 5.4 with this purpose in mind, and on occasion has rejected a literal application of its provisions that did not accord with the purpose for the Rule. Rule 5.4 accomplishes this purpose by requiring that lawyers, to the exclusion of nonlawyers, own and control law practices, which thus helps assure that clients are accorded the protections of the professional standards lawyers must maintain."

[The opinion cites ABA Formal Op. 93-374 for the proposition that Rule 5.4 is not violated by a lawyer's sharing court-awarded fees with a pro bono organization that sponsors the litigation, in part because of the absence in such fee-sharing of any threat to the lawyer's independent professional judgment; and ABA Formal Op. 88-356 for the proposition that paying a service fee

to a temporary lawyer agency based on a percentage of lawyer's wages did not constitute illegal fee-splitting under Rule 5.4(a) or a violation of Rule 5.4(c).]

- HH&J, §48.04.1, at 48-12 – 12-1 & n.3.1 (discussing the prohibition on sharing fees with nonlawyers under Rule 5.4(a)): “A better way to approach the proper application of Rule 5.4 is to consider its title, ‘Professional Independence of a Lawyer.’ And the statement in Comment [1] should be considered as well: that the purpose of limiting fee-sharing under this rule is ‘to protect the lawyer’s professional judgment.’ It would be plausible, in other words, to interpret Rule 5.4(a) so that it prohibited the sharing of legal fees *only* in situations where it could be reasonably anticipated that a lawyer’s exercise of independent professional judgment would be impaired. That would also be consistent with Comment [14] to the Scope section as well; the Model Rules ‘are rules of reason’ that ‘should be interpreted with reference to the purposes of legal representation and of the law itself.’ Unfortunately, however, . . . the failure to adjust the basic text of the rule has led to a potpourri of inconsistent results, seemingly dependent on nothing more than how a particular transaction or relationship is characterized.

...

“Other paragraphs of Model Rule 5.4 also support an interpretation that focuses on possible interference with a lawyer’s independence. . . . In each of the [Rule 5.4 subsection] instances, the objective sought by the rule is to prohibit nonlawyers from making or unduly influencing decisions that should be made by lawyers. It should follow that when these risks are not present, the reason for the prohibition disappears.”

- Litigation Funding example: [NYC Bar Ethics Opinion 2018-5](#) (noting that Rule 5.4(a) should be interpreted in light of the purpose of the rule to protect lawyer independence, but holding that lawyers are prohibited from borrowing funds from a nonlawyer litigation funder where repayment is contingent on the lawyer earning from fees from the case, regardless of how fees are computed); criticized for, among other things, ignoring the purpose of the rule to protect lawyer independence, at HH&J, §48.05, at 48-12.5 – 48-12.6 (also noting that the opinion “is certainly correct that a revision to Rule 5.4 that puts its policy underpinning directly into the text of the rule would be beneficial”); Peter Jarvis & Trisha Thompson, *The Case for Lawyer-Directed Litigation Funding in NY, Parts I & II*, LAW360, January 10, 11, 2019.

Shift in Discussion of Professional Independence from “Core Values” to “Regulatory Objectives”

- Terry, Mark & Gordon, at 2736: In setting regulatory objectives for the legal profession, “lawyer independence is important because it promotes a rule-of-law culture, which will impact both the individual client the lawyer serves as well as the larger society.”
- Also, Terry, at 897-98: “It is indisputable that if MDPs are permitted, there is a risk that a lawyer’s professional judgment could be pressured and perhaps compromised. Any loss of independence potentially has consequences not only for the individual client being served, but also for the entire society and, potentially, the rule of law in that country. . . . [A] regulator might adopt a special rule for MDP lawyers that provides guidance about how to protect independence in an MDP setting. This new rule could address issues such as direction of an MDP lawyer’s judgment and who sets the MDP lawyer’s compensation, among other issues.”

- [ABA Resolution 105](#), approved by ABA House of Delegates at the February 2016 Midyear Meeting in San Diego, as proposed by the ABA Futures Commission, adopts a set of model regulatory objectives for state regulators considering how to regulate nontraditional legal service providers; Objective H: “Independence of Professional Judgment”; per the Report on the Resolution, at 3-4:

“Regulatory objectives are different from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the ‘legal profession.’ By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide. The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.”

CONCLUSION

- Andrews, at 656, writing in 1989:

“It is only a matter of time before the business canons will be changed to meet the needs of contemporary society. Change may come as a result of federal preemption. It may come as a result of litigation and public outcry against the legal monopoly. Or it may come as a result of leadership by the bench and bar. The legal profession has always had something of a tarnished reputation with the public. Perhaps if lawyers were to take the initiative and acknowledge that they are prepared to work with others as full partners that reputation would be improved.”

CITED TREATISES/LAW REVIEW ARTICLES:

Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577-656 (1989)

Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U.L. REV. ____ (2019) (forthcoming)

Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988)

Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000) [Green I]

Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599 (2013) [Green II]

Hazard, Hodes & Jarvis, *THE LAW OF LAWYERING* (4th ed. 2014) [HH&J]

Perlman, *Towards the Law of Legal Services*, 37 CARDOZO. L. REV. 39 (2015)

Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469 (2000)

Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule*, 72 Temple L. Rev. 869 (1999)

Terry, Mark & Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012)

Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992)

Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625 (1999)

Considering the Future of Rule 5.4

45th ABA National Conference on Professional Responsibility

May 31, 2019, Vancouver, Canada

Laurel S. Terry, Resources Relevant to the CPR Rule 5.4 Panel (May 2019)

(Please send additional suggestions to LTerry@psu.edu)

1. **Rule 5.4** of the ABA Model Rules of Professional Conduct, <https://perma.cc/GB2C-3C65>
2. **Rule 5.4 state variations chart:** ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct, Rule 5.4* (As of Sept. 28, 2018), <https://perma.cc/CK49-PKAD>

Rationale for Rule 5.4

3. Arthur Lachman, *Lawyer Professional Independence & Rule 5.4: An Overview Compiled by Art Lachman* (May 2019) (included in 45th ABA National Conference materials)
4. Laurel S. Terry, *Examples of Regulatory Objectives for the Legal Profession* (Updated March 2, 2019), https://works.bepress.com/laurel_terry/89/ (short document that lists the regulatory objectives adopted by the Supreme Courts of Colorado, Illinois, and Washington, as well as the ABA's Model Regulatory Objectives and those from non-U.S. jurisdiction; it also includes links to a [long](#) article and [short](#) article about regulatory objectives)

State Versions of Rule 5.4 that Differ From/Supplement ABA Model Rule 5.4:

5. **D.C.:** [RPC 5.4](#) (allows partnerships and fee sharing among lawyers and nonlawyers in the delivery of legal services), <https://perma.cc/GBJ4-5EWM>
6. **Georgia:** [RPC 5.4\(e\)](#) (allows fee sharing with ABS firms that are legal in their jurisdiction), <https://perma.cc/ZCQ2-296G>
7. **Utah:** [Rule 5.4](#) of the Rules of Professional Conduct for Utah Licensed Paralegal Practitioners (LPP) allow fee sharing with lawyers, but Utah RPC 5.4 has not yet been changed. See generally Utah Court Rules [Ch. 12, Art. 15](#) and <https://perma.cc/KUD3-Y2JZ> (court LPP webpage) and <https://perma.cc/7CCK-7BVZ> (Utah State Bar LPP webpage).
8. **Washington:** [RPC 5.9](#) Business Structures Involving LLLT and Lawyer Ownership, (allows partnerships and fee sharing among Washington's lawyers and Limited License Legal Technicians or LLTs), <https://perma.cc/4A54-JJT3>

Jurisdictions that Currently Are Considering Rule 5.4 Issues:

Arizona

9. Arizona Judicial Branch, *Legal Services Task Force Webpage*, <https://perma.cc/C4GF-BUQ6>
10. Supreme Court of Arizona, *In the Matter of: Establishment of the Task Force on Delivery of Legal Service and Appointment of Members*, Administrative Order No. 2018 – 111 (Nov 21, 2019),

<https://perma.cc/WRS3-7698> and Jan. 2019 *Electronic Briefing Book*, <https://perma.cc/DR5R-WBH3>

11. AZ Task Force, *Draft Minutes of March 14, 2019 and April 29, 2019 Workgroup Proposals and Discussion* (showing discussion of a “proposal for how Arizona might test a change in ethical rules to allow for alternative business structures where lawyers could partner with non-lawyers” and various models), <https://perma.cc/J3ZQ-MLLU> and <https://perma.cc/39CZ-XFR3>

California

12. William D. Henderson, *Legal Market Landscape Report* (July 2018) (Commissioned by the State Bar of California), <https://perma.cc/X2KM-UTL5>
13. State Bar of California, Webpage of the *Task Force on Access Through Innovation of Legal Services* (AILS) (established July 2018), <https://perma.cc/4KCQ-FNTS>
14. *Memo* to the CA Alternative Business Structures/Multidisciplinary Practice Subcommittee, <https://perma.cc/X5KM-U2WZ> and *Fact Sheet*, <https://perma.cc/KBG5-NWTY>
15. Selected CA Task Force Documents (out of the many on their webpage):
 - ABS Comparative Models Table (March 26, 2019), <https://perma.cc/3QLX-YRHL>
 - April 8, 2019 Agenda Item B.4: Provider regulation vs. “Legal Advice Device” regulation (March 26, 2019), <https://perma.cc/UM2B-QFDY>
 - April 8, 2019 Agenda Item D1: Development of a Survey (March 26, 2019), <https://perma.cc/G6ZE-Q5AD>

Utah

16. Utah Supreme Court, *A Move Toward Equal Access to Justice* (March 2019), <https://perma.cc/5JBC-TLUH> (announcement of a new task force)
17. Agenda, Supreme Court’s Advisory Committee on the Rules of Professional Conduct (April 15, 2019), <https://perma.cc/ZUS6-7PUA> (pages 7-9 summarize some of the ongoing regulatory reform work, including “OWNERSHIP OF LAW FIRMS” issues)
18. Draft Work Group on the Regulatory Structure for Legal Services Statement of Purpose, (Supplement to the Utah Rules of Professional Conduct Committee April 15, 2019 Agenda) <https://perma.cc/G2GT-62YL>

U.S. Groups That Currently (or in the past) Have Worked on Rule 5.4 Issues:

19. **APRL** [Association of Professional Responsibility Lawyers], *The Future of Legal Services Committee (and its Alternative Business Structures/Multidisciplinary Practice/RPC 5.4 Subcommittee)* co-chaired by Art Lachman and Jayne Reardon)
20. **IAALS** [Institute for the Advancement of the American Legal System], *Making History: Unlocking Legal Regulation* (45th National Conference materials include a description of the April 16-17, 2019 IAALS Workshop, its Agenda, and Attendees bios)

21. **New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”), Public Comment Draft of Proposed Changes to Various RPCs, including Rule 5.4** (would add a new Rule 5.4(a)(4) to address a division of fees between New York lawyers and out-of-state co-counsel or referring lawyers who work in law firms with nonlawyer owners or supervisors)
22. **New York State Bar, *Proposed ABA Resolution 10A re ABA Best Practice Guidelines for Online Legal Document Providers*** (submitted for consideration at the Aug. 2019 ABA Meeting, see <https://perma.cc/LLT5-UQKM>)
23. **NOBC** [The National Organization of Bar Counsel] had committees that created [Global Resources](#) and FAQ documents for its webpage. For the Alternative Business Structures Committee FAQ document, see <https://perma.cc/6V29-JVMM>
24. **Past ABA Initiatives (many of which have useful resources online):**
 - [Report on the Future of Legal Services in the United States](#) (2016) [by the ABA Commission on the Future of Legal Services], <https://perma.cc/V2KY-N7FH>
 - ABA Commission on Ethics 20/20, [Work Product of the Alternative Law Practice Structures Working Group](#), <https://perma.cc/FH3U-EGW5> (includes 3 lengthy discussion papers)
 - ABA Commission on Multidisciplinary Practice (1998-2001)[Note: you can find individual pages through Google, but the ABA MDP Commission’s master webpage was not available in April 2019; for a summary of the Commission’s work, you can see [this book chapter](#) by Laurel Terry]

Experiences outside the U.S. with Rule 5.4-Type Issues

25. **IN GENERAL:** See generally item #23, supra. The NOBC’s ABS FAQ document was prepared with the assistance of regulators from Australia, Canada, and the UK: <https://perma.cc/6V29-JVMM>
26. Laurel S. Terry, *International Developments and their Impact on U.S. Lawyer Regulation*, Miller Becker Lecture Handout (April 2019), https://works.bepress.com/laurel_terry/96/ (This document is an 8-page updated summary of the *who-what-when-when-where-why-and-how* regulation issues documented in the Terry/Mark/Gordon [Trends in Global Lawyer Regulation](#) article; the 2013 Terry follow-up article on [Trends in Global and Canadian Lawyer Regulation](#))

CANADA

27. **Nova Scotia Regulation Page** (contains links to a wealth information about the regulator’s “from the ground up” initiative to remake lawyer regulation)
 - Infographic from the NSBS webpage (also in the Conference materials), <https://perma.cc/MP45-KC3H>
 - Nova Scotia Barristers’ Society Regulatory Objectives with Commentary (also in the conference materials), <https://perma.cc/BV8S-NLW8>
 - [Darrel Pink article re Nova Scotia Regulation](#)
 - Laurel Terry [article](#) about proactive regulation that discusses Nova Scotia’s developments and a 4-page JOTWELL [blog post](#) that reviews a Susan Fortney PMBR article
28. **British Columbia, Law Firm Regulation Initiative** webpage, <https://www.lawsociety.bc.ca/our-initiatives/law-firm-regulation-initiatives/>

29. **British Columbia**, Proposed Professional Governance Act, <https://perma.cc/P3BX-LYZU> (“The proposed Act is intended to strengthen government oversight for professional associations (regulatory bodies) by establishing a statutory Office of the Superintendent of Professional Governance (Office) in the Ministry of Attorney General.” – see [here](#)). For background, see Regulatory Oversight Bodies Proliferating in British Columbia, <https://perma.cc/RNW2-HS5C>
30. **Prairie Provinces**: The Law Societies of Alberta, Saskatchewan and Manitoba, *Innovating Regulation – A Discussion Paper of the Prairie Provinces* (Nov. 2015), <https://perma.cc/HF5V-3FJY> and website: <https://www.lawsociety.sk.ca/initiatives/innovating-regulation/> ,
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England

32. Stephen Mayson, [Independent Review of Legal Service Regulation](#) initiative, including his March 2019 review of ABS issues, INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION, The Focus of Legal Services Regulation, Working Paper LSR-3 | March 2019, <https://perma.cc/999Y-KX37> (also in the Conference materials); *see also* Darrel Pink, *Canadian Law Societies should pay attention to Stephen Mayson’s work* [on Independent Review of UK Experience], <https://perma.cc/2Y2D-LFNX>
33. UK Solicitors’ Regulation Authority [Webpage](#), and [Legal Services Board](#) webpage
34. [Legal Futures](#) Webpage (useful news re UK ABS developments)
35. Lucy Ricca, *UK Legal Service Reforms Under the Legal Services Act* (2007): A Brief Overview, <https://perma.cc/G2GT-62YL> (circulated by the Utah RPC Committee for its April 15, 2019 meeting)

Australia

36. Australia: [Law Society of NSW, The Future of Law & Innovation in the Profession \(2017\)](#), <https://perma.cc/YA4N-T8DB>
37. Steve Mark and Tahlia Gordon, *Chapter 14: The Australian Experiment: Out with the Old, in with the Bold* in Paul Haskins ed., THE RELEVANT LAWYER (ABA 2015)
38. Australia: Steve Mark & Tahlia Gordon, *Creative Consequences Website* (where you can download “[The Stories \(the full version\)](#)” from Laura Snyder’s two books about ABS firms, <https://perma.cc/298X-T9GR>

Ireland

39. [Report from](#) [Ireland’s] Legal Services Regulatory Authority [and Alison Hook] re Multi-Disciplinary Practices (2017), <https://perma.cc/C7G7-N2WA>

Singapore

40. Singapore Ministry of Law, Legal Services Regulatory Authority webpage, <https://perma.cc/R79M-4MWC> (regulates entities)

Miscellaneous

41. ABA Formal Opinion 464: *Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers* (Aug. 19, 2013), <https://perma.cc/7GUE-2ZAY>
42. New York City Bar Formal Opinion 2014-1: *Ethical Considerations for Lawyers Contemplating Business Arrangements with Non-Legal Organizations*, <https://perma.cc/RJ7F-WQPY>
43. The White House, *Occupational Licensing: A Framework for Policymakers* (July 2015), <https://perma.cc/8F8U-RALQ>
44. Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 Wash. U. L. Rev. __ (2019) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343786
45. Darrel Pink, *Looking Back on the 2020s: What a Decade!*, [ABA Law Practice Management Magazine](#) (forthcoming, July 2019):

Abstract: As I look back over the past decade, on the eve of our 2030 long-range planning meeting, I am astounded and proud of what the legal profession has accomplished. Ten years ago the doomsayers had the legal profession on the verge of extinction. Our professional associations at both the state and national levels resisted change. Lawyers flocked away from membership in bar associations that did not cater directly to their practice areas. Technology in general, and artificial intelligence in particular, were painted as more threatening than they had been in the earlier years of the century. We lived with an access-to-justice crisis that saw millions of citizens left with inadequate legal services or none at all.

Market-Related Issues

Access to Legal Services Issues

46. Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), <https://perma.cc/UZB7-3ZX8> and [this summary](#)
47. Executive Summary, *Report of the ABA Commission on the Future of Legal Services* (2016), <https://perma.cc/8AE3-8C7D>
48. Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 S. Car. L. Rev. 443 (2016) (summarizes several studies including her Am. Bar Foundation study), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949010
49. Gillian Hadfield & Deborah Rhode, *How to Regulate Legal Services to Promote Access, Innovation, & the Quality of Lawyering*, 67 Hastings L.J. 1191 (2016), <https://perma.cc/99PA-RZJJ>

Technology and Market Developments Reports and Articles

50. Legal Startups list, <https://angel.co/legal>, <https://perma.cc/DW9R-DFDA>
51. Robert Ambrogi, *Law Sites: Legal Tech Startups*, <https://perma.cc/9GUS-LSD7> (includes list and grid views of legal services startup companies)
52. ABA *Center for Innovation*, <https://perma.cc/LVV8-JSN3>

53. Beaumont Legal ABS (LegalZoom): [website \(https://perma.cc/CPN6-WKT4\)](https://perma.cc/CPN6-WKT4); [article](https://perma.cc/P66Q-Y2GE) (“Legal Zoom secures “largest ever investment in law,” <https://perma.cc/P66Q-Y2GE>); and 2016 audit report

Examples of Technology and Legal Services Market Developments

54. William D. Henderson, *Innovation Diffusion in the Legal Industry*, 122 Dickinson L. Rev. 395 (2018), <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss2/2/>
55. Laurel Terry 4-page blog JOTWELL post summarizing, with links, an article about the applicability to legal services of Harvard prof. Clayton Christensen’s [creative destruction theory](https://perma.cc/GKB4-5CGK), <https://perma.cc/GKB4-5CGK> and post summarizing Pearce/McGinnis article on 5 ways [machine intelligence](https://perma.cc/M97B-QURF) will affect legal services, <https://perma.cc/M97B-QURF>

Big 4 Developments:

56. David B. Wilkins & María J. Esteban Ferrer, [*The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*](#), 43(3) Law & Social Inquiry 981 (2017) and summary [here](#)
57. [Law.com, Big Law's Trojan Horse: Are the Big Four Preparing an Invasion? \(Nov. 2018\)](#)
58. Sam Skolnik and Amanda Iacone, *Big Four May Gain Legal Market Foothold With State Rule Change*, Bloomberg Law (April 11, 2019), <https://perma.cc/D6V4-MLNK>.

Selected Law Review & Other Items Related to Rule 5.4

59. Larry Fox, [*Save Our Ship* \(2015\)](#), <https://perma.cc/A8H5-JXLN> (Comments sent to the ABA Commission on the Future of Legal Services regarding its Issues Paper Concerning New Categories of Legal Services Providers (Oct. 16, 2015), <https://perma.cc/U4BJ-QY67>)
60. Laurel S. Terry, [*An “Issue Checklist” for the ABA Commission on Multidisciplinary Practice*](#) (1999) reprinted in Gary Munneke and Ann McNaughton, *Multidisciplinary Practice: Staying Competitive and Adapting to Change* (2001), <https://perma.cc/NHZZ-R4GL>. (To see other Terry MDP items, select “Multidisciplinary Practice” from the “Jump to Category” dropdown menu at https://works.bepress.com/laurel_terry/).
61. MDP Symposia cited in n.5, p. 5 of [Mark Tuft’s 2018 AITS Memo](#) for the CA Task Force:
- Multidisciplinary Practice Symposium, 32 Loyola U.-Chi. L.J. 543–691 (2001); Business Law Symposium: Multidisciplinary Practice, 36 Wake Forest L. Rev. 1-215 (2001); The Future of the Profession: A Symposium on Multidisciplinary Practice, 84 Minn. L. Rev. 1083–1654 (2000); Symposium: Multidisciplinary Practice, 20 N.Y.L. Sch. J. Int’l & Comp. L. 153–96 (2000) (transcript of symposium proceedings); *see also* Symposium: New Roles, No Rules - Redefining Lawyers' Work, 72(4) Temple L. Rev. 773-1036 (1999).

See also articles by [Alberto Bernabe](#), [Louise Hill](#), [Judy McMorro](#), [Andy Perlman](#), [Mitt Regan](#), [Nick Robinson](#), [Jakob Weberstaedt](#), and [David Wilkins & Maria J. Esteban](#), (among others).

Note: In order to ensure that these links remain useful after the 2019 45th ABA National Conference on Professional Responsibility, many of the links in this document are “permalinks.” To get to the actual website (and activate internal links), click on the “View the Live Page” tab in the upper right-hand corner of the permalink website.



IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
ESTABLISHMENT OF THE TASK)	Administrative Order
FORCE ON DELIVERY OF LEGAL)	No. 2018 - <u>111</u>
SERVICES AND APPOINTMENT)	
OF MEMBERS)	
)	

“Promoting Access to Justice” is Goal 1 of the Judiciary’s Strategic Agenda, *Advancing Justice Together, Court & Communities*. Much has been accomplished through the work of the Arizona Commission on Access to Justice to promote this goal for those with limited financial means to obtain legal services, and those efforts will continue.

Changes in technology, the legal profession, and the economy call for a reassessment of the delivery of legal services to consumers more broadly. Across the nation, judicial and legal community leaders are examining this issue and experimenting with new models, whether by recognizing that certain services can be provided by non-lawyers or by embracing new ways for lawyers to provide legal services, such as unbundled or “limited scope” representation. Arizona likewise has explored new ways of delivering legal services. For some fifteen years, the Court has authorized the certification of legal document preparers and, recently, the State Bar of Arizona implemented a web-based “Find A Lawyer” program connecting those with legal needs with lawyers willing to do the work at an affordable cost. Arizona courts have also worked to expand and clarify ways in which court staff can provide legal information to self-represented parties.

Court rules, however, have not necessarily kept pace with changes impacting the delivery of legal services. For example, Supreme Court Rule 31(d) regarding the requirements for admission to practice has been expanded incrementally to include thirty-one exceptions. At the least, the rule requires restyling, updating and reorganizing. Other court rules should be reassessed given that consumers often rely on sources other than lawyers for legal information or other assistance and that lawyers increasingly are providing services other than through traditional legal partnerships or professional corporations.

It is timely to review the regulation of the delivery of legal services in Arizona. This review should focus on how rules and codes governing the practice of law in Arizona can be revised to improve the delivery of legal services to consumers by lawyers and others, such as licensed document preparers. In addition to considering Arizona’s current practices, such a review should also consider on-going work by nationally-involved organizations, such as the Conference of Chief Justices (including its 2016 Resolution recommending consideration of the ABA’s Model Regulatory Objectives for the Provision of Legal Services) and the Institute for the Advancement of the American Legal System (“IAALS”) at the University of Denver; experience in other states

with limited license legal technicians or other non-J.D. licensed professionals; and efforts at the law schools at the University of Arizona and Arizona State University.

Therefore, pursuant to Article VI, Section 3 of the Arizona Constitution,

IT IS ORDERED:

1. ESTABLISHMENT: The Task Force on Delivery of Legal Services is established.
2. PURPOSE: The Task Force shall:
 - a. Restyle, update, and reorganize Rule 31(d) of the Arizona Rules of Supreme Court to simplify and clarify its provisions.
 - b. Review the Legal Document Preparers program and related Arizona Code of Judicial Administration requirements and, if warranted, recommend revisions to the existing rules and code sections that would improve access to and quality of legal services and information provided by legal document preparers.
 - c. Examine and recommend whether other non-lawyers, with specified qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, administrative hearings not otherwise allowed by Rule 31(d), and family court matters.
 - d. Review Supreme Court Rule 42, ER 1.2 related to scope of representation and determine if changes to this and other rules would encourage broader use of limited scope representation by individuals needing legal services.
 - e. Recommend whether Supreme Court rules should be modified to allow for co-ownership by lawyers and non-lawyers in entities providing legal services; and,
 - f. In the Chair's discretion, consider and recommend other rule or code changes or pilot projects on the foregoing topics concerning the delivery of legal services.
3. REPORT AND RECOMMENDATIONS. The Task Force shall present preliminary recommendations to the Commission on Access to Justice and to the Attorney Regulation Advisory Committee for their respective input and, by October 1, 2019, submit a report and recommendations to the Arizona Judicial Council. The Task Force may present findings and recommendations as tasks are completed rather than waiting until all five charges are completed.
4. MEMBERSHIP: The individuals listed in Appendix A are appointed as members of the Task Force effective immediately and ending December 31, 2019. The Chief Justice may appoint additional members as necessary.
5. MEETINGS: Task Force meetings shall be scheduled at the discretion of the Chair. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.
6. STAFF: The Administrative Office of the Courts shall provide staff for the Task Force and shall assist the Task Force in developing recommendations and preparing any necessary report and Supreme Court Rule petitions.

Dated this 21st day of November, 2018.

SCOTT BALES
Chief Justice

Appendix A

TASK FORCE ON DELIVERY OF LEGAL SERVICES

Chair

Justice Ann A. Scott Timmer

Members

Peter Akmajian
Schmidt, Sethi & Akmajian, Tucson

Victoria Ames
Sandra Day O'Connor College of Law, ASU

Robyn Austin
Tucson Federal Credit Union
Public Member

Betsey Bayless
Public Member

Hon. Rebecca White Berch (*Ret.*)

Don Bivens
Snell & Wilmer, Phoenix

Stacy Butler
James E. Rogers College of Law, UA

David Byers, Director
Administrative Office of the Courts

Diane Culin
Court Administrator, Santa Cruz County

Whitney Cunningham
Aspey, Watkins & Diesel, Flagstaff

Hon. Jeff Fine
Clerk-elect, Maricopa County Superior Court

Paul D. Friedman
O'Steen & Harrison, PLC

Hon. Joe Kraemer
Maricopa County Superior Court

Hon. Maria Elena Cruz
Arizona Court of Appeals, Division One

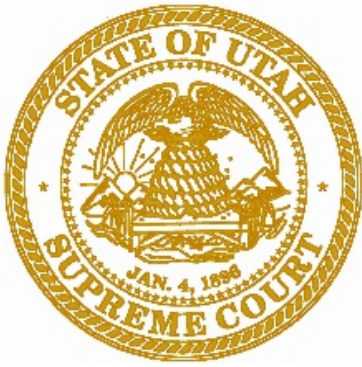
John Phelps
Executive Director, Arizona State Bar

Hon. Peter Swann
Arizona Court of Appeals, Division One

Guy Testini
Chief Counsel
Arizona Industrial Commission

Billie Tarascio
Modern Law, Scottsdale

Mark Wilson, Director
Certification and Licensing Division
Administrative Office of the Courts



Supreme Court of Utah

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Appellate Clerks' Office
Telephone 801-578-3900
Email: supremecourt@utcourts.gov

March 4, 2019

A Move Toward Equal Access to Justice

Four billion people live “outside of the rule of law—with little access to basic legal tools.”¹ This predicament is not unique to third-world countries: According to the World Justice Project’s most recent survey, the United States is tied for 99th out of 126 countries in terms of access to and affordability of a civil justice system. Yet access to justice should be the hallmark of the American legal system. In the words of Chief Justice John Marshall, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [they] receive[] an injury.”² And “[o]ne of the first duties of government is to afford that protection.”³

As the branch of government with constitutional responsibility over the administration of justice, the Utah judiciary has been in the vanguard of initiatives aimed at solving the access-to-justice problem. To this end, the judiciary, under the leadership of the Utah Supreme Court and the Judicial Council, has relatively recently established state-wide pro bono efforts, moved to systematize court-approved forms and make them easily accessible online to all, established a new legal profession in Licensed Paralegal Practitioners, and piloted an online dispute resolution model for small claims court. Each of these initiatives takes an important step toward narrowing the access-to-justice gap. But the most promising initiative involves profoundly reimagining the way the law is regulated in order to harness the power of entrepreneurship, capital, and machine learning in the legal arena.

In this regard, in late 2018, the Utah Supreme Court, at the request of the Utah State Bar Association, charged John Lund (past President of the Bar) and Justice Deno Himonas with organizing a work group to study and make recommendations to the Court about optimizing the regulatory structure for legal services in the Age of Disruption in a manner that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services. With this objective in mind, members of the Utah court system and the State Bar and academics and other experts, working closely together, have begun to envision and outline what a new regulatory structure might look like. This regulatory structure involves, among other things, (1) loosening restrictions on lawyer advertising, solicitation, and fee arrangements, including referrals and fee sharing; (2) providing for broad-based investment and participation in business models that provide legal services to the public, including non-lawyer investment and ownership of these entities; and (3) creating a regulatory body under the auspices of the Utah Supreme Court to develop and implement a risk-based, empirically-grounded regulatory process for legal services. This body would also, potentially, solicit non-traditional sources of legal services, including non-lawyers, and allow them to test innovative legal service models and delivery systems through the use

¹ Hadfield, G.K. (2017) *Rules for a Flat World*, p. 281, Oxford University Press.

² *Marbury v. Madison*, 5. U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

³ *Id.*

of a “regulatory sandbox” approach, which permits innovation to happen in designated areas and addresses risk and generates data to inform the regulatory process.

Bridging the access-to-justice gap is no easy undertaking: it requires multi-dimensional vision, strong public leadership, and perseverance. It also requires timely action. Knowing this, the work group intends to complete its work and provide a written report with specific recommendations to the Supreme Court by June 30, 2019.



The State Bar of California

Task Force on Access Through Innovation of Legal Services

Studying ways to increase access to justice for all Californians by responsibly harnessing the power of technology.

Background

Too many Californians needing legal services cannot afford an attorney or don't have meaningful access. A 2018 [Legal Market Landscape Report](#), commissioned by the State Bar, concluded:

- As in healthcare, education, and other knowledge-intensive professions, the cost of traditional legal services is increasing.
- Access to legal services is decreasing. A growing proportion of consumers are choosing to forgo legal services rather than pay the high price. In a recent study conducted by the National Center for State Courts, 76% of civil cases involved at least one party who was self-represented, roughly double the number 20 years earlier.
- Law is moving rapidly from a model of one-to-one consultative legal services to one where technology could enable affordable, one-to-many legal solutions.
- The public interest may be better served by regulatory approaches that encourage innovation in one-to-many legal solutions created by professionals from multiple disciplines.
- Modifying ethics rules premised on one-to-one legal services to facilitate greater collaboration across law and other disciplines could have many benefits: driving down costs; improving access; increasing predictability and transparency of legal services; aiding the growth of new businesses; and elevating the reputation of the legal profession.

By harnessing innovative approaches from the tech sector while maintaining our paramount commitment to protect the public, the State Bar hopes to help improve access.

The [State Bar's Task Force on Access Through Innovation of Legal Services](#) is charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services.

The Task Force will deliver its final report to the Board of Trustees no later than December 31, 2019. In keeping with the State Bar's Strategic Plan goals and objectives, each recommendation is expected to balance the dual goals of public protection and increased access to justice.

Task Force Charter

The Task Force will address three broad areas:

1. Definition of unauthorized practice of law

Review the current consumer protection purposes of the prohibitions against unauthorized practice of law as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public. In addition, assess the impact of the current definition of the practice of law on the use of artificial intelligence and other technology-driven delivery systems, including online consumer self-help legal research and information services, matching services, document production and dispute resolution;

2. Marketing, advertising, partnerships, and fee-splitting

Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law-related services, especially in those areas of service where there is the greatest unmet need; and

3. Non-lawyer ownership or investment

With a focus on preserving the client protection afforded by the legal profession's core values of confidentiality, loyalty and independence of professional judgment, *prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non-lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.*

Task Force Composition

The Task Force has 23 members, a majority of whom are non-attorneys. A non-attorney majority helps ensure that the recommendations of the Task Force are focused on protecting the interests of the public.

Chair: Lee Edmon, Presiding Justice, California Court of Appeal Second Appellate District, Division 3

Vice-Chairs: Toby Rothschild, Of Counsel, OneJustice; and Joyce Raby, Executive Director, Florida Justice Technology Center

OPEN SESSION AGENDA ITEM

703 JULY 2018

DATE: July 19, 2018

TO: **Members, Board of Trustees**

FROM: Randall Difuntorum, Program Manager, Professional Competence

SUBJECT: State Bar Study of Online Delivery of Legal Services – Discussion of Preliminary Landscape Analysis

EXECUTIVE SUMMARY

This matter is before the Board of Trustees (“Board”) for discussion. After the January 2018, planning session, the Board added objective d to Goal 4 of the strategic plan, directing the study of online legal service delivery models to determine if regulatory changes are needed to support or regulate access through the use of technology. The Bar contracted with Professor William D. Henderson¹ to conduct a landscape analysis of the current state of the legal services market, including new technologies and business models used in the delivery of legal services, with a special focus on enhancing access to justice.

BACKGROUND

The State Bar’s 2017-2022 Strategic Plan sets forth among the goals and objectives of the Bar, the following:

Goal 4: Support access to justice for all California residents and improvements to the state’s justice system.

¹ Professor William Henderson is on the faculty at Indiana University Maurer School of Law, where he holds the Stephen F. Burns Chair on the Legal Profession. Prof. Henderson focuses primarily on the empirical analysis of the legal profession and has appeared in leading legal journals, including the *Stanford Law Review*, the *Michigan Law Review*, and the *Texas Law Review*. In addition, he regularly publishes articles in *The American Lawyer*, *The ABA Journal*, and *The National Law Journal*. His observations on the legal market are also frequently quoted in the mainstream press, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Atlantic Monthly*, *The Economist*, and National Public Radio. Based on his research and public speaking, Prof. Henderson was included on the *National Law Journal*’s list of The 100 Most Influential Lawyers in America (compiled every ten years). In 2015 and 2016, he was named the Most Influential Person in Legal Education by *The National Jurist* magazine. In 2010, Prof. Henderson co-founded Lawyer Metrics, an applied research company that helps lawyers and law firms use data to make better operational and strategic decisions. Lawyer Metrics (now LawyerMetrix) was acquired by AccessLex Institute in 2015. In 2017, he founded Legal Evolution, an online publication that chronicles successful innovation within the legal industry.

Objective d: Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

To begin the work outlined in this objective, the Bar contracted with Professor Henderson to lay the groundwork for future regulatory changes by capturing the many online legal service delivery models that have developed and the ways states across the country have addressed those business models.

DISCUSSION

Professor Henderson's report is provided as Attachment A. The report is the first step in the Bar's study of delivery of legal services through the use of technology.

The goal is to survey the landscape of the current and evolving state of the legal services market with a particular emphasis on new business models developed for delivering legal services using methods that are distinct from traditional delivery systems. This includes models that provide full-service legal representation and models focused on limited scope services either combined with, or independent of, other available law related or non-legal professional services. Other law related services might include: document drafting; legal information consulting; self-help resources; access to legal information and forms/templates databases; pre-paid or subscription legal service plans; dispute resolution services; and lawyer client matching services provided through interactive online directories, lead generation or other technology based techniques for pairing a prospective lawyer and client. Non-legal professional services include accounting, investment, research, information technology and counseling services. Non-lawyer involvement in these new business models may take the form of either active or passive participation, including passive capital investment. In addition to the above, the landscape analysis includes a discussion of the emerging "gig economy."

Next steps include Board consideration of a task force to prepare policy and implementation recommendations.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal 4: Support access to justice for all California residents and improvements to the state's justice system.

Objective d: Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

RECOMMENDATION

Staff recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees receives and accepts Professor William Henderson's landscape report on the legal services market; and it is

FURTHER RESOLVED, that the Board of Trustees authorizes the formation of a Task Force to analyze the landscape report and conduct a study of possible regulatory reforms, including but not limited to the online delivery of legal services, that balance the State Bar's dual goals of public protection and increased access to justice; and it is

FURTHER RESOLVED, that the Board of Trustees directs staff to work with the Chair and Vice-Chair of the Programs Committee to draft a task force charter and a recommendation for the categories of expertise that the members to be appointed to the Task Force should possess in order to ensure that the Task Force represents a broad range of interests.

ATTACHMENT(S) LIST

- A.** Legal Market Landscape Report (July 2018) by Prof. William D. Henderson
- B.** Excerpts from the Terms of Use Provisions for LegalZoom and AVVO.COM

Legal Market Landscape Report

Commissioned by the State
Bar of California

July 2018

William D. Henderson



Legal Market Landscape Report
Commissioned by the State Bar of California
July 2018

Executive Summary

Throughout the United States, legal regulators face a challenging environment in which the cost of traditional legal services is going up, access to legal services is going down, the growth rate of law firms is flat, and lawyers serving ordinary people are struggling to earn a living. The primary mechanism for regulating this market is lawyer ethics, including the historical prohibition on nonlawyer ownership of businesses engaged in the practice of law. However, private investors are increasingly pushing the boundaries of these rules by funding new technologies and service delivery models designed to solve many of the legal market's most vexing problems.

There is ample evidence that the legal profession is divided into two segments, one serving individuals (PeopleLaw) and the other serving corporations (Organizational Clients). These two segments have very different economic drivers and are evolving in very different ways. Since the mid-1970s, the PeopleLaw sector has entered a period of decline characterized by fewer paying clients and shrinking lawyer income. Recent government statistics reveal that the PeopleLaw sector shrank by nearly \$7 billion (10.1%) between 2007 and 2012. Throughout this period, the number of self-represented parties in state court continued to climb. The Organizational Client sector is also experiencing economic stress. Its primary challenge is the growing complexity of a highly regulated and interconnected economy. Since the 1990s, corporate clients have coped with this challenge by growing legal departments and insourcing legal work. More recently, cost pressure on corporate clients has given rise to alternative legal service providers (ALSPs) funded by sophisticated private investors. Both responses come at the expense of traditional law firms.

What ties these two sectors together is the problem of lagging legal productivity. As society become wealthier through better and cheaper good and services, human-intensive fields such as law, medical care, and higher education become relatively more expensive. In contrast to medical care and higher education, however, a growing proportion of U.S. consumers are choosing to forgo legal services rather than pay a higher price.

The legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethics rules hinder this type of collaboration. To the extent these rules promote consumer protection, they do so only for the minority of citizens who can afford legal services. Modifying the ethics rules to facilitate greater collaboration across law and other disciplines will (1) drive down costs; (2) improve access; (3) increase predictability and transparency of legal services; (4) aid the growth of new businesses; and (5) elevate the reputation of the legal profession. Some U.S. jurisdiction needs to go first. Based on historical precedent, the most likely jurisdiction is California.

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1. Size and Composition of the U.S. Legal Market

There is widespread consensus among lawyers, judges, legal academics, regulators and sophisticated clients that the legal market is in a period of significant tumult. Further, there is also agreement that this tumult may be the early stages of a fundamental transformation. Yet, what is new and disconcerting for many is that these changes are not being driven by licensed lawyers or the organized bar. Rather, the causes are powerful external market forces that cannot be easily categorized using our familiar and well-established frameworks. At a minimum, our frameworks need updating.

Effective regulation requires (1) an understanding of the marketplace, and (2) the ability to clearly articulate how duly enacted rules, policies and procedures are serving the public interest. The purpose of this landscape report is to describe the rapidly evolving structure of the U.S. legal market (the first prong) so that Trustees of the State Bar of California can better evaluate vital regulatory questions that bear on the protection of the public as required under the State Bar Act.¹

To establish a clear baseline, Section 1 begins with the most current government statistics on legal services. It then describes facets of the emerging legal economy that are not captured by traditional categories yet reflect significant new business models and novel ways of legal problem-solving. In most cases, these changes require close collaboration between lawyers, technologists, data scientists, and several other disciplines.

1.1. Legal Services Data from the U.S. Census Bureau

Every five years, the U.S. Census Bureau conducts the Economic Census, which is a comprehensive measurement of American business.² The most recent Economic Census was conducted in 2012. The information is organized based on the North American Industry Classification System.³ The four-digit NAICS number for legal services is 5411. In 2012, the U.S. legal services market (NAICS 5411) totaled approximately \$261.7 billion in revenue.

As show in Figure 1, the legal services sector has experienced significant growth over the last two decades. It is noteworthy, however, that the pace of growth appears to be slowing. Between 1997 and 2002, the sector grew 43.3 percent (\$127.1 to \$182.1B), followed by 31.5 percent growth between 2002 and 2007 (\$182.1 to \$239.4B). However, between 2007 and 2012, growth slowed to 9.3 percent (\$239.4 to \$261.7B). Further, total employment in the legal services sector has declined by approximately 55,000 jobs since the 2007 high-water mark. In fact, in terms of employment, the legal sector is smaller now than it was in 2002.⁴

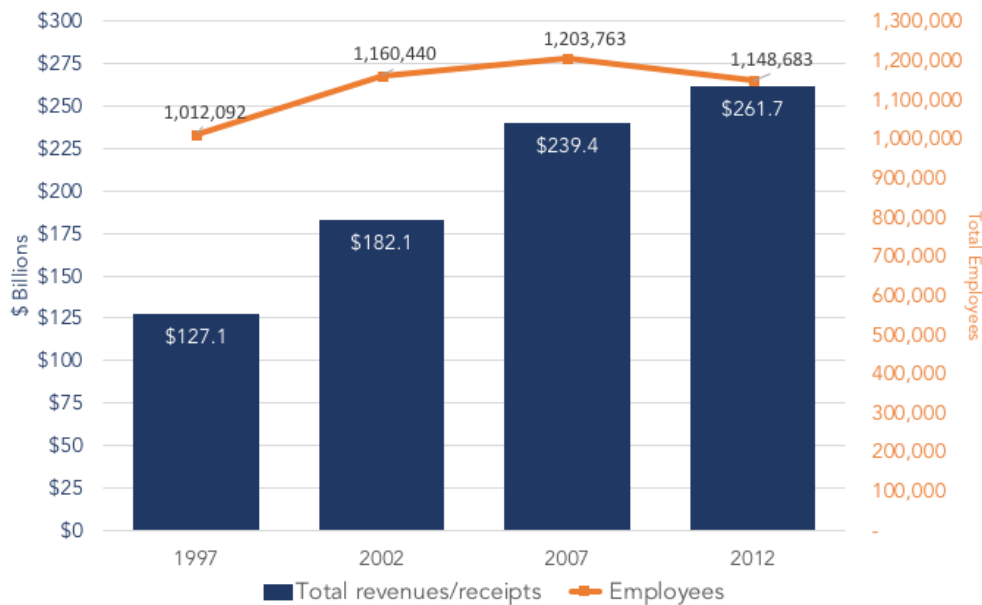
¹ See Business and Professions Code section 6001.1 State Bar— Protection of the Public as the Highest Priority ("Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."). See also, Business and Professions Code sections 6055 et seq., operative Jan. 1, 2018– (describing the creation of a voluntary nonprofit association that is a non-governmental entity separate from the State Bar, that assumes the responsibilities and activities of the former sections of the State Bar).

² See <https://www.census.gov/programs-surveys/economic-census.html> (last visited June 22, 2018).

³ The NAICS system was first introduced in 1997, replacing the Standard Industrial Classification (SIC) system. Thus, we do not have commensurable data for the pre-1997 time period.

⁴ According to the U.S. Census County Business Patterns data set, employment in the legal services sectors (5411) totaled 1,137,480 in 2016, which suggests continued stagnant employment.

Figure 1. U.S. Legal Services (NAICS 5411), Receipts and Employment, 1997 to 2012



Sources: U.S. Census Bureau, Economic Census. Graph generated by Legal Evolution PBC

An important caveat regarding the Figure 1 statistics, however, is that in the Economic Census data, law firm partners are owners rather than employees. Thus, partners are *not* part of the employment count. Data from the ABA suggests that the U.S. legal profession has gotten significantly older over the last half century, with the median age climbing from 39 in 1980 to 49 in 2005.⁵ Therefore, it is quite possible that the diminution in legal services employment is occurring because law firms contain more partners who are, on balance, older and less leveraged in terms of associates, paralegals and staff.

The emphasis on law firms is important because, as the official government statistics show, the vast majority of the legal services sector is comprised of offices of lawyers (95.1%). Nonprofit legal service organizations are included in this category but make up a small fraction of the overall market (1.0%). The remaining balance of the legal services sectors is comprised of title abstract and settlement offices (541191) and all other legal services (541199). These figures are summarized in Table 1.

⁵ See Bill Henderson, *Is the Legal Profession Showing its Age?*, LEGAL WHITEBOARD, Oct. 13, 2013, http://professorhenderson.com/downloads/Is_the_Legal_Profession_Showing_Its_Age.pdf (last visited June 23, 2018).

Table 1. U.S. Legal Services Market, 2012

Legal Services (5411)	Receipts (5-digit) (thousands)	Receipts (6-digit) (thousands)	Percentage
Offices of Lawyers (54111)	\$248,884,540		95.1%
Law firms (5411101)		\$246,141,231	94.1%
Nonprofit legal aid organizations (5411102)		\$2,743,309	1.0%
Other legal services (54119)	\$12,810,105		4.9%
All other legal services (541199)		\$3,256,378	1.2%
Title Abstract and Settlement Services (541191)		\$9,553,727	3.7%
Total	\$261,694,645	\$261,694,645	100.0%

Source: U.S. Census Bureau 2012 Economic Census

According to the same Economic Census data, the California legal services market (5411) in 2012 totaled \$38.6 billion, which was 14.7 percent of the \$261.7 billion U.S. legal services sector. As shown in Table 2, the composition of California is very similar to the overall U.S. market. The only noteworthy difference is an “all other legal services” sector that is, proportionally, twice the size of the national market (2.5% versus 1.2%).

Table 2. California Legal Services Market, 2012

Legal Services (5411)	Receipts (5-digit) (thousands)	Receipts (6-digit) (thousands)	Percentage
Offices of Lawyers (54111)	36,920,644		95.7%
Law firms (5411101)		\$36,506,552	94.6%
Nonprofit legal aid organizations (5411102)		\$414,092	1.1%
Other legal services (54119)	\$1,670,893		4.3%
All other legal services (541199)		\$717,802	2.5%
Title Abstract and Settlement Services (541191)		\$953,091	2.5%
Total	\$38,591,537	\$38,591,537	100.0%

Source: U.S. Census Bureau 2012 Economic Census

It is noteworthy that since 2002, the “all other legal services” market in California has more than doubled, growing from \$312.7 to \$717.8 million. Drawing upon the Dun & Bradstreet Reports that tracks private company data, including their NAICS number, there is a wide variety of companies in this space, such as a document retrieval company called Macro-Pro (Long Beach, \$12 million in annual reviews, 156 employees); a cloud-based e-discovery software company called Case Central (Pasadena, \$7.5 million, 60 employees); a company that files and serves court documents called One Legal (Los Angeles, \$4.million, 60 employees); and a company that provides full-service patent and literature search capabilities (San Diego, \$1.1 million, 10 employees).

The key takeaway from Tables 1-2 is that official measures of the legal services in the U.S. show a market overwhelmingly comprised of law firms. What is not included, but nonetheless economically significant, consists of:

- In-house lawyers working directly for corporations and nonprofits
- Lawyers working in federal, state and local government
- Lawyers working as part of the gig economy
- Lawyers and allied professionals working in a burgeoning technology and publishing sector that is focused on legal issues and problems

1.2. In-House and Government Lawyers

The U.S. Bureau of Labor Statistics (BLS) compiles information on specific occupations, with breakdowns based on geography and industry. This provides a reliable method of tracking the income and growth of lawyers by sector, including those working in-house or in government.

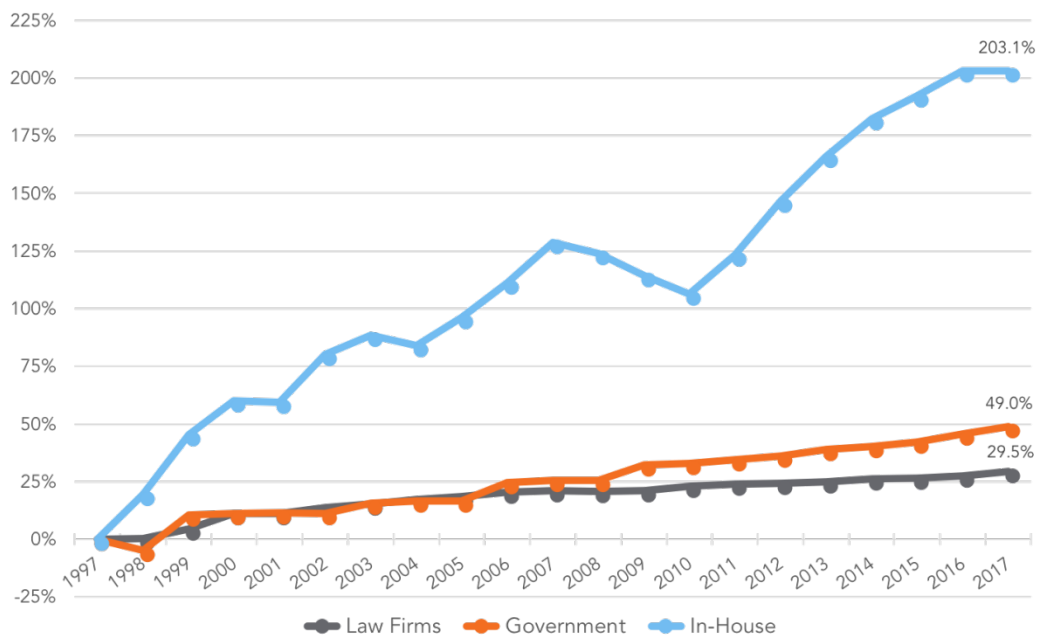
According to the latest government statistics, there are currently 628,370 lawyers employed as W-2 employees working in various parts of the U.S. (Similar to the Economic Census, these government data also do not include law firm partners and solo practitioners.)⁶ The largest industry category of employer is legal services (5411), with 388,670 lawyers, followed by lawyers working in government (local 54,920, state 42,250, federal 37,210).⁷ For the purposes of this analysis, in-house lawyers are professionals working as lawyers in industries other than legal services or government. In 2017, this number totaled 105,310, which is roughly equivalent to the number of lawyers working in the domestic offices of the 200 largest U.S. law firms based on revenues (Am Law 200).

Figure 2 below shows the growth of lawyers by practice setting with 1997 as the baseline. The most striking feature is the rapid growth rate for in-house lawyers. Note also how employment rates for in-house lawyers tracked the economic downturn in 2008 to 2010. Yet it is also noteworthy that since the mid-2000's, the growth rate for law firm employment has lagged behind the rate for government lawyers. Among the three practice settings, in-house lawyers had the highest incomes (\$162,242) followed by law firms (\$147,950) and government lawyers (\$108,411).

⁶ According to ABA statistics, in 2018 there are 1,338,678 active resident attorneys in the U.S. See https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf (last visited July 11, 2018). Thus, it is reasonable to estimate that slightly more than half of lawyers are either law firm partners, shareholders, or solo practitioners. Unfortunately, the number and income of lawyers as business owners is not something tracked and published by the U.S. government. Data on employed lawyers, particularly over time, remain a useful barometer of the vitality of the overall legal economy.

⁷ See Occupational Employment and Wages, May 2017, 23-1011 Lawyers, <https://www.bls.gov/oes/current/oes231011.htm> (last visited June 23, 2018).

Figure 2. Percent Change in Employed Lawyers by Practice Setting, 1997 to 2017



Sources: Bureau of Labor Statistics. Graph generated by Legal Evolution PBC

1.3. Employed Lawyers Working in California

As of May 2017, there were 79,980 “employed” lawyers working in the state of California. This number includes lawyers working in legal departments, public interest organizations and government. It also includes associates, staff attorneys and counsel working in law firms, but excludes partners and shareholders (i.e., owners of the firm). The metro areas of Los Angeles-Long Beach-Glendale and San Francisco-Redwood City-South San Francisco are both in the top 10 for U.S. metropolitan areas based on total employment of lawyers (#3 LA with 27,210 jobs, #9 San Francisco at 11,580).

According to the BLS, employed lawyers in California earned an average of \$168,200 per year, which is the highest income among the 50 states, trailing only the District of Columbia at \$189,560. When ranked by average income, six of the top 10 metropolitan areas are located in California:

- #1 San Jose-Sunnyvale-Santa Clara (\$198,100, 5,470 lawyers)
- #2 San Francisco-Redwood City-South San Francisco (\$189,660, 11,580 lawyers)
- #3 Anaheim-Santa Ana-Irvine (\$189,150, 7,700 lawyers)
- #5 San Rafael (\$180,530, 560 lawyers)
- #9 Oxnard-Thousand Oaks-Ventura (\$174,420, 1,200 lawyers)
- #10 Los Angeles-Long Beach-Glendale (\$170,210, 27,210 lawyers)⁸

Although limitations in available data make it difficult to pin down the composition and drivers of California’s relatively vibrant legal services economy, the author believes that one factor is California’s role in the in-house legal department growth movement. California is home to

⁸ See Occupational Employment and Wages, May 2017, 23-1011 Lawyers, <https://www.bls.gov/oes/current/oes231011.htm> (last visited June 23, 2018).

many of the nation's leading technology companies. Personnel from these legal departments – including Cisco, Google, Oracle, NetApp, Yahoo, Facebook and Adobe – were the driving force behind the creation of the Corporate Legal Operations Consortium (CLOC).⁹ This organization is a relatively new but large and growing global trade association for legal operations (“legal ops”) professionals. All CLOC board members are employed in Fortune 500 legal departments based in northern California. The 1000+ CLOC members tend to be influential in how their organizations buy legal services, often demanding better use of data, process, and technology. This flexing of economic power by legal departments—often through teams of legal ops professionals—is an important development that will be addressed in other parts of this report.¹⁰

1.4. Lawyers Working in the Gig Economy

In recent years, the gig economy has expanded to include lawyers.¹¹ Unfortunately, there is no reliable mechanism for tracking the growth and composition of this subsector. Some of the larger and more established managed service companies (also known as alternative legal service providers or ALSPs), such as Axiom, UnitedLex and Counsel On Call, maintain a stable of employed lawyers who are regularly assigned to major clients. Although these lawyers are technically contingent workers, a large portion are W-2 employees who are eligible for benefits through the company.¹² However, these lawyers are the exception rather than the rule. Most lawyers in the gig economy are independent contractors with no guaranteed flow of work and relatively little leverage to negotiate for higher rates or wages.¹³

Lawyers working in the gig economy are likely to be counted through the U.S. Census Bureau's Nonemployer Statistics Program. NES is an annual series on businesses that are subject to federal income tax but have no paid employees.¹⁴ Thus, to be clear, if a solo practitioner employs a secretary, paralegal or associate, this arrangement would qualify as a law firm and would therefore be tracked by other Census Bureau programs.¹⁵ In 2016, the legal services sector (NAICS 5411) had 285,603 nonemployer establishments. Of this number, 54,742 (19.2%) generated revenues in excess of \$100,000 per year; 15,312 (5.4%) exceed \$250,000 per year. At the other end of the spectrum, 83,439 (29.2%) had revenues of less than \$10,000 per year. Table 3 contains a breakdown for the United States and California based on type of entity.

⁹ See www.cloc.org (last visited July 11, 2018).

¹⁰ See Sections 2.4 and 4.2, *infra*.

¹¹ See, e.g., Claire Bushey, *The gig economy comes to law*, CRAIN'S CHICAGO BUSINESS, May 6, 2017 (reporting on growth of contract lawyers used by major staffing agencies, typically for document review for corporate clients); Emma Ryan, *The gig economy: How freelancing is set to change the business of law*, LAWYERS WEEKLY (Australia), Nov. 30, 2017 (reporting greatest utilization of gig lawyers among in-house legal department); *How the Gig Economy is impacting Legal Services*, TRANSLATEMEDIA, Jan. 13, 2017 (reporting on changing attitudes among younger lawyers but also noting difficulty of simultaneously using contingent worker and maintaining data security).

¹² See William D. Henderson, *Efficiency Engines: Building Systems for Corporate Legal Work*, ABA JOURNAL, June 2017, at 37 (discussing managed services business model and identifying the largest managed services providers).

¹³ For a detailed look into the rise and conditions within this subsector, see ROBERT A. BROOKS, *CHEAPER BY THE HOUR: TEMPORARY LAWYERS AND THE DEPROFESSIONALIZATION OF THE LAW* (2011).

¹⁴ See <https://www.census.gov/programs-surveys/nonemployer-statistics.html> (last visited June 25, 2018).

¹⁵ Employment within law firms is tracked annually by the County Business Patterns (CBP) program. Annual receipts are captured every five years through the Economic Census.

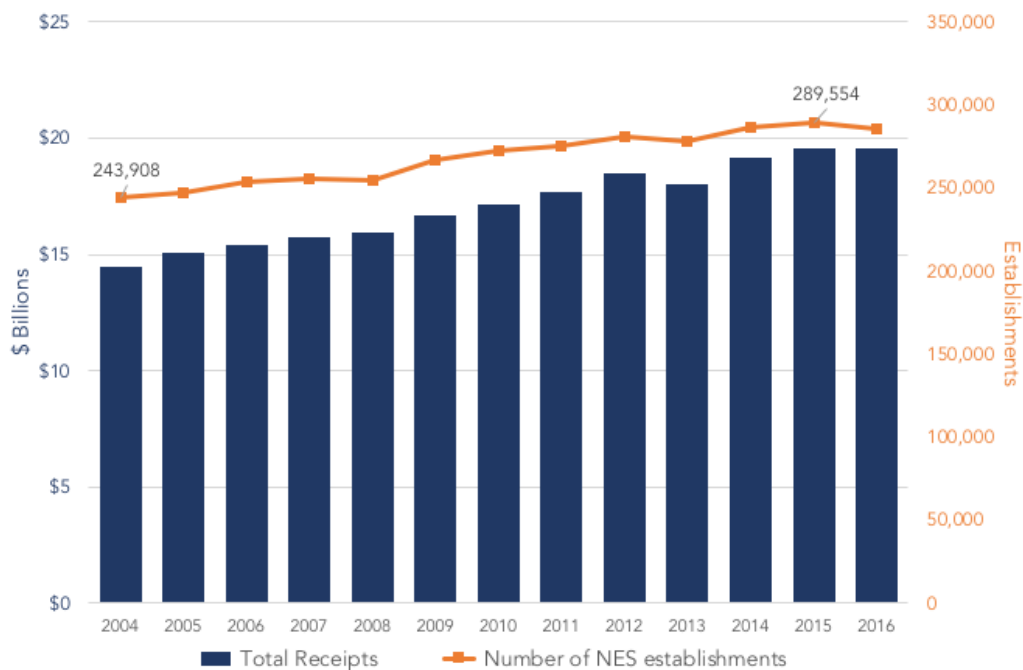
Table 3. 2016 Nonemployer Statistics: Count, Receipts, Average Revenue

Type of Entity	United States			California		
	Number	Total Receipts (thousands)	Avg. Rev.	Number	Total Receipts (thousands)	Avg. Rev.
Individual proprietorships	258,987	\$15,987,423	\$61,731	43,364	\$3,250,949	\$74,969
S-corporations	16,070	\$1,598,720	\$99,485	1,900	\$262,889	\$138,363
Partnerships	7,421	\$1,675,755	\$225,813	1,147	\$337,061	\$293,863
C-corporations / Other	3,125	\$304,103	\$97,313	649	\$82,591	\$127,259
All establishments	285,603	\$19,566,001	\$68,508	47,060	\$3,933,490	\$83,585

Source: U.S. Census Bureau 2016 Nonemployer Statistics

Despite the imprecision of NES groupings, the NES trends reveal significant changes in the legal economy that are likely connected with the growth of the gig economy for lawyers. Figure 3 shows the growth of receipts and number of nonemployer establishments in the 2004 to 2016 time period.

Figure 3. Total Receipts & Number of Nonemployers, 2016 Legal Services (NAICS 5411)



Sources: U.S. Census Bureau, Nonemployer Statistics. Graph generated by Legal Evolution PBC

Figure 3 should be contrasted with Figure 1, which tracks changes in revenue and employment in the broader legal services industry (overwhelmingly law firms). Whereas employment peaked in the broader legal services market in 2007 and is now lower than 2002 levels, the nonemployer segment, which fully contains the gig lawyer economy, has been moving upward in both receipts and number of establishments. Between 2004 and 2016, the count increased by more than 41,000 establishments (i.e., contract lawyers and/or solos without employees). During this

same period, total employment in the legal services sector declined by 80,870 jobs.¹⁶ These trend lines suggest that traditional law firm employment is slowly giving way to a workforce that is more contingent. This is likely occurring because traditional legal employers are struggling to grow and thus are seeking ways to reduce the risk of adding w-2 employees.

As the gig economy grows and matures, it is also segmenting. One of the most established segments is the market for contract lawyers doing document review for major litigation and information requests from the FTC/DOJ related to antitrust review of proposed mergers. For nearly 20 years, this work has slowly moved out of law firms to contract attorneys provided by a large number of national and regional staffing agencies¹⁷ or managed service firms.

One of the best windows on this market is the Posse List, which is a website founded in 2002 that maintains a large number of Listservs based on geography, subject matter expertise and foreign language proficiency. The staffing agencies and managed service firms post jobs; in turn, interested Posse List subscribers respond. According to a recent story in *Chicago Crain's Business*, the number of attorneys who subscribe to the Chicago portion of the Posse List increased from 1,520 in 2006 to over 5,000 in 2017.¹⁸ The California market has robust coverage, with a statewide Listserv along with separate lists for the Los Angeles, San Francisco, San Diego and Sacramento markets.

In theory, the work brokered by the Posse List is the type of labor-intensive work most susceptible to replacement by legal process outsourcing and artificial intelligence. Yet time zone differences, the complexity of managing language and cultural issues and a shrinking wage differential between the U.S. and abroad have kept a substantial amount of this work in the U.S. Further, at least in 2018, AI technologies are being deployed not to replace lawyers, but to help manage the relentless increase of volume and complexity of information and legal tasks. As a result, recent reports show growing demand in the major markets, causing some work to be diverted to lower-cost U.S. markets.¹⁹ Pay is currently in the \$32 to \$35 per hour range in major markets – a sum that is probably well below the expectations of most law school graduates.

Another segment of the gig economy for lawyers is centered around the needs of smaller and midsize law firms that occasionally have large projects or surges in demand. This portion of the bar is increasingly served by lawyer-to-lawyer marketplaces that are carefully constructed so that sufficient subject matter information is shared to facilitate bidding on projects and matching subject matter expertise, but not information that would compromise client confidentiality. After a match is made, a conflict check is performed before entering into a project engagement.

¹⁶ Calculated by Legal Evolution PBC from U.S. Census Bureau County Business Patterns data. In 2004, there were 1,218,350 employers in the legal services sectors (5411). In 2016, that number had declined to 1,137,480.

¹⁷ Many of these staffing agencies are either publicly held companies or owned at least in part by private equity firms. For example, Kelly Law Registry (owned by Kelly Services, traded on the NASDAQ), Special Counsel (owned by Adecco Group, a publicly traded Swiss company), Robert Half Legal (owned by Robert Half International, traded on the NYSE).

¹⁸ See Bushey, *supra* note 11.

¹⁹ See, e.g., Greg P. Bufithis, *Tales from the trenches: the explosion of e-discovery projects in D.C. and NYC*, THE POSSE LIST, June 18, 2018, at <http://www.theposselist.com/2018/06/18/tales-from-the-trenches-the-explosion-of-e-discovery-document-review-projects-in-d-c-and-nyc/> (last visited June 26, 2018).

One of the most established marketplaces is Hire An Esquire, which claims to maintain a network of 8,000+ legal professionals in 50 states that have been vetted for quality. Some of these professionals are Hire An Esquire employees, while others are independent contractors. According to a 2017 article Hire An Esquire charges out attorneys at an average of \$70/hour, taking a 12 percent fee for 1099 projects and 40 percent for W-2 projects.²⁰ Hire An Esquire is financed by a combination of angel and venture capital funding.²¹

Other more recent entrants to the lawyer-to-lawyer marketplace space include LawClerk.legal and Lawyer Exchange. In contrast to Hire An Esquire, both of these portals let the price of work float between the contracting law firms and contract lawyers. Further, both enable the contracting firm and contract lawyers to rate their experience with each other, thus enabling a market that reflects not only price but also quality of work and collegial nature of the work environment. In the case of LawClerk.legal, the company appears to elide the risk of multijurisdictional practice and the unauthorized practice of law by holding itself out as “a marketplace through which persons holding a law degree (“Lawclerks”) may be engaged in the capacity of a paraprofessional (verses as a lawyer) by attorneys that are admitted to and in good standing with their respective state’s bar association (“Attorneys”)[.]”²² The range of typical services includes “preparation of memorandums, pleadings, written discovery, and agreements.”²³

The business model for lawyer marketplaces usually requires the entity running the marketplace to act as a transparent and trustworthy conduit for payment. In most cases, but not all,²⁴ payment is tied to the amount or volume of work. Although this raises nominal questions related to Rule 5.4 of the ABA Model Rules of Professional Conduct²⁵ concerning fee-splitting – a fact that all of these businesses took into account before launching – the tension is with the text of the existing rules rather than the underlying policy, which is to safeguard lawyer independence.²⁶ Thus, when evaluating the propriety of these marketplaces, legal regulators should fully weigh the benefits of these services to both clients and lawyers and require a clear factual basis to show that lawyer judgment is at risk of being compromised to the detriment of clients. The fact that these marketplaces are springing up in such numbers, often backed by professional investors, is a telling sign that buyers and sellers need better pathways to find each other.

²⁰ See *Need a Freelance Lawyer? 3 Online Contract Marketplaces Compared*, CAPTERRA LEGAL SOFTWARE BLOG, Sept. 26, 2017, at <https://blog.capterra.com/need-a-freelance-lawyer-3-online-contract-lawyer-marketplaces-compared/> (last visited June 26, 2018).

²¹ See Crunchbase, https://www.crunchbase.com/organization/hire-an-esquire/funding_rounds/funding_rounds_list (last visited June 26, 2018).

²² See Ethics White Paper, https://www.lawclerk.legal/ethics_whitepaper (last visited June 26, 2018) (focusing on Model Rule 5.3, “Responsibilities Regarding Nonlawyer Assistants” and Model Rule 5.5 “Unauthorized Practice of Law”).

²³ *Id.*

²⁴ For example, MPlace is a marketplace for contract attorneys working on large corporate project that also maintains and shares ratings on clients and contract lawyers. However, its business model is a single-price annual subscription based on number of review “seats” the client hopes to fill.

²⁵ Unless otherwise noted, all rule references are to the ABA Model Rules of Professional Conduct.

²⁶ See Rule 5.4, 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.*” (emphasis added)).

1.5. Alternative Legal Service Providers (ALSPs) and LegalTech

In 2018, it is hard to overstate the tremendous economic and technological ferment of the legal ecosystem growing up within and around the traditional legal services market. Various organizations now produce “market maps” of the legal tech and legal startup space. Appendix A contains a representative sample published by Thomson Reuters,²⁷ which breaks down this crowded and diverse marketplace into the following categories (with number of companies in parentheses).

- Business Development / Marketplaces (19)
- Litigation Funding (6)
- Legal Education (13)
- E-Discovery (11)
- Practice Management (20)
- Legal Research (17)
- Case Management Analytics (10)
- Document Automation (17)
- Contract Management / Analysis (12)
- Consumer (11)
- Online Dispute Resolution (11)

Several of the companies mentioned in this report were launched *after* the creation of the 2016 Thomson Reuter map. The rapid change in this space makes it very difficult to accurately track.

Another window on the massive amount of innovation occurring in the legal services space can be seen in the large number of legal startups that are using artificial intelligence to create “point solutions” related to legal problem-solving.²⁸ For example, Tel Aviv-based LawGeex is a company that makes automated contract review technology that helps businesses sift through the myriad of contracts that are entered into during the normal course of business, such as NDAs, supplier agreements, purchase orders and SaaS licenses. As of April 2018, it had raised more than \$21 million from a syndicate of venture capital companies.²⁹

To help distinguish itself within a crowded marketplace, LawGeex recently launched a content marketing campaign³⁰ that included the creation of its LegalTech Buyer’s Guide. This remarkable document provides a detailed breakdown of venture capital funding (\$233 million in

²⁷ See David Curle, *Legal Tech Startups: Not Just for Silicon Valley Anymore*, LEGAL EXECUTIVE INSTITUTE, August 2, 2016, <http://www.legalexecutiveinstitute.com/legal-tech-startups/> (last visited June 26, 2018). CBInsights, which caters to professional investors, also regularly produces a legal tech market map. See, e.g., <https://www.cbinsights.com/research/legal-tech-market-map-company-list/> (last visited June 26, 2018).

²⁸ A point solution is a tech-driven way to handle a narrow category of work. Many point solutions require lawyers and staff to learn many new technologies, which slows overall tech adoption.

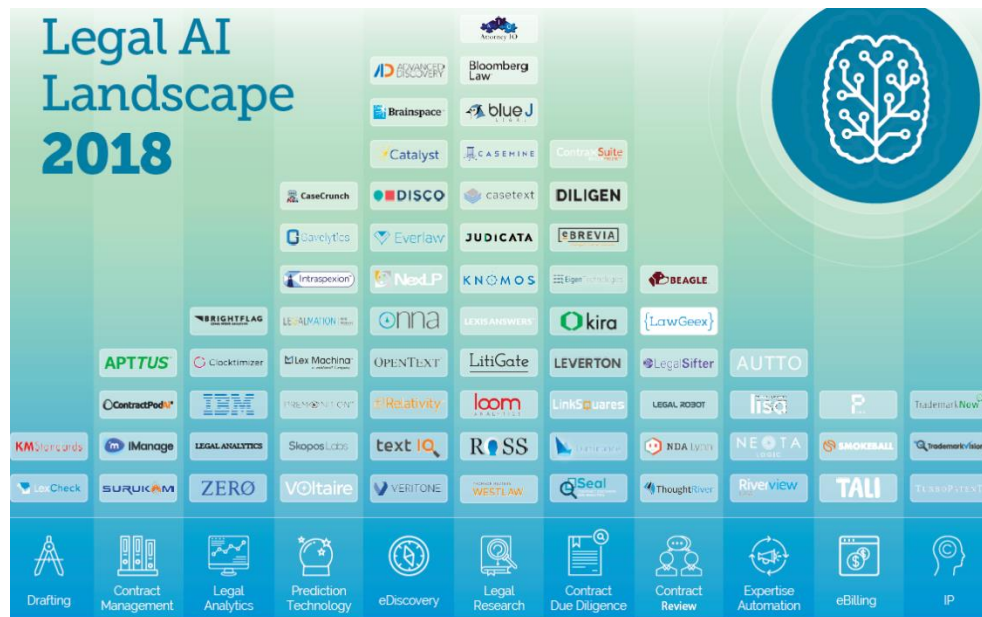
²⁹ See Steve O’Hear, *LawGeex raises \$12M for its AI-powered contract review technology*, TECHCRUNCH, Apr. 17, 2018, at <https://techcrunch.com/2018/04/17/lawgeex-raises-12m-for-its-ai-powered-contract-review-technology/> (last visited June 28, 2018).

³⁰ Content marketing is strategy where a company raises awareness for its products and services by providing prospective clientele with information that aids them in their business, often by educating them on complex technical topics. High quality content is a way to signal expertise within a crowded market. Thus, when a prospective client moves closer to a buy decision, they are favorably disposed toward the company that helped educate them. Within the legal industry, see generally JORDAN FURLONG & STEVE MATTHEWS, CONTENT MARKETING AND PUBLISHING STRATEGIES FOR LAW FIRMS (Ark 2013).

2017 across 61 deals) along with information on recent mergers, acquisitions and industry consolidation. What is most useful to buyers, however, is the careful categorization of more than 130 technology companies into 16 different categories. This includes a capsule summary of all 130+ companies, touching on issues of price, user experience, relative drawbacks and limitation compared to competitors and occasional pithy commentary from insiders. What makes the document credible is the fact that LawGeex is described in only *one* of the 16 legal tech categories.

Figure 4 below is a summary of the many AI-enabled legal tech companies based on “use case.”

Figure 4. Legal Tech Companies-based Artificial Intelligence Use Case



Even to a researcher focusing on the legal industry, this is a bewildering array of offerings. The author is reminded of an observation made 25 years ago by software engineer Paul Lippe, a legal tech entrepreneur who was then general counsel of Synopsys, an electronic design automation company based in Mountain View, California: “It’s only AI when you don’t know how it works; once you know how it works, it’s just software.”³¹ This anecdote makes a very important point: there is a lag between the development of new innovations and the ability of laypeople (including lawyers) to accurately understand, contextualize and categorize how these innovations fit into our economy, society and system of government.

The combining of law with technology is driven by powerful economic forces. Now more so than at any other time in history, law is in the process of moving from a pervasive model of one-to-one consultative legal services to one where technology enables one-to-many legal solutions.³² As momentum grows, more pressure will be placed on a regulatory framework

³¹ See Paul Lippe and Daniel Martin Katz, *10 Predictions about how IBM’s Watson will impact the legal profession*, ABA JOURNAL, Oct. 2, 2014 (Legal Rebels Series), at http://www.abajournal.com/legalrebels/article/10_predictions_about_how_ibms_watson_will_impact/ (last visited June 28, 2018).

³² See generally RICHARD SUSSKIND, *TOMORROW’S LAWYERS* (2nd ed. 2017) (discussing the transition for one-to-one consultative legal services to one-to-many productized legal solutions).

premised on one-to-one legal services. This raises very difficult questions for regulators, as paradigm shifts are rare events that are difficult to recognize. Rather than amend an ethics framework built for a bygone era, the public interest may be better served by a new regulatory structure that includes traditional lawyering side by side with one-to-many legal services, products and solutions created by a wide range of professionals from multiple disciplines. This is the path taken by Australia and the United Kingdom with the likelihood of Canada going next.³³

Section 2 of this report has additional descriptions and examples of other alternative legal businesses. However, that discussion requires a deeper understanding of how the U.S. legal market is functionally divided into two markets: one serving individuals and a second serving organizational clients.

2. Individual versus Organizational Clients

Drawing upon the social sciences, Section 2 reveals two legal markets: one serving individuals and another serving organizational clients. These markets need to be analyzed separately because they involve different economic drivers that are evolving in very different ways.

2.1. Chicago Lawyers I and II Studies

Two of the most important and informative studies on the legal profession are the Chicago Lawyers I and II studies.³⁴ Chicago Lawyers I was based on a randomized sample of 800 Chicago lawyers drawn in the year 1975. One of the study's most salient findings was that the legal profession was comprised of two "hemispheres," one serving individuals and the other working for large organizational clients. The specific hemisphere was strongly correlated with a lawyer's income, home zip code, law school attended, ethnicity, religion and bar association memberships, etc. The researchers described these two groups as hemispheres not only because each composed roughly half the profession, but also because their professional interests and networks seldom overlapped.³⁵

In 1995, the same core researchers conducted Chicago Lawyers II, which replicated the original study based on a new sample of Chicago lawyers. Over the intervening two decades, the organizational client hemisphere experienced a dramatic surge in work from corporate clients. As a result, the amount of time lawyers devoted to organizational clients doubled compared to the time spent on personal and small-business clients. Thus, the term "hemisphere," as in half, no longer applied. Typical large law firm income increased from \$144,985 in 1975 to \$271,706 in 1995. In-house counsel also fared well. In contrast, the most economically challenged group was solo practitioners, as these lawyers were much more likely to serve individuals through personal injury, family law, criminal defense and trusts-and-estates work. In 1975, a solo practitioner in the sample earned a median income of \$99,159 (in 1995 dollars). By 1995, this

³³ See, e.g., Judith A. McMorro, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEORGETOWN L. INT'L L. 665, 669-70 (2016) (discussing liberalization of legal regulatory changes in the U.K., Australia, continental Europe and Canada).

³⁴ John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure Of The Bar* (rev. ed. 1994) ("Chicago Lawyers I"); John P. Heinz et al., *Urban Lawyers: The New Social Structure Of The Bar* 6-7 (2005) ("Chicago Lawyers II").

³⁵ HEINZ ET AL., *supra* note 34, at 29 ("Only in the most formal of senses ... do the two types of lawyers constitute one profession.").

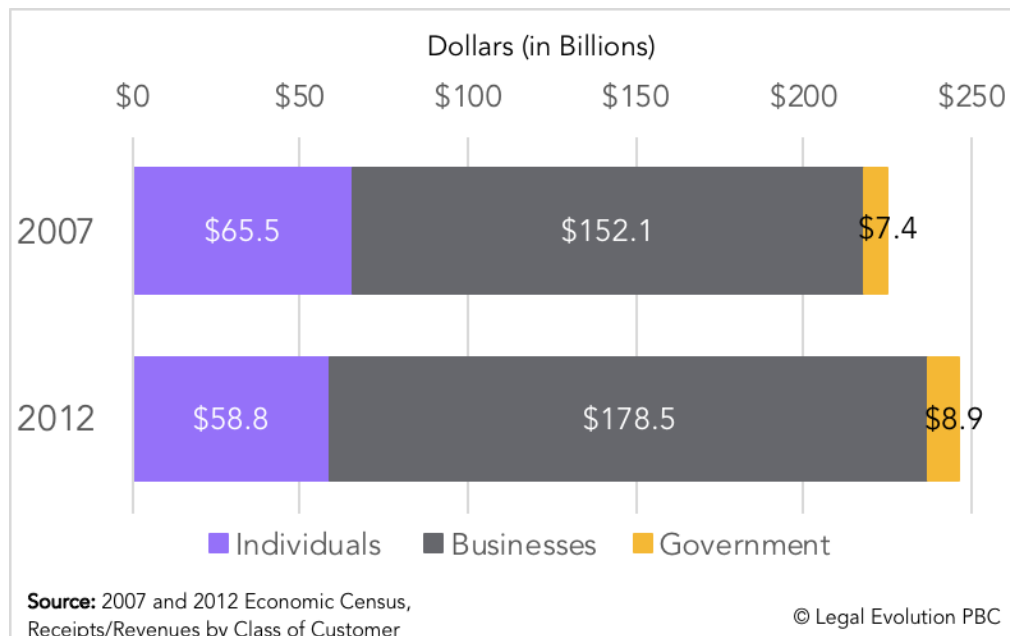
figure had dropped to \$55,000. Further, in 1995, 32 percent of these lawyers were working second jobs compared to 2 percent in 1975.

In the remainder of this report, I will refer to the portion of the bar focused on individuals as the PeopleLaw sector. The portion of the bar focused on corporate clients will be referred to as the Organizational Client sector.

2.2. How Type of Client Shapes the Economics of Practice

The Chicago Lawyers hemisphere framework is a very useful lens for understanding the changes that are occurring within the legal profession. The most fruitful place to apply this framework is the U.S. Census Bureau's Economic Census, which includes breakdowns of economic activity based on "class of customer." Figure 5 below compares total spending on legal services in 2007 and 2012 based on individual, business, or government client:

Figure 5. Dollars Spent on Legal Services, 2007 and 2012, by Type of Client



The most striking feature of Figure 5 is that over a five-year span, the total dollar amount for individual clients (PeopleLaw sector) declined by nearly \$7 billion. During the same time, the amount allocated to business (Organizational Client sector) increased by more than \$26 billion. Although solo and smaller incomes were in the decline in Chicago Lawyers, the actual *shrinkage* of the PeopleLaw sector suggests we are in the midst of an irreversible structural shift..

The stark differences between the PeopleLaw and Organizational Client sectors are made more concrete when the data is broken down by client type. Table 4 presents an estimated breakdown of average legal expenses by type of client:³⁶

³⁶ For a complete discussion of data sources and methodology, see William D. Henderson, "The Legal Profession and Legal Services: Nature and Evolution," in *LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION* § 1-1.2 (Gregory C. Sisk, ed., 2018).

Table 4. Breakdown of 2012 Law Firm Receipts by Type/Size of Client

Type of Client	Number	Total Receipts for Legal Services (thousands)	Avg. Payment per Client	% of Total Receipts
Individuals	314,000,000	\$58,827,000	\$187	23.9%
Business: < \$1M to \$5M	5,359,731	\$41,310,000	\$7,707	16.8%
Business: > 5M to \$100M	344,037	\$65,604,000	\$774,910	26.7%
Business: > 100M to \$4.75B	21,892	\$41,500,000	\$1,895,670	16.9%
Business: Fortune 500	500	\$30,000,000	\$60,000,000	12.2%
Government Entities	89,055	\$8,900,000	\$99,938	3.6%
	319,815,215	\$246,141,000	\$769.64	100.0%

Source: U.S. Census Bureau 2012 Economic Census, Calculations by Legal Evolution PBC

In 2012, the per capita amount spent on legal services by 314 million U.S. residents was \$187. For businesses with less than \$5 million in annual receipts, the average legal budget was \$7,707. In contrast, for the 500 clients in the Fortune 500, the budget was \$60 million. Indeed, in 2012, roughly one out of eight (12.2%) dollars spent on legal services came from a Fortune 500 company – and this does not include the economic value of their large in-house legal departments.

A law practice serving individual “retail” clients is obviously going to require a different business model than a law practice serving the Fortune 500. Thus, it is reasonable to ask whether the public interest would be better served by a regulatory structure that is sensitive to the challenges that exist within these two very different parts of the market.

2.3. The Economics of PeopleLaw

A 2017 study by Clio, a cloud-based matter management and timekeeping company for solo and small firms, provides a window on the challenges of running a “main street” law practice.³⁷

The Clio sample is based on timekeepers from 60,000 law firms billing over 10 million hours of time in 2016 totaling more the \$2.56 billion. Because the sample is so large and reflects lawyers sophisticated and successful enough to pay for matter management software, it is surprising and disconcerting that the typical small firm lawyer is performing only 2.3 hours of legal work per day. Of that amount, only 82 percent is actually billed to clients; and of the amount billed, only 86 percent is being collected – the equivalent of 1.6 hours. At \$260 per hour, which is the average rate for lawyers in the Clio sample, this amounts to a mere \$422 a day, or \$105,000 in gross receipts over a 50-week year. This is a sum that needs to cover office overhead, health care, retirement, malpractice insurance, marketing, taxes, etc. Of the remaining six hours left in the workday, 33 percent was focused on business development and 48 percent on administrative tasks, such as generating and sending bills, configuring technology and collections.³⁸

The average matter in the Clio system was worth approximately \$2,500.³⁹ Building a financially successful law practice out of low-stakes, high-volume cases requires capital for technology and marketing along with significant business acumen and managerial ability. Very few small firm

³⁷ See 2017 CLIO LEGAL TRENDS REPORT (2017), available online at <https://www.clio.com/2017-legal-trends-report/#download> (last visited July 1, 2018).

³⁸ *Id.* at 13.

³⁹ See *id.* at 8 (calculated from total dollars billed (~\$2.56 billion) divided by number of matters (1.03 million matters)).

lawyers possess these resources and skills. Thus, as the Clio data show, they are forced to allocate a lot of their time to relatively ineffective methods of finding work. Under Rule 5.4, which exists in some variation in all 50 states, lawyers must be the exclusive owners of any business that engages in the practice of law.⁴⁰ This regulatory constraint may be a primary reason why the PeopleLaw sector has entered a period of serious decline.

2.4. The Economics of Large Organizational Clients

At the same time that the work of lawyers tilts more toward organizational clients, large corporate legal departments are increasingly seeking ways to control their legal expenses. This pressure is building because of the sheer complexity of a highly regulated and interconnected global economy. Although this pressure is experienced by lawyers and clients as a problem of cost, the root cause is lagging legal productivity, a topic discussed in greater detail in Section 3. This focus of this section, however, is the economics of large organizational clients.

For large corporate enterprises with operations throughout the U.S. and abroad, compliance with the law is a necessity. The sheer complexity of this task favors large law firms with a large array of highly specialized lawyers. Since the mid 1980s, *The American Lawyer* has tracked the financial performance of the nation's largest law firms. In 2012, on the 25th anniversary of the Am Law 100, the following statistics described the changes that had occurred among the nation's 100 largest law firms:

- Total gross revenues increased from \$7.2 billion to \$71.0 billion (+886%).
- Total lawyer headcounts went from 26,000 to 86,272 (+231% rise).
- Average profits per partner grew from \$325,000 to \$1.48 million (+355%).

During this same time period, the Consumer Price Index climbed 205 percent while the GDP increased 235 percent. Although the overall pie of the U.S. economy was growing, the nation's largest law firms were enjoying a proportionately larger slice.⁴¹ Despite the continued climb of profits in the nation's large firms, the overall demand for corporate legal services, as measured by lawyer hours in law firms, has been relatively flat for the last several years.⁴² This reflects a transition period where the firm has a higher proportion of older partners. By dint of experience, these partners bill at higher rates. This will persist in the short- to median term because many senior lawyers do not want to invest in new tools and learning—but neither do their older in-house counterparts. As baby boomer lawyers retire, however, the pace of change will accelerate.

The long-term trend is for in-house lawyers to do more with less.⁴³ Through the year 2018, the most aggressive cost-saving measures have occurred through insourcing—i.e., adding headcount in the legal department, primarily by hiring large firm associates.⁴⁴ Indeed, this trend

⁴⁰ See Rule 5.4.

⁴¹ See William D. Henderson, *AmLaw 100 at 25*, AMERICAN LAWYER (June 2012).

⁴² See JAMES W. JONES, ET AL., 2017 REPORT ON THE STATE OF THE LEGAL MARKET (Georgetown Law, Center for the Study of the Legal Profession 2017) ("Overall, the past decade has been a period of stagnation in demand growth for law firm services, decline in productivity for most categories of lawyers, growing pressure on rates as reflected in declining realization, and declining profit margins.").

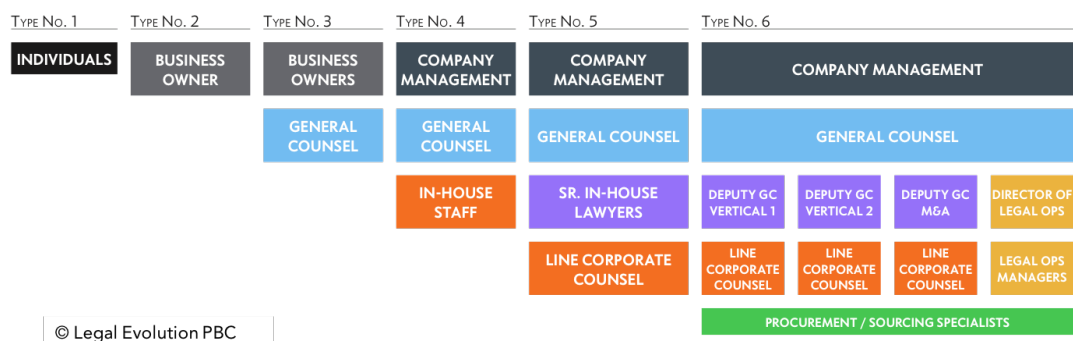
⁴³ See SUSSKIND, *supra* note 32, at 12 (discussing more-for-less imperative).

⁴⁴ See, e.g., Jacob Gershman, *Law Firms Face New Competition – Their Own Clients*, WSJ LAW BLOG, Sept. 14, 2014 ("This year corporations are shifting an estimated \$1.1 billion that they used to spend on outside lawyers to their own internal legal budgets That migration cements a trend that took off during the recession[.]"); Henderson,

was observed in Figure 2 in Section 1.2. The growth and proliferation of in-house lawyering have resulted in some legal departments, particularly in heavily regulated or IP-intensive industries, that are several hundred lawyers and thus are the functional equivalent of large law firms embedded inside multinational corporations. The largest and most advanced legal departments are now organized into practice groups. Many also include “legal operations” professionals focused on building processes and leveraging technology to cope with the tremendous complexity of running a company in an interconnected and globalized world.

This section is organized around the two-hemisphere framework. Yet, the structure of the Organizational Client sector has changed dramatically since the Chicago Lawyers II study. Thus, to more accurately conceptualize the current variations of organizational clients, the author created Figure 6.

Figure 6. Six Types of Clients



The Type No. 6 client in Figure 6 is an entirely new structure that only came into being within the last 10-15 years.

In addition to the growth of corporate legal departments, a second cost-saving measure is the diversion of work to alternative legal service providers (ALSPs), which includes companies such as Axiom, UnitedLex, Integreon, QuisLex, Elevate and many others. These are private corporations run by a mix of lawyers and business executives. In the majority of cases, they are financed by prominent venture capital and private equity funds.⁴⁵ This movement began with legal process outsourcers in the mid-2000’s who specialized in large document review projects connected with the proliferation of electronically stored information. Yet these companies now perform work on sophisticated corporate transactions, albeit in each case under the supervision of either law firm or in-house lawyers.⁴⁶

The steady growth of ALSPs is one of the main reasons that the lexicon on law has gradually shifted from discussions of the “legal profession” to a changing “legal industry.” As noted by one investment banker who has provided significant funding to companies in the legal industry, “If law firms themselves can’t have outside investors, the market will continue to chip away at

Efficiency Engines, *supra* note 12, at 42 (Axiom CEO Mark Harris tracing growth of legal department back to “Ben Heineman at General Electric.”).

⁴⁵ See, e.g., Henderson, *Efficiency Engines*, *supra* note 12, at 42 (discussing prevalence of sophisticated investors among managed services providers).

⁴⁶ This supervision is done pursuant to Rules 5.1 (responsibilities of supervisory lawyers) and 5.3 (responsibilities regarding nonlawyer assistants).

every part of a law firm that is not the pure provision of legal advice Anything that can be provided legally by a third party will be."⁴⁷

3. The Problem of Lagging Legal Productivity

As discussed in Section 2, the PeopleLaw and Organizational Client sectors are evolving in dramatically different ways. However, they have one crucial commonality: both groups are struggling to afford legal services. In the PeopleLaw market, this manifests itself in more citizens going without access to legal services. In the corporate market, clients cope by insourcing legal work and, when that is not possible, by demanding fee discounts from law firms. Both clients and lawyers view the financial gap between legal budgets and the corporations' legal needs as a problem of price – i.e., that legal services cost too much. Yet, it is more much accurately characterized as a problem of lagging legal productivity.

3.1. Cost Disease

Throughout our modern economy, productivity gains vary widely from sector to sector. Because of improvements in design, technology, production processes and logistics, over the last two to three decades the typical consumer has enjoyed declining costs for thing like clothing, computers, long-distance calling, travel, etc. In some cases, the lowering of cost is also accompanied by significant increases in quality (e.g., safer and more reliable cars; the evolution of cellphones into smart devices).

In contrast, there are other sectors, such as education and medical care, where prices tend to go up much faster than worker income. The reason for the upward spiraling price is that these activities are very human-intensive and involve specialized human capital. Unfortunately, it is the *lack* of productivity gains in these sectors that accounts for their higher cost, as these workers have sufficient market power to raise prices to preserve their relative place in the economy.

This phenomenon is what economists refer to as "cost disease." It was first noted in a book by two economists, William Baumol and William Bowen, focused on the performing arts. The authors observed that the time and human effort it takes to perform a 45-minute Schubert quartet has not changed in hundreds of years.⁴⁸ Despite the inability of live musicians to improve productivity, the wages of the musicians continued to rise.

3.2. Law Compared to Medical Care and Higher Education

Along with medicine, education and the performing, law is a field afflicted with cost disease.⁴⁹ There is strong evidence, however, that society is adapting to higher relative costs for legal services in a different way than medical care and education.

Specifically, over the last three decades, consumers have generally allocated significantly more of their income to medical care and education. In contrast, the proportion of income allocated

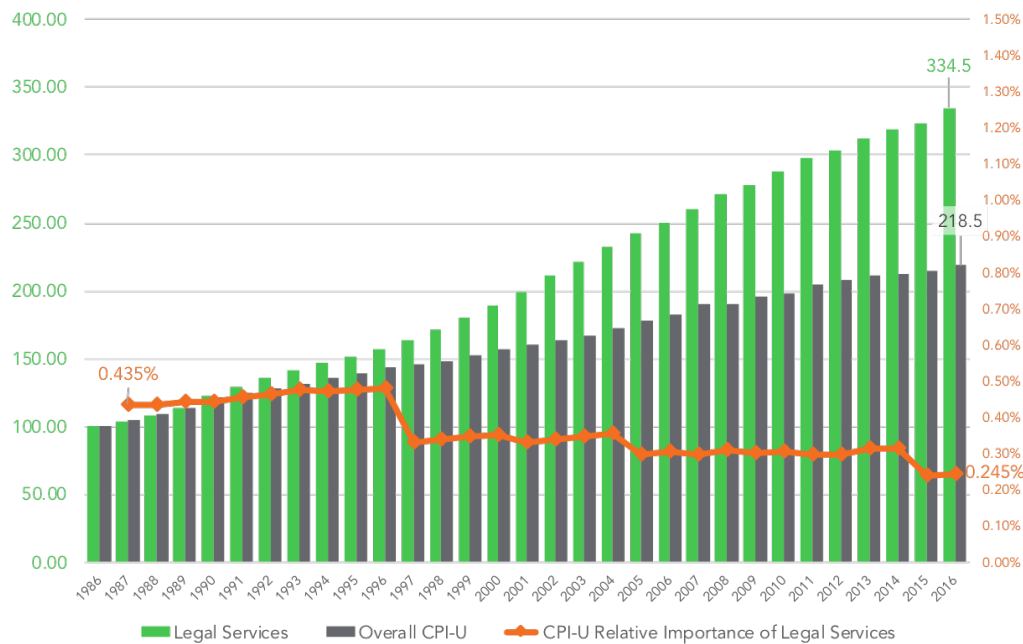
⁴⁷ See Barbara Rose, *Law, the Investment*, ABA JOURNAL (Sept. 2010) (quoting Nick Baughan of Marks Baughan & Co.).

⁴⁸ WILLIAM J. BAUMOL & WILLIAM G. BOWEN, *PERFORMING ARTS: THE ECONOMIC DILEMMA* 164 (1966).

⁴⁹ See generally WILLIAM J. BAUMOL, *THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T* (2013) (discussing industry afflicted by cost disease along with possible public policy responses).

to legal services has declined by almost 50 percent. Stated more concisely, legal services are losing wallet share among U.S. consumers. Figure 7 shows these two trend lines together.

Figure 7. Legal Services Compared to Overall CPI-U and Relative Importance of Legal Services in CPI Basket



Source: Data from U.S. Bureau of Labor Statistics, calculations by Legal Evolution PBC

The left axis (green) in Figure 7 is the Consumer Price Index for All Urban Consumers ("CPI-U") with the base year set to 1986 (Index = 100). The green and gray bars show the cost of legal services rising nearly twice as fast as the overall CPI-U basket. The right axis (orange) measures the "relative importance" of legal services within the CPI basket. Basically, as the relative prices of goods and services change, consumers adjust how they allocate their money. The U.S. Bureau of Labor Statistics tracks these changes and uses this data to periodically reweigh the composition of the CPI-U basket.⁵⁰ What we observe is a gradual downward trend in which American consumers are finding ways to forgo legal services.⁵¹

Table 5 compares the change in wallet share of legal services to medical care and college tuition.

Table 5. Change in Relative Importance in CPI-U for Three Sectors

CPI component	Relative importance in CPI-U		
	1987	2016	Change over time
Legal Services	0.435%	0.245%	-43.7%
Medical Care	4.807%	8.539%	+77.6%
College Tuition	0.840%	1.807%	+120.3%

Source: Bureau of Labor Statistics, calculations by Legal Evolution PBC

⁵⁰ See <https://www.bls.gov/opub/hom/cex/home.htm> (last visited July 5, 2018).

⁵¹ The orange line in Figure 7 shows a sudden drop in the relative importance of legal services in 1997 (from 0.480% to 0.329% of consumer spending). This drop occurred because the BLS reweighted the CPI basket for the first time in several years. Yet, the CPI basket is now re-weights the CPI based on a two-year rolling average.

3.3. Impact on the Practice of Law

Cost disease results in increases in relative prices in sectors that are very human-intensive. The price increases then can set off second-order effects, such as shrinking demand or substitution. The legal sector has all three symptoms.

- *Higher relative cost*: Even within the economically stressed PeopleLaw sector, the average hourly rate for a lawyer is \$260.⁵² In the Organizational Client sector, profits of large firms have increased much faster than the nation's GDP and Consumer Price Index.⁵³
- *Shrinking demand*: Between 2007 and 2011, the PeopleLaw sector shrank by nearly \$7 billion, or 10.2 percent.⁵⁴ This occurred on the heels of the deteriorating economics of lawyers serving individual clients.⁵⁵
- *Substitution*: The PeopleLaw sector is increasingly served by legal publishers such as LegalZoom, Rocket Lawyer and many others that provide access to tech-enabled forms. In effect, this creates a consumer DIY culture where it is difficult to combine high-quality, low-cost forms with legal advice.⁵⁶ In the Organizational Client sector, in-house lawyers have become a substitute for law firms; in turn, ALSPs are a partial substitute for both.⁵⁷

The negative effects of cost disease occur because of lags in productivity between sectors. In the U.S., the market is constrained by the ethics rules with regard to nonlawyer ownership and the unauthorized practice of law. Thus, as a sizable portion of the public struggles to afford a lawyer and a sizable portion of the bar struggles to find sufficient fee-paying client work, legal regulators need to seriously evaluate whether the consumer protection benefits of these ethics rules are worth the cost. This topic is taken up directly in Section 4.

3.4. Courts and Access to Justice

Courts are on the front line of the legal sector's cost disease problem. Yet, as explained below, courts are also partially responsible for cost disease.

Courts are on the front line because they are dealing with a surge in the number of self-represented litigants. This trend was recently documented in a major study conducted by the National Center for State Courts (NCSC).⁵⁸ The study was based on all civil matters in 10 large urban counties that were disposed of in those counties over a one-year period, including Santa Clara County.⁵⁹ The sample totaled 925,344 cases (approximately 5% of the total civil case load

⁵² See Section 2.3, *supra* at page 14.

⁵³ See Section 2.4, *supra* page 15.

⁵⁴ See Figure 5 and accompanying text.

⁵⁵ See Section 2.1, *supra* at page 12.

⁵⁶ This is due the ethics rules on fee-sharing (Rule 5.4) and unauthorized practice of law (Rule 7.2).

⁵⁷ See Section 2.4, *supra* at page 15.

⁵⁸ See PAULA HANNAFORD-AGOR JD, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (National Center for State Courts 2015) [hereafter LANDSCAPE STUDY] (building sample based on the July 1, 2012 to June 30, 2013 time period).

⁵⁹ The counties were Maricopa County (Phoenix, AZ), Santa Clara County (San Jose, CA), Miami-Dade County (Miami, FL), Oahu County (Honolulu, HI), Cook County (Chicago, IL), Marion County (Indianapolis, IN), Bergen

nationally) and was built to be roughly representative of the nation as a whole. Remarkably, 76 percent of cases involved at least one party who is self-represented, roughly double the number for the most comparable study conducted 20 years earlier.⁶⁰

The increase in self-represented litigants is occurring because of the growing gap between the cost of lawyer representation and the value of the underlying claim. Of the 227,812 cases in the NCSC study that resulted in a nonzero monetary judgment, the median value was a mere \$2,441. Further, three-quarters of all judgments were less than \$5,100. Only 357 judgments were more than \$500,000 and only 165 more than \$1 million (i.e., the type that might be reported in the mainstream press). According to the NCSC, the median cost per side of litigating a case, from filing through trial, ranges from \$43,000 for an automobile tort case to \$122,000 for a professional malpractice case. Thus, "in many cases, the cost of litigation likely outstrips the monetary value of the case shortly after initiating the lawsuit."⁶¹

Although courts are seriously impacted by cost disease, they are also, in part, one of its causes. This is because the judiciary establishes the procedures lawyers must follow to resolve disputes. These procedures are rooted in lawyer tradition and the idiosyncratic preferences of local jurists. Yet rarely is the system evaluated from the perspective of a citizen with a legal problem. For this reason, the British lawyer and futurist Richard Susskind has posed the question, "Is court a service or a place?"⁶²

When court is viewed as a service, the judicial process becomes something that can be re-engineered to lower costs and improve quality. Arguably, the most advanced system exists in British Columbia, Canada, where all civil matters under \$5,000 and all strata (i.e., condominiums) disputes are required to be resolved through an online system managed by the recently created Civil Resolution Tribunal ("CRT"). Instead of an adversarial system with lawyers, parties without lawyers are guided through a structured online mediation process that is designed to produce early and amicable resolution. Case managers handle most of the work. Less than 5 percent of matters require formal adjudication by the CRT. Users of the CRT (citizens) are giving the system high marks for convenience, cost and fairness. Lawyers would be interested to know that the consulting practice of PwC, the Big Four accounting firm, built the CRT's online platform.⁶³

In the years to come, online dispute resolution ("ODR") is destined to grow. This is because ODR has the potential to lower government administration costs while improving the citizen experience. The European Union has implemented an ODR for all its consumer and online trading disputes. Its homepage reads, "Resolve your online consumer problem fairly and efficiently without going to court."⁶⁴ Similarly, in July 2018, two counties in the Greater Austin

County (Hackensack, NJ), Cuyahoga County (Cleveland, OH), Allegheny County (Pittsburgh, PA), Harris County (Houston, TX).

⁶⁰ See LANDSCAPE STUDY, *supra* note 58, at 31.

⁶¹ See LANDSCAPE STUDY, *supra* note 58 at 25, citing Paula L. Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20(1) Caseload Highlights 1, 2013.

⁶² See SUSSKIND, *supra* note 32.

⁶³ See Richard Rogers & Kandis McCall, The Civil Resolution Tribunal: The World's First Government-Run ODR for Civil Disputes, presentation at the Forum on Legal Evolution, Nov. 9, 2017 (Chicago, IL), at <https://forum.legalevolution.org/program/> (last visited July 6, 2018).

⁶⁴ See <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN> (last visited July 6, 2018).

area in Texas will commence using an online dispute resolution platform built by Tyler Technologies, a publicly traded company specializing in government services. One of the judges who helped implement the system called it “pajama justice” because “[p]eople can sit at home in their pajamas and get emails from the opposite side and see if they can reach a resolution.”⁶⁵ Yet, the underlying methodology is grounded in a sophisticated understanding of the psychology of negotiations, mediation and settlement. For example, the new platform enables a litigant to request an apology. That, in turn, tends to reduce the payout.⁶⁶

4. Ethics Rules and Market Regulation

In the U.S., ethics rules are the primary mechanism for regulating the market for legal services.⁶⁷ Most jurisdictions adopt some variation of the American Bar Association’s Model Rules of Professional Conduct.⁶⁸ Although California has long promulgated its own ethics code, the substance of the California Rules has generally tracked with the policies of the broader U.S. legal profession. In November 2018, a new edition of the California Rules of Professional Conduct will go into effect that will utilize the same numbering system as the ABA Model Rules, thus facilitating easier referencing of rules across jurisdictions.

The key point of this section is that the ethics rules, particularly those pertaining to the prohibition on nonlawyer ownership (Rule 5.4) and the unauthorized practice of law (Rule 5.5), are the primary determinants of how the current legal market is structured. Without these rules, the market would look very different, as private businesses would be free to offer legal-oriented goods and services to both clients and lawyers. Indeed, as discussed in Section 1.5 of this report, private investors see ample opportunity in the current legal market.

The best way to orient the Trustees to the issues at hand is to describe how the current ethics rules are shaping the U.S. legal market. As noted in Section 2, the legal market is functionally segmented into the PeopleLaw sectors versus the Organizational Client sectors. The ethics rules affect these sectors in different ways.

4.1. The PeopleLaw Sector: LegalZoom and Avvo

Under the ethics rules, any business engaged in the practice of law must be owned and controlled by lawyers.⁶⁹ This prohibition limits both the opportunity and incentive for nonlegal entrepreneurs to enter the legal market. Despite this longstanding policy, private investors are increasingly pushing the boundaries of the existing rules.

⁶⁵ See Claire Osborn & Taylor Goldenstein, *Area judges make plans to try out ‘pajama’ court*, MY STATESMAN, June 17, 2018, at: <https://www.mystatesman.com/news/local/area-judges-make-plans-try-out-pajama-court/8HHpoy1p4qEv6USfjWubO/> (last visited July 7, 2018).

⁶⁶ See *id.* (quoting one of the Texas judges, “A lot of people are OK with getting less money than they want out of the case as long as the other person apologizes.”).

⁶⁷ See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707 (1998) (noting that “[e]thical rules are a form of professional self-regulation enforced by civil liability or professional discipline.”).

⁶⁸ See https://www.americanbar.org/groups/professional_responsibility/publications.html (last visited July 7, 2018).

⁶⁹ The only exception in the U.S. is the District of Columbia, which permits a minority ownership of nonlawyers who “performs professional services which assist the organization in providing legal services to clients.” Rule 5.4(b) of the D.C. Rules of Professional Conduct. This modification of Rule 5.4 is widely viewed as a benign way to facilitate partnership stakes for nonlawyer professionals to do lobbying work on federal legislation.

There are dozens if not hundreds of companies that touch on some facet of the PeopleLaw sector that are also owned in whole or in part by nonlawyer managers and investors. However, the two most well-known examples are LegalZoom and Avvo. For the sake of clarity and simplicity, the author will focus on these two companies to illustrate how the ethical rules shape the legal marketplace serving individuals.

Founded in 1999, LegalZoom specializes in tech-enabled legal documents that fit a wide array of individual and small-business needs. In 2012, LegalZoom filed an S-1 with the U.S. Securities & Exchange Commission (a requirement done in preparation for an initial public offering) but ultimately changed course and instead accepted more than \$200 million funding from a European private equity firm.⁷⁰ Although LegalZoom is not a law firm and therefore cannot engage in the practice of law, its brand recognition, which it largely built through conventional mainstream media advertising, enables it to direct advisory legal work to a network of practicing lawyers. It is able to partially monetize this influence by running prepaid legal service organizations in various U.S. states as permitted under Rule 7.3.⁷¹ At present, LegalZoom offers prepaid legal services plans for both individuals and small businesses.⁷²

Avvo is an online legal marketplace founded in 2006 by the former Expedia general counsel, Mark Britton. To get started, Avvo used public records of state bar rolls to build a website that included a nearly complete universe of U.S.-licensed lawyer profiles. In turn, the company created a 1-10 Avvo lawyer rating that was based on bar records and information scraped from online lawyer biographies on law firm websites. The algorithm generally gave higher ratings to lawyers who “claimed” their Avvo profile, as the lawyer was able to provide more complete biographical information. Over time, Avvo added Q&A forums by practice area, which enables lawyers to showcase legal knowledge and demeanor to potential clients. Avvo monetizes its platform by enabling lawyers to upgrade their profile page for a fee, essentially providing low-cost turnkey marketing solutions to small firm lawyers. Also, until recently, Avvo used its platform and marketing reach to facilitate the sale of flat-fee legal services between lawyer and clients (called Avvo Legal Services).⁷³ In exchange for providing these matching services, Avvo received a marketing fee. Avvo was capitalized with \$132 million of venture capital funding.⁷⁴ In 2017, Avvo was acquired by Internet Brands, which is an online marketplace company that uses consumer-oriented content to create industry-specific sales channels. Internet Brands is currently owned by private equity company Kohlberg, Kravis Roberts & Co. (commonly known as KKR).

⁷⁰ See Jason Smith, *LegalZoom.com Plans to Pull Its IPO, Sell Stake to Permira*, WSJ LAW BLOG, Jan. 7, 2014, at <https://blogs.wsj.com/law/2014/01/07/legalzoom-com-plans-to-pull-its-ipo-sell-stake-to-permira/> (last visited July 7, 2018).

⁷¹ The newly enacted California Rule of Professional Conduct 7.3, operative on Nov. 1, 2018, tracks the language of the ABA Model Rule. See MODEL RULES OF PROF. CONDUCT, Rule 7.3(d) (“Notwithstanding the prohibitions [on solicitation of clients] in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.”).

⁷² See <https://www.legalzoom.com/attorneys/> (last visited July 7, 2018).

⁷³ This practice attracted pushback from a several state bars. See Appendix B. In July of 2018, Internet Brands made the decision to end Avvo Legal Services. See Bob Ambrogi, *Avvo Legal Services to be Shut Down*, LAW SITES, July 8, 2018, at <https://www.lawsitesblog.com/2018/07/avvo-legal-services-shut.html> (last visited July 12, 2018).

⁷⁴ See Crunchbase at <https://www.crunchbase.com/organization/avvo#section-acquisition-details> (last visited July 7, 2018).

Reflecting on the experiences of LegalZoom and Avvo, what is the gap in cost, quality and/or convenience that is attracting the interest of sophisticated professional investors? As discussed in Section 2.3 (declining size of PeopleLaw sector) and Section 3.4 (courts glutted with self-represented), there is ample evidence that ordinary citizens increasingly cannot afford traditional one-on-one consultative legal services. LegalZoom offers partial DIY solutions that help close this gap. Likewise, it is becoming increasingly difficult for lawyers to attract a sufficient and steady stream of paying clients.⁷⁵ Both Avvo and LegalZoom offer marketing services that help address this acute lawyer pain point.

Because of their substantial financial backing, LegalZoom and Avvo have been able to establish brand awareness throughout the United States. This high visibility has resulted in a number of run-ins with state regulators and practicing lawyers regarding allegations of the unauthorized practice of law (Rule 5.5, LegalZoom), impermissible fee-splitting (Rule 5.4, LegalZoom and Avvo) and payment of improper referral fees (Rules 7.2-7.3, Avvo).⁷⁶ In effect, these two companies have served as de facto test cases to establish the boundaries of private capital in the legal sector.

The author has reviewed a large number of state bar ethics opinions related to both companies. Although LegalZoom and Avvo have fared slightly better in some jurisdictions than in others,⁷⁷ what all of these opinions have in common is a careful textual reading of the ethical rules that cautions against activities that could be construed as a violation of the existing language. These opinions are not necessarily the final word, as they are typically advisory opinions from bar ethics committees. After the Supreme Court's ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,⁷⁸ there is some basis to believe that these ethics rules and opinions may be subject to federal antitrust scrutiny. In situations where regulators are also "active market participants in the occupation" they are regulating, state-action antitrust immunity is only available when these regulators state are subject to active supervision by the state.⁷⁹ For example, the Antitrust Division of the U.S. Department of Justice has filed a statement of interest to intervene in a Florida Bar unauthorized practice of law case against a legal tech company. The company, TiKD, manages traffic tickets through a smartphone app.⁸⁰ The DOJ's statement is heavily based on the *North Carolina Board of Dentists* decision.⁸¹

⁷⁵ See Sections 2.3 and 3.4, *supra*.

⁷⁶ See Appendix B.

⁷⁷ For example, three committees appointed by the New Jersey Supreme Court jointly concluded that Avvo's legal service plan violated Rules 7.2(c), 7.3(d) and 5.4(a) and that LegalZoom (along with Google-based Rocket Lawyer) were operating unregistered legal plans pursuant to Rule 7.3(e)(4)(vii). The N.J. Supreme Court subsequently denied a petition to review the committees' conclusions. See David Gialanella, *Supreme Court Won't Take Up Avvo's Ethics Case*, NEW JERSEY LAW JOURNAL, JUN. 4, 2018, at <https://www.law.com/njlawjournal/2018/06/04/supreme-court-wont-take-up-avvo-ethics-case/> (last visited July 7, 2018). In contrast, the North Carolina State Bar has treated Avvo's legal service plan as a payment for marketing rather than a referral fee. See Proposed 2018 Formal Ethics Opinion 1, Participation in Website Directories and Rating Systems that Include Third Party Reviews, Apr. 19, 2018 (not final rule), at <https://www.ncbar.gov/for-lawyers/ethics/proposed-opinions/>.

⁷⁸ See *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) __ U.S. __ [135 S.Ct.] 1101.

⁷⁹ *Id.* at 1114.

⁸⁰ See Nathan Hale, Fla. Bar Says Case Law Shows TIKD Is Unlicensed Practice, LAW360, June 5, 2018, at <https://www.law360.com/articles/1050404/fla-bar-says-case-law-shows-tikd-is-unlicensed-practice> (last visited July 9, 2018).

⁸¹ See *United States Department of Justice Supports Tech Start-Up TIKD's Antitrust Lawsuit Against The Florida Bar*, 4-TRADERS, Mar. 13, 2018 (providing link to complaint), at <http://www.4-traders.com/news/United-States->

What is missing from essentially all state ethics opinions on LegalZoom and Avvo – and arguably what is required by *North Carolina Board of Dentist Examiners* – is fact-gathering regarding whether consumers are made better or worse off by technical readings of the rules. Arguably, issues of policy (e.g., what construction of the rule best serves the interests of the public?) are not the province of an ethic committee. Yet, as noted earlier, ethics rules substantially determine the structure and functioning of the legal market. In most jurisdictions, the state supreme court has the authority to modify the rules of professional conduct. However, through norms or established procedure, input is sought from a bar committee of lawyers. Further, these groups, with perhaps the historical exception of California, invariably give substantial weight to ABA Model Rules of Professional Conduct. In turn, the Model Rules must be formally adopted by the ABA House of Delegates.⁸² Nowhere in all this deliberation, however, is there an analysis of how the current legal market is serving consumers.

To both summarize and crystallize the issues in this section, the rules implicated in the LegalZoom and Avvo matters are premised on harm to clients that flows from lack of lawyer independence (Rule 5.4), incompetent legal service (Rule 1.1), unauthorized practice of law (Rule 5.5), and the dissemination of biased and/or misleading information (Rules 7.1-7.3). But as documented in Sections 2 and 3, there is very serious consumer harm occurring because ordinary citizens increasingly cannot afford traditional legal services. LegalZoom, Avvo and many other nonlawyer-owned businesses claim that they are a market response to that very need.

Professor Gillian Hadfield of the University of Southern California School of Law, who is both a lawyer and an economist, argues persuasively that outside sources of capital are most needed in the PeopleLaw sector to develop and finance innovative low-cost solutions to legal problems.⁸³ Following an in-depth analysis of the impact of the ethics rules on market structuring and functioning, Professor Hadfield forcefully concludes:

The prohibition on the corporate practice of law ... hobbles the innovation of lower-cost means of providing legal help to the great majority of ordinary individuals. Many of those lower-cost innovations are within easy reach—if the profession would relax its stranglehold on the practice of law. ... Large-scale data and information systems are now available to provide standardized documents, procedures and protocols to meet the needs of a large segment of the population that now muddles through with no help at all in legal proceedings, imposing huge costs on our courts and other litigants. Innovators with one foot in the law and another in software or enterprise development are already at work but facing unnecessary and costly limits on their business models to comply with corporate practice rules that no one has, or could, demonstrate improve the well-being of ordinary individuals whose alternative to standardized online legal help is no legal help at all.⁸⁴

[Department-of-Justice-Supports-Tech-Start-Up-TIKD-s-Antitrust-Lawsuit-Against-The-Flor--26160154/](#) (last visited July 9, 2018).

⁸² See ABA Constitution and By-Laws, Rules of Procedure for the House of Delegates.

⁸³ See Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014).

⁸⁴ *Id.* at 77.

Under the State Bar Act, the “protection of the public” is the primary governing principle for the State Bar of California. The author encourages the Trustees to take an expansive view of protection that includes greater access to the legal system. Such a view would be consistent with the State Bar’s mission statement in its five-year strategic plan.⁸⁵

4.2. The Organizational Client Sector

Over the last 10-15 years, the evolution of the Organizational Client sector has been significantly shaped by the ethics rules, particularly the prohibition on nonlawyer ownership of businesses engaged in the practice of law.⁸⁶

As noted in Section 2.4, the Organization Client sector is also experiencing cost pressures attributable to lagging legal productivity. The front line of this challenge is a relentless increase in the volume and complexity of legal work that puts pressure on the budgets of corporate legal departments. The first level of response was to grow legal departments to reduce the work going to expensive law firms. The second level of response has been to experiment with ALSPs, particularly for large-scale document reviews.

Because ALSPs are substantially owned by nonlawyer entrepreneurs and investors, they have to navigate ethical duties related to competence (Rule 1.1), effective supervision (Rules 5.1 and 5.3) and unauthorized practice of law (Rule 5.5). In the mid-2000’s, a series of California and New York local bar authority ethics opinions were favorable toward the use of ALSPs.⁸⁷ In 2008, the ABA issued Formal ABA Ethics Opinion 08-451, which effectively provided ALSP’s and their clients with a roadmap for compliance with ethics rules.⁸⁸

This roadmap, however, is somewhat counterintuitive. Despite the fact that most ALSPs employ legions of licensed lawyers, the work of ALSPs is typically characterized as paraprofessional work that must to be supervised by licensed lawyers. This duty, typically memorialized in the engagement letter, assigns supervisor duties to corporate in-house lawyers or outside counsel. This is how ALSPs, many of which are owned and controlled by private equity and venture capital investors, avoid charges of unauthorized practice of law (Rule 5.5) and thus nonlawyer ownership of law firms (Rule 5.4).

Yet this construction of the ethics rules provides a functional exception to Rule 5.4 for nonlawyer-owned companies serving large organizational clients. This is because the majority of legal services in the U.S. are bought by corporations with one or more in-house lawyers.⁸⁹ Thus, companies such as Axiom, UnitedLex, Integreon, Pangea3, Elevate and many others have become “lawyer to lawyer” businesses. Likewise, the Big Four accounting firms now routinely supplies legal services to major corporations, albeit under the supervision of the companies’ legal departments. For example, roughly 600 tax professionals, many of them lawyers, left the

⁸⁵ See <http://board.calbar.ca.gov/Goals.aspx> (last visited July 7, 2018).

⁸⁶ See Rule 5.4.

⁸⁷ See James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 2 PENN. ST. INT’L. L. REV. 323, 325-26 (2008) (collecting opinions and providing summary and analysis).

⁸⁸ See ABA Formal Opinion 08-451, *Lawyer Obligations When Outsourcing Legal and Nonlegal Support Services*, Aug. 8, 2008, online at https://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/ethicsopinion08451.authcheckdam.pdf (last visited July 8, 2018).

⁸⁹ See Section 2.2, *supra*.

General Electric tax department and were “rebadged” as employees of PwC. In turn, the employees were contracted back to GE to work on their tax compliance tasks.⁹⁰

Despite these inroads by sophisticated investors, Rule 5.4’s ban on nonlawyer ownership remains a major roadblock to solving, or mitigating, the lagging legal productivity problem (i.e., cost disease). This is because the efficiency gains of lawyer specialization, which gave rise to law firms, have been fully exhausted. As evidenced by the rise of CLOC and the Type No. 6 client, many legal departments have become as big as large law firms.⁹¹ This is occurring because the complexity of problems facing today’s corporate clients requires close collaboration between technologists, process design experts, data scientists and lawyers. Indeed, as suggested by the discussion of artificial intelligence in Section 1.5, the future of law is profoundly multidisciplinary.⁹² To foster innovation, the ideal would be to have lawyers and allied professionals working together as co-equals *within the same legal service organization*. Although ALSPs have found a workaround to Rule 5.4, it is still mostly limited to high-volume, highly repetitive legal work. Yet many higher-order quality and productivity problems remain.

The policy that underlies Rule 5.4 is lawyer independence.⁹³ This independence is necessary because there is a presumption of asymmetric information between lawyers and unsophisticated clients that runs throughout the law of lawyering. If knowledge is asymmetric, clients have little choice but to trust lawyers. Under this policy rationale, lawyers as a group must be completely independent. Yet this asymmetry does not exist in large corporations with legal departments comprised of former large law firm lawyers. In this context, Rule 5.4 is actually *hindering* the creation of solutions most needed by large organizational clients.

4.3. The U.K. and Australian Models

Two other common law jurisdictions, the U.K. and Australia, have already liberalized their rules to permit lawyers to co-venture with other professionals.⁹⁴ The primary effect of this change is to create a new layer of “entity regulation” where an organization is responsible for maintaining a system of compliance for ethical rules that protect clients.⁹⁵ According to Professor Judith McMorro, the regulatory changes reflected “a reorientation of legal services from a lawyer-centered focus [such as the Model Rules] to a client and customer-oriented perspective.”⁹⁶

In many respects, the enactment of the State Bar Act of 2017 parallels the U.K.’s Legal Services Act 2007. This UK legislation created the Legal Services Board (“LSB”), which oversees all aspects of the legal services market and is charged with promoting eight regulatory objectives,

⁹⁰ See Alex Berry, PwC strikes innovative deal with GE to take on in-house tax law team, LEGALWEEK, Mar. 17, 2017, at <https://www.legalweek.com/sites/legalweek/2017/03/17/pwc-strikes-innovative-deal-with-ge-to-take-on-in-house-tax-law-team/> (last visited July 8, 2018).

⁹¹ See Section 1.3 and 2.4, *supra*.

⁹² This is also the conclusion of one of the legal industry’s most influential knowledge management consultants who is also a law school graduate. See Ron Friedmann, *A Multidisciplinary Future to Solve Legal Problems*, PRISM LEGAL, May 2018, at <https://prismlegal.com/a-multidisciplinary-future-to-solve-legal-problems/> (last visited July 8, 2018).

⁹³ See Rule 5.4, 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.*” (emphasis added)).

⁹⁴ See Section 1.5, *supra*.

⁹⁵ See McMorro, *supra* note 33, at 669.

⁹⁶ *Id.*

the first of which is “protecting and promoting the public interest.”⁹⁷ In addition, three other objectives are explicitly consumer oriented: “(c) improving access to justice; (d) protecting and promoting the interests of consumers of legal services; [and] (e) promoting competition in the provision of legal services[.]”⁹⁸ In 2009, the LSB created the Legal Services Consumer Panel, which is composed of citizens and businesses. The Panel’s role is to provide independent advice to the Legal Services Board about the interests of users of legal services.”⁹⁹ This entails “investigating issues that affect consumers and by seeking to influence decisions about how lawyers are regulated.”¹⁰⁰ To summarize, the U.S. system is designed to guard against lawyer impropriety; in contrast, the U.K. system focuses foremost on consumer welfare and polices lawyer impropriety through entity regulation.

A comprehensive history and analysis of the regulatory systems of other common law countries is beyond the scope of this report. Nonetheless, the Trustees should be aware that having undertaken analyses far more exhaustive than this report over the course of nearly a decade, these jurisdictions concluded that it was time to end the prohibition on nonlawyer ownership.¹⁰¹

5. Conclusion

Law has long been modeled as a self-regulated profession. The primary means of regulation are ethics rules that govern lawyer duties and conduct. However, there is evidence that a large number of clients and potential clients are being underserved by the legal market.

The core market problem is one of lagging legal productivity that, over time, increases the price of traditional consultative legal services relative to other goods and services. In addition to being very harmful to ordinary citizens, this is a major challenge to lawyers trying to earn a living in the PeopleLaw sector. A second problem affecting the legal market is the relentless growth in complexity that flows from living in a highly interconnected and globalized world. Lawyer specialization by itself is no longer sufficient to meet the finite budgets of even the world’s wealthiest corporations.

The legal profession is at an inflection point that requires action by regulators. Solving the problem of lagging legal productivity requires lawyers to closely collaborate with allied professionals from other disciplines, such as technology, process design, data analytics, accounting, marketing and finance. By modifying the ethics rules to facilitate this close collaboration, the legal profession will accelerate the development of one-to-many productized legal solutions that will drive down overall costs; improve access for the poor, working and middle class; improve the predictability and transparency of legal services; aid the growth of new businesses; and elevate the stature and reputation of the legal profession as one serving the broader needs of society.

Some U.S. jurisdiction needs to go first. Based on historical precedent, the most likely jurisdiction is California. The public policy that underlies the legal ethics rules is one of consumer protection. Legal regulators should take a capacious view of this policy and acknowledge the harm that occurs when ordinary citizens cannot afford cost-effective legal

⁹⁷ See <https://www.legislation.gov.uk/ukpga/2007/29/section/1> (lasted visited July 7, 2018).

⁹⁸ See Legal Services Act 2007, at <https://www.legislation.gov.uk/ukpga/2007/29/section/1> (last visited July 12, 2018).

⁹⁹ See <http://www.legalservicesconsumerpanel.org.uk/> (last visited July 12, 2018)

¹⁰⁰ *Id.*

¹⁰¹ See generally McMorrow, *supra* note 33.

solutions to life's most basic problems, such as sickness, housing, old age, family planning and access to government benefits. The law should not be regulated to protect the 10 percent of consumers who can afford legal services while ignoring the 90 percent who lack the ability to pay. This is too big a gap to fill through a renewed commitment to pro bono. This is a structural problem rooted in lagging legal productivity that requires changes in how the market is regulated.

The author is grateful and humbled by the opportunity to write this report.

Appendix A



Appendix B

Table of Ethics Opinions on Avvo^{*}

Jurisdiction	Citation	Digest
Illinois	Client-Lawyer Matching Services Study, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (June 25, 2018)	Prohibiting lawyers from participating in or sharing fees with for-profit services that refer clients to or match clients with participating lawyers is not a viable approach, because the prohibition would perpetuate the lack of access to the legal marketplace.
Indiana	Opinion #1-18 (April 2018)	Avvo Legal Services risks violation of Rules 1.2(c), 5.4(a), 5.4(c), 7.2(b), 7.3(d), 7.3(e).
New Jersey	ACPE Joint Opinion 732; CAA Joint Opinion 44; UPL Joint Opinion 54 (June 21, 2017)	Avvo Legal Service improperly requires lawyer to share legal fee with a nonlawyer in violation of Rule 5.4(a) and pay impermissible referral fee in violation of Rules 7.2(c) and 7.3(d).
New York	Ethics Opinion 1132 (Aug. 9, 2017)	A lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a).
North Carolina	Proposed Amendment to Rule 5.4 (July 26, 2017 (pending approval))	Proposed amendment to Rule 5.4 by Subcommittee on Avvo Legal Services that would allow paying reasonable portion of a legal fee to a credit card processor or online platform for hiring a lawyer if business relationship will not interfere with lawyers's professional judgment on behalf of client.
Ohio	Opinion 2016-03 (June 3, 2016)	To comply with Rules 7.1-7.3, hypothetical referral service similar to Avvo would need to be registered with the state of Ohio and meet its requirements. Marketing fees raise issues of impermissible fee-sharing (Rule 5.4).

^{*} Avvo Legal Services was discontinued in July of 2018. See Bob Ambrogi, *Avvo Legal Services to be Shut Down*, LAW SITES, July 8, 2018, at <https://www.lawsitesblog.com/2018/07/avvo-legal-services-shut.html> (last visited July 12, 2018).

Jurisdiction	Citation	Digest
Oregon	Oregon State Bar Meeting of the Board of Governors (Nov. 17, 2017)	Giving progress report on proposed changes to 7.3 (liberalizing referral fees affecting Avvo), 5.4 (nonlawyer fee-sharing) and permitting partial ownership of law firms by licensed paraprofessionals.
Pennsylvania	Formal Opinion 2016-200 (Sept. 2016)	Avvo Legal Services product likely violates RPC 5.4(a) and Rule RPC 1.15(i), which requires legal fees paid in advance to be deposited in the lawyer's Trust Account. Also raises issues with Rule 1.2, 1.6, 1.16, 5.3, and 7.7.
South Carolina	Ethics Advisory Opinion 16-06 (2016)	Avvo Legal Services violates Rule 5.4 (a) prohibition of sharing fees with a non-lawyers. Arrangement would also violate the Rule 7.2(c) prohibition of paying for a referral and is not saved by the exceptions found in Rule 7.2(c)(1), (2), or (3).
Utah	Opinion No. 17-05 (Sept. 27, 2017)	Hypothetical legal service similar to Avvo legal services violates Rule 5.4's prohibition on splitting fees with a non-lawyer. It also violates Rule 7.2's restrictions on payment for recommending a lawyer's services and may violate a number of other Rules related to client confidentiality, lawyer independence, and safekeeping of client property.
Virginia	In re Legal Ethics Opinion 1885 (Oct. 27, 2017) (pending Supreme Court approval)	Avvo Legal Services violates Rule 5.4(a) and Rule 7.3(d). Rules should not be rewritten to permit this service, as consumer benefits are not outweighed by anticompetitive effects.

About the Author



Professor William Henderson

Professor William Henderson is on the faculty at Indiana University Maurer School of Law, where he holds the Stephen F. Burns Chair on the Legal Profession.

Professor Henderson's focuses primarily on the empirical analysis of the legal profession and has appeared in leading legal journals, including the *Stanford Law Review*, the *Michigan Law Review*, and the *Texas Law Review*. In addition, he regularly publishes articles in *The American Lawyer*, *The ABA Journal*, and *The National Law Journal*. His observations on the legal market are also frequently quoted in the mainstream press, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Atlantic Monthly*, *The Economist*, and National Public Radio. Based on his research and public speaking, Professor Henderson was included on the *National Law Journal's* list of The 100 Most Influential Lawyers in America (compiled every ten years). In 2015 and 2016, he was named the Most Influential Person in Legal Education by *The National Jurist* magazine.

In 2010, Professor Henderson co-founded Lawyer Metrics, an applied research company that helps lawyers and law firms use data to make better operational and strategic decisions. Lawyer Metrics (now LawyerMetrix) was acquired by AccessLex Institute in 2015. In 2017, he founded Legal Evolution, an online publication that chronicles successful innovation within the legal industry.

ATTACHMENT B

Excerpt from LegalZoom Terms of Use

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LegalZoom.com provides an online legal portal to give visitors a general understanding of the law and to provide an automated software solution to individuals who choose to prepare their own legal documents. Customer need not download or even license LegalZoom software. LegalZoom hosts its LegalZip software as a backend service for customers when they create their own documents. The Site includes general information on commonly encountered legal issues. The LegalZoom Services also include a review of your answers for completeness, spelling, and for internal consistency of names, addresses and the like. At no time do we review your answers for legal sufficiency, draw legal conclusions, provide legal advice, opinions or recommendations about your legal rights, remedies, defenses, options, selection of forms, or strategies, or apply the law to the facts of your particular situation. LegalZoom is not a law firm and may not perform services performed by an attorney. **LegalZoom, its Services, and its forms or templates are not a substitute for the advice or services of an attorney.**

LegalZoom strives to keep its legal documents accurate, current and up-to-date. However, because the law changes rapidly, LegalZoom cannot guarantee that all of the information on the Site or Applications is completely current. The law is different from jurisdiction to jurisdiction, and may be subject to interpretation by different courts. The law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance. Furthermore, the legal information contained on the Site and Applications is not legal advice and is not guaranteed to be correct, complete or up-to-date. Therefore, if you need legal advice for your specific problem, or if your specific problem is too complex to be addressed by our tools, you should consult a licensed attorney in your area.

From time to time, LegalZoom may perform certain attorney access services and introduce our visitors to attorneys through various methods, including but not limited to (i) legal plans, (ii) third party attorney directory listings, and (iii) third party limited scope agreements. At no time is an attorney-client relationship fostered or created with LegalZoom through the performance of any such services.

This Site and Applications are not intended to create any attorney-client relationship, and your use of LegalZoom does not and will not create an attorney-client relationship between you and LegalZoom. Instead, you are and will be representing yourself in any legal matter you undertake through LegalZoom's legal document service.

....

Source: <https://www.legalzoom.com/legal/general-terms/terms-of-use> (Accessed on July 13, 2018.)
(Emphasis in original.)

Excerpt from AVVO.COM Terms of Use

....

3. Information on the services

Our Services display both Avvo-created content and content that is not created or developed by Avvo (the "Legal Information"). We may review third party-content to determine whether it is illegal or violates our policies, and we may remove or refuse to display content that we reasonably believe violates our policies or the law. But we do not routinely screen third-party content that is published via our Services. This includes the Legal Information that lawyers post on Avvo, and we cannot guarantee the accuracy, adequacy or quality of any such Legal Information, or the qualifications of those posting it.

4. No formation of an attorney-client relationship

The Legal Information found on Avvo is intended for general informational purposes only and should be used only as a starting point for addressing your legal issues. The Legal Information is not the provision of legal services, and accessing such information, or corresponding with or asking questions to a lawyer via the Services, or otherwise using the Services, does not create an attorney-client relationship between you and Avvo, or you and any lawyer. It is not a substitute for an in-person or telephonic consultation with a lawyer licensed to practice in your jurisdiction about your specific legal issue, and you should not rely on such Legal Information. You understand that questions and answers or other postings to the Services are not confidential and are not subject to attorney-client privilege.

5. Legal services for consumers

Avvo is a platform where lawyers unaffiliated with Avvo can offer information and interact with consumers. We provide a number of methods by which you can purchase legal services or have a direct, confidential discussion of your legal issues with a lawyer. Although some of these methods involve Avvo processing a transaction on your behalf, in all instances, Avvo is simply the intermediary in such transactions. You are liable for paying the lawyer for the services provided. Avvo has no liability, either primarily or secondarily, for paying the lawyer other than as an agent on your behalf. The fees you pay for such services are charged by the lawyer and passed through to the lawyer once services have been rendered. Any attorney-client relationship formed as a result of such discussions is between you and the lawyer you speak with—not between you and Avvo. Furthermore, you understand that Avvo cannot be held responsible for the quality or accuracy of any information or legal services provided by lawyers you connect with via Avvo.

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Source: <https://www.avvo.com/support/terms> (Accessed on July 13, 2018.)



MEMORANDUM

To: Members, ATILS ABS-MDP Subcommittee
From: Randall Difuntorum, ATILS Staff
Date: March 26, 2019
Re: ATILS – ABS Comparative Models Tables

Attachments:

1. ABS Comparative Model Tables
2. Selected Articles from the ATILS Dropbox

Given the apparent growing consensus on ATILS to consider an entity regulation model, it is time to consider the issue of non-lawyer ownership. Attached are ABS Comparative Model Tables and some helpful articles on the implementation of ABS in various jurisdictions. As there are sixteen jurisdictions included, for ease of viewing the information is broken into two tables. The first table addresses: Australia; Denmark; England & Wales; Germany; Italy; New Zealand; Scotland; Singapore; and Spain. The second table addresses: the District of Columbia; Washington State; Belgium; Canada; France; Netherlands; and Poland. In addition, a link to a recent article is provided below.

<https://www.lawgazette.co.uk/features/new-model-armies/5065393.article>

ATILS ABS Comparative Model Table #1

Executive Summary: To facilitate the task force's consideration of alternative business structures (ABS), this table offers a comparative landscape of ABS models currently permitted in other jurisdictions. Primary categories of ABS models include nonlawyer ownership interests, nonlawyer external investments, multidisciplinary practice, or incorporated legal practice. Descriptions of adopted ABS in each jurisdiction are provided in this table along with codified authorities and assigned primary regulators that govern the activities.

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	Australia (States: New South Wales and Victoria)	Denmark	England & Wales	Germany	Italy	New Zealand	Scotland	Singapore	Spain
Nonlawyers are Permitted to Hold Certain Percentage Ownership Interests in Law Firms	Yes.	Nonlawyer ownership is limited to those who work in the firm and at most 10%.	Nonlawyer ownership is limited to those who pass "fit-to-own" test. No set percentage stated. Entities must be licensed.	Yes, limited liability companies are allowed between lawyers and members of specific professions: tax agents, auditors and certified accountants, where majority of the shares and voting rights must be held by the lawyers.	33%	Nonlawyer owners must be relatives of the actively involved lawyers (or a qualifying trust) and are only permitted to own non-voting shares	Permissible in accordance to the Law Society Rules, but separate conditions are not prescribed. *Statutes have been amended as of 2012 that omitted the term MDP and the rule on this form of practice is ambiguous.	25%	Yes
Permitted Nonlawyer Investments (passive or only to the extent of being active in the business)	Yes.	No.	No limit on financial involvement or ownership %	No; no third party ownership of shares and profit. Shares cannot be held in a third parties' account.	No	No	"External investors can have no more than 49% ownership or control over a licensed legal service provider." 51% ownership includes solicitors and a member of another regulated profession.	No	25% external ownership- can be non-regulated entities or individuals. 75% ownership include members and regulated professionals.
Operate as a multidisciplinary practice (MDP), which can provide non-legal services in addition to legal services	Yes. In Australia, MDP is a partnership between a lawyer and a nonlawyer for a business that offers legal services as well as other services. "Solicitors are permitted to conduct other business as long as the public are not deceived and appropriate filing and confidentiality is maintained (Rule 8, Legal Profession Uniform Legal Practice (Solicitors) Rules 2015). A solicitor can practise under any business structure (section 32, Legal Profession Uniform Law)."	No.	England & Wales- MDPs may provide only legal or legal with nonlegal services. Allows nonlawyer managers and owners.	Yes, various forms. Only incorporated limited liability companies require lawyers hold a majority, but does not apply all law firms. (See Alternative legal service providers in link.)	No	No	Yes	No	"Professional services firms can be multidisciplinary, as long as all services provided by the firm are regulated professional activities and share a common objective. Commentators have interpreted this as meaning that the different professional activity
ABS Model Establishes Incorporated Legal Practices (ILP)	Yes. In Australia, ILP can be listed in Stock Exchange and have external (nonlawyer) investors. ILPs have to comply with the Australian Federal Corporations Act as well as the Uniform Law. "The Uniform Law uses principles and includes regulatory objectives for the profession, extending the framework for regulating ILPs to all law firms." Prior requirement for appropriate management system (AMS) is only required if a regulator determines it is needed.	No.	Yes.	No. No external investment allowed.	No	No	Yes- external ownership allowed at a certain percentage.	No	No

ATILS ABS Comparative Model Table #1

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	Australia (States: New South Wales and Victoria)	Denmark	England & Wales	Germany	Italy	New Zealand	Scotland	Singapore	Spain
Primary Regulators	Legal Services Council for Uniform Law; Office of Legal Services Commissioner (OLSC) to handle complaints under the Uniform Law in NSW New South Wales: Legal Services Council for Uniform Law; Office of Legal Services Commissioner (OLSC) to handle complaints under the Uniform Law Victoria: Victorian Legal Services Board and Commissioner		SRA (Solicitors Regulation Authority) and CLC (Council for Licensed Conveyancers) both "regulate firms within which different types of lawyers work." LSB (Legal Services Board) oversees regulation of all lawyers in England and Wales. ICA (Institute of Chartered Accountants) approved regulator of ABS for probate services. Solicitors Regulation Authority (SRA) Council for Licensed Conveyancers (CLC) Legal Services Board (also, see link for a complete list of approved regulators, including ICA)	See Below Federal German Bar Association (Bundesrechtsanwaltskammer)	Council of the Bar Association of Rome Ordine Degli Avvocati di Milano, Milan		Three-tiered: Scottish Government approves and licenses "approved regulators"; approved regulators licenses and regulates "licensed providers"; and the licensed providers manage and oversee the individuals in the entity. (Law Society of Scotland currently trying to obtain regulatory authority from the Scottish Government.) Scottish Government (Law Society of Scotland in the process of applying to become a regulatory authority over ILPs and MDP through the Scottish Government)		Yes Provincial bar associations
Codified Laws or Rules	Uniform Law Australian Federal Corporations Act (for ILP) Legal Profession Uniform General Rules 2015 (Victoria follows New South Wales general rules): https://www.legislation.nsw.gov.au/#/view/regulation/2015/246	Code of Conduct for Danish Bar and Law Society **Report: "Competition and Regulation of the Legal Sector in Denmark"	SRA Standards and Regulations	Rules of Professional Practice (Berufsordnung für Rechtsanwälte) §§ 59c, 59e, and 59f BRAO (German Federal Lawyer's Act)	Code of Conduct for Italian Lawyers		Legal Services (Scotland) Act 2010 (Ch. 2- Licensed Legal Services Providers) Law Society of Scotland Rules License Legal Service Providers <p>*Note: The Legal Services (Scotland) Act 2010 aims to allow solicitors to provide legal services via a range of different business models which are currently prohibited - such as allowing non-solicitor partners, working in partnership with other professionals (MDPs), and external ownership. The Act, introduced as a Bill on 9/30/09, is permissive rather than prescriptive legislation to allow increased choice for those running law firms. Traditionally structured solicitor practices will remain.</p>		Code of Conduct of the Spanish Bar (CD- Código Deontológico de la Abogacía Española)

ATILS ABS Comparative Model Table #2

Executive Summary: To facilitate the task force's consideration of alternative business structures (ABS), this table offers a comparative landscape of ABS models currently permitted in other jurisdictions. Primary categories of ABS models include nonlawyer ownership interests, nonlawyer external investments, multidisciplinary practice, or incorporated legal practice. Descriptions of adopted ABS in each jurisdiction are provided in this table along with codified authorities and assigned primary regulators that govern the activities.

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	D.C	WA	Belgium	Canada (Provinces: Ontario, British Columbia, and Quebec)	France	Netherlands	Poland
Nonlawyers are Permitted to Hold Certain Percentage Ownership Interests in Law Firms	No limit on financial involvement or ownership %	Limited to Limited License Legal Technician (LLLT) and Limited Practice Officer (LPO)	No	Ontario- lawyer-control required; no set percentage. British Columbia- same as Ontario. Quebec- lawyer majority ownership, no set percentage.	No	No	No
Permitted Nonlawyer Investments (passive or only to the extent of being active in the business)	No. D.C. does not permit external investors, who do not perform professional services within the law firm, to own all or part of the ownership. (D.C. RPC Rule 5.4 Comment [8].)	Not permitted.	No	Not permitted.	Yes, only if law firm is created in the form of a societe d'exercice liberal (SEL). Those who can invest are: either a natural or legal person practicing the same discipline as that of the SEL; or people who have ceased to practice the discipline for the SEL, but for a period of no longer than 10 years; or legatees or heirs of the persons mentioned above; or of SPFPL (multi-discipline equity structures, "where equities from two or more firms could create a capital structure.").	No	No
Operate as a multidisciplinary practice (MDP), which can provide non-legal services in addition to legal services	No. Nonlawyers' professional services has to be in assistance to the legal service, and the partnership has to be for the sole purpose of providing legal services. (D.C. RPC Rule 5.4(b)(1) and Comment [7].) This structure differs from other forms of MDPs in a way that this rule intends to allow non-legal services professionals to be employees of the firm and hold managerial position, while providing services that support legal services at the firm. However, it is not an individual professional service alongside legal services as in other types of MDPs.	Yes. LLLT and LPO are permitted.	"Only the Council of the Ordre National can determine with which other liberal professions lawyers can associate in Belgium." Flemish Belgian Bar does not permit MDPs, although it does permit Flemish lawyers to incorporate with firms outside the Flemish territorial jurisdiction if it's permitted in the foreign jurisdiction. (Flemish Bar Council Code of Ethics for Lawyers Rule 171.5.) French Section of the Brussels Bar permits "sharing premises and equipment," but "integrated professional practices are expressly forbidden." ("Multidisciplinary Practices and Partnerships..." by Stephen J. McGerry.)	Ontario- yes with "effective control" (ensures the MDP is in "compliance with the core values...of the legal profession."), and nonlawyers have to supplement the practice of law. British Columbia- yes with effective control and nonlawyers have to supplement the practice of law (Law Society Rule 2-40(2)(1)(a)(i)). Quebec- yes; lawyers need to have majority ownership and nonlawyers must be members of identified professional bodies. Nonlawyers do NOT have to supplement the practice of law in Quebec.	Limited to only the accounting and legal professions, and does not permit "non-liberal professions," ie. auditors and financial advisors, to associate with lawyers. Cooperation permitted "with members of regulated professions for sharing office space," but use of the same name and sharing of costs permitted.	Yes (various forms)	Yes (various forms)
ABS Model Establishes Incorporated Legal Practices (ILP)	No	No	No	Not permitted.	No	No	No

ATILS ABS Comparative Model Table #2

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	D.C	WA	Belgium	Canada (Provinces: Ontario, British Columbia, and Quebec)	France	Netherlands	Poland
Primary Regulators	D.C. Bar	Washington State Bar Association. (Administers attorney regulation on behalf of the Washington State Court.)	Dutch Brussels Bar	<p>CBA (Canadian Bar Association) imposed the rules in the above jurisdictions but has no regulatory function. Law Society of Onario, Law Society of British Columbia, and Le Barreau du Quebec handle complaints.</p> <p>Law Society of Ontario.</p> <p>The Law Society of British Columbia.</p> <p>Barreau du Québec</p> <p>*Only Ontario has established standards for paralegals</p>		Netherlands Bar Association	
Codified Laws or Rules	D.C. Rules of Professional Conduct	<p>Washington State Court Rules. Rule 19, 28, and LLLT RPC.</p> <p>Washing State Court Admission and Practice Rule</p> <p>Washington State Court Rule. Limited Practice Rule for LPO</p>	<p>Flemish Bar Council Code of Ethics for Lawyers</p> <p>French Section of the Brussels Bar- Rules of Professional Ethics (Barreau De Bruxelles. Ordre Francals)</p>	<p>Ontario: By-Law 7</p> <p>Ontario: Rules of Professional Conduct for lawyers</p> <p>Ontario: Rules of Professional Conduct for paralegals</p> <p>British Columbia: Law Society Rule 2-38 - 2-49</p> <p>BC: MDP page</p> <p>BC: Rules of Professional Conduct</p> <p>Quebec: survey and research on legal profession and MDPS</p>			

NEW YORK STATE BAR ASSOCIATION



NYSBA

Report of the Task Force on Nonlawyer Ownership

November 17, 2012

Approved by the NYSBA House of Delegates
pursuant to a resolution adopted November 17, 2012.



**NEW YORK STATE BAR ASSOCIATION
RESOLUTION ADOPTED BY HOUSE OF DELEGATES
NOVEMBER 17, 2012**

WHEREAS, in 2000 the New York State Bar Association approved a resolution from the Special Committee on the Law Governing Firm Structure and Operation that provided, *inter alia*, that “[n]o change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law”; and

WHEREAS, in December 2011 the ABA Commission on Ethics 20/20 released for comment a discussion draft proposing a limited form of nonlawyer ownership of law firms and a paper addressing the sharing of fees between or among firms with offices in jurisdictions where nonlawyer ownership is permitted; and

WHEREAS, in view of the fact that more than ten years had passed since this issue was examined by NYSBA, the Task Force on Nonlawyer Ownership was appointed to consider the nonlawyer ownership proposals, evaluate whether the proposals would advance the profession’s core values of loyalty, independence and confidentiality; and

WHEREAS, in April 2012, the ABA Commission on Ethics 20/20 issued a press release indicating that it will not propose changes to ABA policy prohibiting nonlawyer ownership of law firms at this time, and thus withdrawing its December 2011 discussion draft proposing a limited form of nonlawyer ownership of law firms; and

WHEREAS, the Task Force has completed a report concluding that New York should not adopt any form of nonlawyer ownership in the absence of compelling need, empirical data or pressure for change; and

WHEREAS, in September 2012 the ABA Commission on Ethics 20/20 issued a revised paper withdrawing its December 2011 proposal concerning the division of fees within a law firm, and addressing the division of fees between lawyers in different firms where one lawyer practices in a firm in a jurisdiction that prohibits nonlawyer ownership and the other practices in a firm with nonlawyer owners in a jurisdiction that permits it (the Inter Firm Fee Sharing Proposal); and

WHEREAS, in October 2012, the ABA Commission on Ethics 20/20 issued a press release indicating that it will not propose changes to ABA policy with regard to sharing of fees with law firms in jurisdictions that permit nonlawyer ownership, withdrawing its September 2012 discussion draft proposing an Inter Firm Fee Sharing Proposal and referring the issue to the ABA’s Standing Committee on Ethics and Professional Responsibility;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association approves the report and recommendations of the Task Force on Nonlawyer Ownership; and it is further

RESOLVED, that the Association reaffirms its opposition at this time to any form of nonlawyer ownership of law firms in the absence of a sufficient demonstration that change is in the best interest of clients and society, and does not undermine or dilute the integrity of the legal profession; and it is further

RESOLVED, that the Association refers the issue of how to implement the policy behind the Inter Firm Fee Sharing Proposal to the Association's Committee on Standards of Attorney Conduct with the request that the Committee report back to the House of Delegates; and it is further

RESOLVED, that the issue of nonlawyer ownership be the subject of further study and analysis by appropriate entities of the Association; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such other and further steps as they may deem warranted to implement this resolution.

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I. Introduction

New York State, one of the world's most significant legal centers, has traditionally played a prominent role in the evolution of the law governing lawyers. In particular, New York has been influential in developing the law applicable to the structure and operation of law firms. Law firms are the vehicles through which essential legal services are provided to the public, and the integrity of their ownership and organization is indispensable to maintaining the effective delivery of those services.

At the turn of the twenty-first century, the New York State Bar Association ("NYSBA") established the MacCrate Committee and charged it with studying the existing law governing law firm structure and considering whether there was a need for any changes in the law. In 2000, that Committee issued the MacCrate Report, a seminal and expansive document that contained an appraisal of the American legal profession as of 2000 and discussed in detail nonlawyer involvement in the practice of law. The MacCrate Report opposed the adoption of a 1999 American Bar Association ("ABA") proposal that would have permitted nonlawyer ownership of law firms. NYSBA subsequently adopted a resolution that nonlawyer investment in law firms should continue to be prohibited and joined several other state bar associations in a successful effort to oppose nonlawyer ownership proposals that came before the ABA's House of Delegates.

On December 2, 2011, the ABA's Commission on Ethics 20/20 ("Ethics 20/20 Commission") released for comment a discussion draft proposing a limited form of nonlawyer ownership of law firms (the "ABA NLO Proposal"). The draft proposed to allow certain nonlawyers employed by a law firm to have a minority financial interest in the firm and share in its profits. At the same time, the Ethics 20/20 Commission issued, as an initial proposal for comment, a "conflicts of law" paper to address how to deal with sharing of fees between separate

firms (*inter firm*) or among offices of the same firm (*intra firm*) where one of the firms or offices is located in a jurisdiction where nonlawyer ownership is permissible (both *inter firm* and *intra firm* proposals are together referred to as the “ABA Conflicts of Law Proposal”).¹

In February 2012, Vincent E. Doyle III, then President of NYSBA, gave testimony at a hearing conducted by the Ethics 20/20 Commission. He tracked the history of proposals that would have allowed nonlawyer ownership in New York in particular and the U.S. generally. He observed that after extensive study and debate, our State has consistently refused to allow nonlawyer ownership in law firms. Nonetheless, in recognition of the considerable thought that the Ethics 20/20 Commission had given to the issue of nonlawyer ownership, the fact that the current proposal was more limited than the ABA’s prior proposal, and that more than ten years had passed since the last ABA proposals, President Doyle announced the creation of a new Task Force on Nonlawyer Ownership (“Task Force”) chaired by NYSBA Past President Stephen P. Younger.

The Task Force is comprised of leading practitioners, academics, legal ethicists, retired jurists and other attorneys representing a broad spectrum of the legal profession. It was charged with thoroughly and objectively considering the nonlawyer ownership proposals made by the Ethics 20/20 Commission, evaluating whether the proposed changes will advance the core values of the profession – loyalty, independence and confidentiality – and reporting back to NYSBA.²

The Task Force conducted several meetings between February and November 2012, at which it debated the merits of the Ethics 20/20 Commission’s discussion draft and subsequent proposals solicited the input, views, and experiences of a variety of individuals from various

¹ Subsequent to the initial drafting of this report, the Ethics 20/20 Commission issued a revised conflicts of law proposal which withdrew its initial proposal on *intra firm* sharing of fees, but maintained its proposal on *inter firm* sharing of fees. In response, the Task Force considered this latest proposal as discussed *infra* at 28-31. Ultimately, the Ethics 20/20 Commission also withdrew its proposal on *inter firm* sharing of fees, as discussed *infra* at 31.

² The Report of the Task Force on Nonlawyer Ownership will be hereinafter referred to as “Task Force Report.”

jurisdictions whose professional work has involved, either directly or indirectly, nonlawyer ownership issues. The list of speakers, and a summary of their presentations, is contained in Appendix A of this Task Force Report. The Task Force also reviewed an extensive collection of scholarship on the subject of nonlawyer ownership and discussed these writings at Task Force meetings. A bibliography of these writings is set out in Appendix B to this Task Force Report. To solicit the views of a broad section of attorneys licensed in New York, the Task Force also disseminated surveys to lawyers broken into three groups: Small Firm Practitioners; Large Firm Practitioners; and Corporate Counsel. The results of those surveys are summarized in this Task Force Report.

In April 2012, while the Task Force was in the middle of its work, the Ethics 20/20 Commission announced that it had decided not to continue to pursue the ABA NLO Proposal, which would have changed ABA policy prohibiting nonlawyer ownership of law firms. The Commission noted that it would, however, continue to consider how to provide practical guidance about choice of law problems that arise because some jurisdictions, including the District of Columbia and a growing number of foreign jurisdictions, permit nonlawyer ownership of law firms.

Despite the withdrawal of the ABA NLO Proposal, the Task Force decided to continue with its study and complete the charge assigned to it by President Doyle. This Task Force Report documents the Task Force's findings and recommendations.

The Task Force Report begins with a history of the debate regarding nonlawyer ownership in New York from the 1999 ABA proposals recommending such ownership up through the present. It then describes the Ethics 20/20 Commission's proposals on nonlawyer

ownership and the Task Force's mission. The Task Force Report continues with an examination of the nonlawyer ownership experience in other jurisdictions.

Next, the Task Force Report summarizes the opinions and reports of various bar associations from other jurisdictions and sections of NYSBA prepared in response to the ABA's proposals concerning nonlawyer ownership and choice of law.

Finally, this Task Force Report concludes with the Task Force's observations and recommendations on nonlawyer ownership and choice of law concerns. The Task Force observed that the absence of compelling need, empirical data, or pressure for change, combined with professionalism concerns, all militated against changing New York's position on nonlawyer ownership and against adopting either of the ABA's nonlawyer ownership proposals. As a result, the Task Force voted to oppose adopting any form of nonlawyer ownership in New York, noting that further studies were necessary before any such change should be advocated. The Task Force also voted in opposition to adopting the ABA's proposals on choice of law, except to endorse a proposal on inter firm fee sharing.

The Committee wishes to recognize Bob Emery, Research Librarian at Albany Law School, for his invaluable research assistance throughout this project. In addition, Albany Law School students Mackenzie Keane and Jessica Clemente reviewed drafts of the Task Force Report and provided several helpful suggestions.

The opinions expressed herein are those of the Task Force preparing this Task Force Report and do not represent those of NYSBA unless and until this Task Force Report has been adopted by the Association's House of Delegates or Executive Committee.³

³ The views expressed herein do not necessarily reflect the opinions of every Task Force member.

II. History of the Debate on Nonlawyer Ownership in New York

A. *The MacCrate Report Addresses Nonlawyer Investment in Law Firms*

In 1999, the ABA Commission on Multidisciplinary Practice issued a report proposing, among other things, that lawyers be permitted to form business relations with nonlawyers and to allow entities owned or controlled by nonlawyers to engage in multidisciplinary practice (“MDP”) with lawyers.⁴ That report was rejected by the ABA House of Delegates at the ABA’s Annual Meeting on August 9-10, 1999.⁵

On June 26, 1999, NYSBA’s House of Delegates adopted a resolution:

- (1) opposing any changes in existing regulations prohibiting attorneys from practicing law in MDPs in the absence of a sufficient demonstration that such changes are in the best interest of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession; and
- (2) urging further studies of the matter.

Pursuant to this resolution, on July 28, 1999, NYSBA established a Special Committee on the Law Governing Firm Structure and Operation chaired by Past President Robert MacCrate (the “MacCrate Committee”) “charging it to consider the present law and its effectiveness,

⁴ ABA Comm’n on Multidisciplinary Practice, Report to the House of Delegates, Resolution (as of June 8, 1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html. Much of the focus of the MacCrate Report was on MDP, which is not the subject of this Report as the Ethics 20/20 Commission did not propose to revisit that issue.

⁵ See ABA House of Delegates Resolution (1999), Reports of ABA, Volume 124, No.2, p. 14; available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/flbarrec.html.

whether there is a need for any changes in the law, the evidence in support of such changes, and whether potential advantages from such changes outweigh potential detrimental effects.”⁶

Ultimately, in April 2000, the MacCrate Committee issued a seminal and expansive document entitled “Report of the NYSBA Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*” (the “MacCrate Report”), in which it opposed the ABA’s MDP proposal.⁷ After extensive discussion of its broad study of the principal issues raised regarding the law governing lawyers and law firms in the debate over MDP, the MacCrate Report set forth recommendations as to: “(1) what should be changed in the law to clarify the place of multidisciplinary practice while preserving the core values of the American legal profession; and (2) what in the public interest should remain unchanged in the law.”⁸

With regard to nonlawyer ownership of law firms, the MacCrate Report divided its recommendations into two distinct sections: 1) nonlawyer investment in law firms, and 2) nonlawyer ownership of or control over law firms.⁹

As to nonlawyer financial investment in law firms, the MacCrate Report concluded that the arguments in favor of such investment were not convincing.¹⁰ The type of law firm most likely to benefit from outside investment—*i.e.*, smaller firms and firms facing shortfalls in revenues—“are not likely candidates for outside equity investment.”¹¹ On the other hand, larger,

⁶ NYSBA Special Comm. on the Law Governing Firm Structure Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*, at 1 (2000) (hereinafter referred to as “MacCrate Report”).

⁷ *Id.* at 380, 388.

⁸ *Id.* at 3.

⁹ *Id.* at 377-88.

¹⁰ *Id.*

¹¹ *Id.*

more prosperous law firms would likely attract outside investment but, conversely, would not need or desire this investment.¹²

The MacCrate Report's second objection was that any nonlegal entity likely to be attracted to making such an investment would be financially dominant with respect to the law firm. The Report concluded that it was reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership."¹³ The Report noted that regulatory authorities in various jurisdictions have called for rules that would govern this type of affiliation "with a view to preserving the professional integrity" of this type of "'captive' legal practice."¹⁴

As a third objection to a nonlawyer's financial investment in a law firm, the MacCrate Report indicated that such investment would impose a duty on the principals of the firm to operate it for the "financial benefit of the investors."¹⁵ Even without the added pressure of an outside investor, the Report noted that lawyers have, at times, unfortunately put the financial needs of their firms before a client's interest.¹⁶ With outside investment, there would be an even greater potential for tensions to arise between legal ethics and the independence of the lawyer on the one hand, and the business plan promoted by nonlawyer investors on the others.¹⁷ The MacCrate Report concluded that "this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system...and should not be permitted in New York."¹⁸

¹² *Id.* at 378.

¹³ *Id.*

¹⁴ *Id.* at 379.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 380.

¹⁸ *Id.*

As to nonlawyer ownership or control over law firms, the MacCrate Report reiterated that lawyers may work with nonlawyer professionals, as long as lawyers retain ultimate control over the services provided to clients.¹⁹ According to the Report, the “nonlawyer participants in such ventures . . . do not play a role in the management of the legal practice, and only have a managerial say with respect to the nonlegal services being provided to the public.”²⁰ The lawyers participating in such a venture, explained the Report, remain responsible for their professional and ethical conduct.²¹ The Report also expressed concern that a partnership between a law firm and nonlawyer entity may be outside the scope of existing professional and ethical rules.²² While acknowledging that effective rules could ultimately develop to govern such partnerships, the MacCrate Report urged “the greatest caution” toward any relationship structured in a manner permitting a “dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics.”²³

The MacCrate Report cited several arguments for allowing lawyers to form general partnerships with nonlawyers. Chief among these was that “consumers should have the right to choose the form of the entity that provides legal services to them.”²⁴ The Report explained that some who favored permitting lawyers to form general partnerships with nonlawyers contended that consumers should have the ability to waive the traditional protections of confidentiality and ethical rules in favor of the efficiencies of a “one-stop shopping” option.²⁵

¹⁹ *Id.*

²⁰ *Id.* at 380-81.

²¹ *Id.* at 381.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 382.

²⁵ *Id.*

The MacCrate Report concluded that the “free marketplace” is not the solution to all of society’s problems.²⁶ “To the contrary, society has historically needed frequent governmental intervention and protection *against* the free marketplace.”²⁷ The Report noted that the government has imposed a broad range of regulations on matters concerning public health and safety and on various professions.²⁸ Although a consumer may desire a free marketplace, the Report explained that “[i]t is in the public interest to ensure that the people who hold themselves out as having special skills, whether they be medical, legal, accounting or other skills, in fact possess those skills and that they comport themselves in a manner commensurate with the high degree of trust the public tends to repose in its professionals.”²⁹

In the legal profession, the Report explained, the judicial branch of government has been responsible for: 1) screening those who seek admission to the profession, 2) supervising continuing legal education, 3) exercising continuing disciplinary authority over those who engage in the practice of law, and 4) terminating the licenses of lawyers who fail to comply with minimum professional standards.³⁰ Furthermore, “states continue to enforce unauthorized practice of law restrictions to be sure that nonlawyers do not injure the public by purporting to provide clients with legal services.”³¹ The Report concluded on this point, noting that, prohibiting “nonlawyers from having any significant influence in the manner in which lawyers deliver legal services to clients (including through passive investment in entities providing legal services to the public) is a crucial attribute of the independent bar, which has traditionally played an important role in our culture.”³²

²⁶ *Id.*

²⁷ *Id.* at 382-83.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 383.

³¹ *Id.*

³² *Id.* at 384.

Moreover, even if there were public demand to combine legal and nonlegal services—and the Report pointed out that the evidence of such demand was equivocal at best—such demand could be and is satisfied by strategic alliances, other contractual relationships with nonlegal professional service providers and lawyers owning and operating nonlegal businesses.³³ These arrangements are different from the proposals of those advocating for nonlawyer ownership, maintained the MacCrate Report, in that the lawyers and nonlawyers in such relationships do not refer to each other as a “partner.”³⁴ The Report underscored the importance of a lawyer’s duties of loyalty, confidentiality and independent professional judgment to a client and indicated that vesting any measure of control over the exercise of these duties in the hands of nonlawyers may put those critical values at risk, especially without any effective oversight.³⁵

The MacCrate Report listed a series of specific dangers that it anticipated if nonlawyers were permitted to be significantly involved in the management of a law firm.³⁶ For example, nonlawyer owners “might well view the practice of law less in professional terms than in terms of being but one of several profit centers” and would be less likely to encourage pro bono or public interest work.³⁷ “In sum,” the Report noted, “placing any measure of control over the practice of law in the hands of nonlawyers would form a constant backdrop for the lawyers attempting to practice in the organization, as the financial objectives of nonlawyer management perpetually compete with considerations of professional ethics and the formulation of independent judgments in the best interests of legal clients and the legal system.”³⁸

³³ *Id.*

³⁴ *Id.* at 385.

³⁵ *Id.*

³⁶ *Id.* at 386.

³⁷ *Id.*

³⁸ *Id.* at 386-87.

In situations where a nonlawyer may have an ownership interest in a law firm, the MacCrate Report pointed to the difficulty of ensuring that lawyers maintain control over their practices because “[i]ndicia of nonlawyer influence will often be elusive.”³⁹ The Report noted that it would be extremely difficult to define “the point at which a nonlawyer’s role within an organization rises to the level of inappropriate interference with practice governance.”⁴⁰ Given that alternative means exist to accomplish the goals sought to be achieved through transfers of control of law firms to nonlawyers, the MacCrate Report declined to take on the risks associated with such a proposal and ultimately rejected the notion that the rules against nonlawyer participation in the practice of law should be relaxed.⁴¹ Although the Report recognized that “we [are] mindful . . . that denying nonlawyers the ability to have a financial interest or otherwise participate in law firm governance deprives lawyers of significant opportunities for financial gain,” the MacCrate Committee “believe[d] that it is in the public interest that lawyers forego this opportunity.”⁴²

B. NYSBA’s House of Delegates Votes Against Nonlawyer Ownership

At its annual meeting held in June of 2000, the MacCrate Report came before NYSBA’s House of Delegates and was resoundingly approved by a voice vote after spirited debate.⁴³ The resolution adopted by the House of Delegates provides, in pertinent part, that:

- (1) Lawyers and law firms should be permitted to provide nonlegal services to clients or other persons, directly or through affiliated entities, provided that no nonlawyer or nonlegal entity involved in the provision of such

³⁹ *Id.* at 387.

⁴⁰ *Id.*

⁴¹ *Id.* at 387-88.

⁴² *Id.* at 388. The MacCrate Report also recommended that New York adopt a rule addressing ancillary nonlegal services offered by lawyers and strategic allies.

⁴³ See, e.g., John Caher, *Multidisciplinary Practice Rules Adopted by State*, N.Y.L.J., July 25, 2001, at 1.

services owns or controls the practice of law by a lawyer or law firm or otherwise is permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

- (2) Lawyers and law firms should be permitted to enter into interprofessional contractual arrangements with nonlegal professionals and nonlegal professional service firms for the purpose of offering legal and other professional services to the public, on a systematic and continuing basis, provided no nonlawyer or nonlegal entity has any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by any lawyer or law firm.

- (5) Nonlawyer investment in entities practicing law should continue to be prohibited.
- (6) No change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law, since any demand that exists for greater integration of legal services with those of other professions may be satisfied by permitting lawyers to enter into strategic alliances and other contractual relationships with nonlegal professional service providers, as well as by permitting lawyers to own and operate nonlegal businesses.

NYSBA then directed the bench and bar to consider adding the MacCrate Report's proposed amendments to the Code of Professional Responsibility. In August 2000, proposed amendments to the Code were distributed statewide for comment. The proposals were then

debated at the November 2000 NYSBA House of Delegates meeting and, after some modifications to reflect public comments, were approved and forwarded to the courts for consideration.⁴⁴

C. The ABA Rejects a Proposal to Allow “Lawyer Controlled” Multidisciplinary Practice.

In 2000, the ABA Commission on Multidisciplinary Practice issued a more modest proposal for nonlawyer ownership which recommended that only “lawyer controlled” multidisciplinary practices be permitted.⁴⁵ At the ABA Summer Meeting in 2000, by a vote of 314 to 106, the ABA House of Delegates rejected this proposal in favor of the approach taken in the MacCrate Report.⁴⁶ The resolution of the ABA House of Delegates was similar to the resolution passed by NYSBA’s House of Delegates in June 2000 and provided:

that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions and committees undertake a review of the Model Rules of Professional Conduct (“MRPC”) and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with non-legal professional service providers consistent with the statement of principles in this Recommendation.⁴⁷

⁴⁴ See John Caher, *MDP Remains a Hot Topic of Debate*, N.Y.L.J., Nov. 7, 2000, at 1; see also Wechsler, 2000-2001 *Survey of New York Law: Prof’l Responsibility*, 52 SYR. L. REV. 563, 574-5 (2002) (discussing events leading up to adoption of new Disciplinary Rules).

⁴⁵ Steven C. Krane, *The Heat Subsides: The Future of MDPs in New York*, The New York Prof’l Responsibility Report, Sept. 2000.

⁴⁶ *Id.*

⁴⁷ *Id.*

To the best of the Task Force’s knowledge, the ABA did not undertake further actions concerning multidisciplinary practice or nonlawyer ownership from 2000 up to the time when the Ethics 20/20 Commission conducted its work, although the developments in the United Kingdom, Australia and other jurisdictions may have been discussed at ABA meetings or conferences during that period.

D. The Appellate Divisions of the New York State Supreme Court Adopt Rules Addressing a Lawyer’s Provision of Nonlegal Services and Contractual Relations Between Lawyers and Nonlegal Professionals

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001, specifically DR 1-106 of the Code of Professional Responsibility, entitled “Responsibilities Regarding Non-legal Services.” DR 1-106 addressed “the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons, including lawyers or law firms that own or control an entity providing nonlegal services to clients of the lawyer or law firm, or themselves operate a business providing nonlegal services that are distinct from the legal services they provide.”⁴⁸ For purposes of DR 1-106, “non-legal services” included “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.”⁴⁹ The MacCrate Committee, in proposing DR 1-106, noted that a broad array of nonlegal businesses were being conducted by law firms or by entities owned by law firms, such as lobbying, economic or scientific expertise, appraisal services, accounting, financial planning, real estate and insurance brokerage, title insurance and private investigations.⁵⁰

DR 1-106 created a strong presumption that the Code applies to lawyers who perform law-related services and to lawyers who own or control an entity providing nonlegal services.

⁴⁸ NYSBA Comm. on Prof’l Ethics, Op. 752 (2002).

⁴⁹ DR 1-106(C).

⁵⁰ MacCrate Report at 98-103.

DR 1-106 (A)(1) provided that “[a] lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.”⁵¹ In addition, if a lawyer or law firm provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or lawyer’s firm, the lawyer or law firm must adhere to the Code “with respect to the nonlegal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.”⁵² Furthermore, “[a] lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person” was subject to the Code with respect to the nonlegal services “if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.”⁵³

DR 1-106(B) contained an important caveat for lawyers who coordinate with nonlawyers to provide nonlegal services. That provision cautioned that “a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty [of confidentiality] with respect to the confidences and secrets of a client receiving legal services.”⁵⁴

⁵¹ DR 1-106(A)(1).

⁵² DR 1-106(A)(2).

⁵³ DR 1-106(A)(3).

⁵⁴ DR 1-106(A)(4).

The second rule adopted by the Appellate Divisions concerning multidisciplinary practice, also effective November 1, 2001, was DR 1-107, entitled “Contractual Relationships Between Lawyers and Nonlegal Professionals.” DR 1-107(A) noted that “a lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional or non-legal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services” provided certain conditions are met.⁵⁵

While generally permitted, contractual relationships between lawyers and nonlegal professionals were closely regulated by the courts. Lawyers or law firms entering into and maintaining such contractual relationships had to ensure that the profession of the nonlegal professional or nonlegal professional service firm was included in a list established by the Appellate Divisions.⁵⁶ Those professions seeking to be included on the list had to meet certain criteria outlined in DR 1-107(B)(1). The profession had to be composed of individuals who: 1) possessed a bachelor’s degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university or work experience, 2) were licensed to practice their profession by an agency of the State of New York or the United States Government, and 3) were “required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.”⁵⁷ To date, members of only five nonlegal professions have been deemed eligible to form contractual business relationships with lawyers: 1) architecture,

⁵⁵ DR 1-107(A).

⁵⁶ DR 1-107(A)(1).

⁵⁷ DR 1-107(B)(1)(c).

2) certified public accountancy, 3) professional engineering, 4) land surveying, and 5) certified social work.⁵⁸

Significantly, DR 1-107(A)(2) prohibited a lawyer who enters into a contractual relationship with one of the approved groups from permitting the nonlegal professional or nonlegal professional service firm “to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm.”⁵⁹ In addition, a lawyer entering into a contractual relationship with a nonlegal professional under DR 1-107(A) was, nonetheless, still subject to the traditional prohibitions against sharing legal fees with a nonlawyer or receiving or giving any monetary or other tangible benefit for forwarding or receiving a referral.⁶⁰

E. The COSAC Report and the Appellate Divisions’ Enactment of the New York Rules of Professional Conduct, effective April 1, 2009

In 2007, NYSBA’s Committee on Standards of Attorney Conduct (“COSAC”) issued an extensive report and proposed that New York replace the Code of Professional Responsibility with a set of ethical rules following the format of the ABA Model Rules of Professional Conduct but as revised for application in New York.⁶¹ NYSBA’s House of Delegates approved the COSAC Report proposing the Model Rules, with modifications, at a meeting held on November 3, 2007.

⁵⁸ 22 N.Y.C.R.R. 1205.5 (“Nonlegal professions eligible to form cooperative business arrangements with lawyers”).

⁵⁹ DR 1-107(A)(2).

⁶⁰ *Id.*; see also DR 2-103(D), DR 3-102(A). A complete set of the disciplinary rules may be found at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf>. The New York Rules of Professional Conduct, including rules 1.5, 5.4 and 8.5, may be found at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended070112.pdf>.

⁶¹ NYSBA Comm. on Standards of Attorney Conduct “PROPOSED NEW YORK RULES OF PROFESSIONAL CONDUCT,” p.p. ii-vii (2008) (“COSAC Report”).

On February 1, 2008, NYSBA forwarded COSAC’s proposed set of rules and comments to the Presiding Justices of the Appellate Divisions. On December 16, 2008, the Appellate Divisions announced that, effective April 1, 2009, New York attorneys would be governed by the New York Rules of Professional Conduct (“New York Rules”). While the courts adopted the proposed numbering system, based on the ABA Model Rules, the New York Rules maintain most of the substance of the former Code.

The Appellate Divisions did not add any provisions to the New York Rules allowing nonlawyer ownership of law firms and maintained the contents of DR 1-106 and DR 1-107 and carried them forward in Rule 5.7 (“Responsibilities Regarding Nonlegal Services”) and Rule 5.8 (“Contractual Relationship Between Lawyers and Nonlegal Professionals”), respectively.⁶²

F. New York State Bar Opinions 889 and 911

How to reconcile New York’s Rules of Professional Conduct prohibiting nonlawyer ownership with the rules of other jurisdictions permitting such ownership has recently been considered by NYSBA’s Committee on Professional Ethics in two different contexts. It should be noted that the Committee’s opinions interpreted the current Rules, but did not address the question of what policies best accommodate firms active in jurisdictions with conflicting rules or whether New York’s Rules ought to be modified to adapt to developments around the world.

In Opinion 889, dated November 15, 2011, the Committee was asked by an attorney admitted and practicing in a firm in the District of Columbia whether he could share fees with a nonlawyer who would assist the firm in a class action brought in New York. The lawyer was also admitted in New York.

⁶² The contents of DR 1-107(D), which provided that “a lawyer or law firm could allocate costs and expenses with a non-legal professional or non-legal professional service firm pursuant to a contractual relationship permitted by DR 1-107 (A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each,” were not included in Rule 5.8. Nonetheless, such permission is implied in the Rules. *See* Rule 5.8, Comment 2.

Noting the conflicting rules in the District and in New York, the Committee examined the provisions of Rule 8.5, the choice of law provision. The Committee explained that “[f]orming a District of Columbia partnership with a non-lawyer in the District of Columbia does not become subject to New York Rule 5.4 (prohibiting fee sharing or a partnership with a nonlawyer) just because the partnership may undertake some New York litigation work.” The Committee opined that the provision of New York Rule 8.5 applying the Rules of the jurisdiction having the “predominant effect” led to the conclusion that the Rules of the District were applicable. It reasoned: “Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation.”

Several months after issuing this opinion, the Committee answered a request from a lawyer who wished to become associated with a UK firm that had nonlawyers in supervisory and ownership positions, as permitted in that country. The New York lawyers, as part of the firm, intended to establish a New York office to represent New York clients, but they would not share confidences with the UK nonlawyer owners.

The Committee, in Opinion 911, dated March 14, 2012, concluded that, under these facts, the New York Rule applied and the arrangement was prohibited. It contrasted Opinion 889, and explained that “Rule 5.4 would govern the propriety of the arrangement with the UK entity. Even if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York.”

III. The ABA's Ethics 20/20 Commission Proposals and the NLO Task Force's Mission

The ABA established the Ethics 20/20 Commission in 2009 to conduct a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. The Ethics 20/20 Commission's November 2009 Preliminary Issues Outline identified several issues for consideration and study.⁶³ Among other things, the outline identified issues concerning alternative business structures, such as law practices with nonlawyer managers/owners, multidisciplinary practices, or incorporated or publicly traded law firms in other countries that raise ethical and regulatory questions for U.S. lawyers and law firms.⁶⁴ The Commission then conducted a three-year study of the preliminary issues that it had identified, examining how globalization and technology are transforming the practice of law and how the regulation of lawyers should be updated in light of those developments. The Commission emphasized that its "work in this area has been guided by three principles: protecting the public; preserving core professional values; and maintaining a strong, independent, and self-regulated profession."⁶⁵

In June 2011, the Ethics 20/20 Commission publicly rejected certain forms of nonlawyer ownership that certain other jurisdictions currently permit, including multidisciplinary practices, publicly traded law firms, and passive, outside nonlawyer investment or ownership in law firms.⁶⁶ After further consideration and study, on December 2, 2011, the Commission released for comment a Discussion Draft describing a limited form of court-regulated, nonlawyer

⁶³ ABA Comm'n on Ethics 20/20 Preliminary Issues Outline (Nov. 19, 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

⁶⁴ *Id.* at 6.

⁶⁵ ABA Comm'n on Ethics 20/20, *For Comment: Discussion Paper on Alternative Law Practice Structures*, at 1 (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf ("Ethics 20/20 Discussion Draft on NLO").

⁶⁶ See Press Release, ABA Comm'n on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Firms (April 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

ownership of law firms (the “ABA NLO Proposal”).⁶⁷ The ABA NLO Proposal would have allowed nonlawyers, who are employed by a law firm and assist the firm’s lawyers in the provision of legal services, to hold a minority financial interest in the firm and share in its profits.⁶⁸ The draft resembled the approach permitted by the District of Columbia in its Rule 5.4 (“Professional Independence of a Lawyer”)⁶⁹ for more than twenty years, but included additional requirements that lawyers in a firm retain controlling voting rights and financial interests in the firm.⁷⁰ Specifically, the ABA NLO Proposal recommended consideration of amendments to the Model Rules to allow nonlawyer ownership of firms under the following restrictions:

- such law firms would be restricted to providing legal services;
- nonlawyer owners would have to be active in the firm, providing services that support the delivery of legal services by the lawyers (i.e., the firm could not be a multidisciplinary practice);
- nonlawyer ownership and voting interests would be restricted by a 25% cap intended to ensure that lawyers retain control of the firm;
- nonlawyer owners would be required to agree in writing to conduct themselves in a manner consistent with the Rules of Professional Conduct for lawyers; and
- lawyer owners would be responsible for both ensuring that the nonlawyer owners in their firm were of good character and supervising the

⁶⁷ Ethics 20/20 Discussion Draft on NLO.

⁶⁸ *Id.* at 2.

⁶⁹ D.C. Bar, D.C. Rules of Prof’l Conduct, Rule 5.4.

⁷⁰ Ethics 20/20 Discussion Draft on NLO at 2.

nonlawyers in regard to compliance with the Rules of Professional Conduct.⁷¹

On April 16, 2012, however, the Ethics 20/20 Commission announced that it had “decided not to propose changes to ABA policy prohibiting nonlawyer ownership of law firms.”⁷² The Commission indicated that it had considered the pros and cons of the proposal in the Ethics 20/20 Discussion Draft on NLO, “including thoughtful comments that the changes recommended in the Discussion Draft were both too modest and too expansive.”⁷³ The Co-Chairs of the Commission stated that “[b]ased on the Commission’s extensive outreach, research, consultation, and the response of the profession, there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms.”⁷⁴ In sum, the Commission “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.”⁷⁵

The Ethics 20/20 Commission noted that it would, however, “continue to consider how to provide practical guidance about choice of law problems that are arising because some jurisdictions, including the District of Columbia and a growing number of foreign jurisdictions, permit nonlawyer ownership of law firms.”⁷⁶ The Commission explained that it believes that these issues “need pragmatic attention” and cited its previously released draft proposals addressing them.⁷⁷ The Commission announced that it would decide at its October 2012 meeting

⁷¹ *Id.*

⁷² *See supra* note 66, at 1.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

whether to submit formal proposals on these subjects to the ABA House of Delegates for consideration in February 2013 and that it welcomed comments on its draft proposals.⁷⁸

These choice of law proposals, also released on December 2, 2011, were contained in a document entitled “Initial Draft Proposal for Comment Choice of Law-Alternative Law Practice Structures.”⁷⁹ The draft contained proposals (the “ABA Conflicts of Law Proposal”) to address “problems that arise as a result of jurisdictional inconsistencies, both domestically and abroad, concerning nonlawyer ownership interests in law firms.”⁸⁰ The Ethics 20/20 Commission stated that it had learned that lawyers licensed in the United States “want more guidance as to their ethical obligations when they are asked to work with or within firms that have nonlawyer owners or partners.”⁸¹ The ABA Conflicts of Law Proposal was much narrower than the ABA NLO Proposal and recommended amendments to Model Rule 1.5 (“Fees”) and Model Rule 5.4 (“Professional Independence of a Lawyer”) “to address inconsistencies among jurisdictions, both domestically and abroad, with regard to the sharing of fees with nonlawyers.”⁸²

The ABA Conflicts of Law Proposal would have amended Model Rule 1.5, and Comment 8 thereto, to address the problem that arises when one firm that is governed by a version of Model Rule 5.4 that does not permit nonlawyer partners or owners enters into a fee-sharing agreement⁸³ with another firm that is permitted to have nonlawyer partners or owners

⁷⁸ *Id.*

⁷⁹ ABA Comm’n on Ethics 20/20: Initial Draft Proposal for Comment Choice of Law - Alt. Law Practice Structures (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf (“Ethics 20/20 Initial Draft Proposal on Choice of Law Issues”).

⁸⁰ *Id.* at 1.

⁸¹ *Id.*

⁸² Summary of Actions by the ABA Comm’n on Ethics 20/20, at 5 (Dec. 28, 2011), *available at* <http://www.legalethicsforum.com/files/20111228-summary-of-ethics-20-20-commission-actions-december-2011-final.pdf>.

⁸³ Fee splitting agreements between lawyers not in the same firm are governed by ABA Model Rule 1.5(e) and New York Rule 1.5(g).

under its applicable professional conduct rules.⁸⁴ The proposed amendments to ABA Model Rule 1.5, contained in a proposed resolution accompanying the ABA Conflicts of Law Proposal, would have allowed a lawyer to divide a legal fee with another firm that has nonlawyer partners and owners in a jurisdiction that allows such ownership.⁸⁵ The proposed amendment to ABA Model Rule 1.5(e) read as follows, with insertions underlined:

- (e) A division of a fee between lawyers who are not in the same firm or
between law firms may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or
law firm or each lawyer or firm assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer or
law firm will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.⁸⁶

A proposed amendment to Comment 8 to ABA Model Rule 1.5 would have clarified the intended scope of the above proposal. It stated as follows:

[8] Paragraph (e) permits the division of a fee with a law firm in which a nonlawyer is a partner or has an ownership interest. But see Rule 8.4(a) (prohibiting a lawyer from “knowingly assist[ing]” another to violate the Rule of Professional Conduct). The Rule 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.⁸⁷

⁸⁴ Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 1-2.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.

The proposed amendments to ABA Model Rule 5.4, also contained in a proposed resolution that accompanied the ABA Conflicts of Law Proposal, attempted to resolve a somewhat similar problem that arises when a lawyer practicing in the office of a law firm where nonlawyer fee sharing is impermissible attempts to share fees with nonlawyers in the same firm who are located in another office where such fee sharing is permissible.⁸⁸ The Ethics 20/20 Commission concluded that a lawyer should be permitted to share fees with nonlawyers under these circumstances, “but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.”⁸⁹ This approach was contrary to NYSBA Opinion 911 discussed above, although it was endorsed by the Philadelphia Bar Association in an ethics opinion issued in September 2010.⁹⁰

The proposed amendment to ABA Model Rule 5.4 added a new subsection (a)(5), which read as follows:

(5) a lawyer may share legal fees with a nonlawyer in the lawyer’s firm in a manner that is not otherwise permissible under this Rule, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer. See Rule 8.5(b).⁹¹

⁸⁸ *Id.* at 2.

⁸⁹ *Id.*

⁹⁰ The Philadelphia Bar Ass’n Prof’l Guidance Comm. Op. 2010-7 (Sept. 2010); *see supra* Section II.F.

⁹¹ Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 4-5.

The proposed amendment was accompanied by the addition of a new Comment 3 to ABA Model Rule 5.4, which would have clarified the intended scope of the above proposal. It stated as follows:

[3] Paragraph (a)(5) recognizes that the Rule regarding fee sharing with nonlawyers varies among jurisdictions, both within and outside the United States. As a result, a lawyer may be asked to share fees with nonlawyers in the same firm when that form of fee sharing is not permitted under the rules of the jurisdiction that apply to that lawyer, but permitted under the rules of the jurisdiction that apply to the permissibility of fee sharing with the nonlawyer. Under these circumstances, Rule 8.5(b)(2) (Choice of Law) states that the Rule to be applied is the Rule of the jurisdiction where “the lawyer’s conduct occurred” or had its “predominant effect,” even if the lawyer is not admitted in that jurisdiction. Under this test, if a nonlawyer works exclusively with lawyers and serves clients in an office located in a jurisdiction that permits nonlawyer partnership or ownership interests, Rule 8.5(b)(2) ordinarily permits the firm’s lawyers, including those lawyers located in jurisdictions that do not permit such partnerships or ownership interests, to share fees with the nonlawyer because the predominant effect of the fee sharing will be in the jurisdiction that allows it. To determine whether a lawyer can divide fees with a different firm in which a nonlawyer is a partner or has an ownership interest, see Rule 1.5, Comment [8].⁹²

⁹² *Id.* at 5-6.

After the Task Force issued the initial draft of its Task Force Report on September 14, 2012, the Ethics 20/20 Commission issued two revised drafts for comment on September 18, 2012.⁹³ The first draft addressed choice of rule agreements for conflicts of interest, and is not the subject of this Task Force Report. The second draft (the “Inter Firm Fee Sharing Proposal”), pertinent to the work of the Task Force, concerns choice of law issues associated with the division of fees between lawyers in different firms where one lawyer practices in a firm in a jurisdiction that prohibits nonlawyer ownership of law firms, and the other practices at a firm that has nonlawyer owners in a jurisdiction that permits it.⁹⁴ The Ethics 20/20 Commission observed that “it is important to note that nothing in the draft would alter the existing prohibition on nonlawyer ownership or fee sharing with nonlawyers set forth in Rule 5.4 of the ABA Model Rules of Professional Conduct.”⁹⁵

The Ethics 20/20 Commission considered and rejected a proposal to permit fee sharing among members of a single firm that has offices in both jurisdictions that allow nonlawyer ownership and those that do not (intra firm fee sharing).⁹⁶ The Commission noted that such a rule would allow for the possibility that a nonlawyer in a jurisdiction that allows nonlawyer ownership of firms could influence lawyers’ decisions in those jurisdictions that do not allow nonlawyer ownership.⁹⁷

⁹³ ABA Comm’n on Ethics 20/20, *For Comment: New Drafts Regarding Choice of Rule Agreements for Conflicts of Interest and Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012) available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_co_chair_cover_memo_comment_drafts_on_fee_division_model_rule_1_7_final_posting.authcheckdam.pdf. (“Fee Division Memorandum”).

⁹⁴ See ABA Comm’n on Ethics 20/20: Draft for Comment, *Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012) available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_fee_division_and_choice_of_law_comment_draft_final_posting.authcheckdam.pdf.

⁹⁵ Fee Division Memorandum, at 1. Rule 5.4 of the New York Rules of Professional Conduct contains similar prohibitions to those contained in Rule 5.4 of the ABA Model Rules of Professional Conduct.

⁹⁶ *Id.* See ABA Formal Op. 91-360 (1991) (considering issues arising from fee sharing among members of a single firm that has offices in both the District of Columbia, which allows nonlawyer ownership, and in a jurisdiction that does not).

⁹⁷ Fee Division Memorandum, at 2.

As to issues arising when there is a division of fees between lawyers in separate firms located in two jurisdictions, the Ethics 20/20 Commission decided to propose “modest changes...to clarify that lawyers in jurisdictions that prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with lawyers in different firms in which such ownership or fee sharing occurs and is permitted by the Rules applicable to those firms.”⁹⁸ The Commission noted that this “practical problem...is arising with greater frequency as lawyers from firms in jurisdictions prohibiting nonlawyer ownership and fee sharing work on client matters with lawyers in firms in other jurisdictions – e.g., the District of Columbia, England, Australia and Canada – that permit various nonlawyer ownership options.”⁹⁹

The Ethics 20/20 Commission concluded that lawyers in jurisdictions that prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers should be permitted to divide fees with lawyers in different firms in jurisdictions in which such ownership or fee sharing is permitted “because the concerns underlying the prohibition in Rule 5.4 are not implicated.”¹⁰⁰ The Commission observed that “Model Rule 5.4 is designed to insulate lawyers from the influence of nonlawyers,” but there is no reason to believe that the nonlawyers in one firm are in a position to influence the lawyers who practice “in a different jurisdiction and in an entirely different firm.”¹⁰¹ Therefore, the Ethics 20/20 Commission proposed the addition of a new Comment to Rule 1.5 to permit, subject to certain limitations, a lawyer to divide a fee with a lawyer in a different law firm, even if that other firm is permitted to have nonlawyer partners or owners. The proposed Comment (“Comment [9]”) read as follows:

⁹⁸ See *supra* note 94, at 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

A lawyer who is governed by the Rules of Professional Conduct in this jurisdiction is prohibited from allowing a nonlawyer to direct or regulate the lawyer's independent professional judgment. See Rule 5.4 (Professional Independence of a Lawyer). Subject to this prohibition, a lawyer in this jurisdiction may divide a fee with a lawyer from another firm in a jurisdiction that permits a firm to share legal fees with nonlawyers or to have nonlawyer owners, unless the lawyer who is governed by the Rules of Professional Conduct in this jurisdiction knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship. See Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).¹⁰²

On October 29, 2012, the Ethics 20/20 Commission withdrew its Inter Firm Fee Sharing Proposal, choosing not to present the proposed rule change to the ABA House of Delegates, but rather referring the "narrow and technical issue" to the Standing Committee on Ethics and Professional Responsibility.¹⁰³ The Ethics 20/20 Commission noted that it discussed the issue at its October 25 and 26 meetings, and concluded that "subject to the prohibition of Rule 5.4 (Professional Independence of a Lawyer), the authority to divide fees between lawyers in two independent firms currently exists in Model Rule 1.5."¹⁰⁴ According to Co-Chair Jamie Gorelick, "[i]n deciding which proposals to bring to the House of Delegates, we have considered the importance of the issue to the profession, whether there is confusion as to the application of

¹⁰² *Id.*

¹⁰³ See Press Release, ABA Commission on Ethics 20/20 Will Refer Fee Division Issues to the Standing Committee on Ethics and Professional Responsibility Rather Than Propose Changes to ABA Model Rule 1.5 (Oct. 29, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121029_fee_division_release_ethics_20_20_commission_co_chair_cover_memo.authcheckdam.pdf.

¹⁰⁴ *Id.*

the rules that we can helpfully address, and whether a change in the rules is necessary and helpful to address changes in the legal environment.”¹⁰⁵ Nonetheless, the Task Force decided that, having already given considerable thought to the issues, it should continue to provide its analysis of and comments on the Inter Firm Fee Sharing Proposal in this Report for the benefit of future debate by NYSBA, and potentially the ABA.

IV. Nonlawyer Ownership in Other Jurisdictions

A. Australia

Australia is a Federation comprised of six states and each state has the power through its own constitution to regulate and oversee the legal profession.¹⁰⁶ Australia allows both multidisciplinary practices (“MDPs”) and incorporated legal practices (“ILPs”).¹⁰⁷ Australia’s legal profession is primarily comprised of sole practitioners and small law firms, which constitute approximately 80 percent of the total numbers of lawyers in the country.¹⁰⁸

The alternative business model reform, which included allowing nonlawyer ownership of law firms, began in Australia in 1994 when New South Wales became the first state in Australia to allow MDP.¹⁰⁹ This groundbreaking legislation permitting MDP, the first such rule in any common law jurisdiction, also required that lawyers retain at least 51% of the net partnership income.¹¹⁰ Interestingly, there was little interest in establishing MDP when the legislation

¹⁰⁵ *Id.*

¹⁰⁶ Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 7.

¹⁰⁷ ABA Comm’n on Ethics 20/20 Working Group on Alt. Bus. Structures, *For Comment: Issues Paper Concerning Alternative Business Structures*, at 8 (Apr. 5, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

¹⁰⁸ *Id.* at 7 (citing Murray Hawkins, Dir., Nat’l Legal Profession Project, “Australian Models of Regulating the Legal Profession,” Presentation to the Fed’n of Law Societies of Can. Semi-Annual Conference, 17-19 (Mar. 2011)).

¹⁰⁹ See *supra* note 107, at 8.

¹¹⁰ *Id.*

passed, apparently because most lawyers and law firms felt “that law should remain a profession and not be treated as a business.”¹¹¹

In Australia, MDP is defined as “a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services.”¹¹² Each legal practitioner who is a partner in such a practice is responsible for the management of the practice’s legal services and they must ensure that the rules and regulations governing the practice of law are followed.¹¹³ The Supreme Court of Australia can prohibit a practitioner from being a partner in an MDP if it finds that the practitioner is unfit to occupy such a position.¹¹⁴

Eventually, “pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection, and increased interest in innovation” led to proposals in Australia to allow ILPs, including MDPs and publicly traded law firms, and to eliminate the 50% rule.¹¹⁵ Despite some hesitance based on “concerns within the profession about conflicting duties and increased risks of unethical behavior,” regulators and the organized bar in Australia were able to establish this form of an alternative business structure.¹¹⁶ As of December 2010, there are approximately 2,000 ILPs in Australia, and that number is reportedly growing.¹¹⁷

¹¹¹ *Id.* (citing Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response* (2010)).

¹¹² Legal Profession Act § 153 (2004) (N.S. Wales).

¹¹³ *See supra* note 107, at 10.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing Murray Hawkins, Dir., Nat’l Legal Profession Project, “Australian. Models of Regulating the Legal Profession,” Presentation to the Fed’n of Law Societies of Can. Semi-Annual Conference, 17–19 (Mar. 2011)).

Each Australian state has the authority to set the primary rules governing ILPs.¹¹⁸ An ILP may provide legal and any other services except that it may not operate a “managed investment scheme” or any other service that is not allowed by the applicable regulations.¹¹⁹ Laws relating to attorney-client privilege and other applicable legal professional privileges apply to ILPs and the lawyers who are officers or employees of an ILP.¹²⁰ ILPs are listed on the Australian Stock Exchange and may have external investors. They must operate in compliance with the Australian Federal Corporations Act and must register with the Australian Securities & Investment Commission.¹²¹

An ILP must appoint a Legal Practitioner Director upon incorporation.¹²² The Legal Practitioner Director is responsible for the management of the legal services provided by the ILP.¹²³ It is also responsible for reporting any misconduct by the ILP or any of its employees or directors.¹²⁴ Sanctions for misconduct may be taken against the entire ILP, any director or any practitioner within the ILP.¹²⁵

B. *United Kingdom*

The UK allows nonlawyer ownership of law firms and passive outside investment in law firms by nonlawyers. The movement in the UK toward nonlawyer ownership began about ten years ago when a 2001 Report of the Office of Fair Trading, entitled *Competition in Professions*, concluded that certain rules governing the legal profession were unduly restrictive.¹²⁶ Several

¹¹⁸ See *supra* note 107, at 8.

¹¹⁹ *Id.* at 9 (citing Legal Profession Act 2005, available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/).

¹²⁰ See *supra* note 107, at 9.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 10.

¹²⁶ See John Vickers, Director General of Fair Trading, Report on Competition in Professions (Mar. 2011), available at http://www.oft.gov.uk/shared_oftr/reports/professional_bodies/oft328.pdf.

groups outside the legal profession raised concerns that the disciplinary system operated by the Law Society of England and Wales was confusing, inconsistent, protective of lawyers, and unresponsive to client needs.¹²⁷ As a result, the government solicited a study led by Sir David Clementi to address these issues.¹²⁸

In 2004, Sir David Clementi's group issued a report entitled *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*.¹²⁹ Many of the recommendations made in that Report were incorporated into the Legal Services Act of 2007 ("LSA"), including recommendations pertaining to alternative business structures for providing legal services ("ABS").¹³⁰ Under the LSA, ABS are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with nonlegal services.¹³¹ The LSA is comprehensive in its scope and provides for regulation of the ABS entity as well as the individual.¹³²

The Legal Services Board ("LSB"), established by the LSA, is a national, non-governmental regulator of all groups that regulate the legal profession and it determines which alternative business structures are allowable.¹³³ The LSB has designated the Solicitors Regulation Authority ("SRA") as an approved regulator for these entities, but there may also be other approved regulators.¹³⁴ All entities with a nonlawyer manager and/or owner must be

¹²⁷ *Id.* at 50–52 (explaining the current regulatory structure in place and the problems within that structure).

¹²⁸ David Clementi, Report of the Review of the Regulatory Framework for Legal Services in England and Wales, 1 (Dec. 2004), available at <http://www.legal-services-review.org.uk/content/report/index.htm> (hereinafter referred to as "Clementi Report").

¹²⁹ *See id.*

¹³⁰ Legal Services Act 2007, Part 5, Alternative Business Structures, available at <http://www.sra.org.uk/lisa>.

¹³¹ *See* <http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page>.

¹³² *See infra* Appendix A, at A-7.

¹³³ *See infra* Appendix A, at A-5.

¹³⁴ *See* <http://www.sra.org.uk/sra/how-we-work.page>.

licensed, and all individual participants also must be authorized.¹³⁵ Unlike Australia, the LSA requires nonlawyer owners and managers to pass a “fit to own” test.¹³⁶

Chris Kenny, the Chief Executive of the UK Legal Services Board, explained to the Task Force that three different factors forced these changes in the UK: 1) pressure coming from UK competition authorities; 2) complaints from consumers of legal services and the legal profession’s inability to deal with them; and 3) a “confidence collapse” caused by the push toward a more consumer-oriented legal culture in the UK.¹³⁷ Kenny explained that nonlawyer ownership of law firms makes legal services “more accessible, cheap and cheerful.”¹³⁸ Kenny believes that the Act will lead to better services and more consumer satisfaction.

There are currently 150 applications before the LSB that are being considered for approval as nonlawyer ownership structures. These business structures include: legal disciplinary partnerships (“LDPs”) consisting of IT directors and specialist lawyers, office staff receiving internal ownership rights in the firm, personal injury firms of all sizes making public offerings, private equity firms owning law practices, and family law firms.

LDPs are a form of MDP that permits up to 25% of a law firm’s partnership interests to be owned by nonlawyers.¹³⁹ An LDP can only provide legal services, but may have managers who are different types of lawyers, such as barristers and solicitors.¹⁴⁰ An LDP can include up to 25% nonlawyer managers, but external owners are not permitted.¹⁴¹ Nonlawyer managers are subject to a fitness review and approval by the SRA; LDPs must pay the cost of a criminal

¹³⁵ See *supra* note 107, at 13.

¹³⁶ See, e.g., SRA Suitability Test 2011 (Version 4, June 21, 2012), *available at* <http://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page> (hereinafter referred to as “Suitability Test”).

¹³⁷ See *infra* Appendix A, at A-5-6.

¹³⁸ See *id.* at A-6.

¹³⁹ See <http://www.sra.org.uk/sra/legal-services-act/faqs/01-legal-services-act-basics/What-is-an-LDP.page>. Since March 31, 2009, firms in the UK have been able to become licensed as LDPs.

¹⁴⁰ *Id.*; see Ethics 20/20 Discussion Draft on NLO, at 8.

¹⁴¹ *Id.*

background check for each nonlawyer principal.¹⁴² The SRA can withdraw approval of a nonlawyer manager and may also direct an LDP to appoint a lawyer to ensure compliance with the LDP's obligations and duties under applicable law.¹⁴³ LDPs are required to maintain professional liability insurance.¹⁴⁴

At an August 2010 meeting of the Ethics 20/20 Commission, the Chief Executive of the Law Society of England and Wales reported that, as of June 2010, there were 254 registered LDPs.¹⁴⁵ Over 70% of these LDPs had 10 or fewer partners.¹⁴⁶ The nonlawyer partners in these LDPs included teachers, financial planners, and accountants.¹⁴⁷ By October 2011, the SRA had approved registration of 490 LDPs, nearly double the number from April 2010.¹⁴⁸ The average size of all LDPs with nonlawyers was seven partners.¹⁴⁹ The largest LDPs with nonlawyers had more than 300 partners.

C. District of Columbia

In 1990, the District of Columbia adopted a unique version of Rule 5.4, which permits a lawyer to form a partnership with a nonlawyer if the main purpose of the partnership is to practice law.¹⁵⁰ The District of Columbia's version of Rule 5.4 – unlike any other version of Rule 5.4 in the U.S. – permits a nonlawyer to hold a financial or managerial interest in such a partnership so long as the nonlawyer “performs professional services which assist the organization in providing legal services to clients” and abides by the Rules of Professional

¹⁴² See Suitability Test, *supra* note 136.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Ethics 20/20 Discussion Draft on NLO, at 8.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ D.C. Rule of Prof'l Conduct 5.4(a)(4); 5.4(b).

Conduct.¹⁵¹ The District of Columbia’s Rule 5.4(b) also dictates that “[t]he lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers.”¹⁵² All the conditions of Rule 5.4(b) must be set out in a written instrument.¹⁵³

The District of Columbia’s version of Rule 5.4 does not allow for passive nonlawyer investment.¹⁵⁴ In addition, the Rule does not contain any cap on the nonlawyer ownership percentage and does not require nonlawyers to pass a fitness test prior to obtaining ownership in a law firm.

Hope Todd, the D.C. Bar’s Legal Ethics Coordinator, who spoke at a meeting of the Task Force on April 24, 2012, explained that the Rule allowing nonlawyer ownership has not seen much use in the District of Columbia because a lawyer, if practicing anywhere outside of the District, would most certainly be in violation of another state’s laws that prohibit nonlawyer ownership of law firms. According to Todd, most lawyers who are interested in setting up an alternative practice allowed by the District’s Rule 5.4(b) abandon their plans once they learn about licensure problems in other states.

V. Speakers and Presentations at Task Force Meetings

Perhaps one of the most informative activities of the Task Force was its solicitation of the input, views, and experiences of a variety of individuals whose professional work has touched on, either directly or indirectly, nonlawyer ownership issues. The Task Force sought information from speakers representing the following viewpoints: the Ethics 20/20 Commission; the

¹⁵¹ D.C. Rule of Prof’l Conduct 5.4(b).

¹⁵² D.C. Rule of Prof’l Conduct 5.4(b)(3); *see* D.C. Rule of Prof’l Conduct 5.1 (“Responsibilities of a Partner or Supervisory Lawyer”).

¹⁵³ D.C. Rule of Prof’l Conduct 5.4(b)(4) and Comment 4 thereto, which notes that “[t]he requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.”

¹⁵⁴ D.C. Rule of Prof’l Conduct 5.4, Comment 8.

experience of jurisdictions that currently allow a form of nonlawyer ownership (*i.e.*, Washington, D.C., the UK, and Australia); and leading attorneys and/or professors in the areas of access to justice, law firm practice management, and legal ethics professionalism. The primary means by which the Task Force obtained such information was by inviting speakers to each of the Task Force's meetings.

The Task Force heard from the speakers listed below, whose presentations are summarized in Appendix A to this Task Force Report:

- Jamie Gorelick, Chair, Ethics 20/20 Commission
- Frederic Ury, Ethics 20/20 Commission
- Phil Schaeffer, ABA Standing Committee on Ethics and Professionalism and Liaison to the Ethics 20/20 Commission
- Chris Kenny, Chief Executive, UK Legal Services Board
- Anthony Davis, Hinshaw & Culbertson LLP
- Steve Mark, New South Wales Legal Services Commissioner
- Tahlia Gordon, Research and Project Manager, New South Wales Office of the Legal Services Commissioner
- Carla Freudenburg, Regulation Counsel, District of Columbia Bar
- Hope Todd, Legal Ethics Coordinator, District of Columbia Bar
- Gene Shipp, Bar Counsel, District of Columbia Bar
- Lawrence Bloom, Senior Staff Attorney, District of Columbia Bar
- David Udell, Executive Director, National Center for Access to Justice at Cardozo Law School; Chair, Subcommittee on Access to Justice of the Committee on Professional Responsibility of the Association of the Bar of the City of New York
- Gary Munneke, Pace Law School; Chair, NYSBA Committee on Law Practice Management; Chair, ABA Law Practice Management Section Task Force on the Evolving Business Model for Law Firms
- Paul Saunders, Chair, N.Y.S. Judicial Institute on Professionalism

VI. Task Force Survey Results

To solicit views on nonlawyer ownership from a broad section of New York attorneys, the Task Force circulated surveys to lawyers divided into three populations: Small Firm Practitioners; Large Firm Practitioners; and Corporate Counsel. Surveys were distributed to NYSBA members through NYSBA's email directory. Across all three populations, the majority

of the over 1,200 survey participants opposed the ABA NLO Proposal.¹⁵⁵ This section summarizes the results of the Task Force's survey.

A. Demographics

Both the small and large firm surveys posed the same questions to capture the demographics of survey respondents and to ensure that the respondents fit the criteria for either small or large firm practitioners. The survey asked the following demographic questions:

- (1) Are you in private practice?
- (2) Number of attorneys in your office/organization?
- (3) Please indicate your position.
- (4) Number of years admitted to the bar.
- (5) Age.

Which New York State area do you practice in (primarily)?

The corporate counsel survey posed a slightly different set of demographic questions, as follows:

- (1) Do you consider yourself to be in a Corporate Counsel position?
- (2) Please indicate your title.
- (3) As corporate counsel, do you use outside counsel?
- (4) Number of attorneys in your office/organization?
- (5) Number of years admitted to the bar.
- (6) Age.
- (7) Which New York State area do you practice in (primarily)?

¹⁵⁵ The surveys did not pose questions concerning the ABA's Choice of Law Proposal. At the time of the survey's development and distribution, the ABA's Ethics 20/20 Commission had not yet withdrawn its discussion paper on nonlawyer ownership.

Small Firm Survey Demographics. The Task Force received 821 completed surveys in response to the small firm survey. Reflecting the expected population, 86.9% of respondents worked in firms comprised of less than 10 attorneys. 69.2% of respondents reported working at the partner or of-counsel level, with another 22% of respondents reporting “other” as their title, the majority of whom described themselves as sole owner. 85.5% of respondents had been admitted to the bar at least 10 years, with almost 70% of the respondents having been admitted at least 20 years. Almost 80% of respondents reported being over the age of 45, with over half of respondents over the age of 55 (54%). Respondents as a whole were spread fairly evenly across different regions of the State of New York, with 35.5% practicing in the New York City boroughs, 28.4% in the New York City suburbs (Nassau, Orange, Rockland, Suffolk, and Westchester counties), and 35.2% in upstate counties (north of Orange and Westchester). Less than 1% of respondents reported practicing out of state or out of country.

Large Firm Survey Demographics. The Task Force received 298 completed surveys in response to the large firm survey. As would be expected, 87.8% of respondents reported working at a firm with at least 20 attorneys, and 48.4% reported working in offices with 100 or more attorneys. 72.5% of respondents indicated that they were in the position of partner, managing partner, or of counsel, while 14.8% indicated they were associates or senior associates, and 12.7% indicated “other” positions, including staff attorney, senior counsel, and retired. 83.2% of respondents had been admitted to the bar for at least 10 years, with 72.4% of respondents having been admitted for at least 20 years. 77% of respondents were over the age of 45, with over half of respondents being over the age of 55 (55.6%). Geographically, the majority of respondents reported primarily practicing law in the New York City boroughs (58.5%), followed by 27.6% of respondents practicing upstate (north of Orange and Westchester

counties), 11.2% in New York City suburbs (Nassau, Orange, Rockland, Suffolk and Westchester counties), and 2.7% practicing out of state or out of country.

Corporate Counsel Survey. The Task Force received 92 completed surveys in response to the corporate counsel survey. In line with expectations, 85.9% of respondents identified themselves as corporate counsel, whose titles included “General Counsel,” “Associate General Counsel,” “Senior Counsel,” and “Associate Counsel.” 87.8 % of respondents indicated that they used outside counsel. The reported size of the legal departments varied widely and stretched from one end of the spectrum (one attorney) to the other (over 100 attorneys). 27.5% of respondents said their organization had just one attorney, while 21.3% said there were at least 100 attorneys in the organization. These were the largest two categories, with the numbers of respondents ranging from 3.8% in 50-99 attorney law departments to 18.8% in 2-5 attorney law departments. 80% of respondents reported being admitted to the bar for over 10 years, with 60% of respondents reporting admission for at least 20 years. In comparison to the small and large firm surveys, the largest age range of corporate counsel respondents was between the ages of 36 and 65 (80.2%), followed by 67.9% who were over the age of 45. Geographically, the survey showed a much larger percentage of respondents practicing either out of state or out of country (40.8%) than the small and large firm surveys. The next largest geographic area represented was the New York City boroughs with 28.4% of the respondents, followed by upstate (north of Orange and Westchester counties) with 17.3%, and New York City suburbs (Nassau, Orange, Rockland, Suffolk and Westchester counties) comprising 13.6% of respondents.

B. Questions Presented

For both small and large firms, the survey asked the following six questions designed to elicit respondents’ substantive views on nonlawyer ownership:

- (1) Please indicate your position with respect to the ABA proposal for non-lawyer ownership of firms.
- (2) Please explain why.
- (3) If the ABA proposal were adopted, would you consider giving non-lawyers an ownership interest in your law firm under the terms proposed?
- (4) If so, how would it benefit your firm?
- (5) If no, please explain why.
- (6) Please include any additional comments you may have about this issue.

The corporate counsel survey posed a slightly different set of substantive questions, again designed to elicit respondents' views on nonlawyer ownership of firms.

- (1) Please indicate your position with respect to the ABA proposal for non-lawyer ownership of firms.
- (2) Please explain why.
- (3) If the ABA proposal were adopted, would you consider it beneficial for your outside counsel to grant non-lawyers an ownership interest in your law firm under the terms proposed?
- (4) Please explain why.
- (5) If yes, how would this benefit your organization?
- (6) If no, please explain what detriments you perceive to your organization.
- (7) Please include any additional comments you may have about this issue.

C. Survey Results

Of the 1,211 total survey responses received across small firm, large firm, and corporate counsel respondents, 78.4% of all respondents opposed the ABA NLO Proposal. The largest percentage of opponents was seen in the small firm survey, where 81.7% of respondents opposed

nonlawyer ownership. While still representing a majority, corporate counsel respondents were less strongly opposed to nonlawyer ownership, with 67.9% in opposition. Large firm respondents fell in the middle with 75.2% in opposition. Only 4.8% of all respondents reported that they were “not sure” whether they supported the ABA NLO Proposal. A larger percentage of respondents in the corporate counsel survey reported they were “not sure” of their position (11.1%) than did respondents in the small and large firm survey (5.0% and 2.7%, respectively).

In response to the survey about why the respondent was or was not opposed to the ABA NLO Proposal, comments revealed similar trends across all three populations. Comments in opposition to the ABA NLO Proposal generally referred to concerns regarding lawyer independence, client confidentiality, inability to enforce ethical duties of nonlawyers, improper focus on profit over client needs, inability of nonlawyers to fully comprehend the ethics rules, and tarnishing the image of the profession.

Some of the most illustrative comments in the small firm survey from respondents who opposed the proposal were the following:

- “I believe it would lessen the freedom of the attorney to make professional decisions on behalf of the client since investment considerations might prevail over what is best for the client.”
- “A disbarred lawyer could easily get right back into the game by being a non-lawyer owner of a subsidiary firm.”
- “The non-lawyer expert can be well compensated for his expertise on an employee or consultant basis.”
- “Lawyers go through rigorous and expensive schooling and testing to have the privilege of calling themselves lawyers”

- “This will be the end of pro bono work.”
- “Many businesses today operate on a cost-benefit analysis, where they weigh the cost of disciplinary/criminal consequences against the benefits of rule-breaking. However in law, that is an unacceptable philosophy. Our professional standards are clear: the consequences of an ethical transgression are not a cost of doing business. Ethical transgressions are themselves inherently unacceptable.”

Comments from large firm survey respondents included similarly illustrative remarks in opposition to nonlawyer ownership, such as the following:

- “I feel this will be detrimental to firms providing pro bono legal services as nonlawyers will possibly not understand that ethical obligation.”
- “[It] would demean lawyers in the eyes of the public, who would regard it as further evidence that lawyers are in it solely for the money.”
- “If a non-lawyer fails to comply with rules of ethics, they do not have a license that can be revoked/suspended, etc. This equates to a lack of accountability.”
- “This proposal does not allow for the fundraising that those who seek nonlawyer equity investments have requested, and actually provides for a system more dangerous to the public in which the nonlawyer equity investors actively interfere with the lawyers’ performance of their duties.”
- “[P]lacing profitability ahead of a client’s interest.”

Many of the corporate counsel comments raised the same concerns voiced by small and large firm survey respondents in opposition, and included the following:

- “Independent judgment is one of the most critical facet[s] of being a counsel. This could be seriously impacted if we have non-lawyers owning law firms.”

- “There are other ways of getting non-lawyer capital that do not involve granting ownership rights.”
- “[P]ressure to pursue business at expense of integrity and following the ethics rules.”

On the other side of the coin were comments submitted in favor of the ABA NLO Proposal. These comments generally touched on similar rationales across all respondent populations – *i.e.*, improving access to legal services, increasing innovation and competition, increasing access to capital, a desire to keep pace with international markets, and beliefs that the ABA NLO Proposal had sufficient safeguards.

Small firm respondents offered comments in favor of the ABA NLO Proposal such as the following:

- “It’s extremely limiting to restrict the profession to only partnering with lawyers.”
- “As a small law firm, it may provide opportunity to gain increased business which is not extremely competitive.”
- “In my business I am often paired with advisors whose services coincide with my services. An ability to market joint services would not only be beneficial to my business, but also clients would be better served.”
- “The modernization of the legal profession requires access to capital which is not available under the current model.”
- “[O]ther common law countries allow public listings of law firms . . . firms in the U.S. are at an extreme disadvantage.”
- “[It] aids in succession issues so that an older partner may leave his interest to a family member who is not an attorney.”

- “As a society, we are better off with less restricted, less expensive legal services . . . reduces restrictions and costs through a freer flow of capital and talent.”

Large firm respondents made comments in favor of the ABA NLO Proposal such as the following:

- “Law firms are a business. So long as the rules of professional conduct are complied with, there is no reason other than history to restrict the ownership of this business.”
- “Law firms will be more efficient if they can offer services by non-lawyers.”
- “[Am a] member of the DC bar and worked in a firm with non-lawyer owners in the past...when well done, can be a very good partnership with benefits to clients and the justice system.”
- “[W]e as lawyers are so protective of our own profession that we overlook that the world is ‘bundled’ now and clients want one-stop integrated services. . . . The current approach looks back instead of forward in a global economy and is not in line with EU models.”

Corporate counsel comments included the following (interestingly, a number of comments referred to perceived benefits for small firms):

- “[B]etter competitive environment.”
- “I think this will help smaller firms offer cost-effective services.”
- “[W]ould broaden the pool of capital available to lawyers looking to start law firms and would allow for a larger pool of talent when searching for business

partners with proven skills in the areas of business administration, management and entrepreneurship.”

It should be noted that a handful of respondents indicated that it was too soon for them to form an opinion, providing comments like “too early to tell” and “would want more info on what services the non-lawyer owners would be able to [do].”

In response to whether, if adopted, respondents would consider granting ownership interests to nonlawyers (in the case of law firms) or would consider it beneficial (in the case of corporate counsel), 77.1% of the total 1,211 respondents answered “no.” Once again, small firm respondents had the largest majority in opposition among the three populations (82.5%), corporate counsel respondents had the smallest majority (66.3%), and large firm respondents fell in the middle (71.2%). Only 9.4% of all respondents reported that they were “not sure” whether they would grant nonlawyers ownership interests in their firm or would view it as beneficial. A larger percentage of corporate counsel respondents said they were “not sure” (20%), as opposed to large firm respondents (10.6%), and small firm respondents (8.2%).

Comments given in response to this question were similar to those expressed about the ABA NLO Proposal generally. The comments also provided insight into the practical applications and effect of adopting the ABA NLO Proposal.

On the one hand, small and large firm respondents who indicated that they would not consider retaining nonlawyer owners submitted comments such as the following:

- “My firm does not have enough specialized business which would support the need for these services. It makes more sense for us to contract for outside services as we need them.” (Small firm)
- “I am in solo practice to be independent.” (Small firm)

- “As solo practitioners, we already have to be extraordinarily diligent to avoid conflicts and maintain a practice within the guidelines of the Code of Professional Responsibility. I do not want to have to spend time monitoring the actions of a non-lawyer who may not care if I lose my license.” (Small firm)
- “[T]he proposal sounds a lot like ‘champerty,’ pure and simple. The non-lawyer ‘owner’ in this proposed scenario exists only to profit from his supposed ‘participation’ in the legal endeavor.” (Small firm)
- “I do not want my practice to be subject to the financial demands of investors who have no interest in representing clients on an independent and ethical basis, rather than as objects to be milked to reach a bottom line.” (Large firm)
- “I am ‘old’ fashioned.” (Large firm)
- “I would consider myself at risk in being partners with a non-lawyer. How can I ensure that he complies with the rules, when he does not have the same training as an attorney and he has no license at risk for his misdeeds.” (Large firm)
- “Adding a non-lawyer looking for profit to our firm would definitely intensify the debate we already have – should we take on a case that we believe will benefit our community as well as our client even though it may involve considerable financial risk and years of legal services to prevail. That case will probably never be profitable.” (Large firm)

On the other hand, small and large firm respondents who would consider granting ownership interests to nonlawyers made comments that included:

- “It would enable us to ‘insure’ that the employee would be less likely to seek employment elsewhere.” (Small firm)

- “I could focus more on practicing law, and less on day to day running of a business.” (Small firm)
- “For my firm, I am interested in offering discovery services. It would be a lot easier to get into that business with an equity partner in information technology.” (Small firm)
- “[T]here are other skills that would benefit the firm, skills that might not have been acquired by a traditional lawyer. A non-lawyer might bring diverse information to a practice.” (Large firm)
- “[It] will enable greater flexibility for interdisciplinary problem solving and facilitate the financial health of private practice.” (Large firm)
- “Increased access to expansion capital.” (Large firm)

Corporate counsel respondents who did not view nonlawyer ownership as beneficial offered comments that included the following:

- “I would probably cease using any law firm owned by non-lawyers.”
- “I use outside counsel for legal work only, not in seeking business advice.”
- “I will be very suspicious about that advice knowing there are investors/shareholders who are more profit driven.”
- “I want the attorneys I use to be concerned only with me as a client. I do not want to have to wonder if the attorney is basing his decisions for me on the basis of earning a good return for his non-lawyer investors.”
- “[It] would place a burden on in-house counsel who would need to research non-lawyer owners in the firms under consideration to avoid potential conflicts of interest which would otherwise exist.”

- “[P]oor legal advice.”
- “[T]he shareholder of my lawyers may be the competitor of my company.”

On the other hand, corporate counsel also expressed views that extending nonlawyer ownership rights would be beneficial, including:

- “Should also reduce costs of cases involving experts.”
- “Would allow my outside attorney advisors to use, e.g., CPA to provide numerical calculations to support the attorney’s advice.”
- “Reduce costs.”
- “Shorten time to trial or arbitration; ensure experienced testimony or advice on nonlegal aspects of case.”

The surveys’ request for “any additional comments” provided further insight on respondents’ views, revealing some of the most candid reactions, and making it clear that the issue evoked strong feelings across all populations.

On the one hand, survey respondents’ comments in opposition included:

- “I feel very strongly that the NYSBA should not support this move. It will further dilute the public’s image of the legal profession – which should be about helping non-lawyers navigate our civil and criminal justice system, but is more and more perceived by the public as simply a way to exploit the struggles of individuals for the benefit of the elite. Focus more on how we can regain our stature in the community, please?” (Small firm)
- “It is difficult enough to police the practice of law when it is limited to admitted attorneys.” (Small firm)
- “This is a slippery slope.” (Small firm)

- “I am surprised at the ABA and very disappointed in them. . . to promote what will be the ultimate demise of the profession is astonishing and a testament to the fact that they have lost their way.” (Large firm)
- “[T]he question should be not how would the proposal benefit the firm, but how does the proposal benefit the client.” (Large firm)
- “This is all about greed for the few and not about delivering more efficient, effective, counseling to the majority of citizens at a reasonable fee.” (Large firm)
- “[T]he burden should be on those proposing this change to show why the legal profession needs nonlawyer owners.” (Corporate counsel)
- “[W]ill discontinue my membership should the ABA adopt this rule.” (Corporate counsel)

On the other hand, additional comments in support included:

- “Please make this proposal happen. I think it’s a shame that we’re needlessly limiting business when our economy is struggling so immensely.” (Small firm)
- “Much has happened since 2000, including the report in the UK from Sir David Clementi that formed the basis for the UK Legal Services Act. We need to be alert to these changes and be prepared to respond to them in appropriate ways, o[r] we are going to be left behind.” (Small firm)
- “Although some might argue it is a first step down a slippery slope, the District of Columbia has not slid further down that slope in 20 years.” (Large firm)
- “Legal Services has a lot of people on our Board of Directors who are not lawyers, and I think it works out ok.” (Large firm)

- “The UK recently allowed ABS and my organization is one that is looking to take advantage of that. The bar should be open to innovative structures and focus on ensuring the ethical practice of law within those new structures.” (Corporate counsel)
- “We have professional standards to be upheld AND ENFORCED, and a non-lawyer ownership interest could encourage morality at a higher standard outside the law.” (corporate counsel) (emphasis in original)

In sum, the survey revealed that most respondents, whether from small firms, large firms or corporate counsel, did not support adopting the ABA NLO Proposal in New York. While this survey does not purport to represent a statistically representative sample, it is reasonable to infer that the reasons and comments expressed by the respondents are reflective of both the positive and negative opinions of the larger population of New York-licensed attorneys.

VII. Positions of Other States and Committees

In addition to our NLO Task Force, several committees and bar associations from other jurisdictions or from NYSBA sections have issued formal opinions or reports in response to the ABA’s nonlawyer ownership proposals. The Task Force has considered each of the positions from these associations, sections and committees of which we are aware, each of which is summarized in this section. In addition, substantial comments were posted on the Ethics 20/20 Commission’s website.¹⁵⁶

¹⁵⁶ Comments *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf.

A. Opinions in Opposition

1. New Jersey

In a January 2012 Report, the New Jersey State Bar Association's Professional Responsibility and Unlawful Practice Committee recommended that the Association's Board of Trustees oppose the ABA's then-existing proposal on nonlawyer ownership of law firms.¹⁵⁷ The Committee consists of lawyers from various fields of the profession.

The New Jersey Report concisely stated several bases for opposing the ABA NLO Proposal. The Report noted that the existing system serves the public well and requires personal accountability of lawyers to the judiciary.¹⁵⁸ It emphasized that no Committee member knew of an interest by the local bar, the business community, or general public in allowing nonlawyer ownership.¹⁵⁹ It also noted that the existing rules governing law firm ownership already permit firms to employ nonlawyers and compensate them as they see fit.¹⁶⁰ The New Jersey Report emphasized a general concern about "encroachment on attorneys' accountability and independent professional judgment," and a concern that the proposal "may be tantamount to MDP in sheep's clothing," which New Jersey has long opposed.¹⁶¹ Overall, the New Jersey Report position can be summarized in its statement that the Committee was "wary of changing the status quo without good reason to do so."¹⁶²

The New Jersey Report was adopted by the New Jersey State Bar's Board of Trustees in January 2012.

¹⁵⁷ NJSBA Report of the Prof'l Responsibility and Unlawful Practice Comm. on Ethics 20/20 Proposal to Permit Non-Attorney Ownership of Law Firms (January 25, 2012). One committee member, Steven M. Richman, lodged a minority position in favor of the proposal, in which he criticized the Report's "categorical rejection" of the proposal's effort to "address the reality of the global practice of law while insisting on adherence to local ethical standards." He viewed the proposal as "appropriate, necessary and sufficiently protective of the issues raised in the [Report]."

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2.

¹⁶² *Id.* at 1.

2. *Illinois State Bar Association*

In March 2012, the Illinois State Bar Association (“ISBA”) adopted a resolution opposing the ABA’s proposals to change Model Rule 1.5 and Model Rule 5.4(b).¹⁶³ The Resolution set forth two ISBA policies: “permitting the sharing of legal fees with non-lawyers or permitting ownership and control of the practice of law by non-lawyers threatens the core values of the legal profession”; and it is ISBA “policy to oppose any effort by the American Bar Association to change the Model Rules of Professional Conduct to permit lawyers to share legal fees with non-lawyers or permit law firms directly or indirectly to transfer ownership or control to non-lawyers over entities practicing law.”¹⁶⁴

The Illinois Resolution recited that the changes proposed by the Ethics 20/20 Commission would be inconsistent with both prior ABA policy established in July 2000, as well as Illinois Rule of Professional Conduct 5.4.¹⁶⁵ Further, the Resolution noted that “there has been no demonstrated need or demand from the public or profession for such changes in the Model Rules” and that the sharing of legal fees with nonlawyers adversely impacts core values of the profession such as the exercise of independent judgment and regulation by the judiciary.¹⁶⁶ The Illinois Resolution affirmed and proposed that the ABA affirm and re-adopt “the policy adopted by the American Bar Association in July, 2000, to wit:

The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring

¹⁶³ ISBA Resolution Opposing Certain ABA Ethics 20/20 Proposals And/Or Working Drafts of Proposals and Affirming and Re-Adopting Policy on Fee Sharing and Non-Lawyer Ownership and Control of Law Practices (March 2012).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

to non-lawyers ownership or control over entities practicing law should not be revised.”¹⁶⁷

ISBA further resolved that the ABA should reject all proposals to amend Model Rules 1.5 and 5.4 and to permit publicly traded law firms, nonlawyer ownership of or investment in law firms, and multidisciplinary practice.¹⁶⁸

In June 2012, together with the ABA’s Senior Lawyers Division, ISBA filed a Report and Resolution (denominated ABA Resolution 10A) with the ABA’s House of Delegates urging the ABA to re-adopt its 2000 House of Delegates Resolution “particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence.”¹⁶⁹ The Report reminded the ABA of the core principles and values set forth in the 2000 Resolution.¹⁷⁰ With regard to the Ethics 20/20 Commission’s proposed changes to Rules 1.5 and 5.4(a) on choice of law, the Report emphasized that “[i]f adopted by the House, this would amount to an approval of nonlawyer fee splitting and ownership” which is inconsistent with the policies of all 50 states.¹⁷¹ The Report urged that because the 20/20 Commission had expressed its intention to continue considering the ABA Choice of Law Proposal (after removing from consideration the ABA NLO Proposal), it was imperative that the House of Delegates give guidance as to how the Commission should proceed. The Report also stressed the importance of reaffirming the ABA policy because wide public distribution of the Commission’s nonlawyer ownership proposals had fostered public perception that the profession desires to adopt nonlawyer ownership.¹⁷² The Report urged the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ ABA, ISBA and the Senior Lawyers Div. of the ABA Report to the House of Delegates, Resolution (Aug. 2012) (hereinafter referred to as “Resolution 10A”).

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 5 (emphasis in original).

¹⁷² *Id.*

ABA to avoid the “evils of fee sharing with nonlawyers” and emphasized that lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law.¹⁷³

Resolution 10A was supported by the ABA’s Young Lawyers Division, the Maryland, Indiana, Mississippi, North Carolina, New Jersey, Oregon, Nevada, Iowa and South Dakota bar associations and the National Conference of Women’s Bar Association.

Prior to its August 2012 meeting, the ABA House of Delegates distributed a “point/counterpoint” discussion regarding Resolution 10A, with contributions from proponents and opponents. John Thies (ISBA) and Richard Thies (ABA Senior Lawyers Division) authored the proponent opinion. Michael Traynor and Jamie Gorelick (on behalf of the Ethics 20/20 Commission) authored the opposition opinion.

The proponent opinion urged that the Resolution be debated and voted on at the ABA’s Annual Meeting in Chicago, citing the same reasons set forth in the Resolution itself. The opposition opinion cited three reasons to oppose Resolution 10A. First, in contrast to the position of the proponents, the Commission is unambiguously not recommending “a change in ABA policy on nonlawyer ownership in law firms.” Second, there is “no need for a ‘public clarification’ regarding ABA policy.” Third, “Resolution 10A would foreclose the House of Delegates from even considering related proposals on conflict of rules that the Commission has not yet decided to make and that would not come before the House until February 2013.” The opposition position emphasized that it would be “bad practice” to take preemptive action to foreclose consideration of the issue before all views were fully presented. Further, all members of the Ethics 20/20 Commission, even those who voted against altering the prohibition on

¹⁷³ *Id.*

nonlawyer ownership, felt that consideration of the choice of law issue should proceed for consideration.

At the ABA House of Delegates meeting in August 2012, the House passed a motion to postpone indefinitely consideration of Resolution 10A.

3. *NYSBA Trusts and Estates Law Section*

In response to a request by the Section's Executive Committee and the Task Force's solicitation of comments, in March 2012, the Practice and Ethics Committee of the Trusts and Estates Section issued a report on the ABA's NLO Proposal.¹⁷⁴ The report summarized a survey of members of the Section's Executive Committee, members of the Practice and Ethics Committee and NYSBA's Trusts and Estates listserv. It concluded that this practice area does not favor the ABA's proposal.¹⁷⁵

The Committee's main inquiry was to measure the extent of demand for the proposed change among law firms and their clients. To that end, the Committee issued a survey posing four questions:

- (1) In your T&E practice, do you employ non-owner professionals in the delivery of legal services?
- (2) In your T&E practice, would you offer ownership interests to recruit and retain non-lawyer expertise?
- (3) In your T&E practice, would you expect that non-lawyer ownership would increase the accessibility of your legal services to the public?

¹⁷⁴ Memorandum to Exec. Comm. from Practice and Ethics Comm. re: Report on the Dec. 2, 2011 ABA Discussion Paper on Alt. Law Practice Structures Re Proposal to Amend Rules of Prof'l Conduct to Permit Non-Attorney Partners (March 2, 2012).

¹⁷⁵ *Id.* at 1.

(4) Do you support the proposed ABA amendment to Rule 5.4 of the Rules of Professional Conduct?¹⁷⁶

The Committee reported receiving 27 survey responses, which revealed the following: 59.3% of respondents did not employ non-owner professionals; 88.9% of respondents would not offer ownership interests to recruit nonlawyer expertise; 81.5% of respondents would not expect nonlawyer ownership to increase accessibility to legal services; and 74.1% of respondents did not support the ABA NLO Proposal.¹⁷⁷

Comments from survey participants included the following: “attracting talent can be achieved through contractual means”; “the ABA [NLO] proposal does not go far enough”; “[t]here is no effective mechanism to enforce non-attorney partner compliance with the Rules of Professional Conduct”; “this change would be contrary to our core values and ethical obligations as attorneys”; and “the ABA should explore options that would allow U.S. firms to compete internationally in a way that does not permit U.S. firms, or the U.S.-based component of a multi-jurisdictional firm, to offer partnerships to non-lawyers or be influence[d] by non-lawyer interests.”¹⁷⁸

The Committee’s report concluded that based on the survey results, NYSBA’s existing reservations about commingling business and legal interests, the inability to redress violations of ethical rules by nonlawyers, and the existing ability to contract with nonlegal professionals, the Trusts and Estates Section should oppose the ABA’s proposal.¹⁷⁹

In March 2012, the Section’s Executive Committee adopted the Committee’s Report.

¹⁷⁶ *Id.* at 3.

¹⁷⁷ *Id.* at 3-4.

¹⁷⁸ *Id.* at 4-5.

¹⁷⁹ *Id.* at 5.

B. *Opinions in Favor*

1. *NYSBA International Section*

In March 2012, the Executive Committee of NYSBA's International Section adopted a Report supporting the ABA NLO Proposal, while also recommending that the proposal be more expansive.¹⁸⁰ The International Section reported that its members consist of lawyers licensed in New York, as well as other states, and internationally. To prepare its Report, the Section formed a Subcommittee of four members to gather input from Section members.¹⁸¹

As background, the Report recognized that nonlawyer ownership was preferable to existing threats to the current legal system. These threats include improper influence exerted from banks through direct financing of litigation, document production websites like Legal Zoom and Rocket Lawyer, and non-conventional legal service providers or "alternative" models like Axiom.¹⁸²

The Subcommittee considered the experience of Slater & Gordon, a law firm with offices in Australia and the UK that went "public" in 2007. The Report noted that the Subcommittee had not heard any evidence of shareholder pressure that caused the firm to dilute its professional commitments.¹⁸³ The Subcommittee also considered the experience in the UK, which allows both multidisciplinary practice and alternative business structures pursuant to the Legal Services Act of 2007.¹⁸⁴ The Report indicated that over the course of several years, Section members have engaged in discussions with members of the UK bar.¹⁸⁵ The Subcommittee also stated that it was influenced by a desire to reduce "perceived restricted trade practices of lawyers."¹⁸⁶

¹⁸⁰ NYSBA Int'l Section Task Force on Non-Lawyer Ownership Interim Report (Feb. 24, 2012).

¹⁸¹ *Id.* at 1.

¹⁸² *Id.* at 2-3.

¹⁸³ *Id.* at 3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 4.

The Report identified certain issues that the Section remained concerned about. First, having heard of an instance where a U.S. firm was denied protection of Swiss professional secrecy laws due to its LLP status, the Section expressed concern about “moves to erode the attorney/client privilege, particularly in Europe.”¹⁸⁷ The Report also recommended a “fit and proper test” which all law firm owners (both lawyers and nonlawyers) would be required to meet.¹⁸⁸

After setting forth the Section’s considerations and concerns, the Report made seven “findings.”¹⁸⁹

First, given the International Section’s unique composition, the Report recommended that NYSBA regularly consult with the International Section as thoughts develop on issues relating to nonlawyer ownership.¹⁹⁰ *Second*, the ABA’s previous rejection of publicly traded law firms, passive nonlawyer investment, and multidisciplinary practice should be revisited. According to the Report, the ABA NLO Proposal was too conservative, and external investment is not likely to be any more harmful than sharing fees with a nonlawyer professional.¹⁹¹ *Third*, the Report found that the “imposition of ethical duties on nonlawyers needs clarity,” and that nonlawyer compliance with ethical rules needs certainty.¹⁹² *Fourth*, the Report sought clarity on the possibility of foreign lawyers as nonlawyer owners in a firm.¹⁹³ *Fifth*, the Report recommended that the ABA issue a one-page executive summary to engage busy lawyers and members of the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* There is no specific definition of “fit and proper” in the Report, but the reference is likely to the LSB’s “Fit and proper person policy.” Legal Services Board, L&P 017 Fit and proper person policy – v2.0 (2012), available at <http://www.lsb.vic.gov.au/documents/L-P017FitandProperPersonPolicy-V2.pdf>; see also *supra* note 136 and accompanying text (discussing “fit to own” test).

¹⁸⁹ The Report pointed out some minor errors in the ABA report. For example, the Solicitors Regulatory Authority regulates the solicitors’ profession in both England and Wales, and not just England, as the ABA paper mistakenly indicated.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 4-5.

¹⁹² *Id.* at 5.

¹⁹³ *Id.*

public.¹⁹⁴ *Sixth*, the Subcommittee found evidence that the U.S. system needs to be modernized, as reflected by the fact that three U.S. law firms have registered with the UK as Legal Disciplinary Practices (“LDPs”).¹⁹⁵ *Seventh*, no disciplinary problems with LDPs have been reported in the UK, which suggested no evidence of diminished professional responsibility from their nonlawyer ownership scheme.¹⁹⁶

In sum, the Report advocated modernization of the legal profession, which would include models of law firm ownership previously prohibited in New York. Otherwise, the Report expressed concern that the U.S. may lose ground and law firms may relocate overseas.¹⁹⁷

The Report was adopted by the International Section in March 2012.

One month later, in April 2012, the Executive Committee adopted a second report (“Supplemental Report”) concerning NYSBA Ethics Opinion 911 and choice of law issues.¹⁹⁸ In sum, the Committee expressed its belief that “New York lawyers must be able to affiliate, as employees or partners, with US and non-US law firms that comply with the ownership rules of their home jurisdiction, regardless of whether those ownership rules permit non-lawyer ownership or not.”¹⁹⁹ The Supplemental Report raised concern that the impact of Opinion 911 will affect New York as a major international legal center, insofar as it places a disincentive on foreign firms from continuing to engage New York lawyers or maintain branch offices in New York. The Section feared that, as a result, New York may lose its preferred status as a legal center to more favorable jurisdictions, such as D.C.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 6.

¹⁹⁸ NYSBA Int’l Section Report on Non-Lawyer Ownership (April 12, 2012).

¹⁹⁹ *Id.*

As it concerned the ABA Choice of Law Proposal, the Section supported adoption of the proposal, urging that, at a “bare minimum,” the proposal is “*essential*” if New York does not change its position on nonlawyer ownership.²⁰⁰ Further, it noted that “such affiliation should be permitted regardless of the predominant jurisdiction in which, or with respect to which, the lawyer or foreign legal consultant performs services.”²⁰¹

On October 26, 2012, the Section issued a comment paper to the Task Force Report in which it supported the adoption of the Task Force Report but urged NYSBA’s House of Delegates to appoint a new task force to reconsider the issues.²⁰² According to the Section’s comments, such task force should be charged with adopting recommendations that will:

- (a) Preserve and enhance New York as a center for the practice of international law;
- (b) Provide for the independence of New York lawyers from nonlawyer controls that could compromise professional ethical standards and integrity, including those that can now exist as a result of debt financing; and
- (c) Develop rules and ethical standards applicable to law firms with nonlawyer ownership to ensure the continued maintenance of professional and ethical standards.²⁰³

The Section further advised that it resolved to appoint a Task Force within the Section to “continue to study the potentially conflicting obligations of lawyers exposed to inconsistent

²⁰⁰ *Id.* (emphasis in original).

²⁰¹ *Id.*

²⁰² Comment of the International Section, NYSBA to the Proposed Report and Recommendation of the Task Force on Nonlawyer Ownership (Oct. 26, 2012).

²⁰³ *Id.* at 3.

jurisdictional rules governing affiliation with non-NY firms with permitted nonlawyer ownership and consider means of effectively and fairly addressing these potential conflicts.”²⁰⁴

2. *NYSBA Commercial and Federal Litigation Section*

In July 2012, the Committee on Ethics and Professionalism of NYSBA’s Commercial and Federal Litigation Section issued a Report to the Section’s Executive Committee in which it recommended endorsing the Ethics 20/20 Commission’s proposed amendments to Rule 1.5(e), while recommending revisions to the proposal to amend Rule 5.4(a).²⁰⁵ This Report superseded prior draft reports in which the Committee had recommended endorsing all changes to Rule 1.5 and 5.4(a).²⁰⁶

The Committee endorsed the ABA’s proposed changes concerning inter firm fee sharing, as expressed in the amendment to Rule 1.5(e), because “it helps clients get multijurisdictional advice, it frees attorneys from the difficult task of policing the compensation policies and ownership structure of independent firms in foreign jurisdictions, and it does not interfere with the ability of New York lawyers to make judgments for the benefit of their clients free from the influence of non-lawyer members of the foreign firms.”²⁰⁷

The Committee recommended restricting the ABA’s proposed amendment to Rule 5.4(a) on intra firm fee sharing, such that nonlawyers in the same firm would be permitted to share fees only if the following criteria are met:

²⁰⁴ *Id.* at 6.

²⁰⁵ Report of the Ethics and Professionalism Comm. of the Commercial and Fed. Litig. Section of NYSBA on the ABA Proposal for Comment on Choice of Law – Alt. Law Practice Structures (July 26, 2012).

²⁰⁶ *See, e.g.*, Report of the Ethics and Professionalism Comm. of the Commercial and Fed. Litig. Section of NYSBA, (June 8, 2012). The draft report viewed the changes as “advisable and necessary” to provide guidance to practitioners and address the “practical reality that some jurisdictions allow non-lawyer members.” That report also noted a lack of empirical evidence of instances where nonlawyers in a firm influenced legal advice given to a client, and that “lawyer independence does not seem to be compromised.”

²⁰⁷ *See supra* note 205, at 2.

- (1) the non-lawyer owners are in a foreign jurisdiction that permits non-lawyer ownership;
- (2) non-lawyer owners do not have the ability to control the management of the firm as a whole;
- (3) non-lawyer owners do not sit on the compensation committee or play any role, directly or indirectly, in decisions relating to the compensation of attorneys admitted to practice or working in jurisdictions that prohibit non-lawyer ownership; and
- (4) the non-lawyer performs professional services that assist the firm in providing legal services to its clients.²⁰⁸

In suggesting these limitations, the Committee expressed its concern that the modified Rule 5.4, as originally proposed by the Ethics 20/20 Commission, would lead to effective ownership and control by foreign nonlawyers over New York law firm offices.²⁰⁹

The Committee's report was adopted by the Section's Executive Committee in August 2012.

3. *New York City Bar Association Committee on Professional Responsibility*

In July 2012, the New York City Bar Association's Professional Responsibility Committee sent the Task Force a comment letter on the Ethics 20/20 Commission's proposed amendments to Rules 1.5 and 5.4, in which the Committee expressed support for the ABA's proposal.²¹⁰

²⁰⁸ *Id.* at 3.

²⁰⁹ *Id.* at 2.

²¹⁰ Letter from David Lewis, Chair of the City Bar Comm. on Prof'l Responsibility, to Stephen P. Younger, Chair, NYSBA Task Force on Nonlawyer Ownership (July 23, 2012) (quoting NYSBA Comm. on Prof'l Ethics Opinion 911 (Mar. 14, 2012)).

The Committee made several observations about the Ethics 20/20 Commission's proposal. These observations included: Model Rule 8.5(b)(2) currently focuses on the rules of the jurisdiction in which either the conduct occurred or the predominant effect of the conduct is felt; the Ethics 20/20 Commission found no evidence of undue influence by nonlawyers upon lawyers in separate firms or firms in other jurisdictions where nonlawyer ownership is prohibited; and, since fee sharing is already occurring within firms through "accounting gymnastics," the practical realities of legal practice necessitate a rule that explicitly allows for sharing of fees.²¹¹

The Committee then provided its own analysis by comparing New York's Rules of Professional Conduct with the ABA Model Rules relevant to the issues. Specifically, the Committee noted that Rules 1.5(g) and 5.4 are both similar to the ABA's version of the rules, that NYSBA Ethics Opinion 911 concludes that "a New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers," and that N.Y. Rule 8.5(b)(2)(ii), like ABA Model Rule 8.5(b)(2), effectively permits fee sharing with lawyers or firms in other jurisdictions where nonlawyer ownership is permitted only if the "predominant effect" of the conduct takes place in that other jurisdiction.²¹² The Committee noted that no empirical or other evidence demonstrated improper influence of nonlawyers where the nonlawyers are exclusively associated with firms, or firm offices, located outside New York.²¹³ Further, practical considerations suggest that New York firms currently have sister offices in nonlawyer ownership jurisdictions and that such firms would be required to maintain fiscal and managerial separation from a sister office. Finally, the Committee was

²¹¹ *Id.* at 2-3.

²¹² *Id.* at 4-5.

²¹³ *Id.* at 5.

unaware of any New York firm being “publicly disciplined for maintaining a separate office with nonlawyer owners in a jurisdiction that permits nonlawyer ownership.”²¹⁴

In sum, the Committee opined that “it is appropriate and desirable for the legal profession to proactively address and resolve issues raised by the disparate professional rules concerning fee-sharing with nonlawyers.” The Committee noted that “[l]eft unresolved, these issues may present an opportunity for a regulator outside the profession to seek to fill a perceived regulatory void.”²¹⁵ According to the Committee, New York lawyers currently face the choice of law issues implicated by the rules that inform the ABA Choice of Law Proposal and would benefit from guidance.²¹⁶

4. *NYSBA Committee on Standards of Attorney Conduct*

On October 3, 2012, the New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”), chaired by Joseph E. Neuhaus, submitted a memo to the Task Force in support of the Inter Firm Fee Sharing Proposal. By a vote of 14-6, COSAC adopted a position in support of the proposal.

Specifically, COSAC observed that the proposed Comment [9] addresses in a practical way the problem presented by the fact that some jurisdictions now permit limited nonlawyer ownership of law firms while others do not. The instances in which such fee sharing will arise are relatively limited – principally, where a lawyer in one jurisdiction retains local counsel in another or refers the work on a matter to another lawyer in the relevant jurisdiction more qualified to handle the matter while retaining joint responsibility for the matter. Rule 1.5(e). [internal citation omitted]. The

²¹⁴ *Id.*

²¹⁵ *Id.* at 6.

²¹⁶ *Id.*

Comment clarifies that in such situations the fact that a non-lawyer owner of the other firm might receive a portion of the profits of that firm that stem indirectly from the fees shared by the in-state lawyer is too attenuated a path to qualify as sharing a fee with the non-lawyer owner – just as the receipt by a law firm’s employees or contractors of income that can be traced to legal fees does not amount to prohibited sharing of fees with a non-lawyer.

COSAC’s comments continued:

The proposed Comment properly emphasizes that a lawyer must at all times retain the ability to exercise independent professional judgment and may not allow a nonlawyer to direct or regulate the lawyer’s independent judgment.

Thus, a New York firm would be permitted to share fees with a District of Columbia firm that has a nonlawyer partner, provided the lawyers in the New York firm maintain their independent professional judgment on behalf of the mutual client being served by both law firms and provided both firms were otherwise permitted to share fees in the matter.

According to COSAC, Comment [9] does not diverge from what historically has been understood as acceptable fee sharing arrangements – the agreement is consensual and confirmed in writing by the client, both firms serve a mutual client and both firms have to comply with their jurisdiction’s applicable ethics rules. Further, COSAC observed that making accommodation for cross-border co-counsel (which it contended already exists to some extent) “will not present undue risks of nonlawyer influence on the practice of law by lawyers in such firms” and that the risk of “improper influence” is “significantly reduce[d] since a nonlawyer owner would have to extend his or her influence to a separate firm.”

VIII. Task Force Observations and Recommendations

A. Task Force Observations

In this section of the Task Force Report, the Task Force has attempted to compile its observations about the various strengths and weaknesses of the proposals issued by the Ethics 20/20 Commission concerning nonlawyer ownership structures and choice of law issues. As noted above, the Task Force heard from many extremely knowledgeable and thoughtful speakers. Those speakers were diverse with respect to legal practice background, geography and viewpoints on the issues. Following research conducted by the Task Force, the Task Force members discussed their views on these issues. While each member may have had a specific reason or reasons in voting on the issues, the below observations were discussed by the group as a whole.

1. *Nonlawyer Ownership as an Alternative Structure for Legal Practice*

Some proponents of nonlawyer ownership contend that a nonlawyer ownership model could provide easier access to legal services for those otherwise unable to afford them, and provide several new opportunities for lawyers and law firms to better serve the public.²¹⁷ The Working Group for the Ethics 20/20 Commission reported that it had “heard anecdotal evidence from lawyers who advise District of Columbia law firms on arrangements for admitting nonlawyers to their partnerships that law firms, and small law firms in particular, are increasingly interested in having nonlawyer partners.”²¹⁸ Ethics 20/20 Commission stated that, “[t]hese firms believe that there is or will be client demand for the legal services that firms with

²¹⁷ Ethics 20/20 Discussion Draft on NLO, at 9; *see also* George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 845 (2001); Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 *WASHBURN L. J.* 669, 689–90 (2009).

²¹⁸ *Id.* at 2.

nonlawyer partners are well-positioned to provide.”²¹⁹ Examples cited by the Ethics 20/20 Commission “include law firms that focus their practice on land use planning with engineers and architects; law firms with intellectual property practices with scientists and engineers; family law firms with social workers and financial planners on the client service team; and personal injury law firms with nurses and investigators participating in the evaluation of cases and assisting in the evaluation of evidence and development of strategy.”²²⁰ In contrast, the D.C. Bar officials who presented to the Task Force revealed that there was minimal real world usage of this model in D.C.²²¹ The Task Force survey did not provide support for the notion that there is a strong need for alternative structuring in New York law firms.

Proponents of nonlawyer ownership have also argued that such a regime “permit[s] nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee.”²²² Comment 7 to District of Columbia’s Rule 5.4 provides the following examples: “the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants’ services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions.”²²³ The Working Group for the Ethics 20/20 Commission reported that it had heard anecdotal evidence from small firms that they could better recruit technology experts if they could offer them a partnership interest in a law firm. According to the Working Group, this, in turn, would allegedly “help them innovate

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *infra* Appendix A, at A-13-14.

²²² D.C. Rule of Prof’l Conduct 5.4, Comment 7.

²²³ *Id.*

by harnessing new technologies, thus responding to accelerating demand.”²²⁴ However, N.Y. Rule 5.4(a)(3) already permits a lawyer or law firm to “compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.” In this manner, profit sharing with such nonlawyer experts is currently permitted.

Thus, it cannot be that nonlawyer ownership is just about money and financial structuring of law firms.²²⁵ Rather, it is the concept of allowing nonlawyers to exercise “ownership” over a legal practice that lies at the heart of this debate. Thus, there is not strong support for allowing such ownership at this time.

2. *No Compelling Need*

Despite efforts to seek out voices who would speak for and articulate the “need” for nonlawyer ownership, the Task Force was unable to establish that there is any compelling “need” for alternative practice structures in New York such as nonlawyer ownership at this time. As noted in the survey results discussed in Section VI above, the Task Force did not observe any

²²⁴ Ethics 20/20 Discussion Draft on NLO, at 2.

²²⁵ The financial aspect of the prohibition on nonlawyer ownership has been raised in litigation brought by the law firm of Jacoby & Meyers. In *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep’ts, Appellate Div. of Supreme Court of New York*, 847 F. Supp. 2d 590 (S.D.N.Y. 2012), Jacoby & Meyers LLP sought a declaration that New York’s Rule 5.4 is unconstitutional. The firm argued, among other things, that the prohibition on non-lawyer equity investment imposes higher capital costs and, therefore, impairs the firm’s ability to expand “their mission to provide lower cost legal services to those who cannot afford more traditional lawyers.” *Id.* at 591. The court granted the defendants’ motion to dismiss the complaint because the firm lacked standing to challenge the constitutionality of the Rule. *Id.* at 598. According to court records, the plaintiff filed a notice of appeal on April 5, 2012. The parties have exchanged appellate briefs and oral argument is scheduled before the Second Circuit on October 5, 2012. *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep’ts*, App. Div. of Sup. Ct. of N.Y. (S.D.N.Y. 2012), *appeal docketed*, No. 12-1377 (2d Cir. Apr. 9, 2012). Jacoby & Meyers commenced similar actions in New Jersey and Connecticut. See *Jacoby & Meyers Law Offices, LLP v. Justices of the Sup. Ct. of N.J.*, No. 11-2866 (D. N.J., filed May 18, 2011); *Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Super. Ct.*, No. 11-817 (D. Conn., filed May 18, 2011). On March 7, 2012, the United States District Court in New Jersey denied defendant’s motion to dismiss, remitting the issue of whether an alternative business structure may exist under Rule 5.4(d) of the New Jersey Rules of Professional Conduct to the New Jersey Supreme Court for their review and analysis. The District Court retained jurisdiction over the federal constitutional issues and stayed the case until such time as a party seeks to reopen the matter. *Jacoby & Meyers Law Offices, LLP v. Justices of the Sup. Ct. of N.J.*, No. 11-2866 (D. N.J. March 7, 2012) (order denying motion to dismiss). Oral argument was held in the Connecticut action on March 23, 2012, but there is no subsequent history in the matter as of this writing. See *Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Super. Ct.*, No. 11-817 (D. Conn., filed May 18, 2011).

groundswell of support to adopt nonlawyer ownership in New York. While the Task Force did hear from bar leaders who believed that nonlawyer ownership could serve the profession well, the arguments put forth by most of these leaders spoke about the potential policy-level benefits of nonlawyer ownership as an alternative practice structure – such as improving access to justice or keeping pace with other countries. It is possible that the absence of any expression of a compelling need for nonlawyer ownership of law firms in New York was due to the lack of any meaningful empirical New York data on this issue and the extremely limited experience most practitioners have with these structures. But it is also consistent with the fact that the ABA decided to drop its original NLO Proposal.

3. No Empirical Data

It is critical to note that there simply is a lack of meaningful empirical data about nonlawyer ownership of law firms and what its potential implications are for the future of the legal profession in New York. No form of nonlawyer ownership has been allowed in New York and we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force’s ability to study the issue as it was difficult to assess past experience.

The only, albeit limited, experience that U.S. lawyers have with nonlawyer ownership of law firms is in Washington, D.C. The District of Columbia has permitted nonlawyer ownership since 1990 without any corresponding increase in disciplinary complaints.²²⁶ However, the Task Force also learned that nonlawyer ownership is used relatively little in D.C. Similarly, while LDPs have been permitted in England and Wales since March 29, 2009, apparently no

²²⁶ Ethics 20/20 Discussion Draft on NLO, at 9.

disciplinary problems with LDPs have been reported through November 2011.²²⁷ Nonetheless, it is simply too early to measure the success of these structures at this time.

Most Task Force members recognized that having more empirical data on nonlawyer ownership would be useful in assessing the issues. This is one of the most compelling reasons for future study as additional jurisdictions adopt forms of nonlawyer ownership.

4. No External Pressures for Change

International bar leaders told us that each adoption of nonlawyer ownership in their jurisdiction came about due to outside forces, either economic or governmental, which thrust the change upon the profession. The Task Force did not identify any jurisdiction that had recently adopted a form of nonlawyer ownership where the catalyst for that change came about as a result of a movement from within the profession. For example, the change in the UK came about due to the government's desire to promote competition in the legal market.

In the U.S., regulation of the profession has traditionally been handled at the State level of government. We are not aware of any governmental or other outside forces pressing for change in law firm ownership structures in New York.

5. Concerns About Professionalism

One of the most significant concerns for many Task Force members was the impact that nonlawyer ownership of law firms would have on "Professionalism." In one sense, professionalism is an individual responsibility of each and every lawyer. Thus, it is conceivable that an individual lawyer should still be able to uphold the highest standards of professionalism despite participation in a practice structure incorporating nonlawyer ownership. However, the vast majority of Task Force members observed that it was not worth taking the risk of impacting the core values of our profession by allowing nonlawyers to hold equity interests in law firms.

²²⁷ *Id.*

While professionalism is the responsibility of each and every individual lawyer, it goes beyond each lawyer. Professionalism informs how the profession is regulated as a whole and how our profession is viewed by the public. Despite the fact that there may be missed financial opportunities for lawyers and nonlawyers by not taking advantage of nonlawyer ownership, it is more consistent with the core values of our profession to continue to keep the concept that “ownership” of legal practices is an independent right to be exercised only by lawyers.

6. *Choice of Law Problems and Opinions 889 and 911*

While the Task Force did not observe any need to embrace nonlawyer ownership in New York at this time, there was greater recognition of the concerns related to the choice of law issues identified above. Given the continued increase in interstate and international law practice, New York lawyers need guidance on the ethical issues involved in associating with law firms outside New York that have nonlawyer owners and managers. Today, multijurisdictional law firms are governed by different rules regarding the permissibility of nonlawyer ownership based on their geography, which creates thorny problems for New York lawyers and law firms. Different permutations of these problems arise when New York lawyers or law firms associate with lawyers, law firms, or branch offices of such New York law firms located in jurisdictions that do permit nonlawyer ownership.²²⁸

For example, in Opinion 889, discussed in section II.F. above, NYSBA’s Committee on Professional Ethics opined that a New York attorney who was admitted and principally practicing in a firm in the District of Columbia could ethically conduct litigation in New York if he belonged to a District of Columbia partnership that included a nonlawyer who would benefit from the resulting fees. By contrast, in Opinion 911, also discussed in section II.F., above, the Committee opined that the inquirer, who was a New York attorney practicing law from a New

²²⁸ For example, there are issues regarding referral fees that arise with regard to nonlawyer-owned firms.

York office on behalf of New York clients, could not be employed by an out-of-state entity that has non-lawyer owners or managers. Other opinions in New York condone sharing of fees between lawyers licensed in New York with lawyers who are licensed in another state or country, but who are not licensed in New York, under certain conditions.²²⁹

As these Opinions demonstrate, New York lawyers face a multitude of choice of law and other ethical issues implicated by disparate jurisdictional rules on nonlawyer ownership, which led to Ethics 20/20 discussion drafts relating to potential amendments to ABA Model Rules 1.5(e) and 5.4. In addition, New York needs to be cautious about unduly inhibiting foreign law firms from setting up branch offices within the State. Left unresolved, these ethical issues may present an opportunity for an external regulator to seek to fill a perceived regulatory void. As a result, these issues are worthy of further study and analysis by the appropriate NYSBA committees as nonlawyer ownership develops in other jurisdictions.

Nonetheless, the Task Force concluded that there was a need to draw a sharp line against nonlawyer ownership at this time. The Task Force was also concerned that the ABA Choice of Law Proposal lacked protections against potential abuse of the proposed new rule and would undermine the current predominant effects test. The view of a majority of the Task Force was that if New York chooses not to allow nonlawyer ownership, it should not be allowed in through the back door under a choice of law rule and thereby allow professionalism concerns to erode.

The Task Force's initial concerns surrounding choice of law applied to both intra firm and inter firm fee sharing, the former proposal having been subsequently withdrawn by the Ethics

²²⁹ See NYSBA Comm. on Prof'l Ethics, Op. 864 (2011) ("A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g)."); NYSBA Comm. on Prof'l Ethics, Op. 806 (2007) ("A New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with [Rule 1.5(g.)].").

20/20 Commission on September 18, 2012, and the latter having been referred to the ABA Standing Committee on Ethics and Professional Responsibility on October 29, 2012.²³⁰

However, the Task Force does believe that *inter firm* fee sharing may raise fewer concerns than its counterpart.

The need to maintain the independence of a lawyer's professional judgment is a concern in both the context of *intra firm* and *inter firm* fee sharing. However, in considering the Inter Firm Fee Sharing Proposal, members of the Task Force observed that *inter firm* fee sharing presents little, if any, risk, provided that certain safeguards are maintained in the rules.

Specifically, in *inter firm* fee sharing, a lawyer is contracting with a completely independent law firm, responsible for complying with the ethics rules of its respective jurisdiction. Further, some members highlighted that the agreement is consensual and confirmed by the client in writing. Finally, some members observed that these arrangements have, in practice, existed for some time, and represent a practical solution to a practical issue.

Nevertheless, the Task Force considered whether Comment [9] was the appropriate means of condoning *intra firm* fee sharing arrangements. On the one hand, some viewed a Comment as an inappropriate means of overruling the provisions of a Rule, noting that Rule 5.4 explicitly prohibits the sharing of fees with a nonlawyer. It was observed that to the extent any such change to Rule 5.4 is being made, it ought to take the form of a rule, and not a comment. On the other hand, others viewed Comment [9] as a simple measure clarifying an existing Rule. Opinion 889 provides that a lawyer is not sharing fees directly with a nonlawyer when sharing fees with the **firm** itself. Task Force members expressed the view that there is a difference between sharing fees directly with a nonlawyer, and sharing fees with a **law firm** that has nonlawyer owners – the latter being *arguably* permissible under current ethical rules.

²³⁰ See Fee Division Memorandum, *supra* note 93; *supra* note 103.

After deliberation, the Task Force reached a consensus that Comment [9] would best be served by adding an exception clause designed to protect clients and prohibit *inter firm* fee sharing where the lawyer's independent professional judgement is known to be at risk by virtue of a nonlawyer owner's influence. Specifically, with the addition of such language, Comment [9] would state as follows:

A lawyer who is governed by the Rules of Professional Conduct in this jurisdiction is prohibited from allowing a nonlawyer to direct or regulate the lawyer's independent professional judgment. See Rule 5.4 (Professional Independence of a Lawyer). Subject to this prohibition, a lawyer in this jurisdiction may divide a fee with a lawyer from another firm in a jurisdiction that permits that firm to share legal fees with nonlawyers or to have nonlawyer owners, unless the lawyer who is governed by the Rules of Professional Conduct in this jurisdiction knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship, or knows that a nonlawyer owner is directing or controlling the professional judgment of a lawyer working on the matter for which fees are being divided. See Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).²³¹

The Task Force reached a consensus that although the substance of this suggested revision to Comment [9] should be adopted by NYSBA, the appropriate implementation of the policy would best be carried out following further consideration by COSAC. By referring the implementation of the policy to COSAC, the Task Force expects COSAC's consideration to

²³¹ Suggested language has been underlined.

include whether the change is best accomplished through a modification to the Rules or through adoption of a Comment to the Rules. It should be noted that three members of the Task Force abstained from either supporting or opposing the Inter Firm Fee Sharing Proposal as revised or referring the issue to COSAC for further consideration.

B. Recommendations

At its meeting on June 7, 2012, the Task Force voted on: (1) whether New York should adopt any form of nonlawyer ownership (although the ABA NLO Proposal had been withdrawn) and (2) whether to support the ABA's Choice of Law Proposal. This Report was approved at a meeting of the Task Force on September 10, 2012.

On the issue of nonlawyer ownership, by a vote of 16-1, the Task Force opposed New York enacting any form of nonlawyer ownership at this time. When asked what conditions they would like to see before revisiting the issue of nonlawyer ownership, Task Force members primarily identified studies from jurisdictions where nonlawyer ownership is currently authorized. Members noted that they would want to see studies on the impact of nonlawyer ownership on access to justice, professionalism, lawyer independence, the relationship between the lawyer and the client, regulation of lawyers, and feedback from clients and "consumers" (as the UK refers to clients).

On the ABA Choice of Law Proposal, the Task Force unanimously opposed the proposal as written. By a vote of 9-5, the Task Force opposed any concept of *intra firm* sharing of fees with nonlawyer owners, even if subject to further restrictions.²³² By a vote of 9-6, the Task Force opposed any concept of *inter firm* sharing of fees, even if subject to further restrictions.²³³

²³² *Intra firm* sharing of profits with nonlawyer employees of the law firm is already permitted under Rule 5.4(a)(3) of the ABA Model Rules and New York Rule 5.4(a)(3), which provides that "a lawyer or law firm may compensate a nonlawyer employee...based in whole or in part on a profit sharing arrangement." See NYSBA Comm. on Prof'l Ethics, Op. 917 (2012) ("A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing

Subsequent to the Ethics 20/20 Commission's withdrawal of the *intra firm* fee sharing proposal and issuance of its revised proposal on *inter firm* fee sharing, the Task Force re-convened in October to discuss and vote on the Inter Firm Fee Sharing Proposal. By a vote of 14-5, the Task Force voted in favor of the Inter Firm Fee Sharing Proposal, provided that the language of Comment [9] is modified to explicitly restrict fee sharing where a lawyer knows that a nonlawyer owner is directing or controlling his or her professional judgment, as set forth in Section VIII.A.6 above. Further, on November 1, 2012, the Task Force reached a consensus in favor of referring to COSAC the implementation of the policy behind the modification to Comment [9], including whether the modification is best accomplished as a Rule or as a Comment to a Rule.

September 10, 2012

Amended October 10, 2012, November 1, 2012

based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients.”); NYSBA Comm. on Prof’l Ethics, Op. 887 (2011) (“Rule 5.4(a)(3) clearly allows a lawyer to pay a bonus to a non-lawyer employee, including an employee engaged in marketing, that is not based on referrals of particular clients or matters, but rather is based on the profitability of the entire firm or a department within the firm”); NYSBA Comm. on Prof’l Ethics, Op. 733 (2000) (under former DR 3-102(A)(3), “a lawyer may compensate non-lawyer employees based on profit sharing but may not tie remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms”).

²³³ One Task Force member attending the June 7th meeting did not cast a vote concerning *intra firm* sharing of fees.

APPENDIX A

Speakers and Presentations at Task Force Meetings

A. The Ethics 20/20 Commission

The Task Force considered the viewpoints of several representatives from the Ethics 20/20 Commission including the Chair and individual members. Each expressed their support for the 20/20 Commission's proposal and elaborated on the basis for and requirements of the proposal with regard to alternative business structures for law firms.

At the January 25, 2012 NYSBA Annual Meeting, representatives from the Ethics 20/20 Commission led a panel discussion on the Ethics 20/20 Commission's recent ethics proposals, including the proposal on Alternative Law Practice ("ALP"). Chair Jamie S. Gorelick and Commission Member Frederic S. Ury spoke on the Commission's behalf.

Chair Gorelick expressed the view that the majority of the Commission then supported the ALP proposal, describing the proposal as "extremely modest." She explained that 10 years ago it was big firms that were seeking the benefit of MDP, but now she indicated that the push was coming from small firm lawyers.

Chair Gorelick also clarified that the ALP "proposal" was actually a discussion draft. In other words, the Commission was looking to the bar associations to provide data and real input to help answer two questions: (1) Is there a need or appetite for the proposal? (2) Is there a danger in adopting the change? At the time the discussion paper on ALP was issued, the Commission did not have any data or studies in its hands about the need for or impact of ALP structures, although Chair Gorelick indicated that they did look for such studies. She said that there had been no record of disciplinary complaints in D.C. stemming from nonlawyer ownership of law firms. She indicated that the evidence the Commission was able to amass

included testimony from a consultant to D.C. law firms, who gave the Commission anecdotal evidence that was supportive of the proposal. The Commission also went to the solo practice section of the D.C. bar, where half opined that they did not need ALP, and the other half said maybe. Chair Gorelick commented that the Commission saw the nonlawyer ownership movement in England as a success. She also explained that the Commission discussed the slippery slope issue and agreed that the legal profession should never jeopardize regulation by the courts and should not move toward national regulation of the legal profession.

At the Task Force's March 7, 2012 meeting, Phil Schaeffer, Liaison to the Ethics 20/20 Commission from the ABA's Standing Committee on Ethics and Professionalism spoke about the driving forces, benefits, and concerns behind the NLO discussion draft.

Schaeffer explained that in coming up with its proposal, the ABA was aware of a general sentiment against multidisciplinary practice ("MDP") and did not want to revive it. Instead, the ABA's proposal required that any outside investor support the legal practice itself. In crafting its proposal, the ABA looked to the only nonlawyer ownership prototype in the U.S. – the rule in the District of Columbia. For the last 20 years in D.C., lay people have been able to hold interests in law firms. The D.C. rule is broader than the Ethics 20/20 Commission proposal because in D.C. nonlawyers are able to provide services that are not limited to the legal practice. Schaeffer said that the ABA amassed quite a bit of testimony on the D.C. model, and the model has worked marvelously. Small firms as well as big firms have employed the new structure, and there have been no complaints. He also reported that the model has a broad range of applications, including land use and estate planning. The Ethics 20/20 Commission added more requirements than the D.C. model (e.g., requiring written certifications that outside participants are familiar with the Model Rules of Professional Responsibility and agree to abide by them,

making nonlawyers subordinate to lawyers, and requiring lawyers to maintain control over and responsibility for the practice). Schaeffer emphasized that the Ethics 20/20 Commission suggested a modest proposal requiring that nonlawyers work only in support of the legal practice; such as, for example, an investment advisor supporting estate services.

In response to questions from the Task Force, Schaeffer stated that regardless of whether firms can currently pay nonlawyers bonuses or contracts tied to firm profits, current rules do not allow for a long-term profit-sharing relationship. He elaborated that a lawyer just starting out may not be able to pay bonuses to employees, but could tie the firm's future success to compensation.

Concerning regulation and discipline of nonlawyers, Schaeffer expressed that the Ethics 20/20 Commission's proposal provides that if nonlawyers commit misconduct, their lawyer managers would be held responsible under the normal supervision rules and doctrines of respondeat superior. The only direct way to discipline a nonlawyer within the firm would be to sanction the nonlawyers by forcing them out of the firm. According to Schaeffer, the grievance committee is the last to receive news of misconduct. Schaeffer commented that the real regulation comes in the form of rising costs of malpractice insurance and premiums, and increased malpractice litigation. Further, while there would be no CLE requirements for nonlawyers under the 20/20 proposal, lawyers in the firm would be required to certify that the nonlawyer has read and is familiar with the Rules of Professional Responsibility.

Schaeffer explained that the impetus for the proposal was a desire to improve the quality of services provided to clients. He added that the Ethics 20/20 Commission perceived that the proposal would benefit young lawyers or lawyers of modest means who cannot afford to pay for expert services within their operations and cannot afford to pay a full salary; however, through

nonlawyer ownership, they could procure the desired expertise by offering long-term reward. He agreed with Chair Gorelick's earlier statement that the Ethics 20/20 Commission had no empirical evidence to support the proposal.

Schaeffer continued that the public is unaware of the legal profession's inability to finance litigation in general. Alternative litigation financing is another issue related to the proposal. He indicated that although clients pay for an expert, if the client cannot pay, the expert does not get paid. Having worked in land use law for many years, Schaeffer commented that many experts would have been happy if they were guaranteed a piece of the firm enterprise.

Schaeffer presented his own personal view that the Ethics 20/20 Commission's proposal did not go far enough, commenting that the proposal's 25% cap on nonlawyer ownership did not satisfactorily address the needs of solo practitioners just starting out. He believed the proposal should allow for full ownership, not an arbitrary 25% stake.

B. United Kingdom

At the Task Force's March 7, 2012 meeting, two speakers presented views regarding the United Kingdom's approach to ALP: Chris Kenny, Chief Executive of the UK Legal Services Board; and Anthony Davis, a partner at Hinshaw & Culbertson in New York. Each of the speakers described the movement leading up to the changes the UK made in how legal services are provided, allowing for full nonlawyer ownership, including passive outside investment. In addition, Davis and Kenny explained how legal services are regulated in the UK, and the perceived effectiveness of the system. Davis and Kenny expressed favorable views toward ALP and described the benefits it has provided to the UK.

Davis explained the genesis of the current regime in the UK. Ten years ago, during the Blair administration, a movement arose outside the legal profession to address perceived problems in the provision of legal services. The movement looked at the way solicitors were

disciplined and regulated, and concluded that the system was not working. Instead, a number of lawyers were committing fraud, and the system was harming clients and failing to address the needs of the public. Also around this time, the antitrust regulators in the British government began to look at restrictive trade practices within the legal profession, beyond just solicitors.

Out of this movement came a series of committees and reports, most notable being the Clementi Report, which led to the Legal Services Act of 2007. The Act provides for an overarching non-governmental, national regulator of all groups that regulate the legal profession, known as the Legal Services Board. The largest group regulated by the Legal Services Board is solicitors, and the second largest is barristers. Davis explained that one of the “sub-regulators” is the Solicitor Regulatory Authority (“SRA”). The SRA is an independent agency and is not a self-regulating entity.

As Chief Executive of the Legal Services Board, Kenny’s role is to regulate the regulators following eight overarching principles, which are laid out in the Act. Davis pointed out that the Legal Services Act is governed by the same objectives as the U.S. legal profession (e.g., service to clients, to the public, and professional independence). One critical difference is that the Legal Services Board and SRA also promote competition in the provision of legal services.

Kenny further explained that pressure from inside the UK around three issues combined to lead to this change. First, there was pressure from the UK competition authorities. A 2001 report concluded that law is no different from other businesses in that there should not be a barrier to ownership of law firms, because it would be unconscionable to allow such barriers anywhere else in the economy. Second, the profession was struggling to deal in a satisfactory way with complaints from consumers. Third, there was a collapse of confidence in self-

regulation of professions generally, including in other professions such as architects, as the country moved toward a more aggressive consumer culture. Kenny believes that nonlawyer ownership makes legal services much more accessible and less expensive.

Kenny also explained the workings of the Legal Services Act of 2007, describing it as complicated but absolute. The only two entities currently approved as legal licensing authorities are the SRA and the Council for Licensing and Conveyances (an authority of 1,000 people overseeing residential property work). The approval process is quite long and drawn out (it took 12 months in each case). The Act contains a specific test that imposes rules on regulators, and requires internal compliance structures and proper compensation arrangements.

Kenny informed the Task Force that there are 150 applications currently in the pipeline for NLO structures for law firms. He provided the following examples of structures: law firm partnerships consisting of IT directors and specialist lawyers, but not necessarily external investment; office staff receiving internal ownership rights in the company, which benefits firms in capturing the commitment of junior staff; small-to-large personal injury firms making initial public offerings (he commented that some people still feel uncomfortable with this example); private equity firms that are prepared to invest in law firms; family law firms; and in the communications business, a discrete personal injury work force of 120,000-130,000. Kenny indicated that he has seen a wide variety of practices within the last 2-3 months. Whether that level will be sustained and whether the front-line regulator approves them all remains to be seen. Kenny said the Board wants to make sure entry is possible, but also increase the professionalization of risk management in law firms at the same time.

In response to inquiries about the nature of investment structures, Kenny confirmed that investment structures have been tested to bring legal services to Main Street in the UK. For

example, there are plans to offer legal work in banking and food retailing. As one example, “Quality Solicitors” began three years ago, which helps brand and promote small firms.

Kenny explained the quality control and risk management measures the UK has put in place. Section 90 of the Act identifies three types of regulation: (1) proactively limiting the scope of the services; (2) regulating supervision of law firms; and (3) imposing penalties. Under the SRA model of quality control, the firm/entity is regulated as well as the individual (which was not the case before 2007). Before, partners were responsible only for those they supervised. Now, regulation is becoming a normal part of the legal market.

Davis described how the regulator regulates the entity as well as the individual in the UK. Each entity is required to have a chief compliance officer who is personally responsible for the provision of legal services by both lawyers and nonlawyers. Davis explained that management is also separately responsible and subject to discipline. The regulator can levy sanctions against the firm, but can also remove an owner from management or take away the owner’s investment, and prevent a nonlawyer from owning a piece of the firm in the future as well. The regulator has the power to place conditions on licenses and ownership interests, and levy fines for noncompliance of up to £50 million.

Davis described three levels of safety that are built into the Act. First, there is a fitness-to-own test, through which criminal records of all potential owners are checked. Second, there is general regulation of the profession. SRA regulation provides a less detailed set of rules but sets forth what the lawyer is to achieve for the client. Third, there are enforcement measures like imposition of fines.

Kenny responded to questions concerning the Act’s actual impact on the legal system in the UK. The Board reports annually on the impact of the Act on access to justice – one of the

specific objectives of the Board and regulators. There is an expectation that the UK will see improvement as to value and range of routine legal services that are provided, but Kenny expects to see a diminution in the number of small firms. Kenny sees consolidation as a sign that the market is serving the public better. Currently, eighty-five percent of firms in the UK have four partners or fewer, such as mom and pop solicitor shops.

Kenny believes that the Act has resulted in “consumer benefit.” Such consumer benefit is seen in mass marketing in the personal injury market, and greater accessibility in language and terms of service, all of which enables legal services to be less daunting to the customer. Kenny gave an example of a one-stop shop that provides both law and accounting services.

When asked how the system affects professionalism, Kenny responded that the profession is self-aware, and that self-training ensures ethical conduct. At the same time, although nonlawyers are bound by the same ethical rules, there are no ethics training requirements for nonlawyers because, as Kenny described it, there is no reason for nonlawyers to make legal judgments, so those activities are only being carried out by people with the legal skills to do them.

C. Australia

On May 14, 2012, the Task Force Co-Chair and Secretary participated in a conference call with Steve Mark, the New South Wales Legal Services Commissioner, and Tahlia Gordon, the Research and Project Manager at the New South Wales Office of the Legal Services Commissioner. The call focused on learning about Australia’s experience with alternative legal structures.

Mark explained that one of the biggest problems for organizations and law firms in America and England is the failure to understand what happened in Australia with regard to ALP. In his view, Australia did not go down the path of nonlawyer ownership at all. Rather, it

went down the path of reforming law firm structure and allowing law firms to incorporate, which incidentally allowed multi-disciplinary law firms. In contrast, the English allowed multi-disciplinary practices first and then followed the path of nonlawyer ownership, which Mark viewed as a fatal mistake.

As in the UK, Mark agreed that the push for change came from outside the profession. In 1999, due to federal government initiatives on competition policy, every jurisdiction in Australia was required to look at their legislation and determine whether there were barriers to competition. It was believed that all barriers should be removed unless the cost of removal was greater than the cost of retention. One of the results of this review was that Australia identified a barrier in the legal profession known as the “51% rule.” Under that rule, if a firm allowed any nonlawyer to participate in the practice, the lawyers in the firm had to control at least 51% of everything because of the ethical duties lawyers owed to the court. That rule, which existed in Australia for 10-15 years, was found to be anti-competitive toward accountants who could not enter law partnerships and have a controlling interest. Mark said that after some debate, but without much feedback from the legal profession, the government simply allowed multi-disciplinary practice to exist unfettered.

Mark explained the shift from multi-disciplinary practice to incorporation of law firms in Australia came by way of new legislation. When multi-disciplinary practice was introduced unfettered, a concern arose that accounting firms would call themselves law firms and “all hell would break loose.” That did not happen. At the time, multi-disciplinary practices were not regulated by corporate or legal regulators; legal regulators only regulated the conduct of individual lawyers, not entities. Mark commented that the existence of unregulated entities was one of the drivers behind the Australian government passing legislation called the Legal

Profession Act (“LPA”). By 2001, the government amended this legislation to allow law firms to incorporate, in order to bring them into a regulatory regime.

The LPA established the position of the solicitor director. The legislation requires any incorporated law practice to have at least one solicitor director, which Mark believes to be a key feature of the regulation. The solicitor director has the same duties as both a lawyer to the court, and as a director to the corporate regulator. Under the LPA, each solicitor director has to ensure that the law practice has appropriate management systems and is compliant with the LPA and the ethical duties of lawyers. As the regulator, Mark had to determine what an “appropriate management system” meant. To do so, he identified 10 points that firms must address (in contrast to what he referred to as a 300-page manual). Mark followed this route because he did not want to micromanage law firms by hiring 300 employees and evaluating the final management systems themselves. Rather, he wanted to force law firms to persuade him that they have a system that works. Mark only has a staff of 30, as compared to a staff of 1,200 for the legal regulator in the UK, whereas the size of the UK’s legal profession is only four times the size of Australia’s. According to Mark, the Australian system is not about heavy regulation. It favors principle regulation, as opposed to prescriptions.

As Mark expressed it, the Australian regulatory regime promotes professional ethics, values of professionalism which promote standards, profitability, standing in the profession, and competing on value (not commoditized services). The new system encourages a return to professionalism and away from commercialism, especially in small-to-medium size firms.

As an example of how this regulatory regime has worked, Mark pointed to Slater & Gordon, the first firm to go public in Australia. Before listing its shares, the firm met with Mark to show him the prospectus for the offering, and discuss promoting professionalism, the rule of

law, and client protection (given that his role is to reduce complaints related to these areas).

Mark advised the firm to make serious changes to reflect that the firm would still be a law firm and not purely a corporation. Mark advised that, as a law firm, Slater & Gordon needed to make it clear that its primary duty is to the court, and not the corporate regulator. As a result, the firm revised its constitution and shareholder agreements to list a hierarchy of primary duties owed by its directors, in the following order of importance: (1) duty to the court, (2) duty to the client, and (3) duty to the shareholder. Mark informed us that Slater & Gordon recently acquired a UK firm, and used the same hierarchy of duties even though the UK does not require it. Slater & Gordon also added language informing investors that if there is a conflict between corporate law and the LPA, the LPA will prevail.

Mark noted that Slater & Gordon had a case against the tobacco industry. Shareholders of the firm wanted to drag the case out, so that they could earn more money through fees. However, the firm's clients were dying, so the law firm settled the case. Mark explained that shareholders cannot sue the firm the way they could as shareholders in a conventional corporation. As a result, he believes that the LPA structure helps return law firms to their roots as a profession and not just a business.

Mark emphasized that there is a difference between the UK and Australia regarding incorporation and external ownership. Referring to the pitfalls of the UK system, he noted that Sir David Clementi (who led the Clementi Report) was an accountant, not a lawyer. He missed the fundamental point of ensuring that the ethics of a law firm are maintained. Mark explained that the UK went about creating change in the wrong way, opening firms to external investors but not requiring a fit-and-proper test. Focus was placed more heavily on who the buyers were. Mark pointed out that the UK does not have a mechanism to require that the law firm remain a

law firm. Moreover, in Australia, if a solicitor director fails to ensure that the firm has an appropriate management system, Mark can step in and remove the solicitor director's practicing certificate, after which the firm will have seven days to find a new solicitor director or face involuntary liquidation.

As it concerns the impact of the LPA and law firm incorporation, Mark said complaints have dropped by two-thirds since law firms began incorporating. Mark and Gordon are looking at Slater & Gordon to examine the impact of the public listing on the firm's culture. They have talked to firm staff and administration, and have taken client surveys to get a sense of the internal climate at the firm. Their preliminary findings revealed no impact on the firm's ethical culture after listing publicly. Apparently, the concern is more about growth; the firm has grown so fast that employees do not know everyone in the firm anymore, and the firm is losing some of its collegiality. Mark informed us that, overall, the results have been wonderful because firm lawyers have been prompted to talk among themselves and figure out the best approach the firm should take. The result is a better-managed law firm, reduced complaints, better professionalism and ethics, higher profits, and less staff strain. Mark has received many "thank you" letters.

D. District of Columbia

At its meeting on April 24, 2012, the Task Force heard from representatives of the D.C. Bar; Carla Freudenburg, Regulation Counsel at the D.C. Bar; Hope Todd, the D.C. Bar's Legal Ethics Coordinator; Wallace E. Shipp, Jr., Bar Counsel, D.C. Office of Bar Counsel; and Lawrence Bloom, Senior Staff Attorney.

Todd provided the Task Force with background and the circumstances leading up to D.C.'s adoption of Rule 5.4(b). She explained that contrary to the common perception, D.C.'s NLO rule was not adopted because of pressure to allow nonlawyer lobbyists to join law firms. Rather, in the 1980s, when D.C. was considering adopting the ABA model rules, D.C. picked up

on two recommendations that the ABA rejected which aimed to provide better services to clients by loosening restrictions on sharing legal fees with nonlawyers. One of those proposals subsequently became Rule 5.4(b). Todd said the Rule is limited in scope because it allows individual nonlawyers to provide services only to an entity whose sole purpose is to provide legal services.²³⁴ The Rule does not allow passive nonlawyer investment in firms, nor is D.C. interested in pursuing that concept. She expressed the view that the practice of law is enhanced by offering other services, while remaining subject to the Rules of Professional Conduct.

Todd explained that D.C. lawyers are made vicariously liable for breaches of ethics rules by nonlawyer members of their firms, an obligation which must be recognized in writing. There are no CLE requirements for nonlawyers, and D.C. does not even have CLE requirements for its lawyers. Shipp confirmed that in the 20 years of Rule 5.4(b)'s existence, there have been no disciplinary complaints related to nonlawyer owners. Since D.C. does not regulate firms in the same way as the UK, when asked how D.C. would respond to a complaint concerning a nonlawyer, Shipp conceded that this is a legitimate concern but he has not had to confront it.

Todd and others described D.C.'s practical use and experience with the Rule, noting that it has been hard to track. They informed the Ethics 20/20 Commission that D.C. has no empirical evidence on how the Rule is working. Todd explained that the Rule itself has not attracted wide usage because outside of D.C., a lawyer would risk violating another state's rules prohibiting nonlawyer ownership. Thus, unless a firm is solely based in D.C., lawyers have been, and will be, fearful to take advantage of D.C.'s Rule 5.4(b) until other jurisdictions change their rules. This limits the practical ability of sizeable D.C. firms having nonlawyer partners, and the result is that only small-size firms can take advantage of this structure (e.g., nurses in

²³⁴ Shipp gave the following example of acceptable use of the Rule: a two-person law firm wants to bring in a social worker partner, both attorneys are licensed in D.C., and the social worker's function is related to the practice of law.

personal injury firms, and marketing directors). Although Todd was unable to give names because their ethics help line is confidential, she did disclose that the help line has received calls from firms purporting to have nonlawyer partners, asking how their role should be communicated to the public.

Shipp confirmed that use of the Rule is very limited. He indicated that the Rule's use may be limited because D.C. has a liberal admissions policy for out-of-state lawyers: 3,600 lawyers are admitted in D.C. each year, though only 125 sit for the D.C. bar. Thus, most lawyers will immediately have an ethics issue if they waive in from another jurisdiction and want to have a nonlawyer partner. The Ethics 20/20 Commission spoke with a D.C. lawyer who advises attorneys on setting up ALP structures. The lawyer said that although there is a lot of interest in the issue, most lawyers do not pursue it due to the licensing issues in other states. Instead, most firms set up ancillary services, pay good salaries to their nonlegal employees, or implement profit-sharing structures.

Todd and Shipp agreed that there is more interest from out-of-state firms wanting to take advantage of the D.C. model, as opposed to D.C. stand-alone firms. However, the D.C. bar's response has been to advise attorneys to be concerned about ethics issues in their primary jurisdiction of practice. At that point, most lawyers walk away. Shipp reported that of the roughly 1,000 phone inquiries he receives per year, only 10-20 are inquiries from lawyers who actually have nonlawyer partners in D.C. Shipp also indicated a willingness to allow a nonlawyer partner to be physically located outside the state, as long as the firm agreed to abide by D.C.'s ethics rules.

E. David Udell

The Task Force invited David Udell to speak at its meeting on April 25, 2012 about NLO's impact on access to justice issues. Udell is the Executive Director of the National Center

for Access to Justice at Cardozo Law School, and Chair of the Subcommittee on Access to Justice of the Committee on Professional Responsibility of the Association of the Bar of the City of New York. While Udell emphasized the need for improved access to justice, he noted that it is undetermined how NLO would enhance that goal.

At the outset, Udell noted that access to justice has become an increasingly serious problem. Because of the economy, many more people are unrepresented. Court budgets have been slashed, the legal services groups' budgets have been slashed, less interest is available to fund IOLTA accounts, and legal fees are rising in the private market, which is pricing the middle class out of the legal system. Legal education is also being attacked as irrelevant, failing to teach practical skills, and leaving high numbers of graduates underemployed.

Udell noted that Chief Judge Lippman has been holding a third year of hearings on the state of access to justice in New York as part of a Task Force headed by Helaine Barnett.²³⁵ He explained that the Task Force has collected data on the numbers of unrepresented New Yorkers, finding that only 10% of tenants have legal representation in Housing Court matters, and close to 0% are represented in debt collection and foreclosure proceedings.²³⁶ There have been concerted efforts to use the court's budget to obtain more funding for legal services.

Udell pointed out that the New York City Bar Committee on Professional Responsibility is taking a fresh look at nonlawyer ownership models of practice and unauthorized practice laws. Udell noted that alternative business structures have always been an issue when considering improvements to access to justice. Although Udell indicated that the Committee on Professional Responsibility has not yet completed its work, he thinks the profession is subject to sharp

²³⁵ See, e.g., The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York (Nov. 2011), *available at* https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf.

²³⁶ See, e.g., *id.* at 16.

criticism because it has prevented other models of representation, while in several areas of law lawyers have not been available to provide any representation to the poor and middle class. Nonetheless, Udell believes it is comparing apples to oranges to say that lawyering is advanced by allowing nonlawyer ownership. Udell stated that there is a market opportunity for nonlawyers to provide services at lower costs than what lawyers charge, but that issue is beyond the scope of his Committee. Alternative business structures are not his Committee's main focus, but rather they are looking at the need for greater access to justice and how to meet that need.

Udell and Task Force members discussed instances where nonlawyers currently provide services that are akin to legal services. For example, in social security disability litigation, nonlawyers provide assistance to clients in disability appeals. Securities arbitration is not considered the practice of law either. In foreclosure proceedings, parties are often pushed into debt modification and use the services of financial advisors. Nonlawyers also participate in providing services in unemployment insurance, workers compensation, NLRB cases, and tax assessments. Udell pointed out the "friend" model, where an unrepresented person can bring a nonlawyer to court to provide moral support and speak to the judge on their behalf, but there is less regulation of what the nonlawyer can do in that situation. The concept was controversial when it was being considered in the UK, but reports indicate that judges appreciate this role.

Udell closed by stating that there is a population for whom a small payment is hard to make in order to pay for legal services so there is a powerful argument that companies like Walmart, if they could own legal service providers, could do so at lower costs than are currently charged. He noted that this model is currently being played out in the UK.

F. *Gary Munneke*

On April 25, 2012, the Task Force heard from Gary Munneke, a Professor at Pace Law School, who is Chair of the ABA's Law Practice Management Section Task Force on the

Evolving Business Model for Law Firms and Chair of the New York State Bar Association's Committee on Law Practice Management.

Since the time when Rule 5.4 was first introduced during the 1990s, Munneke has studied the subject of alternative business structures. He expressed the view that the Ethics 20/20 Commission's discussion paper was correctly withdrawn, as the issue is multi-faceted and complex, and it was not adequately addressed in the paper. He indicated that the issue has deep roots in the American system of law, noting that the first draft of the Model Rules would have provided that a lawyer cannot allow a nonlawyer to influence the lawyer's perspective. Munneke recalled that in debating the Model Rules, delegates to the ABA House from Oklahoma asked whether Sears would be able to own a law firm. They amended the rules to add a prohibition on fee sharing with nonlawyers and passive investment in law firms.

Munneke explained that the discussion on alternative law structures raises several issues that deserve different attention: (1) nonlawyer investment in firms; (2) nonlawyer ownership of firms; (3) influence on a lawyer's independent professional judgment; (4) fee sharing with nonlawyers; and (5) multidisciplinary practice (which he referred to as combined services).

Addressing the issue of nonlawyer investment, Munneke expressed there is a need to capitalize law firms so they can compete on a global stage. This is seen in the efforts of UK firms to be dominant world players in the legal services sector. We need to consider the financing of law firms if New York firms are to compete globally. Access to capital helps firms compete in the world market. The Report of the New York State Bar's Task Force on the Future of the Legal Profession notes that large firm economics will continue to change.²³⁷

²³⁷ See NYSBA Report of the Task Force on the Future of the Legal Profession (Apr. 2, 2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108.

Turning to the issue of nonlawyer ownership, Munneke indicated that he is less troubled by passive investment in law firms than direct ownership. There are a number of situations where we already have forms of nonlawyer “control” over firms: corporate counsel’s office, general counsel who work for the CEO of a company, group legal services, groups like the NAACP Legal Defense Fund (which are dominated by boards of directors which include nonlawyers), law firms that are dominated by a single client, large firms that delegate major decisions to nonlawyer administrators, lawyers employed by nonlegal organizations (e.g., Big Four accounting firms), and fee sharing by the beneficiary of a law firm retirement plan. Passive investment is more dangerous. Lawyers can capitalize their firms through loans, but lending terms are so strict that banks end up influencing how firms run their businesses. He cited Dewey LeBoeuf as an example.

Munneke would distinguish multi-disciplinary practice from investment/ownership issues. There are already teams of lawyers that work with nonlawyers. In particular, because the current rules allow law firms to have ancillary businesses, nonlawyer ownership exists to the extent ancillary businesses can be owned by a nonlawyer. New York recognized this reality and tried to establish rules to ensure clients were advised of these arrangements. But sometimes ancillary services are indistinguishable from traditional law firm services.

Munneke said that before any new ABA proposal on alternative law practice surfaces, he would like to study situations where nonlawyers are in a position of influence so he could begin to piece together what protections are needed to preserve the lawyer-client relationship and articulate those protections as standards. In 1969, when the Code of Professional Responsibility was adopted, a few lines were devoted to the issue. In 1983, when the Model Rules were adopted, a few pages addressed the issue (particularly conflicts), and New York allowed law firm

affiliations in Rules 5.7 and 5.8. Munneke indicated that we are moving in the right direction with lawyer regulation. In essence, we should look at what has already happened and ask how we can protect the attorney-client privilege and preserve our core values now.

Munneke said there may be certain unwaivable conflicts that impact nonlawyer ownership, but that concern has not been thought out yet. He thought we might be able to draft rules to cover situations that do not present unwaivable conflicts.

Regarding the ABA's choice of law proposal, Munneke recognized that New York should want British law offices to be able to transact business here. He acknowledged that Opinion 911 is more advisory. To make sure choice of law rules are not abused, Munneke suggested that a restructuring be considered so that affiliated law firms can work around the current rules.

G. Paul Saunders

At its April 25, 2012 meeting, the Task Force heard from Paul Saunders, Chair of the NYS Judicial Institute on Professionalism created by former Chief Judge Judith S. Kaye to review issues related to lawyer independence. He expressed concern that nonlawyer ownership will negatively impact the professional independence of lawyers.

Saunders began by explaining the workings of the Institute. The Institute consists of 20 members all appointed by the Chief Judge. For the last 15 years, the Institute has had a broad mandate to examine issues of lawyer professionalism, and bring together representatives of the legal profession, judiciary, and academy for dialogue about the profession. The Institute is supported by the Office of Court Administration, but is independent and sets its own agenda. Saunders informed us that Lou Craco's Committee on the Profession and the Courts preceded the Institute.

Saunders informed the Task Force that for the last two-and-a-half years, the Institute has been examining lawyer independence. He noted that the Craco Committee emphasized that lawyer independence is one of the single most important hallmarks of the legal profession. The Institute decided to study this issue from several perspectives. In the Fall of 2009, it began holding convocations to examine the question, and will eventually publish the results and proceedings. The Institute held its first convocation at Fordham Law School on the subjects of lawyer independence, big firm practice, and the role of law firm general counsel. The second was held in Albany and focused on lawyer independence for government lawyers. They discussed how lawyers representing small government entities, such as town or school boards, must render their legal advice in public, and the difficulties involved in trying to give legal advice to an elected official. The Institute held a third convocation at Hofstra Law School on small firm practice and solo practitioners. The fourth convocation will be held this Fall at the Judicial Institute at Pace. The convocation will focus on in-house corporate counsel and will feature IBM's general counsel, Bob Weber.

Saunders said that the Institute has not taken a formal position on nonlawyer ownership but he shared his thoughts on the issue. Rule 2.1 of the New York Rules and the ABA Model Rules requires lawyers to exercise independent professional judgment and render candid advice when representing a client. Unlike the ABA Model Rules, under New York's Rule, a violation of this rule is not enforceable by disciplinary proceedings. Still, he indicated that independence is essential to our profession as distinguished from other professions.

Saunders expanded on the policy behind Rule 2.1 and whom it protects. Most think the Rule protects clients so that they will not break the law. Saunders said that Professor Michaels has studied this Rule and concluded that the real purpose is not to protect clients, because many

other rules do that; rather, the purpose is to protect third parties and society. Craco's keynote address at the Institute's last convocation elucidated this concept. Lawyers need independence in two senses: one sense of independence is our collective autonomy from supervision by others; the other is our ability to give disinterested advice to clients. We are an independent autonomous profession only because we are called on to give our best disinterested advice free from exterior pressures. In this respect, we are actually performing a service to the public; we are delivering the rule of law.

Saunders continued that nonlawyer ownership is related to independence in three ways. First, ours is a noble profession because we are autonomous, we govern our own professional conduct, and we have a set of rules that we subscribe to. Few other professions can say that. Nonlawyers are not required to be independent. As a result, nonlawyer ownership might threaten the autonomy of the profession that is essential to its continued existence.

Second, nonlawyer ownership may threaten our collective ability to give candid, totally dispassionate legal advice. In Europe, there is no lawyer-client privilege for in-house counsel, because in-house counsel are not independent. In-house counsel in Europe cannot give independent legal advice to their boss/owner because their job, salary, or a promotion may depend on it. Saunders said that the same argument might be made concerning nonlawyer ownership of a law firm because other forces affect one's independence as a lawyer.

Third, there is the argument that nonlawyer ownership "threatens" public notions that the law is a noble profession. Public perception is very important to our profession and to our continued autonomy. According to Saunders, that is not to say that law is not a business. Rather, he believes that we do not need any more signs suggesting the "business" aspect of the law to the public. What we need are more signs that the practice of law is a profession, a noble

profession. The Institute is dedicated to the preservation of professionalism and our collective calling.

When asked whether there are any alternative law firm structures that would not raise independence concerns, Saunders responded that the farther away the nonlawyer is from having anything to do with the practice of law, the better.

As to access to justice, Saunders replied that nonlawyer ownership may increase availability of services to people who are unable to afford a lawyer. However, he did not think we needed nonlawyer ownership to achieve this. Our problem is a collective unwillingness to make legal services more affordable.

Saunders said that although lawyers are regulated by the courts, we are still autonomous. At the margins, the rules are enforced by a disciplinary board, but usually discipline is achieved by lawyers understanding the rules and governing themselves.

Saunders opined that the need for law firm capital and resources does not alleviate independence concerns. Non-equity ownership and commoditization of legal advice diminish the perception of our profession. We need the public to understand that we are a profession, not a drug store. Saunders believes that attorney advertising has diminished our profession and that we are approaching a slippery slope by addressing the possibility of nonlawyer ownership.

APPENDIX B

Bibliography of Writings Compiled by Task Force

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NEW YORK STATE BAR ASSOCIATION
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To: Subcommittee on Unauthorized Practice of Law and Artificial Intelligence
From: Wendy Chang
Date: March 26, 2019
Re: B.4. Provider regulation vs. “Legal Advice Device” regulation

In the February 28, 2019 ATILS meeting, there was a thoughtful February 25, 2019 memo from ATILS-OPC staff with a proposal for the concept of focusing the subcommittee’s recommendation to the concept of regulatory approval of a “legal advice device” vs. regulatory approval of provider entities. It used as its inspiration the [FDA’s process for approval of medical devices](#). This memo provides an analysis of the proposal in the context of the ongoing discussions of the subcommittee.

The FDA Process of “Medical Devices”

The Food and Drug Administration (“FDA”) describes its mission, in part, as assuring that “patients and health care providers have timely and continued access to safe, effective, and high-quality medical devices. In addition, it provides consumers, patients, caregivers, and healthcare providers with understandable and accessible science-based information about the products it oversees.”¹

As part of that mission, the FDA has a tiered process for review and authorization of “medical devices” for sale to the general public. “Medical device” is defined as:

A medical device is an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part or accessory which is:

- recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them
- intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or
- intended to affect the structure or any function of the body of man or other animals, and which does not achieve any of its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes.²

¹ <https://www.fda.gov/medicaldevices/resourcesforyou/consumers/default.htm>, last visited March 25, 2019.

² *Id.*

Devices are classified according to risk to the public into three classes, with class 1 presenting the lowest risk requiring the lowest level of regulatory review, to level 3, representing the highest risk, and consequently requiring the highest level of review. Levels of review are also separated by levels of risk:

- **Premarket Notification [510(k)]** – submission required to demonstrate that the device is substantially equivalent to a device already placed into one of the three device classifications before it is marketed.
- **Premarket Approval (PMA)** – application required to demonstrate that the device is safe and effective when used. It is the most stringent type of device marketing application and is required for Class III devices.
- **Humanitarian Device Exemption (HDE)** – a marketing application for a Humanitarian Use Device (HUD). An HUD is a medical device that is intended to benefit patients in the treatment or diagnosis of a disease or condition that affects, or is manifested in not more than 8,000 individuals in the United States per year.

Once approved or cleared, medical devices may be sold to the public.

ATILS-OPC Staff Proposal

The February 25, 2019 memo (“OPC Proposal”) presented a proposal for regulatory approval of a “legal advice device”, setting forth a proposed structure and a draft flow chart of regulatory approval. Rather than restate the OPC proposal, a copy is attached as Exhibit “A.”

Discussion

As will be discussed further below, the structure in the OPC Proposal aligns well with the discussions of the subcommittee to date, and provide a good analog for future discussion.³

1. Question for discussion: Does the subcommittee intend for provider certification to apply to the provider for all purposes, irrespective of product offering, or is the contemplated certification providing the safe harbor limited to the provider *as it pertains to the specific approved software*?

To date, the subcommittee has used language discussing a safe harbor certification process for legal technology providers, but the discussion has appeared to have focused on review of both the actual software product being proposed, as well as a review of the providers themselves, as

³ Health care and legal services do not directly correlate. Health care utilize a large amount of physical products, some which use technology (for example, a pacemaker) and others that do not (for example, a bandage). Where the product uses technology, such technology is often housed inside a physical product. All of these manifestations meet the FDA’s definition of “medical device.”

However, there is no equivalent to these physical products in the legal industry. The legal industry’s “deliverable” typically consists of some form of words – either spoken or written. In that sense, using the term legal advice “device” may be confusing.

it pertains to the delivery of the software product.⁴ Where a company offers more than a single software product, this distinction becomes critical.

If the proposed certification is software specific, then this a direct analog to the OPC Proposal's definition of "legal advice device", which is limited in definition to a form of technology (i.e. software application). ("To oversimplify, staff's concept is that a 'legal advice device' could be defined as any technology that researches and applies law to a person's particular facts and renders a legal opinion on legal question and/or provides a recommendation for action that is legally sound.")⁵ In terms of access, developing a process that is physical "device" specific which would only increase costs to members of the public, who would be faced with being required to purchase different devices to operate different programs.

2. Question for discussion: Should the subcommittee propose a tiered regulatory approval process based upon the level of risk to a member of the public?

The OPC Proposal proffers several tiers of review based upon the FDA process. Please see the OPC Proposal for an illustration of this discussion:

- a. Is it "Legal Advice" – if not, is it a scrivener or legal information provider?

Under current law, this type of service is defined as not the practice of law. The question is whether or not it makes sense to open a regulatory path for these providers, given the existing law. Is it needed?

- b. Is the product exclusively provided to lawyers/law firms?

Where a lawyer is using the technology as a tool, then it is not UPL under current law, and the risk of competent and ethical use of the product can be shifted to the lawyer. The question, again, is whether or not it makes sense to open a regulatory path for these providers, given the existing law. Is it needed?

- c. Where a product will be offered (in whole or in part) to members of the public, the level of proof of competency and efficacy required to obtain regulatory approval depends on the degree of risk to the non-attorney user of the product.

Question for the subcommittee:

- Is it within public policy to require differing tiers of proof of competency and efficacy?
- Does creating tiers overcomplicate regulation?
- Do differing levels of proof create commercial uncertainty for providers?

⁴ See Rubin/Walker Memo of February 19, 2019.

⁵ OPC Proposal at p.2.

- Who decides what tier a company falls into?
- Would compliance with a uniform standard be easier to administer (with the knowledge that a simpler product with lesser risk would probably have an easier time meeting the uniform standard. Should the decision of what level of proof should be submitted be the choice of the applicant, who then takes the risk of the regulator's decision).

As a predicate question in the OPC Proposal, does the product have an existing regulatory approved version in existence (i.e. 1.0, 2.0, etc.)? If so, the OPC Proposal proffers a streamlined approval process, which would encourage upgrades. This makes logical sense.

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5 categories of risk and the levels of proof as proffered in the OPC Proposal:

Class	Process/Proof ⁶
1 – advice re document preparation that does not involve a proceeding before a tribunal (low risk)	Lowest clinical evidence requirement to demonstrate competency and efficacy
2 – advice re issue pertaining to a non-adjudicative proceeding (e.g. a legislative or administrative matter) (moderate risk)	Moderate clinical evidence requirement to demonstrate competence and efficacy
3 – advice re issue pertaining to a civil proceeding before a tribunal (family law or personal injury matter) (high risk)	Higher clinical evidence requirement to demonstrate competence and efficacy
4 – advice re issue pertaining to a criminal proceeding before a tribunal (highest risk)	Highest clinical evidence requirement to demonstrate competence and efficacy

Question to subcommittee: Do we want to adjust the definitions of the different classes to focus on the impact of the services, rather than the type of service being offered.

3. Question to subcommittee: the OPC Proposal sets forth post-approval regulation suggestions to require mandatory self-reporting of complaints received from users, future known issues and material changes in circumstances that impact functionality of the product. Should the subcommittee recommend adoption of this proposal?

⁶ The Rubin/Walker memo discussed evaluation metrics at p.8, which is analogous to the clinical trials discussed in the OPC Proposal.



MEMORANDUM

To: Members, ATILS
From: Randall Difuntorum, ATILS Staff
Date: March 26, 2019
Re: ATILS – Development of a Survey

Attachments:

1. Rebecca Sandefur, Legal Tech for Non-lawyers: Report of the Survey of U.S. Legal Technologies, Executive Summary 2019 (Appendices not included.)
2. State Bar of California Legal Malpractice Survey 2018
3. PRWeb Article re 2018 Harris Poll for Your Lawyers Online

Synopsis:

This memorandum introduces the topic of a survey to acquire data that will inform ATILS consideration of regulatory reforms. Also provided are examples of data currently available from selected other surveys. The ATILS survey will be conducted by the National Opinion Research Center (“NORC”), an independent 501(c)3 research corporation. NORC will interview a sample of California adults to measure public opinion regarding the use of technology based tools to deliver legal services to consumers. In developing topics for NORC to prepare as survey questions, ATILS should consider the data that has been collected by other surveys.

Background:

The proposed survey should reach a representative sample of consumers. Accordingly, the questions prepared for this survey should be aimed at that audience. The survey might not necessarily reach lawyers, technologists, legal services providers or entrepreneurs. However, the survey will not be the only source of input because public comment will be solicited on ATILS’ tentative report and recommendation.¹ The tentative report and recommendation will be submitted to the Board of Trustees (“Board”) with a request that the Board authorize a public hearing as well as a 60-day public comment period. The public hearing is being planned for August 10, 2019 in San Francisco which coincides with the ABA Annual Meeting in San Francisco. Lawyers, technologists, legal services providers and entrepreneurs can be included in the outreach efforts for public comment and testimony on the ATILS tentative report and recommendation.

The combination of data on public opinion from the survey and outreach efforts for written comments and testimony on the tentative report and recommendation should provide useful information for ATILS to evaluate its tentative recommendations.

¹ ATILS should complete the tentative report and recommendation at the June 28, 2019 ATILS meeting.

Discussion:

The survey results and public comment received should be helpful in addressing questions that are likely to be asked about ATILS recommendations for regulatory reform regardless of what those recommendations might be. Among the questions that are likely to be asked about any ATILS recommendations for regulatory reform are the following two questions:

1. Are ATILS recommended reforms likely to improve access for consumers who are indigent or have lower incomes?
2. To what extent, if any, would ATILS recommended reforms account for traditional protections of an attorney-client relationship, such as the evidentiary attorney-client privilege?

Regarding the first question that might be asked about ATILS regulatory reforms, Rebecca Sandefur's executive summary of "[Legal Tech for Non-lawyers: Report of the Survey of U.S. Legal Technologies](#)" includes some relevant data. (A copy is provided as Attachment 1.) For example, in the summary it is observed that: "To use digital tools, people need access to the internet. ¶ Americans access the internet in range of ways: through home broadband, through their cell phones, and using computers they have access to at work or in a public space like a library." The executive summary provides a table of internet access in the U.S. that includes income as one key factor. The survey data reveals that 21% of persons with an income of less than \$30,000 are dependent on smartphone use while 53% use a home broadband network. This contrasts with the use by persons with incomes of \$75,000 or more as 93% of these persons use home broadband and only 5% are dependent on smartphone use. Based on this, it might be inferred that a high dependence on smartphone use to access the internet might be a significant barrier for accessing technology based tools that involve large internet data transfer costs.

Regarding the second question that might be asked about ATILS regulatory reforms, there is helpful data collected by the "[State Bar of California Legal Malpractice Survey 2018](#)." (A copy is provided as Attachment 2.) This survey was conducted by NORC. One question included in this survey is: "Q6. For each of the following terms, please chose which statement most accurately describes your understanding of the that term." The options were: "I have never heard this term;" "I have heard this term but do not know what it means;" "I have heard this term and know what it means;" and "DK/SKP" [don't know/skip]. "Attorney client privilege" is one of the terms surveyed and the data is shown below.

NORC 11/26-12/11/2018 (1,038 adults surveyed)	I have never heard of this term	I have heard this term but do not know what it means	I have heard this term and know what it means	DK/SKP
Attorney client privilege	12%	17%	71%	1%

Conclusion:

The foregoing discussion offers just two examples of existing survey data that ought to be considered in ATILS effort to craft its own survey topics.² To the extent possible, given the limited number of questions involved in any survey exercise, ATILS should consider topics and questions that complement or further the data analysis made possible by information already collected by other relevant surveys.

² There is also a December, 2018 [Harris Poll](#) conducted for [Your Lawyers Online](#) that provides interesting results and may also be considered in developing the ATILS survey topics. An overview article is provided as Attachment 3. The data collected is posted in the ATILS Dropbox.

LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES

Rebecca L. Sandefur, with the assistance of Alice Chang, Taemesha Hyder, Sajid Khurram,
Elizabeth Prete, Matthew Schneider, and Noah Tate.

EXECUTIVE SUMMARY

Legal technology is a rapidly developing field. It includes tools targeted at a range of different user groups, including lawyers, law firms, corporations, in-house legal departments, court systems, community organizations, and individual users who are not trained as attorneys. Some tools do legal work; others track and manage it. Still others are “under the hood,” allowing developers to more easily produce legal tools.

With funding from the Open Society Foundations, the Survey of US Legal Technologies sought to identify existing digital technologies that assist with justice problems in US jurisdictions and include among their user groups non-lawyers, whether individual members of the public working on their own justice problems or non-lawyers such as social workers or community organizers working directly with the public. The main findings of the Survey are:

- Over 320 digital legal tools for nonlawyer users exist for US jurisdictions, offering assistance with a range of both criminal (*e.g.*, arrest, police stops, expungement) and civil (*e.g.*, family, housing, health, employment) justice problems.
- Just over half of tools (52%) assist the user in taking some action on a justice problem, such as producing a legal document, compiling evidence, diagnosing a legal problem, or resolving a dispute.
- Using many tools requires resources or capabilities that some groups and communities are unlikely to have. The same groups often unable to access traditional lawyer assistance – such as people with low incomes, racial minorities, and people with lower levels of education – are also less likely to be able to use digital tools.
- Many tools reflect outdated design standards, presenting long lists, long articles, and lots of text.
- Tools are both restricted and limited in the services they provide. Few offer more than one function. A large component are simply repositories of information about the law. Few tools aid users in diagnosing legal aspects of problems they experience.
- The types of justice problems served by the tools, while often important, only partly match the types of justice problems most commonly reported by Americans.
- Many tools are free to use, but a substantial minority charge the user.

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THE UNIVERSE OF LEGAL TECHNOLOGIES

Legal technology is a rapidly developing field, and includes tools targeted at a range of different user groups, including lawyers, law firms, corporations, in-house legal departments, court systems, community organizations, and individual users who are not trained as attorneys. Some of these tools do legal work, while others track and manage legal work, and still others are “under the hood,” allowing tool developers to more easily produce legal technologies. The focus of the present project is on tools that non-lawyers may use to diagnose, understand, or take action on legal problems, whether those non-lawyers are using the tools to work on their own problems or are working to assist others with justice problems, for example in their work as staff of community organizations, courts, or social services providers.

In a field with such diffuse activity and rapid development, producing a complete and definitive list of technologies targeted at any user group is impossible: new technologies are born and die almost daily, and there is no registry of such tools. Thus, while this project’s strategy for identifying the universe of such technologies was expansive, no such effort can claim to be comprehensive. The search for technologies relied on existing lists compiled for a range of different purposes, on searches in repositories where users may find such applications, and on outreach to people whose work was likely to make them aware of such tools (see Appendix A for details).

The results of this activity produced the Survey of US Legal Technologies, funded by a grant from the Open Society Foundations. The Survey reports on the state of the field as of Fall 2018.

The Survey identified 322 technologies designed for use by non-lawyers in US jurisdictions (see Appendix B for a listing). An important focus of this research project is access to justice by low-income communities and others who currently have restricted access to law and legal services. The universe of tools therefore includes the state-wide legal resource websites provided in every state and hosted by legal aid agencies, as well as a range of resources targeting low-income people and other vulnerable groups.

Analysis of the data from the Survey explored the following questions:

- What kinds of justice problems do the tools assist with?
- What kinds of specific tasks do the tools assist with?
- How do the types of justice problems and areas of law served compare with the kinds of justice problems and needs people actually have?
- What groups of users are likely to be able to use the tools?

WHAT DO THE TOOLS DO?

Digital legal tools exist in the form of websites and of applications that can be downloaded to a mobile phone or other device. They exist for many areas of law in which Americans report having justice problems. However, the services most tools offer in those areas do not match well with what is known about people's needs for assistance.

Tools come in a range of genres. One group of tools consists of legal dictionaries, applications that give access to the US constitution, or applications that compile information about the legality of some activity that differs from state to state, like possession of marijuana for recreational use or laws regulating concealed firearms or knives. Another group of tools are basically compilations of legal information targeted at a specific population, such as low-income residents of a state. Sometimes this legal information is supplemented by official legal forms for acting on some kinds of justice problems. On some websites, forms must be downloaded, printed and filled in by hand, while on others the tool facilitates the user in completing the form or other document on line and may even send the document on to its intended recipient, like a court or a service provider. Another group of tools are essentially lawyer referral services. A few tools provide extensive services for specific justice problems. These tools diagnose legal problems, compile evidence necessary for making a claim about the problem, and enable the user to act. For example, JustFix assists users in putting together a complaint to a landlord about a habitability problem in an apartment, and then sends the complaint letter. Tools offering such extensive services are rare.

AREAS OF LAW SERVED BY EXISTING TOOLS

About a fifth of tools (22%) claim to assist users with problems in any area of law. Most tools, however, specialize in one or a few areas.

Existing tools target a wide range of types of justice problems. Table 1 reports the most prevalent areas of law existing tools serve. About half of tools (51%) offer assistance with problems related to criminal justice system involvement, such as police stops, arrest, bail, and expungement. Almost a third of tools (31%) assist with matters of family law, including divorce, custody, guardianships, conservatorships, and adoption. A quarter of tools offer services for consumer problems, including buying and selling goods and services by individuals (e.g., cell phone contracts, goods bought on the internet), warranties, debt, credit and bankruptcy. About a fifth of tools (22%) help with housing issues unrelated to the transfer of real property, assisting with landlord-tenant issues such as eviction and problems with housing conditions. About a fifth of tools (23%) provide assistance with real property matters, like purchase and title search. Another

group of tools (22%) offers assistance with matters related to employment, like the calculation of overtime, problems with employers or interactions with unions. Another group of tools (21%) assists with legal problems related to health.

Table 1. Principal Areas of Service: All Tools

Field of Law	Tools Serving
Criminal	51%
Family	31%
Consumer (including bankruptcy)	25%
Real estate	23%
Civil Rights	23%
Employment	22%
Housing	22%
Health	21%

Notes:

N=322 technologies

Source: *Survey of US Legal Technologies*

Additional tools exist for a range of other areas of law, including contract, immigration, intellectual property, personal injury, and traffic.

SERVICES TOOLS PROVIDE

No existing tool is a “one stop shop” for justice problems generally. For example, there is no tool that consists of a natural language interface that diagnoses the legal aspects of a user’s life situation, offers possible routes to solution, and then facilitates taking action toward a solution by compiling evidence of a complaint and creating or filing a legal document with a court or other agency. A few tools do provide a fuller range of services for a specific type of justice problem. These tools take a user from identifying a problem, to considering options, to taking action on it themselves.

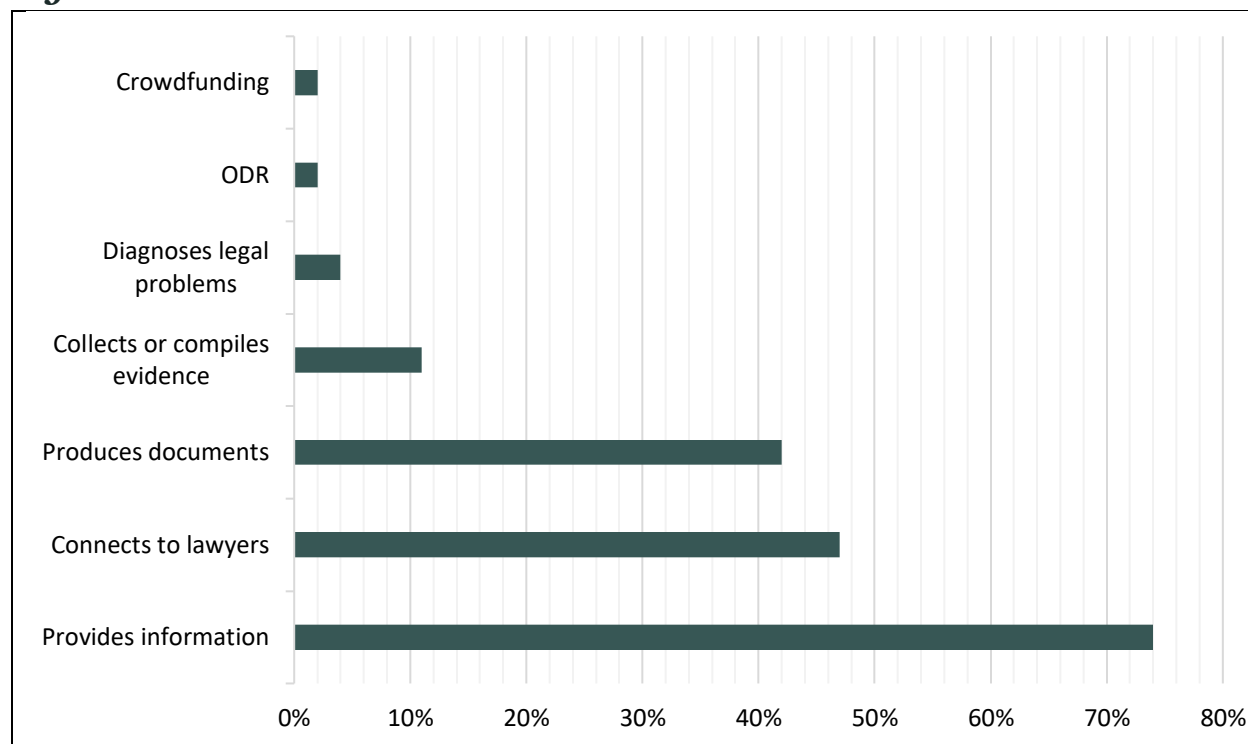
At present, most tools provide legal information or connections to lawyers, as Figure 1 shows. About three quarters of tools provide legal information of some type, and just under half connect people to attorneys. Most referrals to lawyers are “cold”: that is, the

user is given a list of attorneys selected by location or professed specialty, but no information is passed along to the attorney by the tool. About 15% of tools offer “warm” referrals, where the tool passes along information about the potential client and connects the client with the attorney.

Tools that facilitate a user in taking some action typically automate one piece of working on a justice problem, like diagnosing a problem as having legal aspects, consequences or remedies (*e.g.*, “my employer is committing wage theft”); or, compiling evidence for a complaint (*e.g.*, “here are the hours I worked for which I was not paid the mandated rate”); or, producing legal documents like parenting plans or contracts.

Just over half of tools go at least one step toward empowering users to take some concrete action on their own to work on a justice problem. As Figure 1 shows, around two fifths of tools assist the user in creating documents, like powers of attorney, forms to file with courts, or letters of complaint. A handful of tools assist the user in compiling evidence, like hours worked in a case of potential wage theft or pictures of housing code violations in a habitability issue. A few tools help the user to diagnose legal problems. A few provide online dispute resolution services, and a few offer crowdfunding platforms for bail or litigation costs.

Figure 1. Services Tools Provide

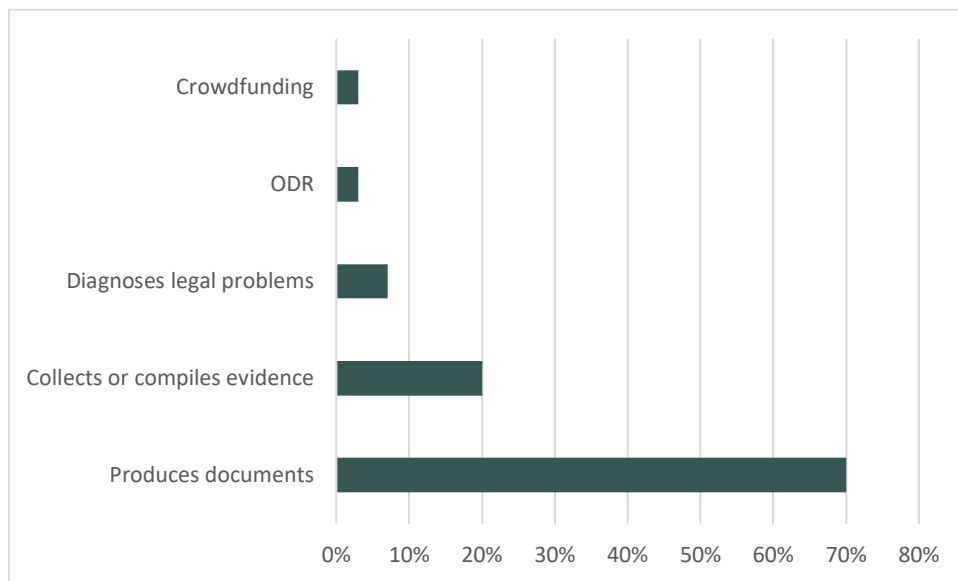


Notes: n=322 technologies

Source: *Survey of US Legal Technologies*

Among tools that facilitate user action, the most common task is the production of documents. As Figure 2 reports, 70% of tools that “do” something, create documents. A fifth of this group of tools help users compile evidence – for example, of a wage theft claim, of a housing code violation, or of abuse or neglect. The other functions are quite rare among existing tools.

Figure 2. Services Tools Provide: Tools that Facilitate User Action



n=167 technologies that facilitate user action.

Notes: A tool facilitates user action if it helps the user complete a task related to taking action on a legal problem without assistance from an attorney. This includes diagnosing legal problems, compiling evidence, creating documents, providing on-line dispute resolution, or crowdfunding legal actions.

Source: *Survey of US Legal Technologies*

WHAT TOOLS PROVIDE VERSUS WHAT PEOPLE WANT OR NEED

There is a substantial mismatch between the services tools offer and what is known about the assistance wanted or needed by the American public. While some tools do exist that serve the broad legal problem areas Americans most frequently encounter, the services the tools actually offer are not those that research suggests Americans want or need when they face justice problems.

Besides information and lawyer referral, the most common service offered by existing tools is the creation of documents. Tools assist people in creating many different kinds of documents, including advance directives, contracts, wills, powers of attorney, parenting plans, petitions for divorce, patent applications, answers to eviction, orders to show cause, and letters of complaint. Many Americans could certainly benefit from this assistance, but for the most part the tasks of document creation come rather late in the game in the life cycle of a justice problem – once someone has already figured out that some kind of legal problem exists on which she could take some sort of formal action. Since most Americans facing justice problems do not recognize legal aspects of their problems, existing tools are not useful for most problems.

TYPES OF ASSISTANCE AMERICANS WANT OR NEED

One of the most striking findings of recent research is that while many Americans have civil justice problems, they typically do not recognize those problems as having legal aspects or remedies (Sandefur 2014). For example, someone will realize that an elderly parent needs assistance with his financial affairs. Or, a grandparent may take in a grandchild whose parent cannot care for her. Or, an employee may be furious at an employer for not paying overtime wages for holiday and weekend hours. Many people in these situations, however, will not recognize that their care tasks for parents or grandchildren have legal aspects, and can be facilitated by legal instruments like limited powers of attorney or guardianship. And many will attribute the employer's behavior to the employer's personal flaws rather than recognizing the situation as the legally actionable problem of wage theft.

In a context where many people experience justice problems that they do not recognize as legal or remediable, tools that offer diagnosis – explaining to someone that their problem involves specific legal aspects, such as violations of housing codes or wage and hour laws – and provide options for response could be particularly valuable. There are very few such tools.

TYPES OF JUSTICE PROBLEMS AMERICANS HAVE

In the United States, most Americans are experiencing at least one civil justice problem (Legal Services Corporation 2017a; Sandefur 2016). From surveys of the American public, the kinds of problems that Americans report most commonly involve:

- Household finances
- Health and insurance

- Consumer problems
- Family and divorce
- Livelihood (employment, benefits)
- Housing

US civil justice surveys have typically not asked people about immigration problems and, because they have been focused on civil justice, have not asked about criminal justice system involvement (Consortium on Legal Services and the Public 1994; Legal Services Corporation 2017a; Sandefur 2014; see also Pleasence 2016).

Other information suggests that immigration and criminal problems may affect many millions of Americans. According to the Migration Policy Institute (2016b), immigrants of all types – documented, undocumented, naturalized, etc. – comprised 13.5% of the US population in 2016. In that same year, law enforcement authorities performed an estimated 10.7 million arrests for crimes, or about one arrest for every 30 US residents (Federal Bureau of Investigation 2016). And the US is well-known for mass incarceration, which creates a whole range of collateral consequences that can become justice problems related to expungement, legal debt, and the like (Harris 2017; Selbin, McCrary, and Epstein 2017).

Tools do exist that offer some assistance in the areas of law where Americans most commonly experience justice problems, but the services they offer for those problems are limited, focused mainly on providing legal information, referring users to attorneys, and creating different kinds of documents.

WHO IS ABLE TO USE THE TOOLS?

In order to use digital tools to learn about and take action on legal problems, people at minimum need access to specific resources and possession of specific capabilities. While many Americans do possess the basic capabilities necessary to use digital tools and have access to the necessary resources, a substantial minority do not. This substantial minority includes many members of groups that report higher rates of civil justice problems or are otherwise vulnerable, like poor people and non-Whites.

ACCESS TO THE INTERNET

To use digital tools, people need access to the internet. A majority of American adults are internet users: 89% of US adults were internet users in 2018. While there are no longer significant racial disparities in internet use, there are important differences by income and education. For example, virtually all adults (98%) earning \$75,000 or more each year use the internet, while four-fifths (81%) of those earning less than \$30,000 a year do so. Similarly, 65% of those with less than a high school education use the internet, in comparison with 97% of college graduates (PEW 2018).

Americans access the internet in a range of ways: through home broadband, through their cell phones, and using computers they have access to at work or in a public space like a library. How people access the internet affects their ability to use legal technologies. For example, some digital legal tools are quite data intensive, which means that people who have cell phone-only access to the internet may incur large data costs in using the tools (Rostain 2018). People with low incomes, racial minorities and people with lower levels of education are among the groups most likely to be dependent on cell phones for personal internet access, as Table 2 shows.

Table 2. Access to the Internet in the US: 2016

	Home broadband users	Smartphone dependent internet users
Race	73%	12%
Whites	78%	9%
Blacks	65%	15%
Hispanics	58%	35%
Education		
< high school	34%	27%
College graduate	91%	5%
Income		
< \$30,000	53%	21%
\$75,000 +	93%	5%
Type of community		
Urban	73%	12%
Suburban	76%	12%
Rural	63%	14%

Notes: Smartphone-dependent users are those who do not have home broadband access but own smartphones.

Source: PEW Research Center 2018.

TEXT-DEPENDENCE AND ADVANCED READING LEVELS

Most digital legal tools are text-based, in the sense that written words are the principal and often the only way in which the tool communicates with the user. Table 3 reports on the capabilities of Americans to use text-based or English-only tools. The table also reports on whether tools can be used by people who have limited English facility or cannot read text. Many tools created for US jurisdictions are offered in English only. Just over 8% of US adults have limited proficiency in English, and therefore are likely to be unable to use English-only tools. About one in seven US adults (14.5%) do not have basic literacy skills. Fully 75% of existing tools require English-language facility. Most tools are designed to be used only by people who are both sighted and literate in at least one language. Only 16% of tools provide at least some of the material offered through a means other than written text, such as a video.

Table 3. User Capabilities and Digital Legal Tool Capabilities

User capabilities		Tool capabilities	
Limited English Proficiency	8.1%	Available in languages other than English ^a	25%
Adults with below basic literacy	14.5%	Usable by people who cannot read or cannot see text ^b	16%
Adults with visual disability	2.7%		
Aged 65+	6.4%		

Notes:

^aThe most common available language is Spanish, but some tools provide multiple languages.

^bIf a tool provided videos or audio for some material, it was coded as usable by this standard.

Sources: Migration Policy Institute 2016a; National Center for Education Statistics 2003; National Federation of the Blind 2017; Survey of US Legal Technologies.

Populations with restricted access to justice through traditional routes – those with lower incomes and less education – are also less likely to be able to use existing digital tools effectively, as these groups have average lower levels of English literacy. Tools designed specifically for low-income populations are as likely to be text-based as tools

designed for groups more likely to have higher levels of literacy. Tools designed for low-income communities often present information in long articles that are written at reading levels too advanced for intended users (Dyson and Schellenberg 2017; Legal Services Corporation 2017b).

Thus, people who are vision impaired, have low literacy, or are not proficient in English are poorly served by most existing tools.

FREE, FREEMIUM AND FEE-FOR-SERVICE

Many tools offer their services for free to users, while others offer some free services and then charge a fee for more extensive service, and some tools cannot be used without the user paying a fee. Roughly three quarters of existing tools are free to users.

BARRIERS AND OPPORTUNITIES

The Survey of US Legal Technologies reveals that the modal digital tool targeting nonlawyer users provides limited services: typically information about the law or a referral or connection to an attorney. The modal tool does little to facilitate a nonlawyer in taking any independent action on a justice problem. Many tools that offer free service are not usable by many people in low-income communities, because of limited internet access or barriers of language or literacy. While some of these limitations reflect current limitations in technology, the main engine of restriction is human actions and choices.

WHY DON'T TOOLS CORRESPOND MORE CLOSELY TO PEOPLE'S KNOWN NEEDS AND CAPABILITIES?

The services offered by existing legal digital tools and those that research suggests people want and need are poorly matched. Among the reasons for this, three stand out: the ecology of tool creation, outdated design processes, and the resource-strapped environment of tool development in the nonprofit sector.

No organization or market currently coordinates tool development. A wide range of different kinds of actors are working to develop digital legal tools: for-profit companies, startups, nonprofit organizations, and private individuals who create tools and offer them to the public through app stores like Google Play or iTunes. In the

United States, the creation and distribution of many services is coordinated substantially by markets for those services, where demand and competition are important factors. Most tools are not participating in a fee-for-service market, so consumer demand has less impact and tool creators are guided by other ideas about what tools the public may want.

Development of digital tools is usually provider-driven, reflecting the interests and beliefs of those offering the service, rather than the wants and needs of the intended user populations. Established techniques exist for creating tools through user-centered, user-driven, and collaborative design. However, with a few notable exceptions, these techniques have not often been used in the development of existing tools (Hagan 2018).

Matching tools to client needs requires knowledge of those needs and the capacity to adapt existing tools or create new ones that connect closely with those needs. Most of the nonprofit service providers working with low income populations do not have access to the resources of time, money and expertise necessary either to conduct a rigorous needs assessment for their service populations or to create or customize digital tools. Rather, they must use available products “off the shelf,” adapting them as they are able based on their understanding of what people might find useful.

Starting with the needs and perspectives of potential users of new tools would be the first step in creating a body of technologies that are more closely aligned with the justice problems Americans actually have and the kinds of assistance they want or need with those problems. A few tools have been developed in this way; more should be.

WHY DON'T TOOLS “DO” MORE?

Many existing tools may be conduits of information, but only about half assist their users in taking any kind of action on justice problems by automating one or more tasks. In part, the limited utility of many existing tools reflects the fact that most are not currently designed in close consultation with intended user groups. However, there are two other important factors that limit what existing digital legal tools can do: the legal profession’s robust monopoly on the provision of legal advice and the challenges of coordination in contemporary state court systems. Thus, a central responsibility for this situation rests with the justice system itself.

One of the most common tasks automated by existing tools is the creation of legal forms. Many working in this field look forward to a day when tools create forms accepted by courts and file them with the appropriate forum immediately upon

completion. While this is beginning to happen, implementing standardized forms and getting courts to accept them is a herculean task of coordination that requires every court in every county in a state accept a new way of doing its work. Even when rules change formally, clerks, judges and other courthouse staff can persist in older patterns, refusing to recognize documents that are officially approved by the court system. The barriers here are not technological, but human.

A key reason for the limitations in what available tools provide is the current regulatory regime for legal services in the United States, which limits most assistance with legal problems to services provided by licensed attorneys (Rhode and Ricca 2013). In particular, unlike in other jurisdictions (for example, the United Kingdom), non-lawyers in the United States are usually prohibited from offering legal advice. Non-lawyers engaged in providing services that look like legal advice are at risk of the legal profession's action against the unauthorized practice of law. As a way of avoiding this risk, most US tools stay in the realm of "legal information," general, publicly available information about the law and people's rights. Most tools do not offer diagnosis of the legal aspects of people's problems, suggest possible routes of action, or provide other services that would help move a problem toward resolution.

A growing evidence base suggests that non-lawyers can provide effective services for some kinds of justice problems without risk to consumer protection (see, *e.g.*, Rhode and Ricca 2013; Sandefur and Clarke 2018). This evidence base can help guide sensible revisions to the rules about unauthorized practice that would permit the expansion of what both human non-lawyers and digital tools can provide. At present, what is missing is the will to tackle these revisions.

CONCLUSION

Digital legal technologies hold promise to empower individuals and communities to identify, understand, and take action on their justice problems and to use the rights that are theirs under law. At this stage in the growth of this field of activity, realizing that promise is not a technological challenge, but rather a social one.

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ACKNOWLEDGEMENTS

Funding for this research was provided by the Open Society Foundations (OSF). Helpful feedback came from Matthew Burnett and Peter Chapman of OSF, as well as from participants at an OSF convening on Technology and Legal Empowerment held in New Orleans, LA in January 2019 and participants at the 2nd International Conference on Access to Justice and Legal Services held at University College London in June 2018.

State Bar of California Legal Malpractice 2018

Conducted by NORC at the University of Chicago for the State Bar of California

*Interviews: 11/26-12/11/2018
1038 adults*

*Margin of error:
4.17 percentage points at the 95% confidence level among all California adults*

NOTE: All results show percentages among all respondents, unless otherwise labeled.

"" indicates less than 0.5%*

"-" indicates 0%

Q1. First, have you or someone in your household ever experienced a situation where a lawyer was needed?

[MULTIPLE RESPONSES]

	NORC 11/26-12/11/2018
Yes, myself	48
Yes, someone in my household	30
No	31
DON'T KNOW/SKIPPED ON WEB/REFUSED	*

N=1038

If "Yes, myself" or "Yes, someone else in my household" at Q1

Q2. What was the most recent reason [you/someone in your household] needed a lawyer?

[OPEN END RESPONSE]

ATILS STAFF NOTE: An overview of the survey responses received for Q2 is attached at the end of this document.

If "Yes, myself" or "Yes, someone else in my household" at Q1

Q3. Thinking about the most recent time [you/someone in your household] needed a lawyer, which of the following actions did [you/they] take? If [you/they] took no action you can say that too.

	NORC 11/26-12/11/2018
[Handled on my own/They handled it on their own]	7
Consulted a lawyer but did not hire them	18
Hired a lawyer	68
Consulted a non-legal third party	3
Took no action	4
DON'T KNOW/SKIPPED ON WEB/REFUSED	*

N=745

If “Consulted a lawyer but did not hire them” or “Hired a lawyer” at QS3

Q4. How did [you find a/they find a] lawyer or other legal service?

[MULTIPLE RESPONSES]

	NORC 11/26-12/11/2018
Asked family and friends	53
Through a lawyer referral service	15
Used search engines like Google or Bing	19
Through social media platforms like Twitter/Facebook/Instagram/ LinkedIn/NextDoor	2
Searched the State Bar of California website	5
Searched other websites	5
Searched the Yellow Pages	5
Got a recommendation from [my/their] co-worker or employer	8
Got a recommendation from a union [I/they] belong to	1
Got a recommendation from a club or social group [I/they] belong to	3
Advertising on television, radio, or other media	4
Other	17
DON'T KNOW/SKIPPED ON WEB/REFUSED	-

N=652

Q5. [When you consulted with or chose to hire a lawyer/Suppose you needed to hire a lawyer], how important [would/were] each of the following factors [be] in making your choice?

NORC 11/26-12/11/2018	Not important at all	Slightly important	Moderately important	Very important	Extremely important	DK/SKP /REF
Cost	3	8	22	38	29	1
Experience	1	3	10	44	42	1
Reputation	3	4	14	42	37	1
The information the lawyer presents on their website	14	15	28	25	15	2
That they have legal malpractice insurance	10	14	23	32	20	1
That they are close to my house or office	13	23	37	20	7	1
That they were available during times convenient to me	4	11	28	37	19	1
That the referral came from a lawyer referral service	30	20	26	16	8	1
The reviews online or on social media	19	20	27	22	11	1
That I know them personally	46	17	19	12	6	1
That someone I know has hired or recommended them	12	16	26	32	13	1
The information about the lawyer on the State Bar of California website	11	12	25	33	17	2
Advertisements about the lawyer	37	24	24	9	4	2
That the lawyer specializes in a certain area of law	2	5	19	44	29	2

N= 1038

Q6. For each of the following terms, please choose which statement most accurately describes your understanding of that term.

NORC 11/26-12/11/2018	I have never heard this term	I have heard this term but do not know what it means	I have heard this term and know what it means	DK/SKP /REF
Legal malpractice insurance	12	28	59	*
Professional liability insurance	20	32	47	1
Retainer fees and/or agreements	11	22	67	1
Contingency fees	18	37	44	1
Attorney client privilege	12	17	71	1
Conflict of interest	6	11	82	1
Bar licensing	10	17	72	1

N= 1038

Q7. Based on what you know, are all lawyers currently required to have legal malpractice insurance in order to practice law in the state of California, or not?

	NORC 11/26-12/11/2018
Yes, it is currently required	23
No, it is not currently required	10
Not sure/don't know	65
DON'T KNOW/SKIPPED ON WEB/REFUSED	1

N=1038

Q8. If lawyers do not have legal malpractice insurance, should they be required to disclose that information to potential clients, or not?

	NORC 11/26-12/11/2018
Yes, should be required	86
No, should not be required	12
DON'T KNOW/SKIPPED ON WEB/REFUSED	2

N=1038

If "Yes, should be required" at Q8

Q9. When should the lawyer disclose that they do not have legal malpractice insurance?

	NORC 11/26-12/11/2018
Before the client decides to hire them	84
At the time the client decides to hire them	15
DON'T KNOW/SKIPPED ON WEB/REFUSED	*

N=902

Q10. Do you think the State Bar of California website should include information about whether each lawyer has legal malpractice insurance, or not?

	NORC 11/26-12/11/2018
Yes	89
No	10
DON'T KNOW/SKIPPED ON WEB/REFUSED	1

N=1038

Q11. Do you think all lawyers should be required to have legal malpractice insurance in order to practice law in California, or not?

	NORC 11/26-12/11/2018
Yes, should be required	78
No, should not be required	21
DON'T KNOW/SKIPPED ON WEB/REFUSED	1

N=1038

If "Yes, should be required" at Q11

Q12. Lawyers who have legal malpractice insurance may charge higher fees to clients, to cover the cost of their insurance premiums. Given this information, do you think all lawyers should be required to have legal malpractice insurance in order to practice law in California?

	NORC 11/26-12/11/2018
Yes, should be required	86
No, should not be required	13
DON'T KNOW/SKIPPED ON WEB/REFUSED	1

N=787

Q13. Suppose a proposal was on the ballot to require California lawyers to have legal malpractice insurance. If this proposal passed, on average lawyers would increase their hourly fees by [\$10/\$20/\$30/\$40/\$50]. Would you vote favor or against such a proposal to require legal malpractice insurance?

[RESPONSE OPTIONS ROTATED]

	NORC 11/26-12/11/2018
Vote in favor	57
Vote against	41
DON'T KNOW/SKIPPED ON WEB/REFUSED	2

N=1038

If "Working – as a paid employee" or "Working – self-employed" at EMPLOY

Q14. Are you employed full-time or part-time?

	NORC 11/26-12/11/2018
Full-time	75
Part-time	23
DON'T KNOW/SKIPPED ON WEB/REFUSED	2

N=610

If “Working – as a paid employee” or “Working – self-employed” at EMPLOY

Q15. Would you say your job is a white collar job, a blue collar job, or something else?

White collar work is usually done in an office or other professional environment. Blue collar refers to jobs that involve manual labor.

	NORC 11/26-12/11/2018
White collar	55
Blue collar	27
Something else	17
DON'T KNOW/SKIPPED ON WEB/REFUSED	1

N=610

Q16. Are you or is anyone in your household a lawyer or work for a lawyer?

[MULTIPLE RESPONSES]

	NORC 11/26-12/11/2018
Yes, I am a lawyer	1
Yes, someone else in the household is a lawyer	5
Yes, I work for a lawyer	2
Yes, someone else in the household works for a lawyer	1
No one in the household is a lawyer or works for a lawyer	92
DON'T KNOW/SKIPPED ON WEB/REFUSED	1

N=1038

SURV_LANG. Survey interview language

	NORC 11/26-12/11/2018
English	93
Spanish	7

N=1038

SURV_MODE. Survey interview mode

	NORC 11/26-12/11/2018
Online	89
Phone	11

N=1038

DEVICE. Device

	NORC 11/26-12/11/2018
Desktop	35
Phone Interview (not online)	11
Smartphone	50
Tablet	5

N=1038

GENDER. Gender

	NORC 11/26-12/11/2018
Male	49
Female	51

N=1038

AGE4. Age – 4 categories

	NORC 11/26-12/11/2018
18-29	22
30-44	28
45-59	24
60+	26

N=1038

AGE7. Age – 7 categories

	NORC 11/26-12/11/2018
18-24	12
25-34	20
35-44	19
45-54	14
55-64	17
65-74	12
75+	6

N=1038

RACETHNICITY. Combined race/ethnicity

	NORC 11/26-12/11/2018
White, non-Hispanic	41
Black, non-Hispanic	6
Other, non-Hispanic	2
Hispanic	35
2+, non-Hispanic	5
Asian, non-Hispanic	12

N=1038

EDUC. Education (highest degree received)

	NORC 11/26-12/11/2018
No formal education	1
1 st , 2 nd , 3 rd , or 4 th grade	*
5 th or 6 th grade	2
7 th or 8 th grade	1
9 th grade	1
10 th grade	1
11 th grade	3
12 th grade, no diploma	5
High school graduate – high school diploma or equivalent (GED)	23
Some college, no degree	21
Associate degree	8
Bachelor's degree	20
Master's degree	9
Professional or doctorate degree	4

N=1038

EDUC4. 4-level education

	NORC 11/26-12/11/2018
No high school diploma	14
High school graduate or equivalent	23
Some college	29
Bachelor's degree or above	34

N=1038

Marit. Are you...

	NORC 11/26-12/11/2018
Married	45
Widowed	4
Divorced	12
Separated	2
Never married	26
Living with partner	11

N=1038

Emp. Which statement best describes your current employment status?

	NORC 11/26-12/11/2018
Working (NET)	59
Working – as a paid employee	47
Working – self-employed	12
Not working (NET)	41
Not working – on temporary layoff from a job	1
Not working – looking for work	8
Not working – retired	16
Not working – disabled	8
Not working – other	9

N=1038

INCOME. Household income

	NORC 11/26-12/11/2018
Less than \$50,000 (NET)	42
Less than \$5,000	4
\$5,000 to \$9,999	3
\$10,000 to \$14,999	5
\$15,000 to \$19,999	5
\$20,000 to \$24,999	6
\$25,000 to \$29,999	4
\$30,000 to \$34,999	6
\$35,000 to \$39,999	3
\$40,000 to \$49,999	6
\$50,000 or more (NET)	58
\$50,000 to \$59,999	8
\$60,000 to \$74,999	10
\$75,000 to \$84,999	6
\$85,000 to \$99,999	10
\$100,000 to \$124,999	9
\$125,000 to \$149,999	6
\$150,000 to \$174,999	3
\$175,000 to \$199,999	2
\$200,000 or more	5

N=1038

REGION9. Region – 9 level

	NORC 11/26-12/11/2018
New England	-
Mid-Atlantic	-
East North Central	-
West North Central	-
South Atlantic	-
East South Central	-
West South Central	-
Mountain	-
Pacific	100

N=1038

REGION4. Region – 4 level

	NORC 11/26-12/11/2018
Northeast	-
Midwest	-
South	-
West	100

N=1038

METRO. Metropolitan area flag

	NORC 11/26-12/11/2018
Non-metro area	2
Metro area	98

N=1038

INTERNET. Household internet access

	NORC 11/26-12/11/2018
Non-internet household	16
Internet household	84

N=1038

HOUSING. Home ownership

	NORC 11/26-12/11/2018
Owned or being bought by you or someone in your household	57
Rented for cash	40
Occupied without payment of cash rent	2

N=1038

HOME_TYPE. Type of building of panelists' residence

	NORC 11/26-12/11/2018
A one-family house detached from any other house	63
A one-family house attached to one or more houses	9
A building with 2 or more apartments	24
A mobile home or trailer	4
Boat, RV, van, etc.	*

N=1038

PHONESERVICE. Telephone service for the household

	NORC 11/26-12/11/2018
Landline telephone only	5
Have a landline, but mostly use cellphone	27
Have a cellphone, but mostly use landline	12
Cellphone only	55
No telephone service	1

N=1038

HHSIZE. Household size (including children)

	NORC 11/26-12/11/2018
1	17
2	28
3	13
4	15
5	9
6+	18

N=1038

HH01. Number of HH members age 0-1

	NORC 11/26-12/11/2018
0	97
1	3
2	*

N=1038

HH25. Number of HH members age 2-5

	NORC 11/26-12/11/2018
0	85
1	9
2	5
3	*
4	*

N=1038

HH612. Number of HH members age 6-12

	NORC 11/26-12/11/2018
0	79
1	12
2	7
3	1
4	1
5	*
6	*
7	-
8	*

N=1038

HH1317. Number of HH members age 13-17

	NORC 11/26-12/11/2018
0	81
1	13
2	5
3	*
4	1

N=1038

HH18OV. Number of HH members age 18+

	NORC 11/26-12/11/2018
1	21
2	43
3	16
4	8
5	8
6	1
7	1
8	*
9	*
10	*

N=1038

Excerpt from State Bar of California Legal Malpractice Survey (2018)

Question #2: What was the most recent reason [you/or someone in your household] needed a lawyer?

Answers:	Anti-Trust	Juvenile Criminal Matter
	Assault and Battery	Legal Advice
	Bankruptcy	Medical Malpractice
	Breach of Contract	Misconduct
	California Fires	Name Change
	Car Accident	Non-Disclosure Agreement
	Child Support	Personal Injury
	Citizenship	Probate
	Class Action Lawsuit	Real Estate
	Contracts	Restraining Order
	Copyright	Royalties
	Credit Issues	Sexual Assault Crime
	Criminal Matter	S-Corporation
	Death	Social Security
	Disability	Special Needs Assistance
	Discrimination	Taxes
	Divorce	VA Benefits
	DMV Ticket	Vandalism
	Drugs	Wills/Trust
	DUI	Worker's Compensation
	Employment Issue	
	Eviction	
	Falsely Accused	
	Family Law/Custody	
	Fees for Attorneys	
	Foreclosure	
	Health Insurance	
	Hit and Run	
	Identity Theft	
	Immigration	



Survey: Americans Believe Legal Fees are Extremely Expensive, Wish There Were Alternatives to Traditional Lawyers

Over Two-Thirds of Americans (69%) Say They Would Use Online Legal Services to Save Money, Underscoring the Relevance of Virtual Law Firms like Your Lawyers Online

PORTLAND, Ore. ([PRWEB](#)) December 10, 2018 -- Results from a new survey conducted online by The Harris Poll on behalf of [Your Lawyers Online](#) show there is nearly universal agreement among Americans that legal fees today are extremely expensive, with over 9 in 10 (91 percent) agreeing, and they wish there were alternatives to traditional lawyers when dealing with small legal matters (82 percent). More than two-thirds (69 percent) of American adults say they would be willing to use online legal services if it would save them money. Younger adults (76% of those age 18-54 vs. 65% of those age 55+), those who have lower household incomes (72% of those with total household income of less than \$100k vs. 62% of those with \$100k or more), and are parents (78% of those who are parents of children under 18 vs. 66% who are not) are more likely to say this.

The survey findings highlight the relevance of virtual law firms such as Your Lawyers Online, which replace traditional “fee-for-time” models with “fee-for-service” solutions that offer unbundled legal services to save users time and money—especially on small legal matters like reviewing legal documents or establishing a will.

“I really think virtual law firms like Your Lawyers Online represent the future of law in a digital age where Americans are seeking efficiency and value over cumbersome and costly traditions,” says Your Lawyers Online Founder & CEO Nicole Schaefer, a family law attorney and entrepreneur based in Portland, OR. “There is this exclusive mystique around law that keeps people without a law degree feeling mystified by the process, which is why they usually end up paying so much for legal services. We are setting out to change that by making the process more accessible to everyone.”

Additional highlights from the survey are below:

- **Nearly Three-Quarters Would Use Online Legal Services:** Around three-quarters of those between the ages of 18 and 44 (76 percent), those with household incomes between \$50K and \$99.9K (74 percent) as well as parents with children under 18 years old (78 percent) would use online legal services if it would save them money.
- **Americans Want Alternatives to Lawyers:** Nearly everyone with a household income of \$50K to \$74.9K (87 percent) wish there were alternatives to traditional lawyers when dealing with small legal matters (i.e. reviewing legal documents or establishing a will).
- **Even Those With Higher Household Incomes Agree:** Even those with household incomes of \$100K agree that legal fees are extremely expensive (91 percent) and 79% say they wish there were an alternative to traditional lawyers when dealing with small legal matters.

This survey was conducted online within the United States by The Harris Poll on behalf of Your Lawyers Online from December 4-6, 2018 among 2,003 U.S. adults ages 18 and older. This online survey is not based on a probability sample and therefore no estimate of theoretical sampling error can be calculated. For complete survey methodology, including weighting variables and subgroup sample sizes, please contact Nicole Schaefer, Founder & CEO of Your Lawyers Online, at 971-288-1046.

Your Lawyers Online offers automated, secured and affordable solutions, and can even double as a traditional law firm on an as-needed basis. In addition, monthly memberships provide a 10 percent discount for all legal



services booked through the site. For more information, visit <https://yourlawyersonline.com/>

About Your Lawyers Online

[Your Lawyers Online](#) is a virtual law firm of online legal providers specializing in divorce, probate, business and animal law. By eliminating the “fee for time” model and replacing it with a “fee for service” model, the site’s unbundled legal services save users time and money. The platform offers an automated, secure and affordable solution, and doubles as a traditional law firm on an as-needed basis. Your Lawyers Online currently offers up-to-date information and expertise in business law, animal law and family law, and a monthly membership that provides a 10 percent discount on all legal services booked through the site.

About The Harris Poll

[The Harris Poll](#) is one of the longest-running surveys in the U.S. tracking public opinion, motivations and social sentiment since 1963 that is now part of Harris Insights & Analytics, a global consulting and market research firm that delivers social intelligence for transformational times. We work with clients in three primary areas; building a twenty-first-century corporate reputation, crafting brand strategy and performance tracking, and earning organic media through public relations research. Our mission is to provide insights and advisory to help leaders make the best decisions possible.

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Online Web 2.0 Version

You can read the online version of this press release [here](#).

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The Future of Lawyering

[1-24 Meeting Agenda – FOL](#)

The Association of Professional Responsibility Lawyers (APRL) has formed the Future of Lawyering Committee to explore the evolving nature of technology and its impact on the delivery of legal services and access to justice. Our goal is to develop specific proposals for amending the legal ethics rules and reforming the lawyer regulatory process. The APRL Future of Lawyering Committee will continue the excellent work of the APRL Regulation of Lawyer Advertising Committee, which adopted reports and recommendations for rule changes in the areas of advertising and solicitation that are now being considered by the American Bar Association and several states. This committee is chaired by APRL president-elect Jan Jacobowitz, a professor at the University of Miami School of Law, and former president Art Lachman, a practitioner in Seattle.

Access to justice is an ethical prerogative, and there is little doubt that the legal needs of a large portion of the American public are not being met. This void is increasingly being filled by nonlawyer entrepreneurs utilizing modern technology. We believe that our ethics rules do not adequately address the practical ways people deal with problems that arise in their everyday lives, which they often do not even identify as legal ones, and what lawyers can do to assist them in solving these problems. In forming the Future of

Lawyering Committee, APRL seeks to become a proactive voice in the inevitable change that has already begun in the delivery of legal services. As with the successful advertising initiative, our goal is to make meaningful proposals for change in the area of lawyer regulation so that the profession may both embrace evolving technology and increase the delivery of competent legal services to the American public, with full accountability, and without unreasonably restraining competition.

The Future of Lawyering Committee will evaluate and report to the APRL Board on various aspects of the delivery of legal services. The initial focus will be on the regulations that govern multijurisdictional practice and the unauthorized practice of law, and a lawyer's interaction with nonlawyers, which implicates issues such as referral fees, the giving of value for recommending the lawyer's services, and fee sharing. The Committee will also explore and recommend changes to other aspects of practice regulation in the "5" series of the ABA Model Rules regarding "Law Firms & Associations," including multidisciplinary practice/alternative business structures and nonlawyer investment in law firms; law-related/ancillary law firm businesses; restrictions on the right to practice; and alternative regulatory models for legal services delivery.

The Committee's work, which is expected to take approximately two years, is modeled on the Advertising Committee in including the participation of both APRL members and non-member experts and liaisons, including representatives of the ABA Center for Professional Responsibility and the National Organization of Bar Counsel. Given the breadth of the issues to explore, the Committee has been divided into four subcommittees to examine the various issues, with the goal of creating an integrated and comprehensive report proposing specific changes to the RPCs and regulatory structures to facilitate the delivery of legal services. Programming at future APRL meetings will also focus on the work and recommendations of the committee and subcommittees, including at the APRL Midyear meeting in Las Vegas in January 2019.

APRL Future of Lawyering Committee Jan Jacobowitz, Co-Chair; Art Lachman, Co-Chair

Referral Fees/Fee Sharing Subcommittee

Lynda Shely, Co-Chair
Hope Todd, Co-Chair

Multijurisdictional Practice/Unauthorized Practice of Law/RPC 5.5 Subcommittee

Ron Minkoff, Co-Chair
Ellen Pansky, Co-Chair

Alternative Business Structures/Multidisciplinary Practice/RPC 5.4 Subcommittee

Peter Jarvis, Co-Chair
Art Lachman, Co-Chair
Lucian Pera, Co-Chair

Firm Management/RPC 5.6/RPC 5.7 Subcommittee

George Clark, Co-Chair
Jayne Reardon, Co-Chair

Liaisons

ABA Center for Professional Responsibility: Mary McDermott

Conference of Chief Justices, Professionalism & Competence of the Bar Committee: Keith Fisher

Federal Trade Commission: William Adkinson

Legal Marketing Association: Kim Perret

National Organization of Bar Counsel: Douglas Ende & Wendy Muchman

The complete list of Committee and its various subcommittee members can be found at this link: [Committees Future Of Legal Professional Committees](#)

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Recent Posts

MAKING HISTORY

Unlocking the Potential of Attorney Regulation to Support a Consumer-Focused System



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MAKING HISTORY: UNLOCKING LEGAL REGULATION

April 16-17, 2019 / History Colorado Center / Denver, Colorado

IAALS' latest initiative on the regulation of legal services is poised to transform the way legal services are provided—and to lead the way to greater access and a system that is fulfilling its promise to the people and organizations who rely on it.

IAALS launched this initiative with a project that tackles the questions surrounding regulation of the legal profession. Our intent was to: 1) create conversations about the appropriate role of the attorney regulatory system; 2) explore how the existing regulatory environment may impede innovation and access to legal services; 3) explore new regulatory models that might strengthen our regulatory system by ensuring access to quality legal services and support the vibrant legal services market that is so critical to our society; and 4) explore Rules changes that might lead the way into the future. The idea was to undertake this work in partnership with courts, regulators, and innovators across the country.

The project began with a 1 ½-day workshop on the questions surrounding entity regulation. Last fall, IAALS partnered with experts Gillian Hadfield, Professor of Law at the University of Toronto and a leading proponent of the reform and redesign of legal systems, and Lucy Ricca, Fellow and former Executive Director of the Center on the Legal Profession at Stanford Law School, and commissioned the creation of a draft model for entity regulation. On April 16-17, IAALS convened a group of state Supreme Court Justices, bar leaders, attorney regulation counsel, and technologists from six states (Arizona, California, Colorado, Texas, Utah, and Washington)—each at various stages of exploring how the regulatory landscape can be modified to create greater access—to participate in the *Making History: Unlocking Legal Regulation* workshop and to consider implementation opportunities.

The workshop was interactive and practical. IAALS came to the table with a draft model and a developed case study to test that model. Participants applied the proposed model to a case study, which allowed the group to surface risks and rewards posed by the new model. Our goal was not abstract conversation, but rather practical analysis and possible development of an action plan.

IAALS has a history of tackling complex and challenging problems and working with stakeholders and decision-makers, and we believe this is a critical time to be talking about how the way we regulate lawyers impacts the way legal services are delivered and accessed now and into the future.




AGENDA

MAKING HISTORY: UNLOCKING LEGAL REGULATION

Colorado History Museum | Denver

April 16-17, 2019

TUESDAY | APRIL 16

- | | |
|---|--|
| 8:00 | Breakfast and Arrival |
|  8:30 | WELCOME AND INTRODUCTIONS
<i>Rebecca Love Kourlis, Executive Director, IAALS</i>
<i>Alli Gerkman, Senior Director, IAALS</i> |
|  9:30 | THE CASE FOR REGULATION REFORM
<i>Professor Gillian Hadfield, University of Toronto</i> |
|  10:15 | RISK-BASED REGULATION
<i>Professor Gillian Hadfield, University of Toronto</i>
<i>Lucy Ricca, Consultant, IAALS</i> |
|  10:45 | LICENSING AND RISK ANALYSIS
<i>Professor Gillian Hadfield, University of Toronto</i>
<i>Lucy Ricca, Consultant, IAALS</i> |
|  11:05 | TEAM WORK: RISK ANALYSIS |
| 12:15 | Lunch |
|  1:15 | TEAM PRESENTATIONS: RISK ANALYSIS |
|  2:15 | MONITORING AND ENFORCEMENT
<i>Professor Gillian Hadfield, University of Toronto</i>
<i>Lucy Ricca, Consultant, IAALS</i> |
|  2:30 | TEAM WORK: ENFORCEMENT |
|  3:15 | TEAM PRESENTATIONS: ENFORCEMENT |
| 4:00 | Day One Wrap-up |
| 5:00 | Cocktails/Dinner |



INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



UNIVERSITY *of*
DENVER

WEDNESDAY | APRIL 17

8:30 Breakfast and Arrival

9:00 OVERVIEW OF DAY

Rebecca Love Kourlis, Executive Director

Alli Gerkman, Senior Director



9:15 TEAM WORK: REGULATORY OBJECTIVES

10:30 Break



10:45 TEAM PRESENTATIONS: REGULATORY OBJECTIVES

11:45 Wrap-Up and Takeaways

12:15 Adjourn

MAKING HISTORY UNLOCKING LEGAL REGULATION

WORKSHOP ATTENDEE LIST

HISTORY COLORADO CENTER
APRIL 16-17, 2019

DREW AMERSON

Director

LexLab at UC Hastings Law



Drew Amerson, Director of LexLab at UC Hastings law school in San Francisco, helps students prepare for the legal jobs of tomorrow. LexLab is an innovation hub for emerging legal technologies. In addition to offering a practical curriculum for students, LexLab houses a legal tech accelerator program and fosters a community of entrepreneurs, students, technologists and lawyers.

Drew is a graduate of Carleton College and Columbia Law School. He was a fellow with the National Center on Poverty Law and worked as a business litigator with firms in Chicago and San Francisco. More recently, he founded a legal tech company and has taught courses on intellectual property and startup law.

CHIEF JUSTICE REBECCA WHITE BERCH (RET.)

Arizona Supreme Court



Rebecca Berch served on the Arizona Supreme Court for 13 years, including 5 years as its Chief Justice; before that she served as a judge of the Arizona Court of Appeals. Before judging, she was on the faculty of the Sandra Day O'Connor College of Law (1986-1995) and served as the Solicitor General for Arizona, Chief Deputy at the Arizona Attorney General's office, and in private practice, where she became a named partner at her firm.

She has received several awards, including the James A. Walsh Outstanding Jurist Award, the ASU Alumni Association Service Award – including twice as the law school's outstanding Alumnus, the Marilyn R. Seymann Founder's Award from the Arizona Foundation for Women, the Sarah Herring Sorin Award from the Arizona Women Lawyers Association, and others. She has an extensive list of publications and presentations, serves on many boards and committees, and speaks often on law-related subjects.

MATTHEW BURNETT

Open Society Foundations



Matthew Burnett is a policy officer with the Open Society Justice Initiative, where he focuses on legal empowerment, technology, and innovative financing.

Previously, Burnett was director of the Immigration Advocates Network, a groundbreaking collaboration among leading immigrant rights organizations in the United States. He played a key role in launching the organization and growing it into a recognized leader on innovative approaches to increasing access to justice for immigrants and building the capacity of immigrant-serving organizations. Prior to his work at the Immigration Advocates Network, Burnett represented asylum seekers in the United States and served as law clerk to Justice Z.M. Yacoob of the Constitutional Court of South Africa.

Burnett holds a JD with concentrations in poverty law and public international law from Seattle University School of Law, and a joint BA in philosophy and the comparative history of ideas from the University of Washington.

H. DICKSON BURTON

President

Utah State Bar



Dickson is the President of the Utah State Bar, and has served on the Utah Bar Commission for nine years. He currently co-chairs a Utah Supreme Court Task Force on lawyer and judge well-being and is a member of another Supreme Court task force addressing regulatory reform.

In his day job, Dickson is the Managing Shareholder of TraskBritt, a nationally-recognized Intellectual Property law firm where he litigates patent, trademark and trade secret matters in courts around the country. He has been an Adjunct Professor at the University of Utah Law School where he taught patent litigation. Dickson is also frequently called upon to mediate or arbitrate patent and other intellectual property disputes.

TOM CLARKE

Vice President for Research & Technology
National Center for State Courts



Tom Clarke has served for fourteen years as the Vice President for Research and Technology at the National Center for State Courts. Before that, Tom worked for ten years with the Washington State Administrative Office of the Courts first as the research manager and then as the CIO.

As a national court consultant, Tom consulted frequently on topics relating to effective court practices, the redesign of court systems to solve business problems, access to justice strategies, and program evaluation approaches. Tom concentrated the last several years on litigant portals, case triage, new non-lawyer roles, online dispute resolution, public access/privacy policies, and new ways of regulating legal services.

NANCY COHEN

Partner

Lewis Brisbois Bisgaard & Smith, LLP



Nancy Cohen, Esq., is a partner with the Denver office of Lewis Brisbois Bisgaard & Smith, LLP. Nancy focuses her practice on the representation of lawyers and law firms in legal malpractice matters and grievance defense and defends other professionals concerning professional licensure and malpractice issues and commercial litigation including real estate and 1983 litigation. She has extensive experience in complex commercial litigation.

Nancy was the Chief Deputy Regulation Counsel with the Colorado Supreme Court Office of Attorney Regulation. She was a member and then a special advisor to the ABA Standing Committee on Professional Discipline, a member of the Colorado Supreme Court Advisory Committee, the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct, and the American Law Institute. Nancy is Past President of the Denver Bar Association. Nancy is Preeminent AV® rated by Martindale-Hubbell and has been recognized as a Colorado Super Lawyer in the area of Professional Liability Defense since 2013, one of the Top 50 Women from 2014-2018, and one of the Top 100 Lawyers in 2015, 2016 and 2018.

JUDGE MARIA ELENA CRUZ

Arizona Court of Appeals



Judge Maria Elena Cruz serves on the Arizona Court of Appeals. Prior to Gov. Doug Ducey's appointment of Judge Cruz to the Court of Appeals, she served as the Presiding Judge of Superior Court in Yuma County. In addition to administering the business of the Yuma courts while she served as Presiding Judge, Judge Cruz presided over criminal cases, the Yuma County Superior Court SAFE Program, Restitution Court, and Drug Court. During her tenure in the Superior Court Judge Cruz has also presided over juvenile, family, civil and criminal matters.

Judge Cruz obtained a Juris Doctorate from the University of Arizona, James E. Rogers College of Law and has a B.A. in Psychology from the University of Arizona. She began her practice of law as a prosecutor in her hometown at the Yuma County Attorney's Office. She later practiced in criminal defense, eventually venturing into solo practice. In 2008 Judge Cruz became the first woman and the first Latino elected Superior Court Judge in Yuma County, Arizona.

Today, in addition to her demanding service on the Court of Appeals, she also serves on the Arizona Supreme Court's Commission on Access to Justice, the Commission on Victims in the Court, the Task Force on Delivery of Legal Services, and volunteers her time to presenting before the Arizona State Bar, U of A Law School, ASU Law School, and community organizations around the State. Judge Cruz also contributes to the development of the law internationally by serving as a professor of law teaching trial advocacy in various regions within the Republic of Mexico, including Mexico City, Tijuana, Mexicali, Monterrey, La Paz, and Guanajuato.

WHITNEY CUNNINGHAM

Managing Partner

Aspey, Watkins & Diesel, PLLC



Whitney Cunningham is the managing partner of Aspey, Watkins & Diesel, PLLC, a 12-attorney general service firm in Flagstaff, Arizona. Mr. Cunningham's own practice area focuses on business and real estate disputes.

He is formerly president of the State Bar of Arizona, and currently a member of the Task Force on Delivery of Legal Services, organized by our Supreme Court.

ZACK DEMEOLO

Manager

IAALS, University of Denver



Zack DeMeola is a Manager at IAALS. He works with Alli Gerkman to improve the delivery of legal services and manages a variety of projects that focus on education, the intersection of law and technology, and regulation of the legal profession.

Zack joined IAALS in 2017 after having litigated in private practice for six years, concentrating on complex commercial litigation, privacy, and data breach issues.

Zack received the George Wythe and Ewell Awards for leadership and service from the William & Mary School of Law, and was recognized by Colorado Law Weekly in 2015 as one of seven Colorado "up and coming lawyers."

AMY C. DEVAN

Executive Director

Wheeler Trigg O'Donnell, LLP



Amy C. DeVan is Executive Director with the law firm of Wheeler Trigg O'Donnell, LLP, responsible for overseeing all administrative and operational functions of the firm. She previously served as the firm's Ethics and Conflicts Counsel. Prior to joining WTO, Amy worked as an Assistant Regulation Counsel for the Colorado Supreme Court Office of Attorney Regulation Counsel in Denver, Colorado, investigating allegations of lawyer misconduct pursuant to the Rules of Professional Conduct, and as Executive Director of

Colorado's Independent Ethics Commission, educating state officials and employees regarding ethics and compliance related obligations.

Prior to joining the Office of Attorney Regulation Counsel in 2010 Amy was employed in private practice for nine years with a boutique immigration law firm in the metro area. A graduate of the University of Colorado School of Law, Amy is a member of the Colorado Bar Association and Denver Bar Association, serving on the Bar Association's Ethics Committee, and the advisory board for The Colorado Lawyer magazine.

ALLI GERKMAN

Senior Director

IAALS, University of Denver



Alli Gerkman is Senior Director at IAALS, where she leads the organization's work to improve delivery of legal services, including work in legal education and the legal profession. She directed one of IAALS' cornerstone projects to identify the key foundations entry-level lawyers need to be effective as employees in their organizations and as counsel to their clients. This work is being used by law schools, law firms, and bar associations across the country, and it laid the groundwork for IAALS' latest projects on licensing and regulation.

In 2017, Gerkman was awarded the Colorado Women's Bar Foundation Raising the Bar Award for her contributions to systemic improvements in legal education and the legal system; in 2018, she was honored as one of Denver's 40 Under 40; and in 2019, she is the recipient of the Colorado Women's Bar Association's highest honor, the Mary Lathrop Trailblazer Award.

SCOTT GIBSON

Assistant General Counsel

Office of Court Administration, State of Texas



Scott Gibson is an Assistant General Counsel with the Office of Court Administration. He has worked in Texas state government for over 20 years – and he has worked in all three branches of the government. He began in working for the Legislative Budget Board in the legislature and switched to the Executive Branch after one session – working for a small regulatory board.

Now with the Judicial Branch he provides legal counsel to the Judicial Branch Certification Commission, addresses public information requests and (among other things) works on matters relating to access to justice. Prior to coming to Texas he worked for the Senate Judiciary Committee in the Florida Senate.

TOM GORDON

Executive Director

Responsive Law



Tom Gordon is executive director of Responsive Law, a national nonprofit working to reform policies that limit access to affordable legal help. He has testified many times before state legislatures, federal administrative panels, and the American Bar Association on behalf of consumers of legal services on topics including unauthorized practice of law, lawyer advertising, and alternative business structures.

He has had op-eds published in the *Wall Street Journal*, and *USA Today*. In 2017, Tom was named to the Fastcase 50 as one of the law's "smartest, most courageous innovators, techies, visionaries, & leaders."

BRIDGET FOGARTY GRAMME

Administrative Director, Center for Public Interest Law

Professor of Law, University of San Diego School of Law



Bridget Fogarty Gramme is the Administrative Director of the Center for Public Interest Law and teaches Public Interest Law and Practice at the University of San Diego School of Law. Prior to joining the Center, she was a civil litigator for ten years, primarily focused on antitrust and consumer protection matters, and a law clerk for the Hon. Cathy Ann Bencivengo, U.S. District Judge for the Southern District of California. Ms. Gramme served as the California Assembly Judiciary Committee's appointee on the Bar Examination Standard Setting and Content

Validation studies in 2017, and has advocated for reform at the State Bar of California since 2014. She is a frequent speaker on consumer protection in the licensed professions, including a presentation at the International Conference of Legal Regulators on the use of artificial intelligence in the legal profession in October of 2018 in the Hague, Netherlands. She is currently serving as a member of the California State Bar's Task Force on Access Through Innovation of Legal Services as well as the Association of Professional Responsibility Lawyers' Future of Lawyering Committee.

GILLIAN HADFIELD

*Professor of Law & Strategic Management
University of Toronto*



Gillian Hadfield, B.A. (Hons.) Queens, J.D., M.A., Ph.D. (Economics) Stanford, is Professor of Law and Professor of Strategic Management at the University of Toronto. Her research is focused on innovative design for legal and dispute resolution systems in advanced and developing market economies; governance for artificial intelligence; the markets for law, lawyers, and dispute resolution; and contract law and theory.

Professor Hadfield is a Faculty Affiliate at the Vector Institute for Artificial Intelligence in Toronto and at the Center for Human-Compatible AI at the University of California Berkeley and Senior Policy Advisor at OpenAI in San Francisco. Her book *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* was published by Oxford University Press in 2017.

Professor Hadfield served as clerk to Chief Judge Patricia Wald on the U.S. Court of Appeals, D.C. Circuit. She was previously on the faculty at the University of Southern California, New York University, and the University of California Berkeley, and has been a visiting professor at the University of Chicago, Harvard, Columbia, and Hastings College of Law. She was a 2006-07 and 2010-11 fellow of the Center for Advanced Study in the Behavioral Sciences at Stanford and a National Fellow at the Hoover Institution in 1993. She has served on the World Economic Forum's Global Future Council for Technology, Values and Policy and Global Agenda Council for Justice and is currently a member of the American Bar Association's Commission on the Future of Legal Education. She is an advisor to courts and several organizations and technology companies engaged in innovating new ways to make law smarter and more accessible.

THOMAS HAMILTON

Vice President Strategy and Operations
ROSS Intelligence



Thomas Hamilton is the VP Strategy and Operations at ROSS Intelligence, where he co-ordinates efforts across the company to ensure that sole practitioners, legal aid groups, law firms, government agencies, corporate law departments, state bar associations and law faculties are able to benefit from cutting edge developments in artificial intelligence research. Thomas believes passionately in the ability of technology to improve access to justice worldwide, and as employee #1 at ROSS Intelligence, speaks to

groups around the world on legal technology innovation, law firm strategy and the transformative economic potential of artificial intelligence technology.

JUSTICE MELISSA HART

Colorado Supreme Court



Justice Hart was appointed to serve on the Colorado Supreme Court in 2017. Prior to joining the Court, Justice Hart was a professor at the University of Colorado Law School, where she directed the Byron R. White Center for the Study of American Constitutional Law. Throughout her years as a professor, Justice Hart maintained an active pro bono practice, writing amicus briefs in appellate courts and representing clients through Metro Volunteer Lawyers. Her teaching and scholarship focused on access to justice, constitutional law, judicial decision

making, legal ethics, employment discrimination, and civil procedure. Justice Hart is a founding Board member of Legal Entrepreneurs for Justice, an affordable law practice incubator that is launching in Colorado in 2019, and a Commissioner on the Colorado Access to Justice Commission.

NINA HESS HSU

General Counsel

Supreme Court of Texas



Nina Hess Hsu has served as General Counsel for the Supreme Court of Texas since October of 2013. Prior to joining the Court, Ms. Hess Hsu practiced in the in-house legal department of Texas Mutual Insurance Company and in the employment and commercial litigation sections of the international law firm of Vinson & Elkins. Ms. Hess Hsu holds a Bachelor's degree from Duke University and a J.D. from the University of Texas School of Law. Following law school, Ms. Hess Hsu served as a law clerk to United States District Judge

Sam Sparks in the Western District of Texas, Austin Division. She is a mother of two young boys and a native of Pennsylvania, but she got to Texas as soon as she could.

JUSTICE DENO HIMONAS

Utah Supreme Court



Justice Constandinos (Deno) Himonas was appointed to the Utah Supreme Court in 2015. Prior to his appointment, he served as a trial court judge for over ten years. Justice Himonas graduated magna cum laude in economics from the University of Utah. He received his Juris Doctorate from the University of Chicago. Upon graduation, Justice Himonas spent fifteen years in private practice where he focused on complex civil litigation. Justice Himonas has taught at the S.J. Quinney College of Law at the University of Utah and was named its 2017

Honorary Alumnus of the Year. He has also been a visiting lecturer at universities in Kiev, Ukraine. Justice Himonas is a recipient of the Judicial Excellence award from the Litigation Section of the Utah State Bar and a Life Fellow of the American Bar Foundation. Justice Himonas has been deeply involved in the access-to-justice movement. To this end , he currently chairs two task forces, one on licensed paralegal practitioners and another on online dispute resolution; co-chairs a work group on regulatory reform; and travels the country speaking on access-to-justice issues including, most recently, at the 2019 South-by-Southwest conference.

RYIKA HOOSHANGI

Attorney at Law

Globalis Law Group, PLLC



Ryika Hooshangi has more than a decade of experience as an attorney and policy advisor for the U.S. Government and private clients on immigration law, foreign affairs, international trade and technology. Ms. Hooshangi has previously served as an attorney-advisor for the U.S. Department of State, counseling U.S. embassies on international agreements and immigration law and policy. She was selected as a Brookings Fellow, working in the U.S. Senate as a Foreign Relations Counsel, advising on complex foreign policy and national security issues. Ms. Hooshangi also served as a senior advisor to the U.S. Senate Finance Committee handling trade agreements. Her work with the federal government has taken her around the globe, including assignments at U.S. Embassies in the United Arab Emirates, Turkey, Ethiopia, Kenya, and India, amongst others, where she advised on day-to-day consular management, security and legal matters. She is the founder and principal of Globalis Law Group, PLLC., advising start-ups like Boundless Immigration and various other clients nationwide.

ROLAND K. JOHNSON

Commissioner of Texas Access to Justice Commission

Former President, State Bar of Texas

Shareholder, Harris, Finley & Bogle, P.C.



Roland Johnson is a proven leader in the Texas legal community. A former president of the State Bar of Texas, he has been honored for his professionalism and legal knowledge, and is often asked to speak on ethics, professionalism, arbitration, and leadership issues. Roland's experience benefits his clients and the community in their quest for justice in commercial litigation, arbitrations, and legal malpractice arenas. Roland is a Fellow of the College of Commercial Arbitrators, a member of American Board of Trial

Advocates, a member of the American Law Institute, board member of Texas Access to Justice Foundation and commissioner to Texas Access to Justice Commission. Roland is a shareholder in Harris, Finley & Bogle, P.C. in Fort Worth, Texas.

MARTIN KATZ

*Chief Innovation Officer/Senior Advisor for Academic Innovation and Design
University of Denver*



Marty Katz serves as the Chief Innovation Officer and Senior Advisor for Academic Innovation and Design for the University of Denver, catalyzing cross-disciplinary experiential education and community engagement. He also serves as the Executive Director of Project X-ITE, a cross disciplinary collaboration between DU's Daniels College of Business, Graduate School of Social Work, Ritchie School of Computer Science and Engineering, and Sturm College of Law.

Prior to that, he served as Dean at the University of Denver, Sturm College of Law, where he is also a Professor of Law. The National Jurist selected him as #4 on their 2014 "Most Influential People in Legal Education" list. He has been ranked in the Top 10 on that list for the last three years. Prior to teaching full time, Professor Katz was a partner in the employment law group at Davis, Graham & Stubbs in Denver, Colorado and a law clerk to the Honorable David M. Ebel of the U.S. Court of Appeals.

REBECCA LOVE KOURLIS

Executive Director

IAALS, University of Denver



Justice Rebecca Love Kourlis believes in the foundations of the American legal system and has dedicated her career, both in and out of the courts, to ensuring that the system provides justice for all. She served Colorado's judiciary for nearly two decades, first as a trial court judge and then as a justice of the Colorado Supreme Court. In January 2006, she resigned from the Supreme Court to establish the Institute for the Advancement of the American Legal System (IAALS), where she serves as Executive Director.

Her work at the helm of IAALS is resolute in its focus on continuous improvement of the American legal system, and a logical off-shoot of her accomplishments on the bench where she spearheaded significant reforms in the judicial system. She began her career with the law firm of Davis Graham & Stubbs, and then started a small practice in rural northwest Colorado. In 1987, she was appointed as a trial court judge with a general jurisdiction docket. She served as Water Judge and later as Chief Judge of the district. She was appointed to the Colorado Supreme Court in 1995.

ARTHUR J. LACHMAN

Attorney at Law

Law Office of Arthur J. Lachman



Arthur J. Lachman practices in Seattle, Washington, focusing on legal ethics, professional liability, and law firm risk management issues. A 1989 graduate of the University of Washington School of Law, he clerked on the Ninth Circuit Court of Appeals, has practiced as a commercial litigation attorney, and has taught civil litigation and ethics subjects at both Puget Sound area law schools.

Art has served as President of the Association of Professional Responsibility Lawyers (APRL) and chair of the ABA Center for Professional Responsibility's National Conference Planning Committee. He is currently Co-Chair of APRL's Future of Lawyering Committee, a comprehensive effort to propose reforms designed to bring lawyer ethics rules governing the regulation of the legal profession into the 21st Century. He is co-author of *The Law of Lawyering in Washington*, published by the Washington State Bar Association, and served as chair of the WSBA Rules of Professional Conduct Committee from 2008 to 2010. He holds bachelor's and graduate degrees in accounting from the University of Illinois at Urbana-Champaign.

PAULA LITTLEWOOD

IAALS Board Member



Paula is a graduate of the University of Washington School of Law and also received a master's degree in International Studies from the UW. She most recently served sixteen years with the Washington State Bar Association, first as the Deputy Director and the last twelve years as Executive Director. Prior to law school, she was a professional campaign coordinator and fundraiser in Washington state, working both on statewide candidate and initiative campaigns as well as local legislative races. After law school, she served as Assistant Dean

for Administration and Public Relations at the UW Law School for five years, then spent a year in Telluride, Colorado, before joining the WSBA. In her volunteer service, she serves as Vice President of the International Institute of Law Association Chief Executives (IILACE); a member of the Institute for the Advancement of the American Legal System (IAALS) Board; and a member of the Executive Committee of the University of Washington School of Law's Leadership Council. She recently served on the American Bar Association's Commission on the Future of Legal Services, co-chairing its Regulatory Opportunities Subcommittee, and was a member of the ABA's Task Force on the Future of Legal Education.

JASON LYNCH

General Counsel

Foundry Group



Jason Lynch is the General Counsel of Foundry Group, a venture capital firm focused on investing in early- and growth-stage technology companies and select venture funds. Prior to joining Foundry, Jason was a partner at Davis Graham & Stubbs LLP, one of Colorado's leading law firms. There, his practiced focused on the litigation of business disputes, cases involving alleged breaches of professional or fiduciary duties, and confidential matters requiring discrete risk assessment and resolution.

QUDSIYA NAQUI

Officer

Pew Charitable Trusts



Qudsiya Naqui joined the Pew Charitable Trusts in March 2019 as an Officer in Pew's newly-created Civil Legal System Modernization Project, where she supports the design and execution of research and technical assistance initiatives aimed at improving the experiences of unrepresented litigants in the civil legal system through leveraging new technologies and other innovations.

Prior to joining Pew, Qudsiya served as a Senior Program Manager at Equal Justice Works, where she designed and implemented programs that launched the careers of lawyers and law students committed to public service. Qudsiya began her career as an immigration attorney and delivered training and technical assistance to non-governmental organizations that provide legal services to unaccompanied immigrant children in federal custody as a Program Associate at the Vera Institute of Justice in New York City. Qudsiya earned her B.A. in Political Science and Human Rights from Barnard College and a J.D. from Temple University Beasley School of Law.

JUSTICE SUSAN OWENS

Washington State Supreme Court



On November 7, 2000, Judge Susan Owens was elected the seventh woman to serve on the Washington State Supreme Court. She joined the court after serving nineteen years as District Court Judge in Western Clallam County, where she was the County's senior elected official with five terms. She also served as the Quileute Tribe's Chief Judge for five years and Chief Judge of the Lower Elwha S'Klallam Tribe for six plus years.

Justice Owens attended college at Duke University. After graduation in 1971, she attended law school at the University of North Carolina at Chapel Hill, receiving her J.D. in 1975. She was admitted to the Oregon State Bar in 1975, and the Washington State Bar in 1976. Justice Owens was active in the District & Municipal Court Judges' Association for many years. She was President-Elect of DMCJA prior to her election to the Supreme Court. She previously served as Vice President, Secretary-Treasurer, and Board member. She served on the Long Range Planning, Diversity, Conference, and Education committees. In 1990, she was co-founder and Chair of the Rural Courts Committee, and has taught that subject at the Judicial College. She is extremely proud to be a member of that most important judiciary.

JAYNE REARDON

Executive Director

Illinois Supreme Court Commission on Professionalism



Jayne Reardon, a former trial lawyer and disciplinary counsel, serves as Executive Director of the Illinois Supreme Court Commission on Professionalism. Promoting the Commission's mission to improve professionalism, civility, and inclusion in the legal and judicial systems, Jayne developed and oversees a statewide lawyer mentoring program and delivery of online and in person professional responsibility education. Past Chair of the ABA Standing Committee on Professionalism and member of

the Association of Professional Responsibility Lawyers' Future of Lawyering Committee, Jayne is a prolific speaker and writer about professionalism and future law topics. She developed and hosts the Commission's annual The Future is Now conference that brings together cutting-edge industry leaders to discuss legal innovations. Jayne is passionate about the need to redesign legal work to be more efficient and effective in the rapidly evolving legal landscape, resulting in greater reward to attorneys and greater access to justice for the public.

LUCY RICCA

Fellow, Stanford Law School Center on the Legal Profession

IAALS Consultant



As a Fellow and former Executive Director of the Stanford Center on the Legal Profession, Lucy Ricca coordinates all aspects of the Center's activities, including developing the direction and goals for the Center and overseeing operations, publications, programs, research, and other interdisciplinary projects. Ricca was a Lecturer at the law school and has written on the regulation of the profession, the changing practice of law, and diversity in the profession. Ricca joined Stanford Law School in June 2013, after clerking for Judge James P. Jones of the United States District Court for the Western District of Virginia. Before clerking, Ricca practiced white collar criminal defense, securities, antitrust, and complex commercial litigation as an associate at Orrick, Herrington & Sutcliffe. Ricca received her B.A. cum laude in History from Dartmouth College and her J.D. from the University of Virginia School of Law.

JULIE SHANKLAND

*General Counsel, Office of General Counsel
Washington State Bar Association*

Julie Shankland is General Counsel of the Washington State Bar. After working in private practice, Julie began her career with the Bar as a disciplinary counsel. She then moved to the adjudicatory side of the Discipline system, working with the Disciplinary Board and hearing officers. She has also worked with the Practice of Law Board.

LYNDA C. SHELY

The Shely Firm, PC



Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to over 1500 law firms in Arizona and the District of Columbia. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona. Prior to moving to Arizona, Lynda was with Morgan, Lewis & Bockius in Washington, DC. Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC.

Lynda is a past president of the Association of Professional Responsibility Lawyers and the Scottsdale Bar Association. She is a member of the ABA Standing Committee on Ethics and Professional Responsibility and liaison to the ABA Working Group to Advance Lawyer Well-being. She also is an Arizona Delegate in the ABA House of Delegates. Lynda is a past chair of the ABA Standing Committee on Client Protection and has served on many Arizona Committees and Task Forces regarding the legal profession. Lynda has received several awards for her contributions to the legal profession, including the 2007 State Bar of Arizona Member of the Year award, the Scottsdale Bar Association's 2010 Award of Excellence, and the 2015 AWLA, Maricopa Chapter, Ruth V. McGregor award. She has been an adjunct professor at all Arizona law schools, teaching professional responsibility.

LEAH WILSON

Executive Director

State Bar of California



Ms. Wilson is the Executive Director of the State Bar of California. In that capacity, she manages a \$180 million budget and 550 staff who are responsible for regulation, licensing, and discipline of California attorneys, as well as for promoting access to legal services and inclusion in the legal profession. Prior to her appointment to that position in September, 2017, she served as the Chief Operating Officer for the State Bar. Before joining the State Bar Ms. Wilson served as the Court Executive Officer (CEO) for the Alameda County Superior Court. There, in addition to being responsible for overall court operations, personnel, budget and policy, she took a particular interest in collaborative courts, and advocated for the use of risk assessment tools and an expansion of effective alternatives to incarceration. Ms. Wilson holds a Master's Degree in Public Policy and a Juris Doctorate, both from the University of California, Berkeley, and is a member of the California State Bar. She also served as President of the Berkeley Unified School District's Board of Education.

JESSICA YATES

Attorney Regulation Counsel

Colorado Supreme Court



Jessica Yates is Attorney Regulation Counsel for the Colorado Supreme Court. Ms. Yates oversees attorney admissions, attorney registration, mandatory continuing legal and judicial education, attorney discipline and diversion, regulation against the unauthorized practice of law, and inventory counsel matters. Prior to her appointment by the Colorado Supreme Court, Ms. Yates was in private practice as a partner at Snell & Wilmer LLP, focusing on appeals and litigation. She clerked for the Honorable David M. Ebel of the U.S. Court of Appeals for the Tenth Circuit. She earned her J.D. from the University of Virginia School of Law in 2006.

While in private practice, Ms. Yates was the Denver lead for her firm's ethics committee, and served as the firm's co-chair for its pro bono committee. She was active in the Colorado Bar Association's appellate group, helping organize its annual appellate CLE for several years, and served on the CBA's amicus curiae committee. She also served on the Standing Committee on Pro Se Litigation for the U.S. District Court for the District of Colorado. She participated on the Criminal Justice Act appellate panel for the Tenth Circuit.

Ms. Yates transitioned into law from a career in public policy and public administration, which focused on management, regulatory and funding issues for health and human services programs. She received her M.A. in Public Administration and Public Policy from the University of York, England, and her B.A. in Journalism and Mass Communication from the University of North Carolina-Chapel Hill.

#10: New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"),

Public Comment Draft of Proposed Changes to Various RPCs, including Rule 5.4

(proposal would add a new Rule 5.4(a)(4) to address a division of fees between New York lawyers and out-of-state co-counsel or referring lawyers who work in law firms with nonlawyer owners or supervisors)

[This document will be added to the conference materials once it is circulated]

Back to the Future (Again) Regarding the Regulation of Legal Services

Author : Laurel Terry

Date : April 18, 2019

William D. Henderson, [Legal Market Landscape Report Commissioned by the State Bar of California](#) (July 2018).

In July 2018, the State Bar of California authorized the formation of a [Task Force on Access Through Innovation of Legal Services](#). This Task Force has been asked to identify possible regulatory changes to enhance the delivery of, and access to, legal services. It will address three broad topics: 1) the definition of unauthorized practice of law; 2) lawyer marketing, advertising, partnership, and fee-splitting rules; and 3) non-lawyer ownership and investment. The first sentence of the [Task Force Fact Sheet](#) states that “Too many Californians needing legal services cannot afford an attorney or don’t have meaningful access.” The second sentence of the Fact Sheet cites a 2018 [Legal Market Landscape Report](#) that was commissioned by the [State Bar of California](#) and written by Professor [Bill Henderson](#).

Professor Henderson’s 2018 *Legal Market Landscape Report* is a document that all lawyers should read. It is jam-packed with data, and it provides the grounding for California’s ongoing conversations regarding the proper scope of lawyer regulation. Moreover, much of the information in the *Report* is not California-specific and thus is of interest to anyone who is concerned about access to legal services and the proper scope of lawyer regulation.

One of the things that I like about Professor Henderson’s work is that I usually encounter sources and perspectives that I am not familiar with. This is true of Professor Henderson’s *Legal Market Landscape Report*, just as it has been true of other Henderson publications such as his recent article, [Innovation Diffusion in the Legal Industry](#).¹ The first section of the *Report* is entitled “Size and Composition of the U.S. Legal Market.” In addition to citing U.S. Census Bureau and U.S. Bureau of Labor Statistics data, which has become relatively common, this section includes an interesting discussion of “Lawyers Working in the Gig Economy” and the data sources that one might use to track these developments. There is increasing scholarly interest in the [gig economy](#), and it is useful to have data sources that one can use as a proxy for tracking the increase in “gig lawyers.”

Section 1 of the *Report* also includes a review of alternative legal service providers. The *Report* asserts that “it is hard to overstate the tremendous economic and technological ferment of the legal ecosystem growing up within and around the traditional legal services market.” This section describes the services offered by some of these alternative legal services providers and provides links to legal tech maps produced by others. The *Report*’s descriptions and classifications are useful given the thousands of start-up companies that are active in the “legal services space” (see, e.g., [here](#) and [here](#)). Figure 4 in this section is a useful graphic entitled “Legal AI Landscape 2018” that has the logos of more than sixty AI companies arranged around an “X” axis that lists eleven different categories of services. Towards the end of this section, Professor Henderson observes that:

As momentum grows, more pressure will be placed on a regulatory framework premised on one-to-one legal services. This raises very difficult questions for regulators, as paradigm shifts are rare events that are difficult to recognize. Rather than amend an ethics framework built for a bygone era, the public interest may be better served by a new regulatory structure that includes traditional lawyering side by side with one-to-many legal services, products and solutions created by a wide range of professionals from multiple disciplines.

The second section of the *Report* focuses on “Individual versus Organizational Clients.” This section’s introductory paragraph states that there are two legal markets that need to be analyzed separately because they involve different

economic drivers that are evolving in very different ways. The first subsection cites the conclusions from the classic 1975 and 1995 *Chicago Lawyers* studies, which found that lawyers tend to work in one of two “hemispheres,” serving either organizational clients, on the one hand, or individual clients, which Henderson here refers to as “PeopleLaw,” on the other hand.² This section explains why Professor Henderson believes that the *Chicago Lawyers* hemisphere framework is a useful lens for understanding current changes within the legal profession. This section contains data about the economics of large organizational clients and the economics of PeopleLaw, as well as other interesting charts, tables, and information. For example, one figure shows that, between 2007 and 2012, there was a decrease in both the absolute dollar amount and the percentage of total dollars that were spent on legal services for individuals. During the same time period, there was an increase in both the absolute dollar amount and the percentage of total dollars that were spent on legal services for organizational clients. The *Report* observes that this data “suggests we are in the midst of an irreversible structural shift” and that “it is reasonable to ask whether the public interest would be better served by a regulatory structure that is sensitive to the challenges that exist within these two very different parts of parts of the market.”

The *Report*’s third section addresses “The Problem of Lagging Legal Productivity” and the impact of “cost disease” on legal education and legal practice and its impact on the courts and access to justice. (Relying on work done by economists, Henderson explains that “cost disease” occurs in situations in which prices tend to go up much faster than worker income due to the lack of productivity gains). He concludes that the legal sector has experienced all three symptoms of “cost disease,” including higher relative cost, shrinking demand, and substitution. The final segment of this section, which is entitled “courts and access to justice,” observes that “Courts are on the front line of the legal sector’s cost disease problem. Yet, as explained below, courts are also partially responsible for cost disease.” After providing examples of some of the ways in which courts increase the cost of legal services, the *Report* notes that some courts are starting to respond. The *Report* quotes [Richard Susskind](#) who asked, “Is court a service or a place?” and then cites several jurisdictions that have begun to offer or require online dispute resolution.³

The final section of the 2018 *Legal Market Landscape Report* is entitled “Ethics Rules and Market Regulation.” As its name indicates, this section identifies the regulatory architecture that affects the delivery of legal services to individuals (“PeopleLaw”) and to organizational clients. Professor Henderson highlights the impact of these rules on the legal services market:

The key point of this section is that the ethics rules, particularly those pertaining to the prohibition on nonlawyer ownership ([Rule 5.4](#)) and the unauthorized practice of law ([Rule 5.5](#)), are the primary determinants of how the current legal market is structured. Without these rules, the market would look very different, as private businesses would be free to offer legal-oriented goods and services to both clients and lawyers....[P]rivate investors see ample opportunity in the current legal market. The best way to orient the Trustees to the issues at hand is to describe how the current ethics rules [such as Rules 5.4, 5.5, [7.2](#), and [7.3](#)] are shaping the U.S. legal market....The ethics rules affect [the organization client sector and the PeopleLaw sector] in different ways.

The reason why this jot is entitled “Back to the Future (Again)” is so that the title can signal the fact that the *Legal Market Landscape Report* addresses issues similar to those that have been addressed in prior and current initiatives. The [ABA Commission on the Future of Legal Services](#), the [ABA Commission on Ethics 20/20](#), and the proposed but then withdrawn 2019 resolution on [Guidelines for Online Document Providers](#) previously addressed related issues. The [Association of Professional Responsibility Lawyers “Future of Lawyering” Committee](#) currently is studying issues similar to those that the California Task Force is examining. Moreover, these kinds of discussions are not limited to the United States. Similar issues have been discussed in the [International Bar Association](#) President’s [Task Force on the Future of Legal Services](#), International Conference of Legal Regulators conferences (see, e.g., [here](#), [here](#), and [here](#)), the [Future of the Legal Profession and Legal Services Committee](#) of the Council of Bars and Law Societies of Europe (CCBE),⁴ the 2017 Report on the Future of Law and Innovation in the Profession [[the FLIP report](#)] from the [Law Society of New South Wales](#) [Australia], [Stephen Mayson’s “Independent Review of \[UK\] Legal Services Regulation](#), in the Compliance-Based Entity Regulation Task Force of the Law Society of Ontario [Canada], and in initiatives by Canadian regulators in [Nova Scotia](#), [British Columbia](#), and the [Prairie Provinces](#).

These prior initiatives suggest that not everyone who reads Professor Henderson's *Report* will agree with his conclusion that "the law should not be regulated to protect the 10 percent of consumers who can afford legal services while ignoring the 90 percent who lack the ability to pay. This is too big a gap to fill through a renewed commitment to pro bono. This is a structural problem rooted in lagging legal productivity that requires changes in how the market is regulated." But regardless of whether you agree with the *Report's* conclusions, it is important to be aware of the data and issues that frame the contemporary debate and discussion about legal services regulation. The *2018 Legal Market Landscape Report* is an invaluable resource for those who are familiar with these initiatives and for those who are new to these debates.

1. William D. Henderson, [Innovation Diffusion in the Legal Industry](#), 122 **Dickinson L. Rev.** 395 (2017). The *Innovation Diffusion* article is based on the first few posts in Professor Henderson's "[Legal Evolution](#)" blog, which includes information and data that many lawyers do not regularly encounter.
2. See John P. Heinz and Edward O. Laumann, [Chicago Lawyers: The Social Structure of the Bar](#) (1982); John P. Heinz, Edward O. Laumann, Robert L. Nelson & Ethan Michelson, [The Changing Character of Lawyers' Work: Chicago in 1975 and 1995](#), 32 **Law & Society Review** 751 (1998).
3. Because the *Legal Market Landscape Report* was issued in July 2018, it does not discuss the Utah Courts' [online dispute resolution](#) system, which was launched in September 2018 and was the topic of my previous Jotwell post. See Laurel Terry, [Look What's New! Utah's Groundbreaking Efforts to Use Online Dispute Resolution \(ODR\) to Increase Access to Justice](#), JOTWELL (October 5, 2018) (reviewing Justice Deno Himonas, *Utah's Online Dispute Resolution Program*, 122 **Dickinson L. Rev.** 875 (2018)). For additional Utah efforts, see Utah Supreme Court, *A Move Toward Equal Access to Justice* (March 4, 2019) (noting that by June 30, 2019, a work group will "make recommendations to the Court about optimizing the regulatory structure for legal services in the Age of Disruption in a manner that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services.").
4. This CCBE Committee webpage is unusually empty, but one can find relevant information [here](#) (2018 conference on AI and Justice); [here](#) (2016 conference agenda); and [here](#) (guide on lawyers' use of online legal platforms).

Cite as: Laurel Terry, *Back to the Future (Again) Regarding the Regulation of Legal Services*, JOTWELL (April 18, 2019) (reviewing William D. Henderson, *Legal Market Landscape Report Commissioned by the State Bar of California* (July 2018)), <https://legalpro.jotwell.com/back-to-the-future-again-regarding-the-regulation-of-legal-services/>.

SELECTED EXAMPLES of REGULATORY OBJECTIVES*

Prepared by Prof. Laurel Terry, (LTerry@psu.edu)

Available at https://works.bepress.com/laurel_terry/89/, Rev'd March 2, 2019*

Nova Scotia Barristers' Society [the regulator]¹	The Terry-Mark-Gordon Recommendations²
<ol style="list-style-type: none"> 1. Protect those who use legal services. 2. Promote the rule of law and the public interest in the justice system. 3. Promote access to legal services and the justice system. 4. Establish required standards for professional responsibility and competence in the delivery of legal services. 5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system. 6. Regulate in a manner that is proactive, principled and proportionate. 	<ol style="list-style-type: none"> 1. Protection of clients; 2. Protection of the public interest; 3. Promoting public understanding of the legal system and respect for the rule of law; 4. Supporting the rule of law and ensuring lawyer independence sufficient to allow for a robust rule of-law culture; 5. Increasing access to justice (including clients' willingness and ability to access lawyers' services); 6. Promoting lawyers' compliance with professional principles (including competent and professional delivery of services); 7. Ensuring that lawyer regulation is consistent with principles of "good regulation."
ABA Model Regulatory Objectives for the Provision of Legal Services (2016)³	UK 2007 Legal Services Act, Sec. 1(1)⁴
<ol style="list-style-type: none"> A. Protection of the public B. Advancement of the administration of justice and the rule of law C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections E. Delivery of affordable and accessible legal services F. Efficient, competent, and ethical delivery of legal services G. Protection of privileged and confidential information H. Independence of professional judgment I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system 	<p>(1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—</p> <ol style="list-style-type: none"> (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services within subsection (2); (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles.

* Please email Penn State Dickinson Law Professor Laurel Terry at LTerry@psu.edu if you aware of additional U.S. examples.

¹ Nova Scotia Barristers' Society, Regulatory Objectives (Adopted in 2014, updated in 2016), <https://perma.cc/JL9J-BUQU> (includes explanations, drafts, and legislative history)

² Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping On The Regulatory Objectives Bandwagon*, 22(1) Prof. L. 28 (Dec. 2013) (9-page article plus footnotes); Laurel S. Terry, Steve Mark, Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 Fordham L. Rev. 2685 (2012) (lengthy article with an appendix containing examples from numerous jurisdictions and tables comparing language for similar objectives), available at https://works.bepress.com/laurel_terry/11/ and https://works.bepress.com/laurel_terry/55/. Regulatory objectives slides are here: https://works.bepress.com/laurel_terry/88/.

³ American Bar Association, Original Resolution 105 and Report, <https://perma.cc/H6F5-FM2Z>; **Resolution 105 as adopted Feb. 2016**, <https://perma.cc/3WQG-LDBW>

⁴ [UK] Legal Services Act of 2007, <https://www.legislation.gov.uk/ukpga/2007/29/section/1>

SELECTED EXAMPLES OF REGULATORY OBJECTIVES

Prepared by Prof. Laurel Terry, Penn State Dickinson Law (LTerry@psu.edu), p. 2

Colorado⁵

... In regulating the practice of law in Colorado in the public interest, the Court's objectives include:

1. Increasing public understanding of and confidence in the rule of law, the administration of justice and each individual's legal rights and duties;
2. Ensuring compliance with essential eligibility requirements, rules of professional conduct and other rules in a manner that is fair, efficient, effective, targeted and proportionate;
3. Enhancing client protection and promoting consumer confidence through Attorney Regulation Counsel, the Attorneys Fund for Client Protection, inventory counsel services, the regulation of non-lawyers engaged in providing legal services, and other proactive programs;
4. Assisting providers of legal services in maintaining competence and professionalism through continuing legal education; Attorney Regulation Counsel professionalism, ethics and trust account schools; and other proactive programs;
5. Helping lawyers throughout the stages of their careers successfully navigate the practice of law and thus better serve their clients, through COLAP, CAMP and other proactive programs;
6. Promoting access to justice and consumer choice in the availability and affordability of competent legal services;
7. Safeguarding the rule of law and ensuring judicial and legal service providers' independence sufficient to allow for a robust system of justice;
8. Promoting diversity, inclusion, equality and freedom from discrimination in the delivery of legal services and the administration of justice; and
9. Protecting confidential client information.

Illinois⁶

Regulatory Objectives for the Provision of Legal Services of the Supreme Court of Illinois

- A. Protection of the public
- B. Advancement of the administration of justice and the rule of law
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
- E. Delivery of affordable and accessible legal services
- F. Efficient, competent, and ethical delivery of legal services
- G. Protection of privileged and confidential information
- H. Independence of professional judgment
- I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

Adopted by the Supreme Court November Term 2017

⁵ Preamble to Chapters 18 to 20, Rules Governing the Practice of Law, Colorado Supreme Court (Adopted April 7, 2016), <https://perma.cc/2XG7-LV6H>.

⁶ Regulatory Objectives for the Provision of Legal Services of the Supreme Court of Illinois (2017), <https://perma.cc/YCG4-L586>. See also the homepage of the Illinois Attorney Registration & Discipline Commission, <https://perma.cc/4ZB9-LSXT>.

Washington⁷

Legal services providers must be regulated in the public interest. In regulating the practice of law in Washington, the Washington Supreme Court's objectives include:

- (a) protection of the public;
- (b) advancement of the administration of justice and the rule of law;
- (c) meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems;
- (d) transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections;
- (e) delivery of affordable and accessible legal services;
- (f) efficient, competent, and ethical delivery of legal services;
- (g) protection of privileged and confidential information;
- (h) independence of professional judgment;
- (i) Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs;
- (j) Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

⁷ Washington Rules of Court, General Rules, GR 12.1 (Adopted effective Sept. 1, 2017), <https://perma.cc/L4CK-57T9>.

APPENDIX 1

COMPARING OUR RECOMMENDED OBJECTIVES WITH EXISTING AND DRAFT REGULATORY OBJECTIVES²⁸³

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
1. Protection of clients	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(d)²⁸⁴ ▪ Scotland § 1(b)(i)²⁸⁵ ▪ New Zealand § 3(1)(a)–(b)²⁸⁶ ▪ Nova Scotia § 33²⁸⁷ ▪ Draft Australia s 1.1.3(c)²⁸⁸ ▪ Draft India § 3(d)²⁸⁹ ▪ Draft Ireland § 9(4)(c)²⁹⁰ 	<p>Some objectives refer to “consumers” and some refer to “clients.”²⁹¹</p> <p>Some include in a single objective “protecting” and “promoting” the interests of consumers.²⁹² We have separated these in Recommended Objectives 1 and 5.</p> <p>Some do not refer explicitly to clients but presumably include this idea when referring to public interest.²⁹³</p>

283. Our recommended objectives and rationale are set forth *supra*. The existing and draft regulatory objectives for the legal profession are described *supra* at Part II.A–B. For convenience’s sake, the existing and draft regulatory objectives are consolidated in Appendix 2, *infra*. This appendix cross-references our recommended objectives with the existing and draft regulatory objectives for the legal profession. Appendix 1 also highlights some of the comments found in Part II.D.

284. Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.).

285. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(b)(i).

286. Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(a)–(b) (N.Z.).

287. Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, § 33 (Can.).

288. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(c) (Austl.).

289. [Draft] Legal Practitioners Act, 2010, § 3(a) (India).

290. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(c) (Ir.).

291. *Compare* Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.) (consumers), *with* [Draft] Legal Practitioners Act, 2010, § 3(d) (India) (clients).

292. *See, e.g.*, Legal Services Act, 2007, c. 29, § 1(1)(d) (U.K.) (“protecting and promoting the interests of consumers”). *Compare* Recommended Objective 1 (protection of clients), *with* Recommended Objective 5 (increasing access to justice).

293. *See, e.g.*, Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a) (Can.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
2. Protection of the public interest	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(a)²⁹⁴ ▪ Scotland § 1(b)(ii)²⁹⁵ ▪ New Zealand § 3(1)(b)²⁹⁶ ▪ Alberta § 49(c)²⁹⁷ ▪ British Columbia § 3(a)²⁹⁸ ▪ Manitoba § (3)(1)²⁹⁹ ▪ New Brunswick § 5(a)³⁰⁰ ▪ Newfoundland and Labrador § 18(1)(1)³⁰¹ ▪ Northwest Territories § 22(a)³⁰² ▪ Nova Scotia § 33³⁰³ ▪ Ontario § 4.2(3)³⁰⁴ ▪ Prince Edward Island § 4(a)³⁰⁵ ▪ Quebec § 12³⁰⁶ ▪ Saskatchewan § 3.1(a)³⁰⁷ ▪ Yukon § 3(a)³⁰⁸ ▪ Draft Australia s 1.1.3(c)³⁰⁹ ▪ Draft India § 3(a)³¹⁰ ▪ Draft Ireland § 9(4)(a)³¹¹ 	<p>Most cite protection of the public interest, but Australia simply cites protection of the public.³¹² Some refer to the “best interests” of the public and some add the word “generally” after stating protection of the public interest.³¹³</p> <p>Some say protecting and promoting, others do not.³¹⁴ Scotland has distinct objectives for supporting the interests of justice and protecting-promoting public interest.³¹⁵</p> <p>This key concept was omitted from the original U.K. bill.³¹⁶</p>

294. Legal Services Act, 2007, c. 29, § 1(1)(a) (U.K.).

295. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(b)(ii).

296. *Cf.* Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(b) (N.Z.). This section refers to maintaining confidence in the provision of legal services, which might mean something different than protection of the public interest.

297. Legal Profession Act, R.S.A. 2000, c. L-8, pt. 3, § 49(c) (Can.).

298. Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a) (Can.).

299. Legal Profession Act, C.C.S.M., c. L107, pt. 2, § (3)(1) (Can.).

300. Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(a) (Can.).

301. Law Society Act, S.N.L. 1999, c. L-9.1, pt. 1, § 18(1)(1) (Can.).

302. Legal Profession Act, R.S.N.W.T. 1998, c. L-2, pt. 3, § 22(a) (Can.).

303. Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, § 33 (Can.).

304. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(3) (Can.).

305. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(a) (Can.).

306. An Act Respecting the Barreau du Québec, R.S.Q., c. B-1, § 12 (Can.).

307. Legal Profession Act, 1990, S.S. 1990, c. L-10.1, pt. 2, § 3.1(a) (Can.).

308. Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a) (Can.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
3. Promoting public understanding of the legal system and respect for the rule of law	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(b)³¹⁷ ▪ Scotland § 1(a)(i)³¹⁸ ▪ Ontario § 4.2(1)³¹⁹ ▪ Draft India § 3(b), (g)³²⁰ ▪ Draft Ireland § 9(4)(b)³²¹ 	<p>U.K. § 1(1)(b) and others refer to supporting the “constitutional” principle of the rule of law and § 1(1)(g) asks for increased public understanding of citizens’ rights and duties.³²² India § 3(g) similarly focuses on public knowledge.³²³ Ireland refers to supporting the proper and effective administration of justice.³²⁴</p>

309. [Draft] *Legal Professional National Law 2011*, ch 1, pt 1, s 1.1.3(c) (Austl.).

310. [Draft] *Legal Practitioners Act, 2010*, § 3(a) (India).

311. *Legal Services Regulation Bill 2011* (Act No. 58/2011), pt. 2, § 9(4)(a) (Ir.).

312. *Compare* *Legal Services Act, 2007*, c. 29, § 1(1)(a) (U.K.), with [Draft] *Legal Professional National Law 2011*, ch 1, pt 1, s 1.1.3(c) (Austl.).

313. *See, e.g.*, *Legal Profession Act, R.S.A. 2000*, c. L-8, pt. 3, § 49(c) (Can.) (“is incompatible with the best interests of the public”); *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(b)(ii) (“the public interest generally”).

314. *Compare* *Legal Services Act, 2007*, c. 29, § 1(1)(a) (U.K.) (“protecting and promoting”), with *Law Society Act, R.S.O. 1990*, c. L.8, pt. 1, § 4.2(1) (Can.) (“The Society has a duty to protect the public interest.”).

315. *See* *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(a)(ii), (b)(ii).

316. *See supra* note 68 and accompanying text.

317. *Legal Services Act, 2007*, c. 29, § 1(1)(b), (g) (U.K.).

318. *Legal Services (Scotland) Act, 2010*, (A.S.P. 16), § 1(a)(i).

319. *Law Society Act, R.S.O. 1990*, c. L.8, pt. 1, § 4.2(1) (Can.) (“The Society has a duty to maintain and advance the cause of justice and the rule of law.”). British Columbia, New Brunswick, Prince Edward Island, and the Yukon refer to the public interest in the administration of justice, which is arguably similar. *See* *Legal Profession Act, S.B.C. 1998*, c. 9, pt. 1, § 3(a) (Can.); *Law Society Act, S.N.B. 1996*, c. 89, pt. 2, § 5(a) (Can.); *Legal Profession Act, S.P.E.I. 1992*, c. L-6.1, pt. 2, § 4(a) (Can.); *Legal Profession Act, R.S.Y. 2002*, c. 134, pt. 1, § 3(a) (Can.).

320. [Draft] *Legal Practitioners Act, 2010*, § 3(b), (g) (India).

321. *Legal Services Regulation Bill 2011* (Act No. 58/2011), pt. 2, § 9(4)(b) (Ir.).

322. *See* *Legal Services Act, 2007*, c. 29, § 1(1)(b), (g) (U.K.) (“increasing public understanding of the citizen’s legal rights and duties”).

323. [Draft] *Legal Practitioners Act, 2010*, § 3(b), (g) (India) (“creating legal awareness amongst the general public and to make the consumers of the legal profession well informed of their legal rights and duties”).

324. *Legal Services Regulation Bill 2011* (Act No. 58/2011), pt. 2, § 9(4)(b) (Ir.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
4. Ensuring lawyer independence sufficient to allow for a robust “rule of law” culture	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(b)³²⁵ ▪ Scotland § 1(a)(i), 1(d)³²⁶ ▪ Denmark Bylaw 1³²⁷ ▪ British Columbia § 3(a)(ii)³²⁸ ▪ Manitoba § 3(1)³²⁹ ▪ New Brunswick § 5(c)³³⁰ ▪ Prince Edward Island § 4(c)³³¹ ▪ Yukon § 3(a)(2)³³² ▪ Draft Australia 1.1.3(f)³³³ ▪ Draft India § 3(f)³³⁴ ▪ Draft Ireland § 9(4)(e)³³⁵ 	<p>The concept of lawyer independence appears often but in varied settings. Several jurisdictions refer to lawyer independence; some of these same jurisdictions have separate objectives regarding the rule of law.³³⁶</p> <p>Regarding independence, the United Kingdom says “ensuring an independent, strong, diverse, and effective legal profession.”³³⁷ Others refer to “varied” rather than “diverse” and some omit this term.³³⁸ India adds language that lawyers have ethical obligations and a strong sense of duty toward tribunals.³³⁹</p> <p>Many Canadian provinces refer in the same paragraph to “independence, integrity, and honor.”³⁴⁰</p> <p>The Australian objective combines independence with a reference to co-regulatory systems.³⁴¹</p> <p>Our recommendation combines these concepts so that it is clear that lawyer independence is not a self-serving value, but is directly related to maintaining a robust rule of law.</p>

325. Legal Services Act, 2007, c. 29, § 1(1)(b), (e) (U.K.).

326. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(a)(i), 1(d).

327. Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1 (“to guard the independence and integrity of lawyers”).

328. Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a)(iii) (Can.).

329. Legal Profession Act, C.C.S.M., c. L107, pt. 2, § 3(1) (Can.).

330. Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(c) (Can.).

331. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(c) (Can.).

332. Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a)(2) (Can.).

333. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(f) (Austl.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
<p>5. Increasing access to justice (including clients' willingness and ability to access lawyers' services)</p>	<p>Access to justice provisions:</p> <ul style="list-style-type: none"> ▪ U.K. § 1(1)(c)³⁴² ▪ Scotland § 1(c)(i)³⁴³ ▪ Ontario § 4.2(2)³⁴⁴ ▪ Draft Australia s 1.1.3(e)³⁴⁵ ▪ Draft India § 3(c)³⁴⁶ <p>Competition provisions:</p> <ul style="list-style-type: none"> ▪ U.K. § 1(1)(e)³⁴⁷ ▪ Scotland § 1(c)(ii)³⁴⁸ ▪ Draft India § 3(e)³⁴⁹ ▪ Draft Ireland § 9(4)(d)³⁵⁰ 	<p>There is some language variability. The United Kingdom says "improving public access" whereas Scotland says "promoting public access."³⁵¹ Australia speaks of empowering clients to make informed choices about the services and costs.³⁵²</p> <p>We believe that "competition" is best thought of as an instrumental goal designed to increase access rather than as a stand-alone objective. We have added language to explain that access includes concepts of ability and willingness, which would include cost and other issues. There is some variability among those jurisdictions that list competition as a stand-alone objective. India, for example, states that competition must be for the goal of improving the quality of service.</p>

334. [Draft] Legal Practitioners Act, 2010, § 3(f) (India).

335. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(e) (Ir.).

336. *See, e.g.*, Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(a)(i), 1(d); *see also* Recommended Objective 3, *supra*, for citations to objectives with "rule of law" language.

337. Legal Services Act, 2007, c. 29, § 1(1)(b), (e) (U.K.).

338. *See, e.g.*, Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(d) ("promoting an independent, strong, varied and effective legal profession").

339. [Draft] Legal Practitioners Act, 2010, ch. 3(f) (India).

340. *See, e.g.*, Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(c) (Can.); Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(c) (Can.).

341. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(f) (Austl.).

342. Legal Services Act, 2007, c. 29, § 1(1)(c) (U.K.).

343. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(i).

344. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(2) (Can.).

345. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e) (Austl.).

346. [Draft] Legal Practitioners Act, 2010, § 3(c) (India).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
6. Promoting lawyers' compliance with professional principles (including competent and professional service)	<ul style="list-style-type: none"> ▪ U.K. § 1(1)(h)³⁵³ ▪ Scotland § 1(f)³⁵⁴ ▪ Denmark Bylaw 1³⁵⁵ ▪ British Columbia § 3(a)(iii)³⁵⁶ ▪ Manitoba § 3(2)(a)³⁵⁷ ▪ New Brunswick § 5(d)³⁵⁸ ▪ Nova Scotia §§ 4(2)(b), 33³⁵⁹ ▪ Prince Edward Island § 4(b)³⁶⁰ ▪ Saskatchewan § 3.1(c)³⁶¹ ▪ Yukon § 3(a)(iii)³⁶² ▪ Draft Australia s 1.1.3(b)³⁶³ ▪ Draft India § 3(h)³⁶⁴ ▪ Draft Ireland § 9(4)(f)³⁶⁵ 	<p>There is variability in the way this concept is conveyed. The United Kingdom and Scotland refer to professional principles and then list them in a separate section.³⁶⁶ Australia does not refer to professional principles, but identifies competency and maintaining high ethical and professional standards.³⁶⁷ Denmark refers to discharging the duties and obligations of lawyers.³⁶⁸ Some refer to the professional responsibility of lawyers.³⁶⁹</p>

347. Legal Services Act, 2007, c. 29, § 1(1)(e) (U.K.).

348. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(c)(ii).

349. [Draft] Legal Practitioners Act, 2010, § 3(e) (India).

350. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(d) (Ir.).

351. Legal Services Act, 2007, c. 29, § 1(1)(c) (U.K.).

352. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e) (Austl.).

353. Legal Services Act, 2007, c. 29, § 1(1)(h) (U.K.).

354. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1(f).

355. Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1.

356. Legal Profession Act, S.B.C. 1998, c. 9, pt. 1, § 3(a)(iii) (Can.).

357. Legal Profession Act, C.C.S.M., c. L107, pt. 2, § 3(2)(a) (Can.).

358. Law Society Act, S.N.B. 1996, c. 89, pt. 2, § 5(d) (Can.).

359. Legal Profession Act, S.N.S. 2004, c. 28, pt. 3, §§ 4(2)(b), 33 (Can.).

360. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, pt. 2, § 4(b) (Can.).

361. Legal Profession Act, 1990, S.S. 1990, c. L-10.1, pt. 2, § 3.1(c) (Can.).

362. Legal Profession Act, R.S.Y. 2002, c. 134, pt. 1, § 3(a)(iii) (Can.).

363. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b) (Austl.).

364. [Draft] Legal Practitioners Act, 2010, § 3(h) (India).

365. Legal Services Regulation Bill 2011 (Act No. 58/2011), pt. 2, § 9(4)(f) (Ir.).

366. Legal Services Act, 2007, c. 29, §§ 1(h), 2 (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), §§ 1(f), 2.

367. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(b) (Austl.).

368. Bylaws of the Danish Bar and Law Society, *supra* note 123, at bylaw 1.

369. *See, e.g.*, Legal Profession Act, C.C.S.M., c. L107, pt. 2, § 3(2)(a) (Can.).

Our Recommended Objective	Related Concepts in Draft or Existing Objectives	Variations and Observations
7. Ensuring that lawyer regulation is consistent with principles of “good regulation”	<ul style="list-style-type: none"> ▪ Ontario § 4.2(4)–(5)³⁷⁰ ▪ Draft Australia s 1.1.3(a), (e)³⁷¹ 	Most jurisdictions do not include these types of principles. ³⁷² Australia and Ontario list regulatory principles but express them differently. ³⁷³

370. Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2(4)–(5) (Can.).

371. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(a), (e) (Austl.).

372. See generally *infra* Appendix 2.

373. See [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3(e) (Austl.); Law Society Act, R.S.O. 1990, c. L.8, pt. 1, § 4.2 (4)–(5) (Can.). Both Australia and Ontario refer to proportionality. Australia also refers to national consistency and regulation that is efficient, effective, targeted & proportionate, whereas Ontario refers to timely, open and efficient regulation. *Id.*; see also *supra* note 103 (citing the Manitoba, Ontario, and Nova Scotia laws that apply to multiple professions, including the legal profession).

APPENDIX 2

EXISTING AND DRAFT REGULATORY OBJECTIVES

(IN REVERSE ALPHABETICAL ORDER)

*United Kingdom [England and Wales]*³⁷⁴

Legal Services Act, 2007, c. 29, § 1 (U.K.).

(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2) [referring to authorized persons];
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

*Scotland*³⁷⁵

Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1.

1 Regulatory Objectives

For the purposes of this Act, the regulatory objectives are the objectives of—

- (a) supporting—
 - (i) the constitutional principle of the rule of law,
 - (ii) the interests of justice,
- (b) protecting and promoting—
 - (i) the interests of consumers,
 - (ii) the public interest generally,
- (c) promoting—
 - (i) access to justice,

374. Legal Services Act, 2007, c. 29 (U.K.), available at <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=3&NavFrom=2&parentActiveTextDocId=3423426&ActiveTextDocId=3423429&filesize=4184>.

375. Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1, available at http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf.

- (ii) competition in the provision of legal services,
- (d) promoting an independent, strong, varied and effective legal profession,
- (e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
- (f) promoting and maintaining adherence to the professional principles.

*New Zealand*³⁷⁶

Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(a)–(c).

3 Purposes

(1) The purposes of this Act are—

- (a) to maintain public confidence in the provision of legal services and conveyancing services;
- (b) to protect the consumers of legal services and conveyancing services;
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

*Denmark*³⁷⁷

Bylaws of the Danish Bar and Law Society

Adopted by the General Meeting of Lawyers on 25 October 2008.

Objects and registered office

Bylaw 1

The objects for which the Danish Bar and Law Society is established are to guard the independence and integrity of lawyers;
to ensure and enforce the discharge of the duties and obligations of lawyers;
to maintain the professional skills of lawyers; and
to work for the benefit of the Danish legal community.

376. Lawyers and Conveyancers Act 2006, pt. 1, § 3(1)(a)–(c), available at <http://www.legislation.govt.nz/act/public/2006/0001/latest/DLM364939.html>.

377. *Bylaws of the Danish Bar and Law Society, Adopted by the General Meeting of Lawyers on 25 October 2008*, available at http://www.advokatsamfundet.dk/Service/English/Rules/~media/Files/English/Vedtaegt_for_Det_Danske_Advokatsamfund_-_08122008_eng2.ashx.

Canada

<p><i>Alberta</i>³⁷⁸ Legal Profession Act, R.S.A. 2000, c. L-8.</p>
<p>Conduct of Members Interpretation 49(1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that</p> <ul style="list-style-type: none"> (a) is incompatible with the best interests of the public or of the members of the Society, or (b) tends to harm the standing of the legal profession generally, is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.
<p><i>British Columbia</i>³⁷⁹ Legal Profession Act, S.B.C. 1998, c. 9.</p>
<p>Public interest paramount 3 It is the object and duty of the society</p> <ul style="list-style-type: none"> (a) to uphold and protect the public interest in the administration of justice by <ul style="list-style-type: none"> (i) preserving and protecting the rights and freedoms of all persons, (ii) ensuring the independence, integrity and honour of its members, and (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and (b) subject to paragraph (a), <ul style="list-style-type: none"> (i) to regulate the practice of law, and (ii) to uphold and protect the interests of its members.
<p><i>Manitoba</i>³⁸⁰ Legal Profession Act, C.C.S.M., c. L107.</p>
<p>Purpose 3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence. Duties 3(2) In pursuing its purpose, the society must</p>

378. Legal Profession Act, R.S.A. 2000, c. L-8, *available at* <http://www.qp.alberta.ca/documents/Acts/l08.pdf>.

379. Legal Profession Act, S.B.C. 1998, c. 9 (effective Dec. 31, 1998) (current to Sept. 21, 2011), *available at* http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_98009_01.

380. Legal Profession Act, C.C.S.M., c. L107 (last revised June 12, 2008), *available at* <http://web2.gov.mb.ca/laws/statutes/ccsm/l107e.php>.

<p>(a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and</p> <p>(b) regulate the practice of law in Manitoba.</p>
<p><i>New Brunswick</i>³⁸¹ Law Society Act, 1996, S.N.B. 1996, c. 89.</p>
<p>5 It is the object and duty of the Society</p> <p>(a) to uphold and protect the public interest in the administration of justice,</p> <p>(b) to preserve and protect the rights and freedoms of all persons,</p> <p>(c) to ensure the independence, integrity and honor of its members,</p> <p>(d) to establish standards for the education, professional responsibility and competence of its members and applicants for membership,</p> <p>(e) to regulate the legal profession, and</p> <p>(f) subject to paragraphs (a) to (d), to uphold and protect the interests of its members.</p>
<p><i>Newfoundland and Labrador</i>³⁸² Law Society Act, S.N.L. 1999, c. L-9.1.</p>
<p>Powers of benchers</p> <p>18. (1.1) The benchers have the authority to regulate the practice of law and the legal profession in the public interest.</p>
<p><i>Northwest Territories</i>³⁸³ Legal Profession Act, R.S.N.W.T. 1998, c. L-2.</p>
<p>PART III DISCIPLINE</p> <p>INTERPRETATION</p> <p>Definitions 22. In this Part, “conduct unbecoming a barrister and solicitor or student-at-law” means any act or conduct that, in the judgment of a Sole Inquirer or Committee of Inquiry, or the Court of Appeal, as the case may be,</p> <p>(a) is such as to be harmful to the best interests of the public or the members of the Society, or</p> <p>(b) tends to harm the standing of the legal profession generally[.]</p>

381. Law Society Act, 1996, S.N.B. 1996, c. 89, available at <http://www.lawsociety-barreau.nb.ca/assets/documents/law-society-act.doc>.

382. Law Society Act, S.N.L. 1999, c. L-9.1, amended by 2008 c. 17, available at <http://assembly.nl.ca/Legislation/sr/statutes/109-1.htm>.

383. Legal Profession Act, R.S.N.W.T. 1998, c. L-2 (last revised May 19, 2011), available at <http://www.justice.gov.nt.ca/PDF/ACTS/Legal%20Profession.pdf>.

*Nova Scotia*³⁸⁴

Legal Profession Act, S.N.S. 2004, c. 28.

Purpose of Society

4 (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

(2) In pursuing its purpose, the Society shall

- (a) establish standards for the qualifications of those seeking the privilege of membership in the Society;
- (b) establish standards for the professional responsibility and competence of members in the Society;
- (c) regulate the practice of law in the Province; and
- (d) seek to improve the administration of justice in the Province by
 - (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
 - (ii) engaging in such other relevant activities as approved by the Council.

Protection of public and integrity of profession

33 The purpose of Sections 34 to 53 [regarding the Complaints Investigation Committee] is to protect the public and preserve the integrity of the legal profession by

- (a) promoting the competent and ethical practice of law by the members of the Society;
- (b) resolving complaints of professional misconduct, conduct unbecoming a lawyer, professional incompetence and incapacity;
- (c) providing for the protection of clients' interests through the appointment of receivers and custodians in appropriate circumstances;
- (d) addressing the circumstances of members of the Society requiring assistance in the practice of law, and in handling or avoiding personal, emotional, medical or substance abuse problems; and
- (e) providing relief to individual clients of members of the Society and promoting the rehabilitation of members.

384. Legal Profession Act, S.N.S. 2004, c. 28, as amended by S.N.S. 2010, c. 56, (consolidated to Sept. 27, 2011), available at <http://nslegislature.ca/legc/statutes/legalpro.htm>.

<p><i>Nunavut</i>³⁸⁵ Legal Profession Act, R.S.N.W.T. (Nun.) 1988, c. L-2.</p>
<p>PART III, DISCIPLINE Conduct unbecoming [22] (2) Any act or conduct that in the judgment of a Sole Inquirer or a Committee of Inquiry or the Court of Appeal, as the case may be,</p> <ul style="list-style-type: none"> (a) is such as to be harmful to the best interests of the public or the members of the Society, or (b) tends to harm the standing of the legal profession generally, is conduct unbecoming a barrister and solicitor or a student-at-law within the meaning of this section.
<p><i>Ontario</i>³⁸⁶ Law Society Act, R.S.O. 1990, c. L.8.</p>
<p>Function of the Society 4.1 It is a function of the Society to ensure that,</p> <ul style="list-style-type: none"> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. <p>Principles to be applied by the Society 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:</p> <ul style="list-style-type: none"> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law. 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario. 3. The Society has a duty to protect the public interest. 4. The Society has a duty to act in a timely, open and efficient manner. 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

385. Legal Profession Act, R.S.N.W.T. (Nun.) 1988, c. L-2 (current to Dec. 19, 2007), available at <http://www.justice.gov.nu.ca/apps/authoring/dspPage.aspx?page=CURRENT+CONSOLIDATIONS+OF+ACTS+AND+REGULATIONS&letter=L>.

386. Law Society Act, R.S.O. 1990, c. L.8, available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90l08_e.htm.

<p><i>Prince Edward Island</i>³⁸⁷ Legal Profession Act, S.P.E.I. 1992, c. L-6.1, c. 39.</p>
<p>4. The objects of the society are</p> <ul style="list-style-type: none"> (a) to uphold and protect the public interest in the administration of justice; (b) to establish standards for the education, professional responsibility and competence of its members and applicants for membership; (c) to ensure the independence, integrity and honour of the society and its members; (d) to regulate the practice of law; and (e) to uphold and protect the interests of its members.
<p><i>Quebec</i>³⁸⁸ An Act respecting the Barreau du Québec, R.S.Q., c. B-1³⁸⁹; Code des professions, L.R.Q., c. C-26.</p>
<p>12. The function of the Office shall be to see that each order ensures the protection of the public. For that purpose, the Office may, in particular, in collaboration with each order, monitor the operation of the various mechanisms established within the order pursuant to this Code and, where applicable, the Act constituting the professional order.</p>
<p><i>Saskatchewan</i>³⁹⁰ Legal Profession Act, 1990, S.S. 1990, c. L-10.1.</p>
<p>Duty of society</p> <p>3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:</p> <ul style="list-style-type: none"> (a) to act in the public interest; (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.

387. Legal Profession Act, S.P.E.I. 1992, c. L-6.1, c. 39 (last revised Dec. 9, 2010), available at http://www.gov.pe.ca/law/statutes/pdf/1-06_1.pdf.

388. An Act respecting the Barreau du Québec [English title], R.S.Q., c. B-1 (last revised Aug. 11, 2010), available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB1%2FB1_A.htm; Code des professions, Law R.Q., c. C-26, available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_26/C26.htm&PHPSESSID=36617b2f4fa6d2928dd8ec6f1def1284 [French], http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_26/C26_A.HTM [English]; *Ordres Professionnels*, OFFICE DES PROFESSIONS QUÉBEC, <http://www.opq.gouv.qc.ca/ordres-professionnels/> (last visited Apr. 21, 2012) (describing the functions).

389. The Act respecting the Barreau du Québec does not contain any objectives language. But the overarching Code of the Professions, which is administered by the Office des professions du Québec, includes “objectives” language. What appears here is an unofficial translation of this Act.

390. Legal Profession Act, 1990, S.S. 1990, c. L-10.1 (current through 2010), available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L10-1.pdf>.

*Yukon*³⁹¹

Legal Profession Act, R.S.Y. 2002, c. 134.

Duty of the society

3 It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interest of its members.

REGULATORY OBJECTIVES THAT HAVE BEEN DRAFTED BUT NOT YET ENACTED

(IN REVERSE ALPHABETICAL ORDER)

*Ireland*³⁹²

Legal Services Regulation Bill 2011 (Act No. 58/2011).

9 (4) The Authority shall, in performing its functions of the regulation of the provision of legal services under this Act, have regard to the objectives of—

(a) protecting and promoting the public interest,

(b) supporting the proper and effective administration of justice,

(c) protecting and promoting the interests of consumers relating to the provision of legal services,

(d) promoting competition in the provision of legal services in the State,

(e) encouraging an independent, strong and effective legal profession, and

(f) promoting and maintaining adherence to the professional principles specified in subsection (5).

391. Legal Profession Act, R.S.Y. 2002, c. 134 (current through 2010), available at http://www.lawsocietyyukon.com/act/lpa_dec2004.pdf.

392. Legal Services Regulation Bill 2011 (Act No. 58/2011) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b5811d.pdf>.

*India*³⁹³

[Draft] Legal Practitioners (Regulations and Maintenance of Standards in Professions, Protecting the Interest of Clients and Promoting the Rule of Law) Act, Government of India, Ministry of Law and Justice, Department of Legal Affairs.

3. The Regulatory objectives. – (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of the clients of the legal practitioners;
- (e) promoting healthy competition amongst the legal practitioners for improving the quality of service;
- (f) encouraging an independent, strong, diverse and effective legal profession with ethical obligations and with a strong sense of duty towards the courts and tribunals where they appear;
- (g) creating legal awareness amongst the general public and to make the consumers of the legal profession well informed of their legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

*Australia*³⁹⁴

Council of Australian Governments (COAG) National Legal Profession Reform, [Draft] Legal Profession National Law (31 May 2011).

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by:

- (a) providing and promoting national consistency in the law applying to the Australian legal profession; and
- (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- (c) enhancing the protection of clients of law practices and the protection of the public generally; and
- (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and

393. [Draft] Legal Practitioners Act, 2010, § 3 (India), available at <http://www.prsindia.org/uploads/media/draft/NALSA.pdf>.

394. [Draft] *Legal Profession National Law 2011*, ch 1, pt 1, s 1.1.3 (Austl.), available at [http://www.ag.gov.au/Documents/National%20Legal%20Profession%20Legislation%20-%20September%202011%20\(%20for%20web%20site%20\).pdf](http://www.ag.gov.au/Documents/National%20Legal%20Profession%20Legislation%20-%20September%202011%20(%20for%20web%20site%20).pdf).

- (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

The prior tables are excerpted from Laurel S. Terry, Steve Mark, Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 Fordham L. Rev. 2685 (2012), https://works.bepress.com/laurel_terry/11/

ADOPTING REGULATORY OBJECTIVES FOR THE LEGAL PROFESSION

Laurel S. Terry, Steve Mark,** & Tahlia Gordon****

In 2007, the United Kingdom adopted a new law called the Legal Services Act. This Act radically changed certain aspects of U.K. lawyer regulation. Section 1 of that Act identified eight “regulatory objectives” that provide the basis for the regulation of the legal profession. The United Kingdom is not the only jurisdiction that has identified regulatory objectives. A number of Canadian provinces, for example, have provisions that are tantamount to regulatory objectives. Australia is also in the process of developing such objectives and routinely uses “purpose statements” when enacting legal profession regulation. However, many countries—including the United States—have not explicitly identified regulatory objectives and do not use purpose statements.

This Article analyzes various regulatory objectives that have been adopted or proposed. It places the use of regulatory objectives and purpose statements in lawyer regulation in a broader context by describing some of the recent profession-specific and non-profession-specific regulatory reform initiatives. The Article recommends that jurisdictions that have not yet adopted regulatory objectives for the legal profession do so. Finally, the Article concludes by offering recommended regulatory objective concepts for jurisdictions to consider.

* Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law. The author would like to thank the many people who assisted with this Article. First, she would like to thank Gail Partin, Mark Podvia, and Geoff Weyl for research assistance. Second, she would like to thank Bruce Green, Russ Pearce, and Sherri Levine for putting together such a stimulating program, and the Fordham colloquium participants for their useful feedback and comments. She would also like to thank Lise-Lotte Skovsager Gümöes from Denmark and the many Canadians who generously provided help with this project, including Don Thompson, Alan Treleaven, Allan Fineblit, Marilyn Billinkoff, Marc Richard, Brenda Grimes, Darrel Pink, Linda Whitford, Barbra Bailey, Susan Jones, Malcolm Heins, Elliot Spears, Sophia Sperdakos, and Lynn Daffe. She also thanks colleagues who provided her with a comparative perspective, including Dubravka Aksamovic, John Flood, Jonathan Goldsmith, Martin Gramatikov, Arnaldur Hjartarson, Martin Henssler, Jay Krishnan, Manoj Kumar, Freddy Mnyongani, Ramon Mullerat, Alexander Muranov, Maria Elvira Mendez Pinedo, Kaviraj Singh, Seow Hon Tan, Micaela Thorstrom, Mfon Ekong Usoro, and Limor Zer-gutman. Finally, she would like to thank Steve Mark and Tahlia Gordon for being such a pleasure to work with.

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See also Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping On The Regulatory Objectives Bandwagon*, 22(1) Prof. L. 28 (Dec. 2013) (9-page article, available at https://works.bepress.com/laurel_terry/55/).



NSBS Regulatory Objectives

The key components of the Nova Scotia Barristers' Society Legal Services Regulation model include six Regulatory Objectives, described below.

The Regulatory Objectives set out the purpose and parameters of the Society's legal services regulation, and provide guidance to the Society, those we regulate and the public. Council has determined that regulation of legal services in Nova Scotia should be carried out in a manner that is proactive, principled and proportionate.

The Regulatory Objectives help ensure clarity respecting the function and purpose of our *Legal Profession Act* and the Society's mandate, and how the Act and Regulations should be interpreted in future. They provide a basis upon which the Society will demonstrate compliance with its function and purpose.

Significantly, the Regulatory Objectives strive to enhance public understanding of and confidence in the regulation of legal services by the Society, and speak to the unique and important role the Society plays in promoting and preserving the independence of the legal profession in the public interest.

- 1. Protect those who use legal services.**
- 2. Promote the rule of law and the public interest in the justice system.**
- 3. Promote access to legal services and the justice system.**
- 4. Establish required standards for professional responsibility and competence in the delivery of legal services.**
- 5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system.**
- 6. Regulate in a manner that is proactive, principled and proportionate.**

As approved by Council on November 14, 2014

1. Protect those who use legal services

The Society's primary mandate is to protect the public.[1]

The Society has a duty to protect those who use legal services by ensuring the competence and integrity of those who provide legal services and fall within the Society's regulatory authority.[2]

The Society therefore has a duty to protect those who engage lawyers and legal entities by ensuring their competence, honesty and candour. Protection places a significant onus on the Society to establish appropriate and effective standards for admission to the Bar and the practice of law. [3]

The Society strives to remain abreast of changes in the legal services marketplace that may impact the profession and consumers in Nova Scotia; be aware of the expectations of consumers of legal services; demonstrate commitment to educating and assisting lawyers in achieving the goals of competent and ethical practice; and adopt clear and transparent means for enforcing adherence to these standards.[4]

2. Promote the rule of law and the public interest in the justice system

The legal profession plays a critical role in promoting the rule of law[5]. As a regulator, the Society carries out its duties in a manner consistent with the rule of law, taking steps to support the rule of law and encouraging lawyers to do the same.[6]

This Objective requires that the Society act in a manner that upholds the independence of the profession and promotes equality before the law, accountability to the law, fairness in the application of the law and procedural and legal transparency[7]. Courts have repeatedly emphasized and supported the critical role that law societies fulfil in maintaining independence of the legal profession through the creation and enforcement of standards of practice.[8] An independent profession is critical to safeguarding the rule of law. The Society must also assist the public in understanding the rule of law, its impact on the public and avenues within the justice system (broadly speaking) that may be available to them. (See Regulatory Objective 1.)

The Society seeks to improve the administration of justice and takes steps to ensure that the conduct of lawyers and the profession encourages public respect for the administration of justice, and public confidence in the regulation of the profession and the justice system.[9]

3. Promote access to legal services and the justice system

There is broad recognition of a serious access to justice problem in Canada[10]. The cost, complexity and inefficiency of the current system put meaningful justice out of reach for many Canadians[11]. To improve access, the Society strives to identify ways the justice system can be more equitable and effective.

Equitable access to justice is one of the most important attributes of a democratic society. Ethical duties of Canadian lawyers are premised on the existence of the duty to foster access to justice.[12] This includes a "general obligation for each lawyer to contribute to the availability of legal services." [13]

The Society has an important role to play in this regard, and strives to create a regulatory regime that supports new ways of offering legal services. This may include unbundled legal services, virtual law firms, multidisciplinary practices, use of technology and outsourcing of legal processes and services.[14] The Society has an obligation to promote affordable legal services[15]; effective remedies including through informal dispute mechanisms; the right to take proceedings before a court; the right to a fair and public hearing; and the right to be tried without undue delay.

4. Establish required standards for professional responsibility and competence for lawyers and legal entities

This Regulatory Objective is integral to the Society's legislative purpose and mandate.[16] It is well established at law that a law society plays a unique and essential role in the independent regulation of lawyer conduct and public protection.[17]

Lawyers are admitted to practice as officers of the court and are obliged to serve the court and the administration of justice competently, ethically and professionally. The Society has a duty to ensure high standards of ethics and competency for those entering the legal profession. The regulatory regime encourages lawyers and legal entities to embed professional and ethical behaviour at all times in delivering legal services. The Society maintains a regulatory framework that supports ongoing education of the profession and the articulation of standards and best practices to promote competent, ethical, culturally competent[18] and professional conduct. The framework supports an approach that is proactive, principled, proportional and focused on risk prevention.

5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system

The existence of discrimination in the practice of law in Canada is well recognized.[19] The history of racism in Nova Scotia, as illustrated by Donald Marshall, Jr.'s wrongful conviction and imprisonment, continues to influence the Society's work.[20]

Consumers of legal services in Nova Scotia represent a rich and diverse fabric of cultures, races and backgrounds. In order to understand and properly protect and promote the public interest, the Society shows leadership by promoting a diverse and inclusive legal profession that is representative of the full spectrum of the public it serves. The Society and the profession ought to identify, respect and promote the interests of the public and clients in a way that is culturally competent and non-discriminatory.[21]

To achieve this end, the Society engages with communities, collaborates with those engaged in the administration of justice including the courts, and provides education to eliminate barriers and prevent discrimination. Along with the ethical duties to provide competent, good quality of service, and to assist in making legal services available, the duties regarding discriminatory behaviour have been part of the Code of Professional Conduct[22] for many years.[23]

6. Regulate in a manner that is proactive, principled and proportionate

The Society's governing statute, the Legal Profession Act, clearly articulates 'what' the Society is mandated to do in the public interest, but not 'how'. A regulator should carry out all its functions in a manner that complies with good regulation principles and instills both public and lawyer confidence in that regulation.[24]

"For regulation to be effective, it must include a constant questioning or assessment of the effectiveness of the regulation in terms of those that are regulated (lawyers) and those affected by the regulation (clients, consumers, and the general community). Regulatory objectives can have the effect of making this clear to the regulators so as to enhance their role in promoting professionalism, the rule of law and client protection."[25]

Good regulation by the Society is characterized by proactivity, principles and proportionality. Proactivity requires the Society to not simply react but to reach out to the profession and the community to ensure that the regulatory objectives are met. Principles require the Society to set a regulatory framework that is aspirational rather than based solely on narrowly focused rules. Proportionality calls for the application of efficient and effective regulatory measures to achieve regulatory objectives using, among others, risk assessment and risk management tools. It calls for a balancing of interests and a 'proportionate' response, both in terms of how the Society regulates and how it addresses matters of non-compliance.

FOOTNOTES

- [1] *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Sections 4 and 33.
- [2] *Finney v. Barreau du Quebec*, 2004 SCC 36.
- [3] *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Section 33.
- [4] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 1991 CanLII 26 (SCC)
- [5] "...the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." (S/2004/616) *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.
- [6] Report of the National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (2003), at page 15 – "Access to justice must become more than a vague and aspirational principle. Law societies and lawyers must see it as part of a modern – "sustainable" – notion of legal professionalism." See also Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45 Alta. L. Rev. 107.
- [7] *Canada (AG) v. Law Society (BC)*, [1982] 2 SCR 307 at 335-336:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of the position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

Omineca Enterprises Ltd. v. British Columbia (Minister of Forests) (1993), 85 BCLR (2d) 85 at para. 53:

One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.

Federation of Law Societies of Canada v. Canada (Attorney General), 2013 BCCA 147 at paragraphs [105] – [111] and [138]

Lord Bingham, *The Rule of Law*, (London: Allen Lane, 2010) at pp. 92-93:

Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be.

[8] *Stewart McKelvey Stirling Scales v. Barristers' Society (Nova Scotia)*, 2005 NSSC 259; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869; *Law Society of Manitoba and Savino* (1983), 1 DLR (4th) 285.

[9] *Lawyers' Ethics and Professional Regulation*, at p. 60-61, and Section 5.6-1 of the *Code of Professional Conduct* (NS)

[10] Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", citing the former Chief Justice of Ontario (remarks presented at Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada . – "access to justice is the most importance issue facing the Canadian legal system"

[11] Report of the National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (2003), at page 1 – "The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack

coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform.”

[12] Alice Woolley, *Imperfect Duty: A Lawyers' Obligation to Foster Access to Justice*, (2008) 45:5 Alberta L. Rev. 107, at page 1

[13] *Code of Professional Conduct* (NS), Section 4.1-1

[14] Section 3.1 of the *Code of Professional Conduct* (NS)

[15] “Absent access to justice, law appears to be available for only the powerful or the wealthy. We live in a country where the rule of law is fundamental to our belief in a civilized society. Where citizens have little or no access to law to enable them to understand and, if necessary, advance our rights, their confidence in a just society based on law will be eroded.” Brent Cotter, *Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada*, (2012) 63 U.N.B.L.J. 54 at p. 67

[16] *Legal Profession Act*, S.N.S. 2004, c. 28 as at Section 4(1).

[17] *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R.; *Canada (Attorney General) v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307; *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 S.C.R. 17, 2004 SCC 36; *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 CanLII 26 (SCC), [1991] 2 S.C.R. 869

[18] Rose Voyvodic, *Lawyers Meet The Social Context: Understanding Cultural Competence*, https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Canadian%20Bar%20Review/Vol84_025.pdf and Richard Devlin and David Layton “Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis” (2014) 60 *Criminal Law Quarterly* 360-385.

[19] *Gichuru v. Law Society* (British Columbia), 2011 BCHRT 185; *Law Society of Upper Canada v. Selwyn Milan McSween*, 2012 ONLSAP 3

[20] Royal Commission on the Donald Marshall, Jr., Prosecution Digest of Findings and Recommendations, 1989, at p.10

[21] Lucinda Vandervort, *Access to Justice and the Public Interest in the Administration of Justice*, 63 U.N.B.L.J. 125

[22] Section 6.3 of the *Code of Professional Conduct* (NS)

[23] *Ibid*, Section 4.1; see also Alice Woolley, *Imperfect Duty: A Lawyers' Obligation to Foster Access to Justice*, (2008) 45:5 Alberta L. Rev. 107

[24] Laurel S. Terry, Steve Mark and Tahlia Gordon, Adopting Regulatory Objectives for the Legal Profession, 80 *Fordham L. Rev.* 2685 (2012) at p. 2739; *Rethinking Regulation*

[25] *Ibid*

Regulatory Objectives

1. Act with independence and integrity
 2. Maintain proper standards of work
 3. Act in the best interests of their clients
 4. Comply with their duty to the court to act with independence in the interests of justice
 5. Keep affairs of clients confidential
- Solicitors' Regulation Authority

Legal Services Regulation Outcomes

The following draft outcomes are the desired results for the Society of management systems for ethical legal practice (MSELP):

1. Lawyers and legal entities provide competent legal services.
2. Lawyers and legal entities provide ethical legal services.
3. Lawyers and legal entities safeguard client trust money and property.
4. Lawyers and legal entities provide legal services in a manner that respects and promotes diversity, inclusion, substantive equality and freedom from discrimination.
5. Lawyers and legal entities provide enhanced access to legal services.

Nova Scotia Barristers' Society

Alternative Business Structures

Frequently Asked Questions

What are ‘Alternative Business Structures’ (“ABS”)?

ABS is a generic reference to any form of business model through which legal services are delivered that is different from the standard sole proprietorship or partnership model. ABS can include non-legal ownership of law firms, publicly traded law firms, external investment, or any other innovative way to offer legal services outside of the traditional partnership firm model.

At least four different ABS models have been identified to date:

- (1) Legal service entity providing legal services only in which individuals who are not licensed attorneys own a minority interest in the entity;
- (2) Legal service entity providing legal services only in which there are no restrictions on non-lawyer ownership;
- (3) Business entity providing legal and non-legal services in which non-lawyers own a minority interest in the entity; and
- (4) Business entity providing legal and non-legal services in which there are no restrictions on non-lawyer ownership.

What jurisdictions presently allow for ABS?

At present there are only two non-U.S. jurisdictions that allow ABS – Australia and England & Wales.

In Australia ABSs, called “incorporated legal practices” (ILP), have been permitted since 2001. New South Wales, the most populous State in Australia was the first jurisdiction to allow ABSs.¹ All of the other Australian jurisdictions have since followed suit.²

In England and Wales ABSs have been permitted since 2007 although the first licenses were issued in 2012.

In the United States, only the District of Columbia (“DC”) explicitly allows for a limited form of ABS. Specifically, pursuant to the DC Bar Rules of Professional Conduct, Rule 5.4, “[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs

¹ On 1 July 2001 legislation was enacted in NSW, Australia permitting legal practices, including multidisciplinary practices (MDPs) to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners: see the Legal Profession (Incorporated Legal Practices) Act 2000 and the Legal Profession (Incorporated Legal Practices) Regulation 2001.

² Legal Profession Act 2006 (ACT) Part 2.6; Legal Profession Act 2004 (NSW) Part 2.6; Legal Practitioners Act 2006 (NT) Part 2.6; Legal Profession Act 2004 (Vic) Part 2.7; Legal Practice Act 2003 (WA); Legal Profession Act 2007 (Qld) Part 2.7; Legal Profession Act 2007 (Tas) Part 2.5; Legal Practitioners Act 1981 (SA), Schedule 1.

professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by the [D.C. Bar] Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; [and] (4) The foregoing conditions are set forth in writing.”

In practice, very few ABS firms have organized in DC. At least two potential issues temper their use. First, because DC attorneys are routinely licensed in one or more other U.S. jurisdictions, and no other U.S. jurisdiction allows ABS, an attorney who is dual-licensed in DC and another jurisdiction may be concerned that the formation of or participation in an ABS in DC will constitute a violation of the Rules of Professional Conduct in the other jurisdiction in which the attorney is also licensed. Second, the prohibition on ABS in all U.S. jurisdictions other than DC limits the ability of a DC ABS law firm to expand beyond DC’s boundaries.

Washington State recently amended its Rules of Professional Conduct to allow Limited License Legal Technicians (“LLLTs”) to own a minority interest in a law firm. *See* Washington State Court Rules, Rules of Professional Conduct, Rule 5.9. LLLTs are considered lawyers in Washington State and arguably, therefore, Rule 5.9 does not allow ABS. LLLTs, however, are limited in their scope of practice. Thus, viewed from that perspective and whether labelled as ABS or not, Washington State is the only other U.S. jurisdiction, besides DC, that authorizes someone other than a fully licensed lawyer to own an interest in a law firm and share profits and fees from the firm.

What was the rationale for permitting ABS?

In Australia the rationale for introducing new forms of legal structures in 2001 was multi-fold. Reasons included removing the regulatory barriers between states and territories to facilitate a seamless, truly national legal services market and regulatory framework; providing greater flexibility in choice of business structures for law practices; enhancing choice and protection for consumers of legal services; and enabling greater participation in the international legal service’s market.³ There was also a growing perception in Australia that the traditional structure of law firms no longer met the needs of many practitioners and clients.⁴

How many ABSs are there in jurisdictions that have permitted them?

Today ILPs comprise about 30% of firms in Australia. In New South Wales for example, as at May 2015, there are 1788 ILPs. Three law firms have listed their practice on the Australian Stock Exchange.⁵

³ S. Mark and T. Gordon, *Innovations in Regulation - Responding to a Changing Legal Services*, 22 Geo. J. Legal Ethics 501 (2009)

⁴ Law Council of Australia, (2001) ‘2010: A Discussion Paper: Challenges for the Legal Profession’, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=0BE36A97-1C23-CACD-2225-CBD6713A3E09&siteName=lca

⁵ The first law firm to seek public listing was Slater & Gordon. Slater & Gordon’s decision to publicly list in May 2007 saw them move from being a traditional partnership to becoming a publicly listed law firm. Following Slater & Gordon’s listing, Integrated Legal Holdings (IHL), a Western Australian based law firm, listed on the ASX on 17 August 2008 and in May 2013, Shine Lawyers became the third law firm to publicly list in Australia.

It has now been just over three years since the Solicitor Regulation Authority (SRA) commenced accepting applications from firms wanting to offer legal services as ABSs.⁶ During this time over 387 law firms have been granted ABS licences.⁷ They vary widely from large new entrants to the legal market to existing firms tying up with other service providers, or firms seeking external investment from private equity companies and firms wishing to promote non-lawyers to partnership level. ABS licences have been awarded to a number of high profile firms over the past two years including Co-operative Legal Services, Riverview Law, Direct Line, Genus Law and PwC Legal.

The impact of ABSs to date on the legal services marketplace in England and Wales is interesting. According to the SRA, research indicates that ABSs “have achieved a significant share of the overall market in certain areas of legal work.” The SRA found that ABSs accounted for a third of all turnover in the personal injury market; ABSs have captured a significant percentage of turnover in mental health, non-litigation (e.g. mergers and acquisitions and probate), consumer and social welfare; and, ABSs are spread relatively evenly across a range of different legal work types.⁸ Of most interest, the survey found that “[T]he most significant changes that ABSs have made, as a result of their new business model, relate to how the business is financed and the attraction of new investment.

How do these jurisdictions regulate ABSs?

(a) Who oversees the regulation of ABSs?

In Australia individual state and territory statutory regulators and professional associations licence and regulate ILPs. For example, in New South Wales, the Law Society of New South Wales handles the licencing of ILPs whilst the regulation of ILPs is handled by the NSW Office of the Legal Services Commissioner (OLSC).

In England and Wales the Legal Services Board (LSB) is the oversight regulator. Only regulators designated as a “licensing authority” by statutory instrument can license and regulate an ABS. At present these regulators include as follows:

1. The Solicitors Regulation Authority (SRA);
2. The Council for Licensed Conveyancers;
3. The Chartered Institute of Patent Attorneys;
4. The Institute of Trademark Attorneys; and
5. The Institute of Chartered Accountants in England and Wales.

(b) What are the regulatory requirements for being granted an ABS licence?

⁶ Applications for the ABS licences commenced in October 2011: http://www.legalservicesboard.org.uk/news_publications/press_releases/2010/pdf/23022010_abs_press_release.pdf

⁷ As at 15 April 2015: Solicitors Regulation Authority, *Search for an alternative business structure webpage*, <http://www.sra.org.uk/absregister/>

⁸ Solicitors Regulation Authority, *Research on alternative business structures (ABSs) Findings from surveys with ABSs and applicants that withdrew from the licensing process*, May 2014, p.3, <file:///C:/Users/Tahlia/Downloads/abs-quantitative-research-may-2014.pdf>; See also ICF GHK, *Qualitative Research into Alternative Business Structures (ABSs)*, May 2014, [file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20\(1\).pdf](file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20(1).pdf)

In Australia a firm wishing to become an ILP must notify the relevant professional association in writing when it intends on providing to provide legal services; begins to engage in legal practice or ceases to engage in legal practice as an ILP.⁹ There is no application form or fee to become an ILP.

In England & Wales, a firm wishing to become an ABS must complete an application form; provide any additional information required by the licencing authority and pay an application fee. The firm must also set out which reserved activities the applicant wishes to be licensed to carry out.

(c) **What are the regulatory requirements for operating as an ABS?**

In Australia, every ILP must appoint a legal-practitioner director.¹⁰ The legislation required that a legal practitioner director must be an Australian legal practitioner who holds and unrestricted practising certificate. The rationale for this requirement is to ensure that a legal practitioner maintains a direct interest and accountability in the management of legal services of the practice.¹¹

Secondly, every ILP must establish and maintain a management framework, legislatively coined “appropriate management systems”, to enable the provision of legal services in accordance with the professional and other obligations of lawyers.¹² The responsibility for establishing and implementing “appropriate management systems” rests with the legal-practitioner director. The legislation provided that failure to establish and maintain “appropriate management systems” is capable of being professional misconduct.¹³

The introduction of legislation requiring “appropriate management systems” was unique not only to legal profession regulation but to regulation generally. It was not based on any pre-existing model and the regulators were not given any guidance from the legislators as to what “appropriate management systems” or a management based system for law firm should comprise.

Consequently the regulator in NSW was forced to think about the concept of “appropriate management systems” and what an appropriate management system for a law firm should comprise. After an extensive period of consultation with the profession and key stakeholders the regulators created the content for “appropriate management systems” for law firms. They did so by considering the types of complaints that were made against lawyers and what elements would comprise of sound legal practice. The regulator came up with ten such elements:

1. **Negligence** (providing for competent work practices).
2. **Communication** (providing for effective, timely and courteous communication).
3. **Delay** (providing for timely review, delivery and follow up of legal services).
4. **Liens/file transfers** (providing for timely resolution of document/file transfers).

⁹ For a copy of the required notification form see:

<http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/008711.pdf>

¹⁰ Section 140(1) Legal Profession Act 2004 (NSW).

¹¹ S, Mark and T. Gordon, Innovations in Regulation - Responding to a Changing Legal Services, 22 Geo. J. Legal Ethics 501 (2009), 506.

¹² Section 140(3) of the Legal Profession Act 2004 (NSW).

¹³ Section 140(5) of the Legal Profession Act 2004 (NSW).

5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer).
6. **Conflict of interests** (providing for timely identification and resolution of “conflict of interests”, including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc).
7. **Records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests).
8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors).
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services).
10. **Trust account requirements** (providing for compliance with Part 3.1 Division 2 of the *Legal Profession Act 2004 (NSW)* and proper accounting procedures).¹⁴

The regulator then developed a process by which law firms could assess themselves against the ten objectives. The process was based on a self-assessment. That is, the legal practitioner director of the law firm assesses the appropriateness of their management systems using a self-assessment document (developed by the regulator) that is forwarded after completion by the legal practitioner director to the regulator for review.¹⁵ The self-assessment document takes into account the varying size, work practices, and nature of operations of different firms. Legal practitioner directors rate firm compliance with each of the ten objectives as either ‘Fully Compliant,’ ‘Compliant,’ ‘Partially Compliant,’ or ‘Non-Compliant.’¹⁶ In addition to developing the framework for appropriate management systems, the regulator in NSW also developed processes and procedures to assist incorporated legal practices through the self-assessment process, and to improve their management systems.

In England and Wales the Legal Services Act 2007 sets out the statutory requirements for ABS licences. The 2007 Act requires that a head of legal practice (HOLP) and head of finance and administration (HOFA) be appointed within each ABS. The SRA decided that all practices, including those which are not ABS practices, must appoint someone to these positions. The SRA has termed these roles compliance officer for legal practice (COLP) and compliance officer for finance and administration (COFA). It is the SRA Authorization Rules for Legal Services Bodies and Licensable Bodies that outlines the requirements for these roles.¹⁷ The designated COLP or COFA must be an individual; be a manager or an employee of the law firm; consent to their designation as the COLP and/or COFA; be of sufficient seniority and responsibility to fulfil the role; and not be disqualified from being a Head of Legal Practice (HOLP) or Head of Finance and Administration (HOFA).

¹⁴ Office of the Legal Services Commissioner, *Appropriate Management Systems to Achieve Compliance*, http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html

¹⁵ Office of the Legal Services Commissioner, Self-Assessment Process, http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_self_assessment_process.html

¹⁶ Ibid.

¹⁷ See Solicitors Regulation Authority, COLPs and COFAs, <http://www.sra.org.uk/solicitors/colp-cofa.page>

The Compliance Officer for Legal Practice (COLP) is responsible for overseeing risk and compliance within their firm and be the SRA point of contact. COLPs are responsible for ensuring that the law firm complies with relevant statutory obligations that are set out in the SRA's Handbook; recording any failure(s) to comply and informing the SRA of such noncompliance. The COLP must report any material failure to the SRA as soon as reasonably practical.¹⁸

The Compliance Officer for Finance and Administration (COFA) are responsible for the role and its obligations. COFA's are responsible for the overall financial management of the firm. COFA's are required to ensure that the law firm, including its employees and managers, comply with any obligations imposed under the SRA Accounts Rules; keep a record of any failure to comply and make this record available to the SRA.¹⁹ COFA's are also required to report any material failure (either taken on its own or as part of a pattern of failures) to the SRA as soon as reasonably practical.

Individuals who are COLPs and COFAs must be fit and proper to undertake the role/s.²⁰ Fit and proper is assessed by taking into account the criteria in the SRA Suitability Test 2011 and any other relevant information. The assessment as to whether an individual is a fit and proper person is undertaken upon initial approval. If the COLP or the COFA is deemed unfit and improper, the SRA may withdraw its approval. The COLP is the SRA's principal point of contact within the firm but is not intended to take the full responsibility of ensuring law firm compliance. The entire management, and to some extent all regulated individuals, are held responsible for the firm's conduct.

Is there annual registration?

There is no annual registration in Australia. However upon becoming an incorporated legal practice an incorporated legal practice must provide to the regulator (OLSC) a self-assessment form demonstrating that it has "implemented and maintained appropriate management systems."

In England and Wales, individual lawyers must renew their licenses annually. Entities are only required to have initial authorization but must nonetheless submit certain details on an annual, or more frequent basis (e.g. insurance details, diversity statistics etc). New entities established under the regulation of the SRA must become either recognized bodies (traditional law firms) or licensed bodies (ABS businesses), a process collectively termed 'authorization'. Authorization must be received from the relevant authorities before commencing a practice and any changes in the composition of the management of the entity (or in the nature of the business of a licensed body) are also subject to prior approval.²¹

What jurisdictions are in the process of allowing ABS (i.e. more than just considering it as an option)?

¹⁸ See Solicitors Regulation Authority, Responsibilities of COLPs and COFAs, <http://www.sra.org.uk/solicitors/colp-cofa/responsibilities-record-report.page>

¹⁹ Ibid.

²⁰ See Solicitors Regulation Authority, What is a COLP and a COFA, <http://www.sra.org.uk/solicitors/colp-cofa/ethos-roles.page>

²¹ The Law Society of England and Wales, Setting up a Practice: Regulatory Requirements, <https://www.lawsociety.org.uk/support-services/advice/practice-notes/setting-up-a-practice-regulatory-requirements/>

Singapore: On October 7, 2014 the Ministry of Law submitted the *Legal Profession (Amendment) Bill 2014* for its First Reading in Parliament.²² The Bill establishes a new regulator, the Legal Services Regulatory Authority, and a frame work for entity regulation as well as permitting ABSs. The Minister's Second Reading Speech of the Bill describes the new arrangement for entity regulation and ABS briefly.²³ On November 4, 2014 the Bill was adopted as law in Parliament. Legal Disciplinary Practices ("LDPs) will be permitted, where non-lawyer managers / employees will be allowed to own equity and/or share in the profits of the LDP. LDPs will only be allowed to provide legal services.

What are the advantages of ABS?

The advantages of becoming an ABS are multiple. They include as follows:

- Equity can be raised from a broader base of potential partners, members or directors including other professionals and non-solicitor employees.
- Non-solicitor employees may be rewarded by partner, member or director status, with a direct stake in the firm.
- The ability to diversify the range of legal services provided by the practice.
- Equity can be raised from outside the legal sector without the need for non-lawyer involvement at the management level. This has the potential to allow firms to attract new investment from different markets.
- You can provide a wider range of services to clients through an ABS than you can through an ordinary law firm.

What concerns have been expressed about ABS?

- They could dilute the core values of the profession.
- A conflict of duties could emerge between a lawyer's duty to the Court, the client and a shareholder.
- Questions have been raised whether the model will positively increase profits.
- Doubts have been raised that they will positively impact on access to justice.

What Does the Research Say About ABS?

In 2008, a research study by Dr. Christine Parker of the University of Melbourne Law School in conjunction with the NSW regulator assessed the impact of ethical infrastructure and the self-assessment process in NSW to assess whether the process is effective and whether the process is leading to "better conduct" by firms required to self-assess.²⁴ The research focused on the number of complaints relating to incorporated legal practices after incorporation and

²² See *Legal Profession Amendment Bill 2014*, [http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20\(Amendment\)%20Bill%2036-2014.pdf](http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20(Amendment)%20Bill%2036-2014.pdf)

²³ See Ministry of Law, Second Reading Speech by Minister for Law, K Shanmugam, on the Legal Profession (Amendment) Bill, <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/2R-speech-Min-LPA-bill-2014.html>

²⁴ C.E. Parker, T. Gordon, S. Mark, 2010, Regulating law firms ethics management: an empirical assessment of an innovation in regulation of the legal profession in New South Wales, *Journal of Law and Society*, Vol 37, issue 3, Blackwell Publishing, UK, pp. 466-500.

comparing this with prior to incorporation. The research found that complaints rates for incorporated legal practices were two-thirds lower than non-incorporated legal practices after the incorporated legal practice completed their initial self-assessment. The research also revealed that the complaints rate for incorporated legal practices that self-assessed was one-third of the number of complaints registered against similar non-incorporated legal practices.

Moreover, in another recent research study conducted on incorporated legal practices in NSW, by Professor Susan Saab Fortney of Hofstra University, New York, in conjunction with the NSW regulator, revealed that a majority (84%) of respondents reported that they had revised policies and procedures related to the delivery of legal services.²⁵ Seventy-one percent of the respondents indicated that they had actually revised firm systems, policies and procedures. Close to half (47%) of the respondents reported that they had adopted new systems, policies, and procedures. In terms of encouraging training and initiatives, 29% indicated that their firms devoted more attention to ethics initiatives and 27% implemented more training for firm personnel.

According to the Legal Services Consumer Panel in England and Wales “the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialized.”²⁶ The Panel state in their 2014 Consumer Impact Report, released on 5 December 2014, as follows:

“There have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman’s published data. Our Tracker Survey isn’t able to segment between ABS and non-ABS firms, but does show that overall consumer confidence in the quality of work and professionalism of lawyers has held steady since 2011.”²⁷

Although it is only early days for ABSs in England & Wales, these statements by the Legal Services Consumer Panel are an unequivocal affirmation that ABSs in practice do not appear to pose a threat to ethics or professionalism.

For More Information . . .

Much has been written about ABS. In addition to the articles and other materials cited in the text and footnotes, above, for additional information please consider the following articles on the topic:

Grech, A. and Gordon, T. (2015). Should Non-Lawyer Ownership of Law Firms be Endorsed and Encouraged? (available at <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/Grech-Gordon-Non-Lawyer-Ownership-Paper-Final.pdf>)

Gordon, T. and Mark, S. (2014). Access to Justice: Can You Invest In It? (available at http://www.researchgate.net/publication/275608762_Access_to_Justice_Can_you_Invest_in_it)

²⁵ S. Fortney & T. Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 St. Thomas L.J. 152 (2012).

²⁶ Legal Services Consumer Panel, 2014 Consumer Impact Report, 5 December 2014, p.15, http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf

²⁷ Ibid.

Mercer, M. (2014). A Different Take on ABS – Proponents and Opponents Both Miss the Point. (available at <http://www.slaw.ca/2014/10/31/a-different-take-on-abs-proponents-and-opponents-both-miss-the-point/>)

Robinson, N. (2014). When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access and Professionalism. (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878)

McGrath, S., Mercer, M., et al. (2014). Alternative Business Structures and the Legal Profession in Ontario. A Discussion Paper. (available at <https://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf>)



INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

The Focus of Legal Services Regulation

Working Paper LSR-3 | March 2019

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INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

WORKING PAPER LSR-3

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March 2019

THE FOCUS OF LEGAL SERVICES REGULATION

Stephen Mayson¹

1. Introduction

The Centre for Ethics & Law in the Faculty of Laws at University College London is undertaking a fundamental review of the current regulatory framework for legal services in England & Wales. Further details and the full terms of reference are available at <https://www.ucl.ac.uk/ethics-law/news/2018/jul/ucl-centre-ethics-law-undertake-regulatory-framework-review>.

The independent review is intended to explore the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016 and its recommendations, and therefore to assist government in its reflection and assessment of the current regulatory framework.

The Review's scope reflects the objectives and context included in the terms of reference, and includes: regulatory objectives; the scope of regulation and reserved legal activities; regulatory structure, governance and the independence of legal services regulators from both government and representative interests; the focus of regulation on one or more of activities, providers, entities or professions; and the extent to which the legitimate interests of government, judges, consumers, professions, and providers should or might be incorporated into the regulatory framework.

This project is being undertaken independently and with no external funding.

This is the third of four Working Papers that address the issues and challenges raised by four fundamental questions for the Review:

- (1) Why should we regulate legal services? (Rationale)
- (2) What are the legal services that should be regulated? (Scope)
- (3) Who should be regulated for the provision of legal services? (Focus)
- (4) How should we regulate legal services? (Structure)

These Working Papers will be updated and reissued as the Review progresses.

The work of the Review is helped by input from the members of an Advisory Panel². Some of the published work and comments of Panel members are referred to and referenced in the working papers. However, the content of this working paper is the work of the author, and should not be taken to have been endorsed or approved by members of the Panel, individually or collectively.

1. The author is leading the Independent Review, and is an honorary professor in the Faculty of Laws and the chairman of the regulators' Legislative Options Review submitted to the Ministry of Justice in 2015.

2. For details, see: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>.

The first Working Paper in this series (LSR-1 2019, *The rationale for legal services regulation*³) addresses the fundamental question of whether there is something special about legal services that requires sector-specific regulation. It concludes that there is, and posits that the public interest provides both the justification and the ‘moral compass’ for regulatory intervention in legal services. This also then suggests that sector-specific regulation is particularly justified to ensure that the public good of the rule of law, the administration of justice and the interests of UK plc are preserved and protected, as well as to ensure appropriate consumer protection where incompetent or inadequate legal services or other consumer detriment could result in irreversible, or imperfectly compensated, harm to citizens.

The second Working Paper (LSR-2 2019, *The scope of legal services regulation*³) examines the scope of legal services regulation – that is, the legal services to which regulation should apply – on the basis that scope is fundamentally a policy issue, driven by a mix of political, social, economic and professional considerations. The outcome of balancing those considerations can place regulatory scope on a spectrum between ‘all’ and ‘none’.

The current scope of regulation represents an ‘intermediate’ approach between no regulation and full regulation of legal services, in that before-the-event authorisation to practise is limited by the Legal Services Act 2007 to the reserved legal activities. These activities are an historical feature of legal services regulation imported into the 2007 Act with no modern, risk-based reassessment of whether or not they provide the correct foundation for 21st century, post-Brexit, regulation.

Using the public interest rationale from LSR-1 (2019) as a criterion, the case for regulation is stronger for some of the current reserved activities than others, and there could also be alternative or additional candidate activities. LSR-2 (2019) suggested that the question of whether the notion of ‘reservation’ needs to be retained should be considered, given that what would be most important in the public interest is some form of before-the-event authorisation. This, along with other forms of during-the-event and after-the-event approaches, could be applied to defined legal activities without necessarily needing to characterise them as ‘reserved’. This might also allow after-the-event regulation to be applied in some form to all legal activities, or at least to provide protection to individual consumers and small businesses where it is most needed.

Having considered *why* legal services should be regulated and *which* of those services should fall within the scope of regulatory intervention, this Working Paper accordingly turns to the potentially more challenging question of what should be the proper focus of that regulatory attention.

3. Available, as updated, at: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>.

2. The challenge of regulatory focus

2.1 Background

Although the short title of the Legal Services Act 2007 refers to ‘services’, for the most part it applies to ‘legal activities’ (which are defined in section 12). This would perhaps lead to an expectation that the approach of the Act would be to regulate by activity. On the other hand, given that activities have to be carried on by an individual, and that authorisation and sanctions are primarily attached to an individual, regulation by reference to a person rather than an activity would be understandable.

However, the Legal Services Act added some complexity to this picture in two ways. First, it provided for the licensing of alternative business structures (ABSs) that gives an authorisation to an organisation, albeit that the authorised activity must in fact be carried on or supervised by an individual who is also personally authorised. In doing so, it added entities to the focus of regulation.

Second, the Act’s structure fundamentally retains the pre-existing approach of regulation by reference to professional titles. Thus, where authorisation is required to carry on a legal activity, that authorisation most often flows from an award of professional title. The CMA, in their legal services market study, emphasised the connection between current regulation and title (CMA 2016, paragraphs 5.90-5.92: see further paragraph 4.1 below):

The Legal Services Act therefore sets up potentially competing (and not entirely compatible) objects of focus for regulation: an *activity*; an *individual* carrying on an activity; and a *context* within which an activity is carried on by an individual (either as part of a profession, or as a participant in an entity). The question of whether regulation should attach primarily to any one of these objects has no straightforward answer.

The solution adopted by the 2007 Act is problematic because authorisation is connected primarily to the holders of a professional title (that is, to part of a context). This is an inevitable consequence of the authorisation process being operated by ‘approved regulators’ whose history lies in professional bodies (such as the General Council of the Bar and The Law Society) that conferred professional titles and then self-regulated the conduct of its members.

Even in recent developments, authorisations have derived from either the creation of new bodies conferring titles (such as the Council for Licensed Conveyancers) or – after the introduction of the 2007 Act – by approving new regulators that already conferred professional qualifications and then regulated those who hold a professional title (such as the Institute of Chartered Accountants in England & Wales).

Consequently, authorisation by reference to title is currently deeply rooted in the structure of the Act, the approved regulators, and authorised practitioners, as well as in the policy and culture of regulation.

Such an outcome was foreseen and accepted by Sir David Clementi in his Review. He reached his conclusion that the failings of the pre-2007 approach to regulation “should be tackled by reform starting from where we are, rather than from scratch”, in full knowledge that this would incorporate a “history of professional bodies with strong roots” that had “produced a strong and independently minded profession” (Clementi 2004: page 36). Nevertheless, this approach is under increasing challenge.

2.2 A shift away from title?

As part of the review of the Legal Services Act 2007 and related legislation, which led to the submission to the Ministry of Justice in 2015 of *Legislative options beyond the Legal Services Act 2007*, that submission stated (Legislative Options Review 2015: page 54):

Future approaches to before-the-event regulation could separate the current regulatory link between title and authorisation⁴. In turn, this could result in risk-based, targeted and proportionate regulation focused on authorisation by regulators for specific legal activities – either by individual or entity – with the award of titles (and the education and certification of knowledge and competence required for the award of them) being a matter for professional or representative bodies rather than regulators. Care would however need to be taken as to the ‘brand value’ of such titles (i.e. the extent of willingness of consumers to purchase services from anyone without such a title), and whether the control of award of such titles by a professional body could become a practical barrier to entry and an impediment to competition.

The Legal Services Board then picked up this issue in *A vision for legislative reform of the regulatory framework for legal services in England and Wales* (LSB 2016: page 22):

We do not consider that regulation should in future be based on professional title – in other words, regulatory rules should not be targeted at particular practitioners solely on the basis of their professional titles.

This view was reinforced when the Competition & Markets Authority, in its market study, concluded (CMA 2016: page 14) that:

While the current regulatory framework is, in principle, well suited to title-based regulation, we are concerned that the current framework also appears to be insufficiently flexible to apply targeted, proportionate, risk-based and consistent regulation to reflect differences across legal services areas and across time. The issues we have identified may indicate that the current framework is not sustainable in the long run.

The report further said (CMA 2016: page 201) that:

an optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it.

This review must therefore consider such a shift away from title-based regulation as envisaged by the CMA and LSB, and to identify what the potential alternatives might be.

To address the future as a choice between regulation by activity or by title perhaps reflects the contrast arising from where we have ended up under the Act, but potentially runs the risk of masking the real choice. This choice is as much about *who* (individual, entity, title-holder) should be regulated *by whom* (regulator) as it is about *what* should be regulated (activity).

For a title-based regulator, as now, the choice would be fairly clear: any individual or entity that met its requirements for qualification or licensing in respect of certain activities. As we know, this approach creates difficulties (the regulatory gaps and asymmetries explored in LSR-0 2019: paragraph 4.5, and LSR-2 2019: paragraph 2.2(5)) because those who do not hold a title (or employ those who do) fall outside the regulatory remit.

For an activity-based regulator, the activity or activities for which it was approved would also be clear, and any authorisation given by it to carry on one or more of those activities could

4. CILEx Regulation already operates such a model for chartered legal executives in relation to conveyancing and probate activities, as does the Council for Licensed Conveyancers and its authorised probate practitioners.

attach to any individual, entity or title-holder meeting its requirements. If the correct activities are properly defined, there is arguably less scope for difficulty, gaps and asymmetries.

2.3 The additional challenge of emerging technologies

Understandably, given the history of the professional and regulatory development of legal services, the current regulatory framework – and many recent considerations of possible alternatives to it – proceed on the basis that regulation must be applied to either an activity or a person (individual, title-holder or entity). However, developments in technology, and particularly in artificial intelligence, present potentially insuperable challenges to these approaches.

The emergence of such challenges was anticipated back in 2004 by Ribstein (2004: 324):

New technologies, particularly including computer software and the Internet, could fundamentally change the provision of legal advice. First, websites can convey large quantities of legal information directly to consumers. This reduces not only the need for legal advice, but also the information asymmetry between lawyer and client that provides the current rationale for [regulation].

Second, Internet services and computer software blur the line between information provision and legal advice. This is partly because of the potential for interactivity, where information is provided based on the user's particular need or question, just as in a traditional lawyer-client setting.

These new technologies force more precise delineation of the activities that require [regulation]. They also challenge [jurisdiction-based regulation] by permitting lawyers to interact with clients in [jurisdictions] in which the lawyers are not licensed. Firms and individuals exploiting the new technologies may try to reduce legal impediments to lucrative business opportunities. Moreover, the fact that Internet law practice can provide effective legal assistance on routine matters to a low-income clientele makes opposition by [representative bodies] politically unattractive. In general, these new business methods demand a clearer theory of the appropriate scope of regulation than is provided by the existing analytical framework.

More recently, an OECD paper on disruptive innovation said (2016: paragraph 74):

it is apparent that, even if legal professionals were able to maintain exclusivity, the market in which they operate will change dramatically. Some disruptive innovations that will impact the industry are being developed outside existing regulatory frameworks. But even regulatory compliant innovation may challenge market structure.... Online service provision allows legal professionals to scale their service offerings, which could lead to a reduction in the number of professionals serving markets and challenge other regulatory restrictions, such as limits on the number of professionals able to operate within a certain region. Finally, lawyers are taking advantage of reforms in legislation limiting the ownership of law firms to create new partnerships and business models involving other legal professionals or non-lawyers.

The challenges of legal technology are therefore widespread, whether technical, regulatory or jurisdictional.⁵

2.3.1 Supportive legal technology

For the purposes of this paper, it might be helpful to distinguish between two types of technology. The first can be described as 'supportive', in the sense that it supports providers of legal services either in the delivery of a legal activity (such as legal research and knowledge management, document assembly, e-discovery, deal rooms, matter

5. For further material see: Akon (2017); Legal Services Board (2018); Solicitors Regulation Authority (2018); Singapore Academy of Law (2017); Sandefur (2019); Law Society (2019).

management) or in the organisational environment in which those activities are delivered (such as case and practice management, time recording and billing, client relationship management). In some of this technology (the organisational, particularly), lawyers might or might not be personally involved in its use; in any case, the clients might not be aware that technology is being used as part of their relationship with the lawyer or the firm.

The regulation of supportive technology presents few issues. There will normally be either or both of individuals and entities subject to regulation, and the usual principles of competent and ethical practice can apply, as well as the duty to protect personal, confidential and sensitive information. To this can be added obligations and expectations of understanding the benefits and risks associated with the relevant technologies, with the consequent assumption of responsibility and liability for the adoption and use of specific technology.⁶

2.3.2 Substitutive legal technology

Far more problematic for regulatory purposes is when technology does not simply support individual or institutional providers of legal services but actually substitutes for them. This can include, for example, chatbots, predictive case outcomes, document review and due diligence, intellectual property renewals, contract management, and online dispute resolution. The increasing development and adoption of artificial intelligence and robotics in legal practice can only extend the opportunities for substitution, as well as the sophistication and processes involved.

Where these technologies are adopted and used by individuals or entities that are otherwise regulated, the position will be the same as for supportive technology (paragraph 2.3.1 above): duties of ethical practice and effective supervision can still apply. However, these forms of technology can potentially be promoted by unregulated providers (individuals or entities) such that approaches to regulation based on individuals, titles or entities will not apply.

However, the ultimate premise of substitutive legal technology is that it can deliver a legal service with no necessary human involvement at the point of delivery. This is a paradigm shift in the delivery of legal services, and where evolution becomes revolution. Also, the client will very definitely be aware that the service is offered by or through technology. As always, there are potential benefits and disadvantages.

On the positive side, technology in some of these substitutive forms might well provide a route to addressing unmet and latent needs for legal services by offering both more accessible and more affordable options to consumers. Given that legal professions the world over have so far pretty well failed many such consumers, steps to prevent technological initiatives and innovations might, at best, appear to be unduly patronising or paternalistic and, at worse, be seen as self-serving protectionism.

On the negative side, though, these systems could come close to supplanting the rule of law with technology becoming the regulatory tool. This could undermine the idea of justice not only being done but being seen to be done; and it could change our notion of 'property' and 'property rights' that form the basis of so much of what lawyers have historically created, protected and transferred.

For example, blockchain tokens indicating proprietary interests of ownership in or security over tangible and intangible assets (such as stocks, debentures, intellectual property) could be issued and transacted on a blockchain; such tokens could also be circulated like a

6. This has been the approach, for example, in the United States, where the ABA Model Rule 1.1 on maintaining competence includes guidance to this effect (and this duty of technology competence has so far been adopted by 35 states).

transferable document, say, for an electronic bill of lading, or as a substitute for bearer instruments.

Of course, this technological innovation could also create new problems and costs for consumers – not least in them not knowing whether the lawtech products and services they buy or access are provided entirely by technology or with some form of human, qualified involvement, whether the products or services are in some way licensed and subject to redress if something goes wrong, or whether these substitutions will offer the same framework of fiduciary and ethical benefits as practising lawyers. It also places a responsibility (and something of a premium) on consumers being able to identify and enter the correct information or questions such that the technology can come up with the ‘right’ advice.

It might be argued that if these forms of technology are in any way involved in carrying on a reserved legal activity, the providers will have to be authorised otherwise they will be committing a criminal offence under section 14 of the Legal Services Act. However, this begs the question whether the ‘provider’ is, or the ‘carrying on’ is undertaken by, the software designer (including anyone responsible for the input of any legal advice or analysis), the developer or programmer, the software host, or the business that actually makes the technology available to the public. It also assumes, of course, that one or more of these individuals or businesses is within the jurisdiction.

The failure of the current framework to be able to regulate substitutive technology for non-reserved activities is, on the face of it, no different to the challenge presented by the existence of the regulatory gap (cf. LSR-0 2019: paragraph 4.5) where the carrying on of non-reserved activities by those individuals or entities not otherwise authorised can proceed with no regulatory oversight or supervision at all. However, the ability of technology to reach a mass audience – where the non-reserved sector of the legal services market is thought to be about 80%⁷ (roughly £25 billion a year) – should reasonably beg some rather uncomfortable questions about the scope and focus of regulation. These will be explored in relation to the options for focus discussed in this paper.

Interestingly, the American Bar Association’s Model Rules of Professional Conduct contain, in Model Rule 5.5, a prohibition on the unauthorised practice of law (UPL; cf. LSR-2 2019: paragraph 2.1). This rule raises a question about whether substitutive legal technology might be considered UPL. In 2015, a US court distinguished between tasks performed by machines and tasks performed by lawyers (*Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*), and held that tasks that could otherwise be performed entirely by a machine could not be said to fall under the practice of law. As a result, tasks that were once regarded as the practice of law can now, through legal technology, no longer be treated as such.

One of the ways of testing regulatory implications of new technologies is through the idea of a ‘sandbox’. In the same way that the health and pharmaceutical sector has clinical trials, and the financial services sector has, under the Financial Conduct Authority, its ‘Project Innovate’⁸, so the legal sector now has SRA Innovate. This is an initiative that lets firms⁹

explore new ways of running your business and introducing original ideas. This is a ‘safe space’ for existing firms, as well as new entrants to the legal services market. It lets you test out ideas that are likely to benefit the public in a controlled way. Here we can work collaboratively with innovators to make sure the right protections are included when creating new products and services.

However, the idea of such sandboxes is not entirely problematic. In providing opportunities for otherwise unregulated business or activities to take place, a regulator might unwittingly

7. Cf. LSR-0 (2019), footnote 51.

8. See <https://www.fca.org.uk/firms/fca-innovate>.

9. See <https://www.sra.org.uk/solicitors/innovate/sra-innovate.page>; and see paragraph 8.5.3 below.

provide quasi-regulatory ‘cover’ and perceived ‘market approval’ for necessarily unproven initiatives. Since not all innovation is necessarily beneficial, sandbox products and services might well create precisely the detriment to public or consumer interests that the regulator was established to guard against.

These legal technology developments can give rise to a number of consumer protection concerns. These were outlined by the OECD (2016):

83. New consumer protection concerns may arise from online legal services offerings. These concerns could include a lack of awareness among consumers regarding whether the online services they are procuring are being offered by licensed professionals or not. In addition, the introduction of legal services by non-lawyers can mean that lawyer-client confidentiality (a fundamental feature of legal systems under which lawyers’ advice is privileged from disclosure in court), could be lost in some cases. The ability to obtain legal advice that is privileged with respect to court proceedings is a key component of the value of legal services and may not fit disruptive business models or regulations adapted accordingly.
84. Data protection concerns may also arise. Consumer data is emerging as a major asset for technology firms, and privacy concerns may be particularly pronounced when online services acquire significant amounts of personal data. In the context of an industry where lawyer-client privilege is a fundamental feature, data protection regulations may need to consider the range of information that can be held by online providers as well as the impact such information can have when improperly disclosed during legal proceedings. Similarly, businesses with offerings beyond legal services may attempt to leverage the consumer information they hold for other purposes, including for sale to other businesses, with attendant implications for legal procedures and consumer privacy.
85. In addition to concerns about consumer protection, regulators may continue to encounter challenges relating to legal service affordability in disrupted markets. Barriers to accessing legal services among low-income consumers may not be fully compensated for by reductions in the cost of these services following disruptive innovation. Given the fair functioning of the legal system is premised on equal access to justice, this may create policy challenges in the future. Adding to these concerns, measures requiring legal professionals to participate in legal aid schemes for low-income individuals may be challenged on the grounds that they impose costs on professionals, who face increasing pressure from disruptive entrants not bound by similar requirements.
86. Regulators may also find that certain other regulatory provisions will be called into question as a result of legal services market innovation.... As a result, there is a significant opportunity for low-cost providers to disrupt markets if permitted by regulation, and incumbents not accustomed to pricing pressures may be ill-prepared to respond.

The development of legal technology (particularly where it substitutes for those who are authorised providers) presents some significant challenges for the future of legal services regulation. It is especially relevant to issues relating to the focus and form of regulation discussed in this working paper, and leads to some fundamental regulatory questions for the medium term:

- (1) Who or what is actually engaged in *delivering* legal services in these circumstances? In other words, where is the ‘hook’ for regulation, and where, when and on whom should liability settle?
- (2) Who should be responsible for machine algorithms, and any legal advice and actions they produce, including managing the risk of inherent or perpetuated programming bias and the supervision of machine learning? How transparent and auditable should those algorithms be?
- (3) Should it be the case that if technology is substituting for a legally qualified human being, there should be some form of regulatory intervention? And should

that intervention control access into the market, or allow open access and then supervise disclosure, performance and redress?

These are undoubtedly difficult and challenging questions about whether, when, how and on whom regulation might be imposed.

2.4 Approaches to scope and focus

The conclusion of LSR-1 (2019) in relation to the rationale for the regulation of legal services is that regulatory intervention is justified where there are assessed risks to the public interest. This will usually be because the nature, importance or consequences of a legal activity to the public or one or more of the parties involved is such that authorisation should be required before that activity can be carried on (for reward), or that consequences should attach to the performance or outcomes where these are not as expected. As such, regulatory focus can fall on one or more of: the activity involved, or an individual or organisation who carries on such an activity.

In summary, the options for focus might be given as:

- (a) *activities* that are judged to meet the public interest threshold for regulation;
- (b) individuals who hold a professional *title* or qualification that is deemed to give them the necessary permission to provide regulated legal services;
- (c) *individuals* who provide regulated legal services, in whatever capacity or context they do so;
- (d) *entities* that provide regulated legal services; and
- (e) *providers* (whether individuals, entities, title-holders or technology) of regulated legal services.

The framework of the Legal Services Act 2007 is essentially built around option (b), with a necessary extension to option (d) in order to accommodate alternative business structures (ABSs) with the ownership, financing or management of those who do not hold a title or qualification within option (b). The current structure is fundamentally title-based: the pre-existing titles, such as barrister, solicitor, notary, chartered legal executive, and licensed conveyancer, provide the 'passport' to authorisation to conduct reserved legal activities, either as individuals or within regulated entities.

Additions to the framework in recent years have similarly been based on title, such as probate practitioners who are chartered accountants authorised by the Institute of Chartered Accountants in England & Wales, or as chartered certified accountants authorised by the Association of Chartered Certified Accountants. An exception to this approach has been probate practitioners authorised by the Council for Licensed Conveyancers (who do not need to be licensed conveyancers in order to seek authorisation).

For the moment, the paper will proceed by considering primarily: on *what* (activity) or on *whom* (individual, entity, profession) should regulatory intervention be focused? It will turn later (in paragraph 8) to the issue of *when* regulation should be applied (before-the-event, during-the-event, or after-the-event). LSR-4 (2019) on regulatory structure will consider *where* and *how* regulation should apply.

This paper will therefore begin where LSR-2 (2019) ended, that is, with a consideration of whether the focus of regulation should be on those *activities* where regulatory intervention is justified, without limiting that intervention to a particular form (such as before-the-event

authorisation). It will then move on to consider alternative types of focus, such as pre-existing professional titles or other qualifications, and the individuals and entities who carry on legal activities.

3. Activity-based regulation

3.1 Clementi's conundrum

In his 2004 Review, Sir David Clementi addressed the difference between an 'inner circle' of the six reserved legal activities (preserved under the Legal Services Act and confirmed in section 12(1) and Schedule 2), and an 'outer circle' of all other legal services. He recognised that a precise definition of 'legal services' is not possible: "it needs some flexibility, given the need to accommodate the inevitable change which occurs over time in the boundaries of what is considered to be 'legal'" (Clementi 2004: pages 95-96).

He also referred to 'regulated services', acknowledging that the definition of this is more complex and "includes all inner circle services, plus those in the wider, outer circle which a lawyer is allowed to undertake in a professional capacity" (Clementi 2004: page 97). As such, regulated services include legal services that are not reserved legal activities but are otherwise explicitly regulated (such as immigration, insolvency, and some elements of claims management: see LSR-2 2019). They might also include non-legal activities – such as financial services – that are regulated under a different framework or provided through an exemption.

More importantly for present purposes, Sir David also recognised the difficulty created by the approach of those who regulate title-holders: "a provider, such as a solicitor, who is authorised to provide one or more of the reserved, or inner circle, services will also be regulated in the provision of the unreserved or outer circle services" (Clementi 2004: page 98). Such an approach to regulation derived from title creates an 'asymmetry of regulation' because "these services can also be provided by an unauthorised individual, and in this case would not be subject to regulation at all" (Clementi 2004: page 98). Regulation by activity rather than title would remove this asymmetry (often referred to as 'the regulatory gap'), and remove a source of potential confusion and difference in consumer protection.

Sir David suggested two approaches to addressing this asymmetry. The first would be to broaden the scope of the inner circle to bring a wider group of services within it, though he acknowledged that "increasing the number of reserved services may be unjustified and anti-competitive, making the delivery of such services too burdensome for the practitioner and, therefore, restricting their availability to the consumer" (Clementi 2004: page 98).

The second approach would be to limit the ambit of regulation purely to the reserved services. But this, he said, "would be to undermine one of the main principles on which the leading professional bodies operate – that all services provided by their members are done to the same high standard of care and concern for the client. In short, it would be a dilution of professionalism and of the brand, and would be likely to add to confusion for consumers" (Clementi 2004: page 99). In any event, he felt that any change in the reserved activities should be a public policy decision for government.

The Clementi Review therefore pulled up short of changing the then reserved legal activities or suggesting a different foundation for the regulatory framework of what became the Legal Services Act 2007. He therefore also shifted the focus of regulation away from a purely activities-based approach to preserve a structure that primarily regulates activities through title-based authorisation.

There might, though, be a third approach. This would be to extend some form of regulation to all legal activities (whether currently reserved or not). As this paper will explore in paragraph 8 below, this need not necessarily lead to the 'full weight' of before-, during- and after-the-event regulation being applied to every legal activity. Instead, a differentiated approach to regulatory intervention could be adopted, based on an assessment of the relative risks to the public good and consumer interests.

3.2 Regulatory criteria and professional standards

Sir David returned to the issue of asymmetry of regulation later in his report, suggesting that a possible solution to it (Clementi 2004: page 99):

requires the setting of a minimum consistent standard across the service type. However front-line regulatory bodies would be free to impose additional standards if they wished. This would permit competition between front-line regulatory bodies, whilst preventing erosion of important consumer protections.

He continued (also at page 99):

Increased consumer education, leading to a heightened awareness from the consumers' perspective when using legal services, is a further way of reducing the effect of these asymmetries. Subject to the public interest consideration of securing probity in the legal system, where customers are well informed the availability of providers regulated in different ways expands consumer choice: buyers can choose a more expensive service with regulatory protection or a cheaper service with limited protection.

Sir David is clearly contemplating here the idea of minimum regulatory standards alongside differing, higher or additional, professional standards being required by particular regulators. In doing so, he appears to have confused, or at least conflated, the 'proper' role of regulation and the maintenance of professional standards. This perhaps opens the door to a different possibility that could reflect both consistency and minimum standards, on the one hand, and choice and differential regulation, on the other, but without the need for multiple regulators of the same reserved activity.

The possibility of this distinction between minimum regulatory criteria and higher professional standards was raised by the CMA in its market study (CMA 2016: paragraph 6.26):

The objective of regulation is to ensure that consumers are protected primarily from the worst consequences of poor-quality delivery, rather than seek to remove all risks that consumers or society may potentially face. When establishing whether regulation should be introduced to ensure additional protection above this minimal level, a targeted regulatory framework should balance the benefits of increased protection with its costs (direct and indirect, for instance in the form of reduced competition) that are likely to be passed on to consumers in the form of higher prices.

This is worth further exploration.

3.3 Reconceiving the 'proper role' of regulation

The better regulation principles and best regulatory practice are incorporated into the Legal Services Act 2007 (by section 28(3)): these require decisions on regulatory matters that are transparent, accountable, proportionate (including cost-effective), consistent, and targeted only at cases in which action is needed (that is, risk-based).

One of the long-standing concerns about self-regulation is that it often results in the imposition of a 'gold standard' approach to the regulation of practitioners. This arises because the regulators of professions understandably wish to maintain the highest possible standards, both to control entry – and consequently competition – within the profession, as well as to control conduct and behaviour.

The proper role of formal regulation, on the other hand, is not necessarily to set the *highest* standards of performance, but rather to define the *minimum acceptable* level of competence or performance required to meet the public interest objectives of State intervention in otherwise private transactions.

This difference of approach is evident from the CMA's recommendation to the Ministry of Justice (CMA 2016: page 17), namely, that regulation (as a mandatory minimum acceptable standard) should be applied directly in legal service areas where there is the highest risk to consumers; and therefore regulation should not be introduced, or it should be removed, when there is insufficient evidence of risk.

The 2007 Act does not perceive there to be sufficient risk either to the public interest or to consumers to require non-reserved activities to be carried on only by authorised persons. However, as a consequence of the Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA) seeking to regulate barristers and solicitors generally (rather than only those who are authorised in respect of a reserved legal activity), they are effectively imposing additional obligations on practitioners by requiring them to submit to regulation when they carry on non-reserved activities. (It is true, of course, that practitioners who object to this could voluntarily apply to be disbarred or come off the Roll so that they can carry on non-reserved activities outside the scope of regulation, and without being able to use their previous professional title, leaving consumers to decide how much – if anything – the additional cost and protection is worth to them.)

As the CMA put it in their market study (CMA 2016: paragraph 5.55):

In finding high regulatory costs in this sector, a particular concern is that, as a result of title-based regulation, the costs of any excessive regulation will be spread across all activities undertaken by the authorised provider – including lower risk, unreserved legal activities. As a consequence, disproportionate regulatory costs may unnecessarily raise the cost of these unreserved services to consumers.

It is therefore debateable whether this approach is in fact consistent with the intention or language of the Legal Services Act (this point is explored further in paragraph 4.5 below).

3.4 A dual approach?

A potentially different approach would be development from the current structure of reserved legal activities, which proceeds from some sense of activity-based regulation. However, such development would not necessarily need to retain the concept of 'reservation'. What might be envisaged, for example, would be, first, an activity-based regulator for specific legal activities that met the public interest threshold for regulation. Such a regulator could set the minimum regulatory standards required for the carrying on of those activities and for monitoring their performance. The regulator could then authorise those who meet the required standards, either independently through various routes to authorisation and assurance of competence or, as now, as part of the award of a professional title.

This could then allow, second, the current (and future) professional bodies to maintain their own self-regulatory jurisdiction over the criteria for award and retention of title. It would also be in their interests to ensure that their criteria were sufficient to meet the minimum regulatory requirements of an activity-based regulator. However, they might also require higher standards for the award and retention of their titles than the regulator might impose for the carrying on of a particular authorised activity.

While this might be seen as allowing 'gold-standard' title regulation, to the extent that it is, it would not be a requirement of the formal regulatory structure. In this context, therefore, the professional bodies could seek to maintain higher or broader professional standards for the professions of, say, barrister and solicitor than those required by an activity-based regulator for authorisation to carry on a specific legal activity.

Such a dual approach could help avoid a one-size-fits-all regulatory style, that in the eyes of some would be perceived as either levelling up or dumbing down standards. It might also reduce temptation for a regulator to be unduly prescriptive in its requirements by instead

focussing attention on what the minimum regulatory standard should be. This would then allow scope for competition, not between alternative regulators as in the current framework, but as between professional 'brands'. The respective professional bodies and their members could seek to persuade their target consumers of the merits of their different brands in terms of, say, price, quality, or additional protections over and above the regulatory minimum, based on what they believe their market will want and pay for.

Such a dual approach might, consequentially, mean that an activity-based regulator could withdraw authorisation from an authorised practitioner who could then no longer carry on that authorised activity but could nevertheless remain in practice using a professional title and conducting other legal activities in respect of which authorisation is still current.

Equally, the relevant professional body might choose to remove the professional title from someone (say) in the light of professional misconduct: while this might lead to the loss of authorisation that was previously based on title, it might not necessarily mean that the individual could not seek alternative authorisation for the exercise of an activity through a different route approved by an activity-based regulator.

Such an approach would give rise to some significant issues:

- (a) whether it would be acceptable, feasible and cost-effective to maintain a dual approach to authorisation for specific legal activities and the award of title;
- (b) the role of the professional bodies in the award and retention of a professional title, and the new self-regulatory approach that would need to be instituted (or reinstated) for that purpose;
- (c) whether such an approach is likely to increase or only redistribute the costs and burdens of the current system;
- (d) whether the obligation to promote and maintain adherence to the professional principles¹⁰ should continue to be applied as a consequence of authorisation by an activity-based regulator, or whether one or more of those principles would be more appropriately required in the context of professional title;
- (e) the implications for legal professional privilege;
- (f) whether consumers would continue to favour the established professional titles in the (possibly questionable) belief that these offered a 'guarantee' of higher quality; and
- (g) whether consumers and the public would find it understandable and acceptable that a practitioner whose authorisation to carry on one or more activities, or right to use a professional title (though not both) had been withdrawn by one approval body but not another.

The idea of a dual approach to activity- and title-based regulation inevitably leads to a consequential consideration of the 'brand value' (or perceived value to clients, the public and the market) of professional titles. This is considered in paragraph 4.4 below.

Finally, it is perhaps worth noting that in the recent Scottish review of legal services regulation, the final report contains the following statement on activity-based regulation (Robertson 2018: page 41):

Activity regulation tends to proliferate the number of regulators and also can lead to inflexibility and a lack of agility. On the other hand it offers the chance to introduce more risk-based profiling. If there is effective individual and entity regulation in place, activity regulation will largely be captured by these groups.

10. The principles are set out in section 1(3) of the Legal Services Act 2007: that authorised persons should act with independence and integrity, comply with their duty to the court to act with independence in the interests of justice, maintain proper standards of work, act in the best interests of clients and keep their affairs confidential.

Just as the current framework appears to many to introduce a surfeit of regulators and oversight regulation, it is not immediately clear (as Robertson suggests) how an activity-based approach would result in anything less complex. Activity-based regulation is not as obvious or straightforward as it might seem at first blush. As we already know from the reserved activities (cf. LSR-2 2019), identifying the correct candidates and defining them robustly is challenging. In a modern, risk-based, technological and global world, flexibility within the framework to be able to update (by adding, removing or amending) the regulated activities will be desirable. The need to avoid both catch-all definitions (that would unduly widen the regulatory scope), and a very long list of finely differentiated activities (that would add to the complexity of regulation) will be a considerable task.

3.5 Legal Education and Training Review

The extensive Legal Education and Training Review (LETR) looked very carefully at the concept of activity-based regulation. It helpfully summarised the advantages (LETR 2013: paragraph 5.7):

In principle, activity-based authorisation offers a number of potential benefits to consumers, regulators and trainees including:

- ensuring authorisation is linked more closely to demonstrable competence in a field of practice;
- aligning authorisation decisions more closely with an evidence-based analysis of risks to consumers, and with the regulatory objectives;
- aligning training more closely to the needs of employers and consumers;
- better ensuring that training or work supervision is conducted by a competent person (assuming the supervisor is also required to have a qualification or 'endorsement' in respect of the activity);
- providing practitioners with a demonstrable basis for claiming specialisation in an activity;
- providing a way for regulators to group and target risks that require similar regulatory oversight or intervention.

However, it made the following powerful observation (LETR 2013: paragraph 5.23):

The available evidence does not make a strong case for an across the board move to activity-based authorisation, though certain areas of activity such as advocacy, will writing and probate, where there is evidence of variable standards and clear potential for consumer detriment, may benefit from this approach. There is no published research on the use of activity-based authorisation in legal settings, or in the financial services market where the model is becoming quite well-developed. The health professions, which through their systems of specialisation perhaps come close to an activity-based approach, operate in a differently constructed training and practice environment, and the general practice qualification for doctors still precedes different areas and levels of specialisation.

In relation to the challenges of definition, it also noted (LETR 2013: paragraph 5.10):

There are also important boundary questions regarding the necessary scope of an 'activity'. 'Activity-based' authorisation, though a useful shorthand, needs to be considered more as a 'field of competence'. This is because the competencies required will often extend beyond the immediate (apparent) bounds of the activity. This is evident with will writing, for example. A simple will may require quite limited knowledge and skills, but for those with sophisticated financial arrangements, or complex family ties and responsibilities, competent will writing becomes a far more sophisticated task, requiring a good understanding of quite specialised elements of land law, trusts, tax and family law. If it is to be meaningful in providing protection to consumers, authorisation may need to reflect different 'levels' of competence, which may add to the complexity as those levels need to be clearly task- or outcome- defined.

The case for activity-based regulation as a predominant focus for the regulatory framework is perhaps not as obvious or as straightforward as might otherwise be assumed. It leads to

a number of challenging issues. It also begs a question whether the 'activity' in question should best be defined by reference to the activity of the legal representative (e.g. conveyancing, drafting a will) or of the client (e.g. buying or selling their home, preparing for death).

3.6 Activity-based regulation and substitutive legal technology

Where a solution or product offered on substitutive legal technology is a legal activity for which (as defined) regulatory intervention is justified, the provider (at least) of that technology could be required to seek prior authorisation or submit to regulatory requirements for conduct or redress (depending on the appropriate form of regulation for the activity involved).

This assumes, though, that the activity can be defined appropriately and in such a way that a substitutive product or service falls within that definition. It also assumes that there is an individual or entity within the jurisdiction on whom obligations can be applied and sanctions imposed in the event of non-compliance.

3.7 Summary

The benefits and advantages of activity-based regulation are:

- it focuses attention only on those activities for which some form of regulatory intervention is justified, based on the assessed risks of that activity;
- it might provide consistency of regulatory requirements and standards in respect of the same legal activity, irrespective of who carries it on;
- it might provide a basis for distinguishing between (formally regulated) required minimum standards and (self-regulated) higher thresholds for practising under a professional title; and
- it is potentially capable of addressing the challenge of substitutive legal technology.

The limitations and disadvantages of activity-based regulation are:

- the potential for significant volume and complexity of 'activities' for regulation;
- it requires robust definitions of the activities to be regulated;
- the activities and their definitions must fairly readily be capable of being updated (through addition, removal and amendment) as consumer or market behaviour, and the associated risks, are perceived to change;
- some retention of both activity- and title-based structures; and
- consequently, the challenge of explaining the regulatory position and consequences to consumers such that they are able to make informed decisions.

4. Regulation by title

4.1 Introduction

As the basis for much of the current regulatory framework, regulation by title will now be considered. This is a shorthand expression for the regulation of legal services and conduct that flows from the award of a professional title or qualification.

The CMA, in their legal services market study, emphasised the connection between current regulation and title (CMA 2016, paragraphs 5.90-5.92):

- 5.90 As set out in the introduction, regulation in legal services is focused primarily on professional titles. The scope of regulation in legal services is determined by regulated professional titles and the reservation of certain activities to providers with these titles. In addition, certain regulated professional titles, in particular solicitors, can only provide legal activities from within entities that have also been authorised to carry out reserved legal activities.¹¹
- 5.91 Professional titles have the potential to distort consumer decision-making. Given their inability to observe quality directly, consumers may choose to rely on title (eg ‘solicitor’) when navigating the market as an indicator of quality. While title can be a useful and practical way for consumers to ensure at least a minimum level of quality, it may distort competition if it results in consumers avoiding unauthorised providers completely, regardless of the level of quality and consumer protection these providers may offer and the value for money that could be obtained by the consumer. This consumer behaviour may result in a barrier to entry for unauthorised providers.
- 5.92 While professional titles have the potential to distort consumer decision-making, the link between regulation and professional titles is not straightforward. As a starting point it is important to note that titles may be self-regulated and would be highly likely to continue to exist independently of regulation. This means that professional titles would continue to be a factor in consumer decision-making even if statutory regulation did not focus on title. However, the current regulatory framework also restricts the entities within which certain professional titles can be employed. In particular this means that unauthorised providers are restricted in their ability to employ solicitors.¹¹

This confirms the fundamental position that results from the Legal Services Act, and points out some of the benefits and disadvantages of that position (which are also considered within paragraph 3 above). As recorded in paragraph 2.1 above, Sir David Clementi explicitly respected the “history of professional bodies with strong roots” (Clementi 2004: page 36).

One must be careful not to attach only negative or unwanted consequences to an historical approach to the regulation of professional legal services. There are bound to be benefits and disadvantages in any approach to regulation, and we must not abandon positive aspects arising from years of professional self-regulation in a dogmatic pursuit of an alternative that gives rise to unintended consequences. Equally, we should not persist with elements of a philosophical or historical style of regulation if that inhibits the development or implementation of a broader, more modern, risk-based and consumer-accessible regulatory framework.

This paragraph will therefore first attempt to set out an assessment of how and why we have reached a certain state in our approach to the regulation of the legal professions, given the nature of the strong roots acknowledged by Clementi.

11. The SRA is now in the process of introducing rule changes that will allow individual solicitors to carry on non-reserved activities from within an unauthorised entity.

4.2 The nature of a profession: professionalism vs. consumerism¹²

The traditional notion of the lawyer-client relationship might be characterised as:

- founded in historical power: this was based on the lawyer's special knowledge and position in society;
- influenced by socio-economic, educational and political trends: this includes the historical imbalance in relative social and educational opportunities, and the attainment of those who became lawyers as against those they often advised, combined with a political climate that was willing to sustain the privileges of professional men¹³;
- now confounded by technology and social media: instant accessibility to information and comparative recommendations from a wide range of sources increases transparency and reduces social and economic barriers to seeking technical or professional advice; and
- suffused with ethos, passion and emotion: there are strong views (from both lawyers and clients) about how each side of the relationship should see itself in relation to the other; for lawyers, this can strike at the heart of their self-identity and what it means to them to be 'a lawyer'.

In addition, in the minds of lawyers, the nature of the relationship with clients is also inextricably linked to whether they see law primarily as a profession ('we advise or represent clients') or as a business ('we serve our customers').

The professional-client relationship traditionally assumed that a client needed help and that the professional knew more than the client – and, indeed, knew better than the client what was best for the client. This was a relationship in which the client was relatively passive, and the professional adopted a somewhat protective, even paternalistic, position.

In these senses, the traditional relationship and the regulation of it was based on the hierarchical power of the lawyer. This stemmed from the lawyer's superior or advantageous knowledge, expertise and experience (described by economists as 'information asymmetry': cf. LSR-1 2019: paragraph 3.3). An implicit consequence of this asymmetry was the view that the professional was better placed than the client to define the content, timing, delivery and price of the lawyer-client engagement.

A further element of this traditional conception was that it was supported by the State through a 'bargain' under which the State allowed the professions to regulate themselves and determine who could be admitted, and then prevented anyone else from practising within these protected boundaries. The potential for professional self-interest in this monopolistic bargain was supposedly tempered by the duties to act as officers of the court, to act in the best interests of clients, and to uphold high ethical standards.

4.3 The decline of professional supremacy

From at least the mid-1980s, the historical 'supremacy' of professionals came under growing pressure. Self-regulation was increasingly seen to have led to self-interest and complacency, protectionist behaviour and unjustified barriers to entry. Indeed, in the minds of many practising lawyers, there was often a greater sense of affinity and accountability to the profession itself than to any particular client or even the organisation in which they practised.

12. This paragraph is drawn substantially from Mayson (2014).

13. This traditional notion also generally pre-dates the admission of women to the ranks of practising lawyers.

Self-regulation was also perceived as providing insufficient incentives for innovation in client service, in organisational structures and management, or in fee arrangements. Much of this was evidenced by increases in the number of complaints by clients and an apparent unwillingness on the part of lawyers (solicitors, particularly) to deal with those complaints appropriately or quickly.

The political mood also changed at this time as Thatcherism took root. Greater emphasis was placed on individual freedom of choice, 'the free market' as a guiding hand to public and private interactions, the retreat of the State from private activity, and a consequent 'deregulation agenda'. The sub-text of this political shift was that professionals were really nothing special – that they were engaged in economic exchanges much like any other service providers, and that the old compact of protected professional territories and self-regulation was no longer justifiable.

Thus, a new age of markets, competition and consumerism arrived in professional services. It reflected and supported the rise of the educated, informed, sophisticated consumers who would make their own choices about content, timing, delivery and cost. This, in turn, changed the expectations and role of clients from passive to active: they should decide when to use (or not use) lawyers and on what basis, and should use their new freedom to shop around. These changes inevitably over time have driven a greater need for cost-efficiencies, processes and structures in law firms and in their relationships with their clients.

As a consequence of these developments, there has been a gradual shift in power in the relationship from the lawyer to the client. There has also been a shift in power, influence and participation as between individual lawyers and their organisational or managerial setting. In all senses, the status and autonomy of the individual practitioner has been eroded.

The eventual political outcome of this fundamental change was the conclusion that self-regulation had failed to keep pace or remain appropriate. It was these shifts in public and political opinion that led to the review of legal services regulation by Sir David Clementi (2004) and then to the Legal Services Act 2007 with its new regulatory settlement that significantly curtailed self-regulation, and introduced alternative business structures with external owners and investors, as well as a new structure for handling complaints.

The greater separation of regulatory and representative functions brought about by the 2007 Act might have paved the way for a more nuanced response by the regulators to the asymmetry of regulation noted by Sir David Clementi (cf. paragraph 3.2 above). The current, 'all-inclusive', approach flows from a broad interpretation of 'regulatory arrangements'. As a consequence, the maintenance and supervision of the brand value of professional titles falls by default to the regulatory bodies rather than to the professional bodies. I shall return to this in paragraph 4.5 below and consider whether this should be required by the regulatory framework, but will first explore the issue of the 'brand value' that is often ascribed (or assumed to attach) to professional titles.

4.4 The brand value of titles and associated protection

As recorded in LSR-0 (2019: paragraph 3), solicitors are the authorised providers most often used by consumers, and research shows a high degree of trust in them, with solicitors being regarded by consumers as the most qualified and trustworthy of professional legal advisers (CMA 2016: paragraph 3.49). Trust and loyalty would seem to be closely correlated, thus creating some potential 'brand value' in the title solicitor. In this context, though, as the LETR observed (2013: paragraph 5.3): "The risk associated with a reliance on titles is that they may create a perception, for consumers, regulators and professionals, that standards are assured when in fact assurance mechanisms are relatively weak".

The CMA's market study said this about brand value (CMA 2016: paragraphs 5.97 and 5.98):

our consumer survey found that the majority of consumers currently assume that all legal services providers would be regulated and do not check whether this is the case. This is corroborated by qualitative research by the SRA which found that consumers were not aware of how to tell the difference between an authorised and unauthorised provider. This evidence suggests a general lack of understanding of the significance of regulatory titles.

Despite this lack of understanding, consumers appear to rely to some extent on regulatory titles to navigate the market. The SRA research found general familiarity and confidence in the term 'solicitor', and that solicitors were generally regarded as better qualified than other providers within the sector¹⁴. Similarly, in our consumer survey, consumers expressed a preference in principle for using authorised providers because of the higher quality and adherence to minimum standards this might imply. While this evidence does not directly indicate a lack of trust in unauthorised providers, it suggests that there is some preference for solicitors, and that trust in quality standards is a relevant factor in consumer decision-making. This evidence suggests that consumers rely on regulatory titles to some extent without having a clear understanding of the significance of these titles. As a result, there is the potential for consumers to avoid using unauthorised providers even in situations where they might benefit from using them.

This led the CMA to the following observations about the role of title (CMA 2016: paragraph 6.87):

we consider that, in a more competitive legal sector, with appropriately scoped risk-based regulation, title might cease to be subject to statutory regulation. Instead, relevant professions could be responsible for the title. However, in the short to medium term, it would be preferable that titles continue to remain subject to regulation. This is because, as noted [earlier], professional titles play an important role in the current market: the majority of legal services are provided by authorised legal providers, mainly solicitors.

It appears from the CMA market study and other research that consumers have a notion that the brand of 'solicitor' (particularly) is associated with clear notions of legal qualification, competence, trustworthiness and regulation, but that this brand label and its attributes might also be applied by consumers on a 'catch-all' basis to other providers of legal services who hold a different title (or indeed no title at all).

The basis of such brand value is therefore somewhat suspect – especially when consumers cannot also identify accurately the consequences that then follow (or do not) to the particular relationship into which they have entered or are contemplating entering. As the CMA stated (CMA 2016: paragraph 4.18, emphasis supplied): "We consider that consumers' reliance on certain professional titles to select a legal services provider is not a cause for concern *provided that they understand what they are getting for the solicitor brand, and the title is an accurate proxy for high-quality advice and service delivery and the availability of redress.*"

However, as the Legislative Options Review suggested (2015: Annex 4, paragraph 4):

'badging', as a barrier to entry, can also limit the availability of services, result in higher quality and performance standards than are necessary relative to the public interest risks posed by the service in question, lead to higher prices, and stifle innovation. It can also generate false consumer – and practitioner – confidence in a provider's abilities across a broad range of legal activities if there are not sufficient safeguards in place (... in relation to continuing competence and the need for periodic reaccreditation).

14. SRA research also showed (CMA 2016: paragraph 3.50) that: "respondents 'were very familiar with the term "solicitor", and there was a general tendency for recent purchasers to describe providers as solicitors, as a "catch all" term for those providing legal services'."

On the available evidence, it is questionable whether the terms of the CMA's emphasised proviso above are met. First, it appears that consumers have a rather vague notion of the brand rather than an accurate and full understanding of what they are getting. Second, the SRA's approach to authorising all holders of the solicitor title to conduct all of the reserved legal activities for which the SRA is an approved regulator undermines the proposition that all solicitors can uniformly and consistently provide high-quality advice in relation to such a wide range of those reserved activities (let alone the much larger range of non-reserved legal activities that the SRA then also allows solicitors to offer).

The CMA's line of thinking had also been picked up by the LSB's Vision Statement (LSB 2016: page 22):

64. The current framework offers authorisation following from title, such as barristers' rights of audience or solicitors' rights to conduct litigation. Economic literature suggests that professional titles can play an important role in driving standards up and developing consistent behaviour among providers.

65. We do not consider that regulation should in future be based on professional title – in other words, regulatory rules should not be targeted at particular practitioners solely on the basis of their professional titles. However, some – although not all – legal professional titles currently have extremely strong brand power for consumers (eg solicitor and barrister) in a market where there are few other signals to help consumers choose between providers. Title therefore acts at the moment as a barrier to sustainable entry to many parts of the market for legal services because a prospective market entrant without the title in question may find it difficult to gain market share.

66. We are concerned that, at present, handing control of the award of protected titles (where this is not already the case) to representative bodies could result in gold-plating of entry standards, less competition and choice for consumers, and might even provide opportunity for de facto rolling-back of liberalising reforms in the market. On the other hand, there are benefits in consistency in the longer term in the handling of protected titles across different professional groups where this is possible (for example, clarity for consumers).

67. In light of the issues above, we believe that transitional arrangements for handling award of title will be required as part of the move to activity-based regulation. Award of professional title should therefore continue to be the responsibility of the regulatory arm of the approved regulator for the time being, where this is currently the case. We do not anticipate additional titles becoming the responsibility of any regulator(s), where this is not currently the case.

The facets of brand value that are usually relied on by those who hold a professional title are claims to delivering a higher or more reliable level of 'quality' to the consumer, and the additional protections available to the consumer as a consequence of having engaged a regulated provider.

In principle, neither the quality of service nor the price of services should be affected directly by whether certain activities are regulated or not. However, in practice, regulated practitioners (where regulation stems from their authorisation to conduct one or more of the reserved activities) will claim that their quality is assured to a higher level than that of unregulated providers who will have no similar regulatory or professional obligations and will therefore (it is asserted) pursue only profit at the expense of quality. Additionally, so this argument runs, such unregulated providers will be able to undercut regulated practitioners on price because they do not bear the direct or opportunity costs and burdens of regulation and can therefore charge less and still potentially make the same margins.

There is some substance in these views of regulated practitioners – more so historically when the SRA's separate business rule prevented them from unbundling their non-reserved activities. There is undoubtedly a direct and opportunity cost to regulatory compliance that, without more, will probably result in higher prices or lower margins. It is also arguable that there is indeed a higher yardstick of quality attaching to those who have regulated status accorded by a professional title and authorisation, and who then become subject to

expectations from the State, the public at large, clients and regulators that they will discharge their professional functions exceptionally well.

However, what this view often gives insufficient value or credence to is that, in the eyes of consumers, quality is a multi-faceted concept that, as well as technical competence and accuracy, incorporates functional dimensions (engagement and ease of use) and utility (practical usefulness and comprehensibility of advice given). Lawyers are often judged to have fallen short on functional quality and utility of advice. Nor does it allow much scope to acknowledge that innovation, alternative approaches to resourcing, and process improvements can drive down the costs of service without inevitably compromising quality (in all of its dimensions).

Finally, these views also ignore the commercial imperative on all providers to achieve an acceptable service (whatever that might mean to individual consumers) at an acceptable price for the value delivered, otherwise market forces and reputation will most probably reduce the demand for any given provider's services. There are thus normal business expectations that will often lead providers (even those offering non-reserved activities outside the scope of current regulation) to offer a good quality of service – and charge accordingly.

Where providers do not offer high quality, this is not inevitably because they set out to dupe customers into accepting a poor (or low) quality service at a low price: it could also be because market research and business experience suggest that consumers do not inevitably want gold-standard (or even high) quality at high prices. As the CMA observed in their market study, there is a risk of poorly targeted regulation if it is “derived from an assumption that higher quality of service was always in the consumer interest rather than recognising that consumers may legitimately make trade-offs between quality and the price of services” (CMA 2016: paragraph 5.42).

In summary, the current regulatory framework has an indirect effect on quality and price by framing both practitioner and client expectations in certain ways, and perhaps by reinforcing an ambivalence towards innovation. While there is undoubtedly some brand value in professional titles and some protection for consumers, it is still questionable whether this presents an overwhelming case to preserve those elements of a regulatory framework that are built on the foundations of professional titles.

However, what an alternative approach might miss is, first, the cultural (or ‘soft’) side of regulation that can shape behaviour and attitudes through strong and pervasive professional identity and norms and, second, the usual corresponding emphasis of self-regulation on the fitness, suitability and integrity of the individual to be and remain a professional person as *well as* on their technical competence and ability. Where these factors contribute to the high degree of consumer trust referred to earlier, it is important that any future changes to the regulatory framework are assessed to determine whether or not they might undermine that basis of trust. If there is such a risk, it could create a corresponding detriment to consumer confidence or weaken a signal to some occasional or vulnerable consumers about the availability or reliability of legal services.

Further, title-based regulation has had to adapt in modern circumstances to the growth of law firms and chambers, with the consequent imperative to recognise – and impose regulatory obligations and consequences to – the organisational context in which law is now practised. This has been achieved through entity regulation, such that title-based regulation is now a mixture of regulation of individual title-holders (cf. paragraph 5 below) and of the entities within which those title-holders work (cf. paragraph 6 below).

4.5 Has the Legal Services Act been generously interpreted?

4.5.1 Introduction

To the extent that a regulator seeks to extend its regulatory remit to non-reserved legal activities carried out by those whom it authorises for one or more of the reserved activities, it seems at least arguable that such a regulator might have stepped outside the *necessary* scope of the Legal Services Act 2007.

The 2007 Act does not perceive there to be sufficient risk either to the public interest or to consumers to require non-reserved activities to be carried on only by authorised persons. However, as a consequence, particularly, of the BSB and SRA seeking to regulate barristers and solicitors for all they do rather than in respect of their authorisation to carry on a reserved legal activity, they are effectively imposing additional obligations on practitioners by requiring them to submit to regulation when they carry on non-reserved activities. In doing so, the regulators are imposing a regulatory and cost burden on practitioners – and therefore a competitive disadvantage – that Parliament does not allow to be imposed on those who are not legally qualified.

In relation to the regulatory objectives in section 1 of the Act, this distorts rather than promotes competition, and arguably does not promote the interests of consumers or improve access to justice (because it increases the costs of non-reserved legal activities). It is also not targeted and risk-based (cf. the approved regulator's duty under section 28(3)(a)), because Parliament has by definition perceived that there is insufficient risk to justify regulation of such activities when carried on by those who are not legally qualified or authorised (and with stronger reason when carried on by those who are so qualified).

To argue that regulating all activities of a title-holder is necessary in order to maintain the conduct and quality of those title-holders is to assert a position on maintaining a professional 'brand' (cf. paragraph 4.4 above), and this arguably goes beyond what is necessary for achieving and maintaining authorisation (cf. paragraphs 3.3 and 3.4 above). To argue that such a position is necessary to avoid confusion for consumers who might not understand why some activities of a title-holder are regulated while others are not is now less easy to sustain.

First, Parliament itself has drawn the distinction between reserved and non-reserved activities and determined that the latter do not in principle require regulating. Second, solicitors will soon be allowed to offer non-reserved activities to the public from an unauthorised entity where the regulatory consequences are different. In other words, there is already potential for consumer confusion already exists, which is not thought to be outweighed by the risks to consumers, and can probably be addressed by improved communication, transparency and informed purchase.

Nevertheless, the regulatory framework must still recognise the challenge of conveying clearly to consumers the structure and consequences of regulation. It must also do so in a way that – for all the merits of disclosure and transparency – does not create information or cognitive 'overload' such that their ability to make an informed decision is jeopardised.

A similar conclusion might be reached in relation to a regulator's imposition of conditions for the award of a professional title. The current approach of some of the approved regulators appears to conflate two distinct processes. The first is the award of a professional title, and the second is authorisation to conduct one or more of the reserved legal activities in England & Wales (with the regulatory consequences that then flow from that authorisation). As a general principle, if a regulator wishes to attach conditions and obligations in relation to the award of a title (as opposed to authorisation for, and the exercise of, reserved and other activities) under the statutory authority of the 2007 Act, one might expect that authority to be direct and explicit.

4.5.2 Authorisation and title

Given the timing of the Act's passage through Parliament, it refers to the professional bodies (such as the Law Society and the General Council of the Bar) as an 'approved regulator', and recognises their regulatory remit over the reserved legal activities of (as appropriate): the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities, and the administration of oaths (section 20, and Schedule 4, paragraph 1(2)). As a transitional matter, those who were qualified at the time were automatically deemed to be authorised persons in respect of those activities (section 18, and Schedule 5).

The Legal Services Board and approved regulators must ensure that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and that regulatory decisions are taken independently from representative ones: the Legal Services Board seeks to achieve this separation of regulation from representation through its internal governance rules (section 30; cf. rules 6 and 7 of the LSB's Internal Governance Rules 2009: see further LSR-4 2019: paragraph 5.2.2). The newly created regulatory bodies, such as the SRA and BSB, then 'inherited' the pre-existing regulatory functions, as delegated by the 'approved regulator'.

Under the Act, an approved regulator's 'regulatory functions' are "any functions ... under or in relation to its regulatory arrangements" (section 27(1)). 'Regulatory arrangements' are then defined in section 21 and include "authorising persons to carry on reserved legal activities" and 'qualification regulations' (section 21(1)(a) and (f)). Qualification regulations are further defined in section 21(2) as (emphasis supplied):

- (a) any rules or regulations relating to –
 - (i) the education and training which persons must receive, or
 - (ii) any other requirements which must be met by or in respect of them,*in order for them to be authorised by the [approved regulator] to carry on an activity which is a reserved legal activity.*

Crucially, therefore, both authorisation and qualification are explicitly framed in terms of carrying on a reserved legal activity, rather than the holding of a professional title.

Any regulatory body's claim to regulate a professional title is for a much broader regulatory remit than authorisation. If not voluntarily delegated by the appropriate professional body as an approved regulator, the justification for this claim must rely on other parts of section 21. In it, the Act introduces the expression "regulated persons", referring to "any class of persons" (such as solicitors or barristers) "which consists of or includes persons who are authorised by the [approved regulator] to carry on an activity which is a reserved legal activity" (section 21(3)).

From this, the regulatory body's authorisation of persons to carry on one or more reserved legal activity, and consequently becoming 'regulated persons', then brings into regulatory scope:

- (a) any additional "education and training requirements" imposed on them as regulated persons (included as part of the qualification regulatory arrangements by virtue of section 21(2)(c));
- (b) "any other requirements which must be met by or in respect of them" as regulated persons (also included as part of the qualification regulatory arrangements by virtue of section 21(2)(c)); and
- (c) the conduct, discipline and practice rules applying to regulated persons (which are part of the regulatory arrangements by virtue of section 21(2) and (3)).

The Act therefore confirms a set of regulatory arrangements that apply to authorised persons as a result of the regulatory body inheriting those broader functions from the approved regulator as part of the initial transitional arrangements in the Act. However, it is arguable that the Act only continues to support such a position if, once anyone is authorised to carry on a reserved legal activity and becomes a 'regulated person', the rules and regulations applying to them as such are consistent with the rest of the Act's regulatory objectives and principles (see further paragraph 4.5.3 below).

Part of a regulatory body's difficulty in using these provisions to claim jurisdiction over title and non-reserved activities is that, as with other provisions in the Act, section 21 is framed in terms of authorisation for reserved activities, not explicitly for all legal activities nor for the award of a title. Further, the definition of 'regulated persons' is not aimed solely at or limited to authorised persons, let alone title-holders. Section 21(3)(b) and (4) makes it clear that the definition includes unauthorised persons who are employees, as well as managers of an ABS (who might well not hold a legal professional title).

It seems clear, therefore, that the explicit terms of the Act are not directed to title-holders as such. While the existence of a title might justify authorisation for a reserved activity, the terms of the Act address authorisation, not title. It is arguable, therefore, that in the implementation of the Act a widespread assumption has been made that regulation of title (and then of non-reserved activities carried on by title-holders) fell within the terms of the Act, but that such an assumption was not in fact a *necessary* consequence of the statute.

Such an interpretation would not, of course, negate the terms of any delegation actually given to a regulatory body by an approved regulator. It is not that regulatory bodies might have been acting beyond their powers. Rather, it is an argument that the approved regulators delegated more than was necessarily required by the Act.

Some support for the argument advanced in this paragraph can be found in the statement to Parliament by the justice minister, Lucy Frazer QC MP, on 6 February 2018:

Currently there is no statutory basis for much of the regulation of individual barristers or entities by the BSB. Barristers are regulated under a non-statutory regulatory regime, with barristers in effect consenting to be bound by the BSB's rules and thus establishing a contract between them.

Such a statement would have been unnecessary had the explicit terms of the Act already applied to the profession or title of barrister. The statement was made during the approval of a statutory instrument to extend the Bar Council's/BSB's powers¹⁵ and put them on a statutory basis; however, those new powers apply mainly to disciplinary and compensation issues, and do not relate to the award of title which, as section 207(1) of the Act confirms, continues to reside with the Inns of Court.

In relation to solicitors, the position is complicated by the Solicitors Act 1974, where the right of admission rests with the Law Society along with powers to make certain regulations (Solicitors Act 1974, sections 3 and 28), that is, with the approved regulator. However, the same analysis can be applied to suggest that the regulatory remit and arrangements under the Legal Services Act 2007 that had to pass to the relevant regulatory body (SRA) are only those – and to the extent required – that are necessary to address training for, and the authorisation of, carrying on one or more of the reserved legal activities for which the regulator is approved.

15. The Legal Services Act 2007 (General Council of the Bar) (Modification of Functions) Order 2018 No. 448.

4.5.3 Risk and proportionality

The argument explored in paragraph 4.5.2 above is undoubtedly tendentious. However, we might still return to the starting point in paragraph 4.5.1 above that the 2007 Act does not perceive there to be sufficient risk to require non-reserved activities to be carried on only by authorised persons. Consequently, a regulator seeking to regulate practitioners for all they do, rather than in respect of their authorisation to carry on a reserved legal activity, imposes additional obligations and a competitive disadvantage.

Even if the whole structure of title regulation has been passed legitimately to regulatory bodies, those bodies still have the obligation (arising from section 28) to act in a way that is compatible with the Act's regulatory objectives, and have regard to "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed"¹⁶ as well as to "best regulatory practice".

As explored in paragraph 4.5.2 above, the terms of the Act do not explicitly refer to the regulation of practitioners as a professional group or as the holders of any particular professional title. Nor do they refer to the education and training of title-holders as such. The closest references to any such position are in section 21 to those regulatory arrangements described above in respect of 'regulated persons', which arise *only as a consequence* of being a class of persons who are authorised to carry on a reserved legal activity. The primary emphasis throughout the Act is on 'authorised persons', namely those who are authorised to carry on a reserved legal activity, and on the education and training of persons who are, or wish to be, authorised.

Further, the LSB's own powers for assisting in the maintenance and development of standards in relation to authorisation and education and training are also expressed in section 4 of the Act to apply only to "persons authorised ... to carry on ... reserved legal activities"; again, there is no reference to professional groups or professional titles. This emphasis in the Act strongly suggests that any regulation aimed at matters other than authorisation or education and training sufficient to justify or maintain authorisation is to be considered consequential or incidental to authorisation.

If this is correct, it would follow that the primary focus of a regulatory body's activities should be on *authorisation* to carry on one or more of the reserved legal activities, and the educational and other requirements necessary for *authorisation* to be granted, maintained or withdrawn. Any broader claim to regulate title-holders (and everything they do), and the education and training required for the award of a title, arguably over-steps the bounds of what is necessary, risk-based and proportionate to meet the regulatory objectives required for authorisation.

4.5.4 Conclusion

The premise of this paragraph is that, in the transition from the former regulatory framework to that under the Legal Services Act, the approved regulators (and, where they exist, their regulatory bodies) have assumed that all regulation that previously applied to the holders of their relevant professional titles was transferred and became the responsibility of the regulatory bodies under the Act. This paragraph reflects an argument that the *necessary* transfer applied only to those aspects of regulation that pertained to training for, and authorisation in respect of, the right to carry on a reserved legal activity.

16. The Legal Services Board in its regulatory standards framework has added a 'gloss' on these principles by requiring approved regulators to regulate on an outcomes-focused basis which is based on risk and evidence.

This would leave a potential residual regulatory role for the approved regulators in relation to the award and retention of title and the carrying on of non-reserved legal activities. Arguably, this would also allow or reflect a more risk-based and proportionate approach to the regulation of legal activities carried on by those who hold a professional title. Indeed, it would already be more consistent with the expressed longer-term preferences of the CMA and LSB (cf. paragraph 4.4 above).

4.6 Title-based regulation and substitutive legal technology

It seems clear that title-based regulation cannot of itself adequately address the need to regulate substitutive legal technology. Nevertheless, where there are individuals or entities involved in the design or provision of a technological product or service on whom regulatory obligations could be applied (because, for some commercial reason, they have decided to adopt substitutive technology themselves), there could well be a basis for regulating such persons.

However, by definition, there will not always or necessarily be an individual involved who holds any professional title, and so title-based regulation could not, alone, offer a solution to regulating substitutive technology. Nor would it be consistent with market or competition objectives if a requirement were to be imposed that there must be a title-holder involved in the provision of legal services through such technology in order to introduce a regulatory 'hook'.

4.7 Summary

The benefits and advantages of title-based regulation are:

- it sustains strong, historical and cultural values of members of a profession;
- it is consistent with consumers' recognition of brand titles (particularly those of solicitor and barrister); and
- it provides a basis under current practice for the entirety of a title-holder's activities and behaviour to be overseen by a regulator.

The limitations and disadvantages of title-based regulation are:

- a professional title does not, of itself, fully convey what activities a title-holder is authorised and competent to offer (such as higher court advocacy by solicitors, the conduct of litigation by barristers, or the provision of advocacy and litigation services by chartered legal executives)
- it creates barriers to entry to the sector for those who do not hold a title;
- it leads to multiple regulators and standards for the same legal activities carried on by holders of different titles;
- it potentially results in a 'gold standard' approach to regulation that underpins the highest professional standards rather than the minimum necessary regulation;
- it currently extends regulation to legal activities that Parliament does not require to be carried on only by authorised persons;
- it therefore perpetuates the regulatory gap, and adds to costs, if market entry requires all authorised providers to undergo training for the right to use a title;
- it encourages multiple authorisation for all reserved activities for which the title regulator is approved, irrespective of current competence (and potentially then generates false confidence among consumers); and
- it cannot deal adequately with substitutive legal technology.

5. Regulation of individuals

5.1 Differential regulation for activities

The essence of regulation of individuals is that they would be authorised or licensed to carry on those legal activities for which such authorisation is required. A regulator would determine what training or qualifications were sufficient to satisfy its requirements for authorisation.

Such an approach could still mean that an individual who holds a professional title or qualification (such as barrister, solicitor, chartered legal executive) could be authorised for a given legal activity on the basis of that title or qualification. Unlike the current position, however, it would not be the single title leading to multiple, automatic or 'passported' authorisation for a number of activities. Instead, one or more regulators would be giving specific authorisation on an activity-by-activity basis.

For example, currently an individual who wishes to exercise rights of audience must in effect decide whether they wish to:

- undertake the extensive process of qualifying as a barrister in order to secure all available rights of audience; or
- undertake the extensive process of qualifying as a solicitor in order to secure most available rights of audience, subject to further qualification and authorisation if he or she wishes to exercise rights of audience in the higher courts; or
- seek only the more limited rights of audience available in defined circumstances to those who qualify as, say, chartered legal executives (with the further requirement for a certificate in civil, criminal or family proceedings), patent and trademark attorneys (with a higher courts advocacy certificate), or costs lawyers (in relation to costs proceedings).

If regulation of individuals were conceived differently, in addition to the choices above (which can remain available), an individual might be able to seek authorisation to exercise a right of audience by meeting only the relevant requirements for one or more of those rights without needing a more general professional qualification as above. The relevant regulator would still need to determine how extensive the training should be in order to warrant the authorisation for the right(s) in question, but this might not need to be as extensive as that required for the award of professional titles.

5.2 The question of competence and aptitude

The current regulators have grappled with the issue of what legal practitioners should be required to know and demonstrate on 'day 1' of practice. It has long been the case that no-one holding a professional title as a barrister or solicitor knows or has even studied all aspects of the law on which they will need to advise or represent their clients during their working lives. The central question is whether they have sufficient understanding of the legal concepts and foundations that will avoid them missing relevant and fundamental legal issues by being too narrowly focused or specialised (cf. paragraph 3.5 above).

It is also important that they have the ability and aptitude to carry out the necessary analysis, research and application. They should also have developed the experience to convey the outcomes of that both orally and in writing in ways that are clear to their clients and persuasive to courts and other authorities who need to make decisions. Additionally – at least in relation to those who make representations in court or to other authorities, though

arguably more generally – authorised individuals should be capable of acting with integrity¹⁷ and with an understanding of ethical issues and how to tackle them.

In respect of any particular legal activity, and the requirements of the public interest and of clients, regulators would therefore need to balance the appropriate breadth and depth of knowledge, expertise and aptitude to secure the objectives of regulation with the lowest acceptable degree of burden and cost to actual and prospective practitioners in meeting them.

Such an approach might pave the way for regulated authorisation of certain individuals who at the moment do not hold a professional qualification but who do have extensive (and sometimes specialised) experience in an activity. This might apply, for instance, to certain social and care workers, police officers, professional McKenzie Friends, and paralegals.

5.3 Clarity of authorisation

Under the current title-based approach, there is inconsistency among title holders about what any given individual is in fact authorised to do – and therefore the potential for confusion in the minds of consumers. For example, a ‘solicitor’ is authorised as an individual to carry out all of the reserved activities except notarial activities. (Whether he or she should be regarded as currently competent and up-to-date to carry out all of those activities is a separate, but also potentially confusing, factor.) In addition, a solicitor might not be authorised to conduct higher courts advocacy.

Similarly, a ‘barrister’ might or might not be authorised to conduct litigation, and so the title does not of itself indicate the degree or range of authorisation¹⁸. Likewise, a ‘chartered legal executive’ might or might not be authorised in respect of any (or only some) of the rights of audience for which a civil, criminal or family proceedings certificate is required.

It follows, therefore, that perhaps the regulation of individuals in respect of specific activities could achieve some opening up of the scope for provision of regulated legal services (by allowing authorisation that is not principally limited to those who hold a professional title or qualification), and potentially make it clearer to consumers exactly what it is that any given individual is authorised to do. Indeed, arguably the use of descriptions such as ‘regulated/ authorised advocate/ litigator’ might be more helpful to consumers than (or in addition to) the current professional titles.

As explored in paragraph 3.4 above, the authorisation (and possible description) given to an individual envisaged here would lie with a regulator, whereas the more general professional titles could remain with the relevant professional bodies. It might be that the individuals and professional bodies concerned would then seek to compete on the difference or competitive advantage that an ‘authorised advocate and litigator’ who was also a barrister was thought by them to have over a similarly described advocate and litigator who also held a different professional title (or indeed no title at all).

The SRA’s emerging approach to a more differentiated regulation of solicitors as individuals, to be implemented during 2019, will allow it to distinguish its regulatory requirements as between solicitors who work:

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17. To be clear, the requirement for integrity extends beyond dealings with courts and other authorities: it is important that legal practitioners should be able to rely on each other (which is why, for example, the obligation on solicitors and licensed conveyancers to fulfil their formal undertakings is absolute), but also that an individual has the personal and professional integrity to ensure that his or her competence is maintained over time through continuing professional development.
 18. In the case of barristers, there might be no authorisation to practise at all, given that the title ‘barrister’ is conferred at the time of Call to the Bar, with pupillage and a practising certificate to follow (or not).

- in an authorised firm (with the solicitor able to carry on both reserved and non-reserved activities with full regulatory cover);
- in an unauthorised firm (with the solicitor still regulated as an individual but only able to offer non-reserved activities, and with more limited regulatory cover available to clients, who must be made aware of those limitations);
- on a self-employed, freelance, basis (providing reserved and non-reserved activities, but not able to hold client money); or
- as an in-house solicitor.

5.4 Regulation of individuals and substitutive legal technology

As with regulation by title (cf. paragraph 4.6 above), there is no inevitability that legal services provided by or through substitutive legal technology would involve individuals (they might, for instance, be provided contractually only through an entity). However, as with regulation of individuals generally, there is at least the prospect that there would be an individual involved in some such ventures, and the necessary combination of individual and entity regulation might provide a basis for the effective regulation of substitutive technology.

5.5 Summary

The benefits and advantages of regulation of individuals are:

- it is better for circumstances where the skill and integrity of individuals is key to the regulated activity (perhaps, say, for advocacy and notarial activities);
- it allows for the authorisation of individuals with specialist skills without requiring a more broadly based professional qualification;
- it provides a basis for increasing the provision of regulated legal activities by individuals who do not hold a professional title; and
- it makes it clearer to consumers exactly what legal activities any individual is currently authorised and competent to carry on.

The limitations and disadvantages of regulation of individuals are:

- it ignores organisational or contextual influences, pressures and obligations unless it is also combined with entity regulation;
- it might lack the additional influence of professional norms, conduct and behaviour that often results from being a member of a profession; and
- by itself, it cannot adequately address the regulation of substitutive legal technology.

6. Regulation of entities

6.1 Background

Historically, the approach of the regulatory framework in England & Wales to the regulation of entities has been mixed. First, barristers in self-employed private practice were prevented from practising other than personally (with their chambers not being structured or treated as a business entity). Similarly, until relatively recently, solicitors were required to practise either alone or in a general partnership with unlimited liability. The approach to legal services regulation was therefore focused for many centuries on the regulation and obligation of individuals, and paid little or no attention to the organisational context in which private practice was carried on (though the position of in-house lawyers was later addressed in the relevant codes of conduct).

Licensed conveyancers were able to adopt incorporated business entities from their creation in 1985, and other legal practitioners have gradually been allowed to practise from any form of legal entity. Most other jurisdictions around the world now also allow private practice from incorporated entities.¹⁹

In addition, the policy decision to allow the creation of ABSs as part of the reforms introduced by the Legal Services Act 2007 meant that regulatory attention needed to shift further. ABS regulation requires not merely that the entity provides a context within which authorised practitioners carry on regulated legal activities but that the entity itself needs authorisation to carry on those activities.

Whereas, historically, the ownership of the business entity (whether a general or limited liability partnership, or a corporate body) within which lawyers practised was restricted to those who were professionally qualified and themselves working in the practice, ABS introduced new permutations. Formerly, with limited exceptions usually relating to internationally qualified lawyers, a solicitors' practice could not have owners who were differently qualified (even as barristers or licensed conveyancers); ABS now allow the potential of ownership among those who are differently qualified (legal disciplinary practice) or, indeed, not legally qualified at all (multidisciplinary practice).

Where the 'non-lawyer' threshold is exceeded (currently at 10% of ownership or control), an ABS licence is required for an entity providing legal services to the public if the entity wishes to provide one or more of the reserved legal activities. There are exemptions for certain types of 'special body' entities such as trade unions and law centres (cf. paragraph 8.5 below).

The regulation of entities therefore provides a different basis of regulatory focus for the delivery of authorised legal services. The complication with entity regulation, however, is that legal services are still predominantly delivered by individuals and therefore, even where the entity itself is licensed, the reserved legal activities that it carries on must nevertheless be delivered or supervised by an individual who is personally authorised in respect of the reserved activity in question. Further, the ABS entity must also appoint an approved Head of Legal Practice who is also individually authorised for at least one of the reserved activities for which the ABS holds a licence.

6.2 The purpose of entity regulation

It would seem that the principal purpose of entity regulation for ABSs lies less in the wish that entities should be authorised to carry on regulated legal activities than in the need to be able to attach some regulatory reach to an organisation that might be wholly owned by those

19. Cf. LSB (2016), Annex 3.

who are not themselves subject to regulation as individuals. As such, it moves in the direction of 'provider-based' regulation (see further paragraph 7 below), in the sense that the legal entity is authorised to provide certain legal services. Further regulatory requirements then specify the conditions for that authorisation as well as for the provision or supervision of regulated services on behalf of the entity by individuals who are themselves authorised.

This in turn has led to a regulatory anomaly (and a consequence of the 'regulatory gap' previously recognised: see LSR-0: paragraph 4.5). If, as a result of an individual being authorised to carry on one or more of the reserved legal activities, there already exists a regulatory 'hook' on which regulated provision can be based, with the consequent protection for the clients of that authorised individual, the question reasonably arises why it is necessary to require further authorisation of the business entity within which that individual practises. The answer lies in the distinction between reserved and non-reserved activities.

Where, say, a solicitor practises within a law firm, both the individual and the firm are subject to the regulatory jurisdiction of the SRA. However, until recently, although the SRA's regulation of the individual covers both the reserved and non-reserved legal activities carried on by that individual, if a business other than a law firm wished to offer only non-reserved services to a fee-paying clientele, a solicitor could not contemplate working for that business *as a solicitor*.²⁰

This led to the rather strange outcome that an unregulated business could employ individuals who were not and never had been legally qualified to provide non-reserved activities for payment (with all the risks of competence, quality and consumer detriment that this might entail), but could not employ a solicitor to provide those same services for payment with whatever degree of reassurance and protection that might otherwise have flowed from the individual being regulated.²¹ The business could not be regulated as an ABS entity because it did not wish to provide reserved activities to the public; and regulation as a non-ABS entity is not available.

6.3 A new approach

The SRA is in the process of changing its Handbook to allow solicitors to work within a non-regulated entity, providing non-reserved services to the clients of that entity. However, it still remains the individual solicitors who are subject to regulation and not the entity.

These developments have been controversial²², largely on the basis that the protection available to consumers in these circumstances is not the same as that available to clients of regulated law firms and ABSs. There have therefore been expressions of concern about the

20. An individual who had qualified as a solicitor could offer those non-reserved services (as can anyone else who is not legally qualified), but could not hold themselves out to the client as a solicitor. There are similar restrictions that apply to barristers, though not to chartered legal executives, licensed conveyancers or chartered accountants.

21. The CMA market study rightly notes (CMA 2016: footnote 566): "There are some situations where unauthorised firms can employ solicitors and promote their activities to the public. 'Non-practising solicitors' have long been a part of the current legal services sector. Non-practising solicitors do not possess a practising certificate and are thus unable to offer reserved legal activities to consumers. However, these solicitors remain on the roll and, as a result, are within the SRA's regulatory scope and subject to disciplinary action. There are roughly 30,000 non-practising solicitors in England and Wales. While some non-practising solicitors are retired, others may still actively provide non-reserved legal activities to consumers as part of an unauthorised entity or as a sole practitioner. In addition, certain non-SRA regulated businesses (for example Peninsula and Which? Legal) employ solicitors to provide legal advice to consumers via phone. This is permitted via Rule 4.14 of the Practice Framework Rules 2011, a rule which also enables the sending of a 'follow up letter' to the enquirer when necessary."

22. See, for example, the Law Society's letter to the LSB opposing the SRA's changes to the Handbook: <https://www.lawsociety.org.uk/news/stories/law-society-opposes-sra-handbook-changes/>.

potential for confusion for consumers about the exact nature of the applicable regulation as well as about the nature and extent of any protection available to them, resulting in what some assert will be a 'two-tier' solicitors' profession.

The CMA addressed in its market study what was then the prospect of this change in regulatory approach. In expressing its overall support, it said (CMA 2016: paragraphs 5.102-5.116):

- 5.102 In addition to its focus on title, the current regulatory framework also restricts the entities within which certain professional titles can be employed. This is the case particularly for solicitors, who are restricted from working in unauthorised firms, even when carrying out only unreserved legal activities.
- 5.103 We consider that a lack of access to regulated titles may restrict the ability of unauthorised firms to compete given the impact that these titles have on consumer decision-making and trust²³....
- 5.104 Another more direct consequence of the restriction is that unauthorised firms may be less able to harness the expertise of solicitors. This may directly affect the services that unauthorised firms can offer and reduce their ability to compete. This is relevant as unauthorised firms may employ different innovative business models or may be able to offer the same services that solicitors offer in relation to unreserved legal activities more cheaply than authorised firms. As a result, we consider the restriction may unnecessarily reduce the availability of lower cost options in the market.

Current SRA proposals on 'individual solicitors'

- 5.105 As part of its Handbook review, the SRA proposes to allow solicitors to provide unreserved legal activities to the public while working in unauthorised firms. These 'individual solicitors' would operate under different regulation than would be the case if employed within an SRA-regulated firm. In particular, they would not be subject to mandatory [professional indemnity insurance (PII)], legal professional privilege would not apply to their communications and complainants would not have access to the SRA compensation fund. The reforms would also establish a greater distinction between the personal regulation of solicitors based on their individual title alone and entity regulation of solicitor firms. The SRA is proposing that this distinction be reflected in two separate codes of conduct....
- 5.106 The SRA proposal would address the competition concerns raised [above]. We consider that access to regulated titles would improve the ability of unauthorised providers to compete in two ways:
 - (a) Through the impact that these titles have on consumer decision-making and trust. This means that consumers may be more willing to use unauthorised providers which employ practising solicitors, in situations where they might benefit from using them; and
 - (b) Through the ability of unauthorised firms to harness the expertise of solicitors in innovative and lower costs business models.
- 5.107 This is likely to have a positive impact on consumers by generating greater competitive pressure on price, and creating new routes and choice for consumers to access advice from qualified solicitors.
- 5.108 However, at the same time, there might be risks to consumer protection if the change led to consumers using providers which offered lesser regulatory protection on an uninformed basis.
- 5.109 In the following paragraphs we consider the possible effects of the SRA proposal and the risks that consumer protection concerns might arise. The implications of the SRA proposal for consumers who chose to use solicitors working in unauthorised firms

23. Cf. paragraph 4.4 above.

would depend on whether they would have otherwise used an unauthorised provider or an authorised provider.

- 5.110 Consumers who would have purchased legal services from an unauthorised firm would benefit from additional protection. As a result of the changes, they would have access to the [Legal Ombudsman (LeO)]. In addition, solicitors working in unauthorised firms would need to follow the minimum standards and ethical codes in the 'Code of Conduct for Solicitors'.
- 5.111 Consumers who would have purchased from an authorised firm but, as a result of the changes, now chose to use a solicitor working in an unauthorised provider would have less protection. As noted above, unauthorised providers who employ solicitors will not be subject to mandatory PII and consumers would not benefit from legal professional privilege. Consumers using solicitors in unauthorised providers would also not have access to the SRA compensation fund.
- 5.112 The differences in regulatory protection between providers are of concern if they are unknown to consumers when they choose a provider, as it is important that consumers are able to choose providers which offer protection appropriate to their needs. As noted above, consumers rely on titles to some extent but often do not understand differences in regulatory protection. It is therefore possible that consumers who decide to use solicitors in unauthorised firms might suffer harm in certain situations as a result of the more limited regulatory protections. In addition, there is a possibility that those consumers who are more aware of regulatory protections might assume that solicitors working in unauthorised firms would have in place the same protections that apply to solicitors working in authorised firms.
- 5.113 The benefits to consumers from these additional regulatory protections can be important, but are limited to certain situations. We note that many unauthorised providers already elect to have PII without a regulatory obligation to do so. Access to the compensation fund becomes relevant when an SRA-regulated firm owes money to a consumer in circumstances where the provider misappropriated funds or did not have PII. This leaves potential for consumers to be exposed to greater risks from using solicitors in unauthorised firms particularly in situations involving the handling of client money. As noted in paragraph 5.76²⁴, the scope of the reserved legal activities in conveyancing and probate may not effectively cover the handling of client money resulting in the potential for regulatory gaps.
- 5.114 We similarly recognise that the lack of legal professional privilege for 'individual solicitors' working within an unauthorised entity is a potentially significant factor that might in certain situations have an influence on the consumer's purchasing decision, if known to the consumer in advance.²⁵
- 5.115 For these reasons, we believe it would be important for consumers to be advised of differences in regulatory protection immediately prior to purchasing legal services from an 'individual solicitor' within an unauthorised firm. In this regard, we note that the SRA proposal contains provisions that are aimed at enabling consumers to make informed choices, such as the obligation on 'individual solicitors' to inform consumers about differences in regulatory protection. We consider that these provisions may be important in mitigating the consumer protection concerns identified and that their effectiveness should be monitored.
- 5.116 Overall, on the basis of the evidence set out above and provided that the measures that the SRA puts in place to mitigate the consumer protection risks are effective, we believe that the benefits to competition of removing the restriction would be likely to outweigh the consumer protection concerns identified.

24. See LSR-2 2019: paragraph 2.5.

25. It might be questionable, however, whether many consumers would in fact be aware in advance of the availability or consequences of legal professional privilege.

Having an element of entity regulation within the framework presents an opportunity to adopt a more differentiated approach (cf. paragraph 8.1 below) under which:

- higher-risk activities that require personal competence, skill or integrity might be subject to before-the-event authorisation at an individual level;
- other activities with lower assessed levels of risk might be subject to during- or after-the-event regulation (or both), at either the individual or entity level; and
- other, more process-based or contextual regulation might be attached at entity level (such as handling client money).

6.4 An unsatisfactory state?

In its current state, the regulation of entities seems a rather unfulfilled halfway house. It applies to firms regulated by most of the principal approved regulators, and to ABSs that meet the necessary criteria in respect of reserved activities and 'non-lawyer' authorisation. The position of special bodies is left in an unresolved position. Business entities that are not otherwise regulated for legal services and that wish only to carry on non-reserved legal activities for the public, cannot be regulated within the current framework at all. There is not, therefore, a coherent or consistent approach to the regulation of entities that wish to offer legal services to the public.

Entity regulation might possibly be better used as a vehicle for attaching regulatory requirements and consequences to the organisational environment in which individuals practise. In this way, challenges such as process-based delivery of legal services, and the handling of client money, might be most effectively addressed as business entity responsibilities, irrespective of the individual authorisations for the personal delivery of legal activities.

6.5 Regulation of entities and substitutive legal technology

As with regulation of individuals (cf. paragraph 5.4 above), there is no inevitability that legal services provided by or through substitutive legal technology would involve entities (they might, for instance, be provided contractually only through individuals). However, as with regulation of entities generally, there is at least the prospect that there would be an entity involved in some such ventures. The necessary combination of individual and entity regulation might provide a basis for the effective regulation of substitutive legal technology – except where, in the current framework, the technology provides advice only on non-matters and there are no authorised individuals otherwise involved.

6.6 Summary

The benefits and advantages of regulation of entities are:

- it attaches regulation to the organisational context in which individuals carry on legal activities;
- it enables the carrying on of regulated legal services when the provider through which those services are offered is not an otherwise authorised individual; and
- it offers a route to the regulation of those activities and processes of a law firm that are more appropriately conducted at an entity or organisational level (such as accounting, and handling client money).

The limitations and disadvantages of regulation of entities are:

- it cannot address the very personal services that require human interaction, skill or integrity unless it is also combined with individual/title regulation;
- services can only be 'delivered' by individuals, process and/or technology, and so requires that delivery necessitates a requirement for supervision by an individual to whom regulatory accountability can be attached (such as an authorised person or Head of Legal Practice);
- it struggles with the distinction between regulated and unregulated activities; and
- it provides an incomplete approach to the regulation of substitutive legal technology.

7. Regulation of providers

7.1 A question of scope

Rather than seeking to differentiate between professional titles, or between individuals and entities, an alternative focus for regulation could be a broader notion of a 'provider'. This description could be defined in such a way that all forms of the provision of legal services could be captured. Once it is decided that a legal activity should be within the scope of regulation, any form of provision by any provider could then fall within the regulatory framework. This would render it unnecessary to distinguish different sources of provision or provider. The principal issue therefore arises from what falls within the scope of regulation, rather than who or what provides the regulated activity.

The benefit of an approach based on regulation of providers is that it can incorporate all of the positive aspects of regulation of individuals and entities within one regulatory arrangement, since all providers – whether individuals, entities or title-holders – would be subject to the same requirements.

Depending on how widely the scope of regulation is framed, regulatory focus on providers could allow different forms of regulatory intervention, of varying degrees and at different points in time, to be applied to all legal services within that scope (cf. paragraph 8 below).

7.2 Regulation of providers and substitutive legal technology

In a framework in which the nature or type of provider does not need to be differentiated, any provider of substitutive legal technology could readily be brought within scope. Of all options for focus, therefore, this would appear to be the simplest for bringing substitutive legal technology within the practical reach of regulation.

The remaining challenge here would relate only to jurisdiction: who or what is the 'hook' within England & Wales on which regulatory responsibility and consequences can attach? This might be one or more of the developer or development process, the provider, the software host, the user, or the location of any relevant activity.

7.3 Summary

The benefits and advantages of regulation of providers are:

- it offers flexibility in relation to the scope of regulation (from all legal activities provided within the jurisdiction to only some targeted, higher-risk activities);
- it offers greater flexibility in relation to the form of regulation to be applied (cf. paragraph 8 below);
- it avoids the need for parallel approaches for individuals and entities; and
- it might come closest to a form of activity-based regulation by attaching to all forms of provision of legal services, including substitutive legal technology.

The limitations and disadvantages of regulation of providers are:

- (depending on scope and form) potentially an extension of the scope of regulation by bringing within the regulatory 'net' providers and activities not currently subject to regulation.

8. Forms of regulation

8.1 Background

Once a policy decision has been taken on the legal services that should fall within the scope of regulation (cf. LSR-2 2019), and the appropriate focus for that regulation (paragraphs 3 to 7 above), the issue that next arises is what form that regulation should take and when it should be applied. In its market study, the CMA suggested that (CMA 2016: paragraph 6.22) “an optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it”.

The CMA continued (CMA 2016):

- 6.23 Adapting regulation to the level of risk means that the form of regulation might differ in practice across legal activities. For instance, regulation could:
 - (a) set entry standards that providers (individuals or entities) are required to meet before they are entitled to provide certain legal activities, for instance through licensing of certain activities ('before-the-event regulation');
 - (b) set training requirements to ensure that providers continue their professional development ('during-the-event regulation'); and
 - (c) allow consumers to have access to specific redress mechanisms (for instance, access to the LeO, mandatory PII, and access to compensation funds) ('after-the-event regulation').
- 6.24 Regulations setting entry requirements on providers appear to be more appropriate for the activities that pose the highest risk to the primary objective. By contrast, during-the-event or after-the-event regulations are likely to be more appropriate for low-risk activities, although they may also be made available as an additional protection for higher risk ones.

The CMA's comments echo the earlier work of the Legislative Options Review (2015):

- 8.2 The current regulatory framework, through the entry point of the reserved legal activities, applies a regulatory 'gate' through which all forms of intervention then become possible. Authorisation to conduct one or more of the reserved activities requires before-the-event (BTE) regulation. Once through that gate, both during-the-event (DTE) and after-the-event (ATE) regulation are then also applied.
- 8.3 In this sense, the current forms of intervention are 'all or nothing'. The LSA therefore prescribes BTE regulation and DTE and ATE regulation follows. The LSA further prescribes certain types of DTE intervention (such as professional indemnity and compensation fund arrangements for ABSs) and ATE intervention (such as access to the Legal Ombudsman).
- 8.4 However, because of this prescription in the LSA, there is no opportunity for separate access to ATE intervention by the Legal Ombudsman for, say, consumers who have sought non-reserved legal services from unregulated providers.
- 8.5 Equally..., when a provider has been authorised for one or more of the reserved activities (for which BTE regulation is prescribed in the LSA), they may then become subject to DTE and ATE regulation on their non-reserved activities (for which BTE regulation is not required in the LSA). A risk-based and proportionate approach to such regulation might conclude that only ATE intervention of some kind would be appropriate for certain non-reserved activities without the need to subject all providers to full BTE, DTE and ATE regulation in respect of all legal activities they conduct.
- 8.6 With less prescription in the statutory framework, and regulators adopting a more risk-based assessment of why, when and how regulatory intervention is required, a more proportionate, less burdensome and more cost-effective approach could emerge. For

example, regulatory interventions which take place before or during service delivery could be considered most appropriate in response to those activities which are classified as posing the highest risk to the public interest or the regulatory objectives, while interventions taking place after the event, such as a redress or compensation scheme, would be more appropriate on their own for low-risk activities, while also being available as an additional safeguard for higher risk activities.

As the Legislative Options Review and CMA market study have pointed out, regulation can be applied before-, during- or after-the-event. Before-the-event regulation sets rules about who can act in a market, what they can do, and how they can do it. It thus aims to set certain standards before any transactions are entered into with consumers.

After-the-event regulation provides for remedies against professionals who have breached professional rules or service commitments, and so can only act after a problem has arisen. Before-the-event regulatory measures are generally regarded as being inherently anti-competitive, because they form barriers to entry in the market to which they are applied. For this reason, there should be a compelling public good or consumer protection need to warrant such restrictions, such as the inadequacy of monetary compensation for harm caused. It seems logical that measures to ensure that a market functions properly can only be justified if no other measures are available that would have a similar purpose but less severe effects on competition.

For clarity, it should be observed that, in the context of this discussion, ‘the event’ is not necessarily the same for all three forms of regulation. For before-the-event intervention, ‘the event’ is the entry of a provider into the market. For during-the-event regulation, and after-the-event measures, ‘the event’ is either the coming into being of a formal relationship of legal representative and client (often referred to as a retainer) or the provision of any advice, service or representation by the provider to the client.

This paper will now adopt the approach of the earlier work of the Legislative Options Review and the CMA market study to consider the different forms of intervention. In considering these interventions, it might be worth framing the discussion against a regulatory context of legal activities being assessed as high-risk, medium-risk and low-risk, and with a working hypothesis of a ‘layered’ approach under which²⁶:

- high-risk activities would attract before-, during- and after-the-event regulation;
- medium-risk activities would attract during- and after-the-event regulation; and
- low-risk activities would attract only after-the-event regulation.

Activities thought to present no risk, or perhaps very little risk, could be subject only to general consumer law (cf. LSR-1 2019: paragraph 2) rather than any sector-specific protection. However, it is worth noting in this context that the Legislative Options Review posed a residual consideration (2015: Annex 4, paragraph 13(a)), namely: “Whether, because non-sector responses might not fully understand the nature of (even no-risk) legal advice and representation and the need for timely resolution of some issues, any consumer of legal services should be allowed access to the after-service complaints jurisdiction and remedies of LeO.” This – and the associated cost of access to LeO – should be borne in mind before concluding that no sector-specific regulation is warranted in any given circumstances.

26. This approach was foreshadowed in the Legislative Options Review (2015: Annex 4, paragraph 10).

8.2 Before-the-event regulation

8.2.1 Different approaches

There can be different forms of before-the-event regulation, including licensing, certification, accreditation and authorisation. These terms are often used interchangeably.

In essence, the framework of the Legal Services Act 2007 – although it refers to authorisation – is more accurately a licensing system, because it achieves authorisation predominantly through professional titles. Licensing usually attaches to professions or occupations, and gives the members of those callings a licence to practise.

Certification or accreditation can be offered by any market actor, whether statutory, professional or commercial. It offers a statement that those who have complied with the certification or accreditation requirements (which, as with licensing, can include appropriate education, training, testing, and practical experience) are competent to carry on the certified activity or activities. This method can therefore be seen, say, in accreditation under the Law Society's conveyancing quality scheme (albeit only open to those firms that are already regulated by the SRA)²⁷ and by the Society of Trust and Estate Practitioners, and in the certification of paralegals by the Professional Paralegal Register.

Authorisation would normally be given in relation to activities (hence authorisation in accordance with the Legal Services Act for carrying on a reserved legal activity). In the context of this Review, title-based licensing is a convenient route to authorisation, but nevertheless arguably confuses authorisation and licensing (hence the issues discussed in paragraph 4.5 above). Similarly, the licensing of ABSs to carry on one or more of the reserved activities is in fact closer to authorisation than to licensing as usually understood.

8.2.2 Licensing, authorisation and certification

The rationale for professional regulation and licensing can be explained as follows (Białowolski et al, 2018: page 12):

The key public policy justification for professional regulation in general, and licensing in particular, is its presumed ability to protect consumers and the wider public from incompetent and unscrupulous practitioners.... Consumers cannot easily obtain information or lack the knowledge to assess the quality of the product or service prior to its purchase, particularly where the provision of a technical service requiring specialist knowledge and skills is involved. Through setting minimum qualifications requirements for entry to occupations and making various postulations regarding work experience and continuous professional development, occupational licensing is expected to raise average skills/competence levels in the occupation, since low-quality providers will presumably be unable to meet the new qualification requirements and are driven out of the occupation.

Ribstein offers a critique of licensing as follows (2004: 305-308):

A lawyer's license tells clients that the lawyer meets certain minimum qualifications. This information may be particularly helpful for clients who deal rarely with the legal system, lack independent resources for checking qualifications, or have relatively small or routine matters that do not justify substantial investigation....

[Lawyer] licensing arguably has four types of benefits. First, by providing quality assurances, licensing encourages people to use licensed professional advisors rather than other ways of dealing with the law, including self-representation. The question, then, is whether society is better off if people get their legal advice from professional advisors. Professionalizing legal advice arguably serves social justice, the rule of law, and the reliability of contracts. On the other hand, legal professionals may promote socially wasteful litigation. Also, licensing, by

27. See: <https://www.lawsociety.org.uk/support-services/accreditation/conveyancing-quality-scheme/>.

increasing the price of legal advice, may reduce low-income clients' access to legal services. This might be ameliorated by requiring lawyers to render services to the poor as part of the cost of the license. But this requirement could have its own negative consequences, including encouraging more inefficient litigation.

Second, licensing may benefit lawyers by reducing their costs of signaling quality. But this benefit accrues mainly to lawyers who practice alone or in small firms and who have difficulty signaling quality in other ways. By contrast, large law firms can signal quality by posting substantial and long-lived reputation bonds. It is not clear how society gains by subsidizing small firms. Licensing may reduce concentration in the market for legal services, but the cost of such concentration is not clear. Also, even if licensing reduces concentration in the market for lawyers, it may increase concentration and reduce availability of legal services overall by blocking entry of low-end non-lawyer providers.

Third, lawyer licensing arguably protects third parties who would be injured by unregulated legal advisors who enable others to break the law. But the costs and benefits of licensing must be compared to those of liability rules. One who hires a lawyer to harm third parties may be held liable as a principal, or the lawyer may be held liable for aiding and abetting the client's wrong. Focusing on lawyers' qualifications to practice would seem to be an ineffective way to prevent lawyers from engaging in misconduct.

Fourth, lawyer licensing might be said to increase social welfare by backing lawyer regulation that improves the administration of justice. In particular, licensing law practice may help ensure good lawyer conduct in court by bringing the power of license revocation to bear on violations of conduct rules. But it is not clear whether this additional sanction is necessary to ensure compliance with conduct rules or that licensing contributes significantly to regulating lawyer conduct in court.

As Ribstein rightly observes (2004: 317): "The relevant question is not whether there is an information asymmetry between clients and lawyers, but whether licensing, with all its costs, more efficiently addresses this asymmetry than certification." As he says, there is a danger that (2004: 313):

licensing hurts the ones who need it most, and helps those who need it least. Licensing is most important in ensuring quality where clients are least able to self-protect, as in small transactions where the costs of obtaining information outweigh the benefits, or where clients are relatively uneducated and unsophisticated. Yet at the lower end of the market licensing laws most restrict the supply of services.

Ribstein's conclusion is that (2004: 327):

Information asymmetries between lawyers and clients do not clearly justify lawyer regulation.... Nor does lawyer licensing help ensure that lawyers will serve the public good. Indeed, lawyer licensing would seem to hurt the very people who most need protection – the poor and disadvantaged who cannot pay the highly trained lawyers the system requires.

Białowolski et al also address the potential downsides of licensing (2018: page 13):

The effect of regulation on service quality can also be negative. Quality is not only linked to skill but also quantity supplied. To explore such an effect, it is useful to consider the imposition of barriers to enter occupations which are cumulatively imposed over time on occupations. Examples of such barriers include compulsory membership of professional associations, artificial limits on the number of professionals that are allowed to operate in the market, restrictions on corporate forms, shareholding requirements, restrictions on joint exercise of professions, incompatibilities of activities, etc. If an increase in quality through better-trained practitioners results in a subsequent fall in their supply (due to aspiring practitioners not meeting the entry or exercise requirements), the service actually received by the consumer suffers for the following reasons.... First, if a decline in the number of available practitioners leads to an increase in price of the product or service, then some consumers might opt for lower-quality services. In a context of licensing, such substitutes are confined to 'do-it-yourself' services.... Price increases can also be driven by consumers themselves. Regulation can reduce uncertainty or the likelihood of poor quality practitioners in the market.

As a consequence, consumers perceive the service to be of higher quality and demand more of the service, thus pushing up the price....

A more extreme unintended consequence of licensing could involve the decision not to consume the service at all, which could be a health and safety risk in itself. Such an effect is likely to be more pronounced among low-income consumers, meaning that any improvement in quality is only felt by those at the middle and upper quartiles of the income distribution.... Overall, the effects of regulation should be analysed not only in relation to improvements in skill levels but also price and availability of services. For example, while one might receive a better quality service from a licensed [practitioner], such effects cannot be realized if such individuals are in short supply and therefore access to [professional] services is restricted. Finally, licensing takes the form of a minimal human capital requirement to practise the occupation and often provides no incentives for human capital development after entry. It is therefore possible that the 'minimum' skill standard imposed by licensing becomes the 'maximum' across the occupation. Coupled with the fact that it restricts competition among practitioners, licensing can reduce the pressure to compete on quality, thus leading to a fall in the overall service quality received by consumers.

Ultimately, as Robinson points out (2018: 1908-1909):

the choice of when and how to use licensing is a political decision that involves answering questions about what values the economy should prioritize and how it should function. For instance, is occupational knowledge and craft best generated and standardized through the market, professional communities, or other means? In a specific occupation, should the government promote labor market individualism or professional trusteeship? Or how should the regulation of a sector of the economy balance the interests of consumers with those of producers?

The 'all-inclusive' approach of licensing, whether or not based on professional titles, seems increasingly problematic. Given a world in which specialisation is increasing, it is not clear that licensing alone offers much assurance to the public or to consumers beyond a general statement that the individual licensee is a 'fit and proper person'. As such, the licence underpins personal integrity and subscription to an ethical code rather than being a warranty of much more than a limited field of competence²⁸.

Consequently, authorisation or certification in some form in relation to specific legal activities is almost certainly needed to supplement a general licence (perhaps by way of additions to or endorsements on a practising certificate). And if licensing and authorisation are separated in this way, the opportunity is then created for authorising those who do not have a licence. On this basis, it might be argued that professional licensing (title) might only survive for regulatory purposes (as opposed to market signalling: cf. paragraph 4.4 above) within a structure of co-regulation or earned autonomy (cf. paragraph 3.4 above, and LSR-4 2019: paragraph 2.2.3).

8.2.3 Before-the-event authorisation

The issue here is accordingly whether, and how, prior approval is given to providers before they are permitted to offer services to the public for reward, other than exclusively on the basis that they hold a professional title or qualification. The Legislative Options Review addresses the requirement for prior authorisation as follows (2015: Annex 4, paragraphs 1 and 2):

28. This statement is based on the range and complexity of modern law being such that any claim to universal, continuing competence across that range is not credible. Indeed, one of the criticisms often levelled by students of vocational qualification courses is that they include far too much 'irrelevant' material that, given their intended areas of practice, they feel they will not need to know (such as business law for intending legal aid practitioners).

A regulator might decide, after clear and careful assessment, that an activity or provider is of such importance to the public interest or of such a high-risk nature that a preventative regulatory approach should be adopted. The premise of such targeted and proportionate intervention, following an appropriate and evidence-based risk assessment, should be that it is justified because during service and after service interventions would represent inadequate or unsatisfactory responses to the risks in question. However, such barriers and exclusions should carry a high burden of proof that they are necessary in the interests of the regulatory objectives.

Any strong restriction or limitation on the carrying out of an activity would need to be transparently assessed against an agreed public interest and risk framework, but such strong regulatory intervention might occur where, for example, there are significant potential issues relating to an individual's position as an officer of the court, or where there is a significant risk of incompetence, fraud, improper investor or management influence, or other consumer detriment. A regulator would need to balance the protection of the public or consumer interest with the possible inhibiting effect any intervention might have on, say, innovation or access to justice.

Ogus describes 'the requirement of prior approval' as "the most interventionist of regulatory forms" (2004: page 9). The rationale and nature of that intervention must therefore meet a high threshold for justification. In the current framework, the requirement of prior approval derives from the need for authorisation in respect of the reserved legal activities. LSR-2 (2019) explored whether the notion of reservation remains necessary, or whether a better approach simply requires the identification of those legal activities that present a sufficiently high risk to the public interest that before-the-event authorisation is warranted.

I therefore agree with principle expressed in the statement in the Legislative Options Review (2015: Annex 4, paragraph 3) that:

a future regulatory system may need to be more agile to meet the challenges of changing market conditions and emerging evidence of higher (or lower) risk. The process and principles for reservation or de-reservation of activities could, therefore, be part of a flexible risk assessment framework. Evidence-based risk assessment might take into account (for example) type of consumer, area of law and type of legal activity in determining whether or not the public interest benefits to be protected or maintained, or the potential harm or detriment to be avoided or reduced, warranted before-the-event intervention.

In the Legal Education and Training Review, the following observations are instructive (2013: paragraph 5.19):

Defining areas of high risk may not be straightforward and could depend on changing market conditions.... More obvious risk areas include those where liberty is at stake (crime, immigration), perhaps where there is a significant risk of distress purchasing (crime, immigration, divorce, (public) child care, domestic abuse, repossession) or where services relate to proportionately high value items in terms of most consumers' net worth (wills, conveyancing). However, this does not address the extent to which complexity and risk may vary within an activity.²⁹

These observations pick up a number of the activities and factors considered in relation to the scope of regulation in LSR-2 (2019).

Forms of before-the-event authorisation could include:

- (a) licensing, based on the award of a professional title: as now, this would result in concurrent authorisation for several legal activities;

29. The LETR also notes: "Client characteristics in particular will be a significant variable, which might affect decisions as to the proportionality of activity-based requirements. At a relatively broad level, this could mean that, eg, separate authorisation of domestic conveyancing would be more proportionate than separate authorisation of commercial conveyancing, even though the latter may involve much higher value transactions."

- (b) separate authorisation for each regulated activity, achieved by authorisation from a regulator, either by separate qualification, or from recognition or exemption based on a professional title; or
- (c) certification in respect of specific activities, based on meeting the criteria for one or more approved certifying bodies, with certification recognised for all regulatory purposes and being an additional requirement for those holding professional titles (though appropriate exemptions might be available as a consequence of activity-specific prior training and experience).

Finally, any requirement for before-the-event regulatory intervention would also need to address the question of whether exemptions should continue in respect of self-representation, providing legal advice and representation without a fee or other reward, and other not-for-profit and similar provision (cf. paragraphs 8.5 and 8.6 below).

8.3 During-the-event regulation

The Legislative Options Review said this about during-the-event regulation (2015: Annex 4, paragraph 6):

There are a number of existing regulatory interventions which are targeted at the period during which an activity or event is taking place, including as a last resort a regulator 'intervening' in (that is, taking control of) a law firm. They remain valid options for any future regulatory intervention. As with 'before delivery' approaches, the premise of during-the-event regulation could be that relying only on after-service intervention would be inadequate or unsatisfactory.

The assumption in this paragraph is that such intervention could be applied both in combination with and (unlike now) independently of before-the-event authorisation.

8.3.1 Standards and the professional principles

Ogus describes the use of standards as a regulatory technique that allows an activity to take place without any prior authorisation or before-the-event control, but a provider who fails to meet those standards will be subject to sanctions (including even criminal penalty) (2004: page 150).

Ogus then identifies three categories of standards that represent different degrees of intervention, from high to low (2004: pages 150-151). Such a spectrum, or sliding scale, of intervention would be consistent with a new approach of targeted and risk-based measures. The three categories are (2004: page 151):

- (a) specification (or input) standards, either to compel a certain method of production or to prohibit the use of other resources or methods (such as the need for services to be carried on or supervised by authorised individuals);
- (b) performance (or output) standards that require certain conditions of quality or behaviour to be met at the point of supply but leave the provider free (or somewhat free) to choose how to meet those conditions (such as a requirement to maintain client confidentiality, or for professional indemnity insurance);
- (c) target standards do not prescribe any specific standard or process, but impose sanctions for detriment arising from the output provided (such as damages for professional negligence, or remedies imposed by the Legal Ombudsman).

In this context, the professional principles in section 1(3) of the Legal Services Act 2007³⁰ represent regulatory standards. As the Legislative Options Review said (2015: Annex 4, paragraph 7(d)):

these are intended to impose obligations on practitioners to behave in a professional and ethical way (they are equally appropriate, though not currently obligatory, for those who provide legal services but do not otherwise have a professional title or membership of a professional group). It may be desirable to find a way for all providers to be bound by these sorts of ethical principles (e.g. through codes of conduct) and for the Legal Ombudsman to take account of them in adjudications. For the future, there might usefully be some debate about whether these principles should explicitly include a personal obligation to act in the public interest, and also whether there should be an explicit hierarchy of duties in relation first to the court, second to the client, and only then to the firm's owners or shareholders³¹.

The CMA referred to codes of conduct in its market study (2016: paragraph 2.24):

Authorised providers' codes of conduct require that authorised providers carry out their work with care, integrity and diligence and with proper regard for the technical standards expected of them.

In addition, authorised providers must adhere to certain requirements that are designed to ensure an appropriate level of service. This includes requirements on key issues such as confidentiality, the handling of client money, and the provision of key information (such as information on the work that will be carried out, fees, the relevant complaints procedure and general obligations such as professional confidence) which is usually communicated in an initial letter to the client called a client care letter.

It is also worth mentioning in this context that formal regulation is not the only effective form of regulatory or behavioural control. Professional norms and peer pressure can exert a strong influence over attitudes and behaviour, whether or not they are incorporated into statutory requirements or a code of conduct. The principal intent of codes of conduct is therefore that the behaviour of *individuals* should be influenced for the better. While there may be an organisational context within which that behaviour takes place, the emphasis for this form of during-the-event regulation is on individuals rather than entities³².

As a member of the Advisory Panel suggested:

motivations often tend to be more mixed/complex/nuanced than some of the discourse around regulation seems to acknowledge. This may for example include their need to preserve their view of themselves as a person with a strong moral compass or their reputation for expertise and trustworthiness in the eyes of their peers. Regulators might need to spend more time understanding those motivations for internalising standards of good behaviour, and what is most likely to cause that mechanism to break down, when assessing where to focus their risk-based regulation.³³

30. The principles are: that authorised persons should act with independence and integrity, comply with their duty to the court to act with independence in the interests of justice, maintain proper standards of work, act in the best interests of clients and keep their affairs confidential.

31. This was the hierarchy of duties adopted in the initial public flotation in Australia of Slater & Gordon (with the approval of the regulator) and included in the prospectus.

32. However, it might be worth noting here the provisions of section 90 of the Legal Services Act 2007, which require those within ABS entities who are not authorised persons not to do anything "which causes or substantially contributes to a breach" by an authorised person of their professional duties.

33. See also Mark et al (2010) for a discussion of how legal services regulators can encourage practitioners in maintaining their ethical integrity in times of change.

8.3.2 Handling client money

When clients transfer (or authorise the transfer) of money to their representatives in a legal transaction such as a house sale or purchase or in the administration of the estate of a deceased family member, they are taking one of the highest risks to consumers. The question of whether or not practitioners should be allowed to hold client money and, if so, under what conditions, is therefore a very important element of during-the-event regulation.

The CMA points out that the current approach to reserved activities leaves the potentially riskier area of the handling of clients' money during conveyancing and estate administration outside the scope of regulation unless the consumer chooses to have that work handled by a practitioner who is an authorised person or title-holder who is subject to entity or professional requirements to comply with specific accounting rules for the handling of client money (CMA 2016: paragraph 5.76; and cf. LSR-2 2019: paragraph 2.5).

It is possible to suggest that the regulatory requirements in respect of handling client money³⁴, and the consequential burden of a compensation fund (see paragraph 8.4.4 below), add to the cost of regulation and its oversight, even for those authorised persons who do not hold client money but must nevertheless contribute to the overall costs of the regulatory framework (such as barristers³⁵ and costs lawyers).

The regulatory framework for the handling of client money might be an area where a predominantly organisational or entity approach could be appropriate (perhaps treating sole practitioners as if they were regulated entities for this purpose).

8.3.3 Undertakings

It is common for solicitors and licensed conveyancers to give undertakings to other parties and to the court (see, for example, LSR-2 2019: paragraph 4.2.5; and see Gould 2015: paragraphs 3.107-3.111). These performance standards create an absolute obligation on the individual who gave the undertaking to honour it. They are subject to unconditional enforcement – even if, for example, the individual concerned or their firm has not received the funds from which a financial undertaking would be discharged. This strict position ensures that business and transactions can proceed efficiently and more quickly on a basis of absolute trust.

Although undertakings can be given on behalf of a firm or entity, the responsibility remains a personal one, suggesting that this form of during-the-event regulation is more appropriate for individuals rather than entities.

8.3.4 Professional indemnity insurance

A requirement to take out professional indemnity insurance (PII) represents a specification standard. The terms of the specification (in terms, for example, of minimum and other levels of cover, or the requirement for and extent of run-off cover) offer assurance to clients that, if something goes wrong with the representation or retainer with a provider, there may be recourse that will provide some redress (see further LSR-4 2019: paragraph 7.7; and see Gould 2015: chapter 10).

This form of consumer protection can be applied at both the individual and entity level.

34. See further, Gould 2015: paragraphs 3.139-3.145.

35. There are limited circumstances in which barristers might hold client money, but they will usually then be regulated under a different regime (for instance, as a manager or employee of a firm regulated by the SRA).

8.3.5 Disclosure and transparency

In a sector where information asymmetry is often advanced as one of the principal reasons to justify regulatory intervention (cf. LSR-1 2019: paragraph 3.3), measures to reduce that asymmetry by requiring disclosure of relevant information might reasonably be expected.

Ogus describes ‘information measures’ as a requirement on suppliers to disclose certain facts, but as not otherwise imposing behavioural controls (2004: page 150). They fall at the low end of the spectrum of regulatory intervention, but are nevertheless potentially very important. Although disclosure of information to consumers might occur before any given provider is retained to provide services, in the context of the current discussion ‘the event’ follows the entry of the provider into the market and, in this sense, the required disclosure of the information to consumers is ‘during-the-event’ of the provider being in the market even if it takes place before any retainer or transaction is entered into with the provider by the consumer.

The CMA has been particularly active in encouraging legal services regulators to require greater transparency on price, service and quality in legal services (CMA 2016: paragraph 7.8). Their intention is to address the “lack of transparency in the sector and the limited extent to which consumers compare providers” which “softens competition and incentives for innovation both between different types of provider (eg authorised and unauthorised) and within provider type (eg solicitors)” (CMA 2016: paragraph 7.6).

However, Ogus poses (and answers) an ‘intriguing basic question’ (2004: page 127):

Given the fact that most suppliers are under competitive pressure *voluntarily* to disclose prices, why is it necessary to *force* them to do so? From a public interest perspective, the answer probably lies in the mode of disclosure rather than its existence. Prices may be voluntarily disclosed, but unless they are in a form which facilitates comparisons with those set by other traders, they impede the competitive goal. In other words, the most significant welfare gains are likely to result from the requirement that prices be indicated with reference to standardized units....

The absence of such standardised units in legal services is perhaps the greatest impediment to achieving the intended benefits of transparency, but that does not necessarily militate against even trying – and it certainly does not justify the historical ban on disclosing prices.

The CMA market study recommended greater transparency, and the LSB and front-line regulators have been working towards the introduction of new rules to meet the CMA’s expectations. Revised rules from the SRA, CILEx Regulation and CLC have been approved, and action plans are in place for the remaining regulators.³⁶

Disclosure and transparency can be seen as part of a broader mission to improve consumers’ legal capability and literacy³⁷ (which is just as important for consumers in the legal sector as financial capability and literacy is in the financial sector). The question of how much of the responsibility for raising the levels of capability and literacy lies with regulators and formal regulation is a different matter (cf. LSR-0 2019: paragraph 4.2).

36. The latest published LSB assessment on progress took place in October 2018: see https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2018/20181016_LSB_Issues_Second_Assessment_Of_Regulators_Transparency_Action_Plans.html

37. See, for example, Wintersteiger (2015).

8.3.6 Continuing competence

Although it is not always easy to agree on an effective regime for the assurance of continuing competence, it is now usual for those who hold themselves out to the market as competent in a particular area of practice to have to comply with requirements for some form of continuing professional development (CPD).

However, as the CMA pointed out in its market study (CMA 2016: paragraph 4.59):

Since November 2016, all solicitors are required to meet the outcomes-based standard set out in the SRA competence statement. The first section of the SRA's Competence Statement states that solicitors must '[m]aintain the level of competence and legal knowledge needed to practise effectively, taking into account changes in their role and/or practice context and developments in the law' and any work beyond solicitors' personal capability should be disclosed. The introduction of the outcomes-focused standard has effectively replaced the CPD requirement for solicitors.

The BSB has a similar, more outcomes-focused approach³⁸, as has CILEx Regulation and ICAEW. The CLC, IPReg and the Faculty Office still maintain hours- or points-based requirements for CPD.

It is a matter for debate whether this aspect of legal practice should remain entirely an element of during-the-event regulation, or whether the assurance of continuing competence should include periodic re-accreditation or renewed authorisation (in effect, a periodic recurrence of before-the-event reauthorisation).

This is an issue that affects a number of professional activities where continuing competence and public trust and reliance are critical. For example, the 2007 White Paper, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century*³⁹, recorded (Chapter 2, paragraphs 2.2 and 2.3):

there has been long debate about whether the health professionals, and particularly doctors, should be required to demonstrate objectively that they have kept up to date with professional and clinical developments and that they continue to apply, through their practice, the values that they committed themselves to when their names were first placed on their professional register. Revalidation is a mechanism that allows health professionals to demonstrate that they remain up-to-date and fit to practise. For the large majority, revalidation will provide reassurance and reinforcement of their performance, and encourage continued improvement. For a very small minority, the scheme will provide a way of identifying problems and an opportunity to put things right.

Public and professional opinion has moved on in the course of this debate, from a position where trust alone was sufficient guarantee of fitness to practise, to one where that trust needs to be underpinned by objective assurance. Public opinion surveys suggest that people expect health professionals to participate in the revalidation of their registration and that many believe that this already takes place every year.

The Legal Education and Training Review noted, in line with the experience in the health sector, the Legal Services Consumer Panel's suggestion that "there is a strong expectation among consumers that lawyers are re- accredited, and that this offers some guarantee of competence" (LETR 2013: paragraph 5.116). However, the LETR offered this conclusion in relation to assurance of continuing competence in legal services (2013: paragraphs 5.118 and 5.119):

38. See: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/continuing-professional-development-from-1-january-2017/>.

39. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228847/013.pdf.

CPD and re-accreditation offer two ways of achieving similar ends. Both are mechanisms for assuring a degree of continuing competence in the legal services workforce. CPD requires monitoring, either at an individual or entity level, but does not require an assessment of competence - continuing competence is inferred from the performance of activity. It may or may not be mandated against specific competencies or outcomes. Re-accreditation does require some evaluation or assessment of each individual practitioner. It tends to be competence-based, reflecting the range of actual work activities undertaken. It is therefore more direct, intensive, and demanding of resources.

CPD has a reasonably long but not entirely happy history in the legal services sector.... Re-accreditation remains largely untested in a market-led professional environment. CPD has a level of acceptance in most of the professional groups; whereas re-accreditation is not necessarily well-understood and is a source of concern. As approaches to assuring competence, the evidence for both has its limits, and the necessity of either will depend on other elements of the [education and training] system, and the strength of the market itself as an arbiter of competence. The development of CPD or re-accreditation will need the support of the regulated community to succeed. At this stage, the research team does not consider that a strong case has been made out for a move to a universal re-accreditation scheme, for the following reasons:

- Any further development towards re-accreditation needs to be considered in the context of other [developments]. It is notable that CPD is a key component of most modern professional revalidation schemes, and therefore a logical pre- (or at least co-)requisite to any move to re-accreditation. Key components, such as systems of personal development planning need to be put in place; there are also risk issues around the use of tools like critical incident reports, which would not be privileged, and might therefore be vulnerable to exposure in litigation for professional negligence.
- A number of proportionality issues need to be considered. First, there appears to have been little formal analysis in the public domain of the (additional) cost burden re-accreditation may impose on professionals operating in a market-based environment. Secondly in a sector like law, where there is a significant proportion of sole practitioners, there are practical challenges in creating an appraisal-based model. Unless self-appraisal is permitted, some form of external system would need to be developed. Thirdly, unlike medicine which operates in a quasi-market, a proportionate risk-based approach needs to take account of the extent to which market mechanisms, in at least some parts of the sector, may limit or obviate the need for additional measures. This may point to the need, as the [Legal Services Consumer Panel] acknowledges, to develop a more nuanced activity-based approach to accreditation rather than a universal scheme.
- Consequently, in the absence of a move to a universal scheme, additional work also needs to be undertaken to assess areas of risk where re-accreditation might be appropriate and proportionate. That would seem to be better progressed in conjunction with any work on activity-based authorisation.

Any consideration of a requirement for renewed authorisation in legal services would accordingly proceed against a sceptical background. Indeed, if the case for activity-based regulation is not compelling (cf. paragraph 3 above), the related case for periodic re-authorisation might also face some challenges. In any event, continuing competence is a matter relating to the individual rather than an entity, except to the extent that a regulated entity might be required to assure itself that all legal activities carried out on its behalf are done so by individuals who are themselves able to evidence that their competence continues to be up-to-date.

8.3.7 Judicial control and oversight

The 2007 Act imposes, through the professional standards in sections 1(1)(h), (3) and 188, an obligation on authorised persons who exercise a right of audience or conduct litigation to comply with their “duty to the court to act with independence in the interests of justice”. There is thus a clear expectation that such during-the-event regulation will take place.⁴⁰

The Legislative Options Review also mentions the judicial control of advocacy, litigation, case management and costs management as forms of during-the-event regulation (2015: Annex 4, paragraph 7(c)). This might include direct and specific control of the courtroom and who appears before the court, as well as over how advocates and advisers behave. It might also extend to more systemic observations and input on quality of services.

Such control as is exercised by judges will tend to be at an individual level for rights of audience and the conduct of litigation, though elements of the latter might give rise to particular issues of organisational process, efficacy and ethics of interest to the presiding judge.

8.3.8 Risk-profiling

The Legislative Options Review also identified risk-profiling by regulators as a way of facilitating effective and proportionate targeting of during-the-event regulation, together with appropriate supervision and monitoring by the regulator (2015: Annex 4, paragraph 7g)). This can provide reassurance to consumers that particular areas of practice or providers are subject to scrutiny and uphold the reputation of the sector.

Such an approach is consistent with a more explicit approach to regulation targeted on risk, as well as conformity with the better regulation principles incorporated by sections 3(3) and 28(3) of the Legal Services Act.

8.3.9 Non-sector-specific requirements

In addition to sector-specific measures of during-the-event protection, as discussed above, there might also be other measures that apply to the consumers of legal services, but are not sector-specific. Examples would include obligations relating to data protection, money-laundering, proceeds of crime, and bribery⁴¹. Obviously, such additional protection can be helpful and reassuring to consumers.

The Legislative Options Review raised the following question in relation to regulatory overlap (2015: Annex 4, paragraph 13(c)):

Given that the general law always applies, whether steps should be taken to remove duplication or extension of general law provisions from sector-specific regulation (in relation to some aspects, say, of money-laundering or data protection compliance).

It seems clear that, when practitioners consider the costs and burdens of regulation, they are equally mindful of sector-specific and non-sector-specific burdens (see Legal Services Board 2015a).

In the interests of consistency and parity across sectors, there is a strong case for suggesting or requiring that any duplication – and particularly any extension of general law provisions – should meet a high threshold for inclusion in sector-specific regulation, based on the better regulation principles. A particular need to justify additional targeting within the

40. For further information, see, for example, Gould 2015: paragraphs 3.81-3.106.

41. Cf. Gould 2015: paragraphs 3.199-3.225.

sector, and a confirmation of proportionality where the sector-specific requirements are more onerous, would not seem to be unreasonable burdens on a regulator in these circumstances.

8.4 After-the-event regulation

8.4.1 Redress

Once a consumer has entered into a relationship for legal advice or representation with a provider, a number of things can potentially go wrong. The advice or misrepresentation might be technically inaccurate or incompetent; the service might fall short of the requisite qualities of being timely, cost-effective, understandable or useful; the inadequacies of the legal advice and representation might result in harm or loss to the client (loss of liberty, increased costs to the client or compensation awarded against the client, an ineffective will or other transaction); or, in extreme cases, there might be theft or fraud by the provider.

The nature and variety of this potential for providers to fall short of expectations or engage in malfeasance suggests a need for different approaches to regulation. In some cases, the removal of a provider from the market might be an appropriate response, along with lesser professional sanctions such as reprimands or limitations on future rights of authorisation or to practise. These responses are, however, 'internal' to the provider and do not necessarily, without more, offer any compensation, restitution or other remedy to the affected client.

In their market study, the CMA referred to redress mechanisms as part of sector-specific consumer protection (2016: paragraph 2.24):

Redress mechanisms and financial protection arrangements:

- Consumers of services provided by authorised providers have access to a regulated redress mechanism for any conduct or service complaints. This includes the right to complain to the LeO.
- In terms of financial protection arrangements, authorised providers are required to have PII, run-off insurance cover and some regulators also maintain a compensation fund that the firms which they regulate must pay into.

It also said (2016: paragraphs 4.90 and 4.91):

- 4.90 Redress mechanisms may not always be a relevant or satisfactory way to address instances of poor consumer outcomes. This is because in some cases the negative outcome experienced by consumers is either irreversible or difficult to identify until much later. That said, in most cases, redress mechanisms can be an effective way to compensate consumers when their legal services provider has acted wrongfully (eg by engaging in an unfair commercial practice), made mistakes (eg has provided poor-quality legal advice) or provided poor service (eg by not providing key information clearly). For consumers, the ability to obtain adequate redress (whether an apology, having the problem put right or compensation) increases trust and confidence and decreases perceived barriers to engagement with the sector.
- 4.91 Effective redress mechanisms can also improve the incentives for legal services providers to offer good quality advice and service. In addition, feedback from complaints enables providers to improve their services and helps regulators to identify systemic problems that might require intervention.⁴²

A number of after-the-event mechanisms are already features of the regulatory framework.

42. For the CMA's views about consumers' awareness of and trust in the available redress mechanisms, see CMA 2016: paragraphs 4.129-4.141.

8.4.2 Conduct complaints

Under the current regulatory arrangements, conduct complaints (those referring to the competence, dishonesty or similar behaviour of the provider) are dealt with by the relevant regulator for the individual whose conduct is complained of. The title-based approach of the Legal Services Act and corresponding multiplicity of regulators means that there are different disciplinary systems in place, different forums for hearings, and different standards of proof (Legislative Options Review 2015: Annex 4, paragraph 8(b); and see further LSR-4 2019: paragraph 7.5 and Gould 2015: chapter 6).

Whereas Clementi sought to provide a single point of reference, through the Office for Legal Complaints and the Legal Ombudsman, for unresolved service complaints (cf. paragraph 8.4.3 below), the structure for conduct complaints and disciplinary processes remains substantially title-based. The Legislative Options Review questioned whether this remained necessary (2015: Annex 4, paragraph 9):

Within a new regulatory settlement, the options could be to retain this division of responsibilities or to allocate them differently: for example, LeO could deal with both service and conduct issues, and a common disciplinary institutional framework could be shared across legal regulators.

8.4.3 Service complaints

Providers are required to have their own internal ('first-tier') complaints-handling procedures. These procedures should have been notified to clients as part of the 'client care' communication at the outset of the retainer relationship. Such a procedure must be free of charge to the client, and should promptly either reject the complaint, or offer an appropriate remedy (such as an apology, further work to put the matter right, a refund or reduction of the fee charged, or compensation). However, if (and only if) these procedures fail to resolve a complaint to a client's satisfaction, then the statutory ombudsman service can be engaged.

The Legislative Options Review noted that service complaints refer to the manner in which a consumer has received a service, and said (2015: Annex 4, paragraph 8(a)):

A statutory independent Legal Ombudsman (LeO) deals with service issues that cannot be resolved by the provider to the consumer's satisfaction. The current remit of LeO only extends to those providers who are authorised persons, that is, those who are authorised in respect of one or more reserved activities. Where a consumer uses a provider who is, quite legitimately, providing a non-reserved legal service without being otherwise authorised, LeO has no mandate to investigate and award redress.

Expansion of the remit of LeO could therefore facilitate greater confidence in both the regulated sector and that part of the legal services market which does not presently fall under sector-specific regulation, and ensure better standards of service provision across the sector. The ADR Directive, which [came] into force in July 2015, reinforces such a development, since it creates an expectation that consumers can access out-of-court dispute resolution for disputes with traders across the economy.

The CMA picked up the ADR theme as an alternative to LeO, and explained (CMA 2016: paragraph 4.98):

ADR involves using alternatives such as mediation and arbitration to resolve disputes without resort to litigation. Under UK law⁴³, all legal services providers (whether authorised or unauthorised) are required to make their clients aware in writing of an ADR provider that operates in the legal services sector. This requirement is triggered when a dispute has arisen

43. The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015.

between a provider and an individual consumer and the consumer has exhausted the provider's internal complaints-handling process. However, legal services providers are not obliged to use a certified ADR provider or, indeed, use an ADR procedure at all.

Their evidence also suggested that legal services providers are more likely to refer dissatisfied clients to LeO than to ADR (CMA 2016: paragraph 4.102).

The CMA further explained the LeO process in its market study (2016: paragraphs 4.106-4.108):

- 4.106 The LeO only accepts complaints that relate to an act or omission by an authorised person in relation to services provided directly or indirectly to the complainant. In addition, the LeO investigates complaints falling in the following categories: (i) Costs information deficient; (ii) Costs excessive; (iii) Delay; (iv) Unreasonably refused a service to a complainant; (v) Persistently or unreasonably offered a service that the complainant does not want; (vi) Failure to advise; (vii) Failure to comply with agreed remedy; (viii) Failure to follow instructions; (ix) Failure to investigate complaint internally; (x) Failure to keep complainant informed of progress; (xi) Failure to keep papers safe; (xii) Failure to progress complainant's case; (xiii) Failure to release files or papers; (xiv) Failure to reply. The LeO does not investigate conduct-related aspects of complaints, instead referring these to the approved regulators. The LeO has the ability to refer a particular act/omission as a test case to the High Court for it to determine whether or not that act/omission should be considered to be a conduct or service issues.
- 4.107 Before reaching a formal decision, the LeO will attempt to resolve most complaints informally. However, where informal resolution has been unsuccessful, an investigator will write a recommendation report. If both parties accept the report, it becomes the LeO's final decision and is binding on the provider. Through its decisions, the LeO can, among other matters, require the legal services provider to pay the complainant compensation for loss, inconvenience or distress (up to £50,000), require that they put things right if feasible or reduce the complainant's legal fees.
- 4.108 Final determinations by the LeO which are accepted by a complainant are binding on the provider, which then has 14 days to fulfil the compensation award. If the provider fails to do so, the complainant is advised to contact the LeO, in which case the LeO will follow up with the provider. If the provider fails to pay the complainant even after the LeO has followed up in this way, the LeO can seek to enforce the compensation award by suing the provider in court. The award would then be enforced by means of a court order. In situations in which compensation awards are made against firms which have closed, the LeO will then seek to enforce the award either against the firm's professional indemnity insurance or the individual partners themselves.

The complaints and ombudsman framework of the Legal Services Act 2007 is a reflection of one of the principal causes of the Clementi Review that led to the Act. This was the perception of increasing complaints against solicitors and the inadequacy of the timeliness or effectiveness with which those complaints were dealt with. The effectiveness of the scheme is therefore a key issue in assessing the impact of the Act. The CMA believes that there is a mutually-reinforcing benefit to be gained (CMA 2016: paragraph 4.124):

The fact that complainants can take their complaints to the LeO may also incentivise providers to offer an effective first-tier complaints process in order to reduce the risk that the complainant will escalate a complaint to the LeO. This is particularly the case given that the LeO publishes information on formal ombudsman decisions.

Further exploration of ombudsman schemes is contained in LSR-4 (2019: paragraph 8).

8.4.4 Compensation Fund

One of the distinctive features of after-the-event regulation in the legal sector is the existence of a compensation fund (see further LSR-4 2019: paragraph 7.8). The CMA explains (2016: paragraph 4.111):

The function of a compensation fund is to enable such clients to make a claim if they are owed money by their legal services provider and have exhausted alternative routes for making their claim (for example, through an insurance claim or the court system). Typically, regulators impose strict rules around obtaining access to the relevant compensation fund.

A compensation fund is created and maintained by a front-line regulator for claims in respect of each of their regulated communities rather than as a single fund for the sector.⁴⁴

Accordingly, there are compensation funds for solicitors, licensed conveyancers, chartered legal executives, and patent and trademark attorneys. The Faculty Office does not maintain a compensation fund for notaries, though The Notaries Society does provide fidelity insurance for the acts of its members. Even some self-regulatory bodies have chosen to establish compensation funds (such as the Society of Will Writers, and the Professional Paralegal Register).

In general, claims can be made by individuals and small businesses in respect of losses caused by the dishonesty of a regulated person, hardship caused by a failure to account for money, or an uninsured loss that should have been covered by professional indemnity insurance, but was not.

8.5 Special bodies

8.5.1 Background

The regulatory structure of the Legal Services Act requires that reserved legal activities may only be provided by authorised individuals, or alternative business structures licensed for that purpose. However, at the time the Act was passed, reserved activities were being provided by certain non-commercial and not-for-profit organisations such as trade unions, law centres and other advice agencies. These organisations are often not owned or managed by otherwise authorised persons and so, in principle, once alternative business structures were introduced, licensing as an ABS would normally be the regulatory form that should be adopted.

Special transitional provisions were included within the Act to allow such organisations to continue to operate for a period of time, providing reserved activities, without an immediate requirement to convert to licensed ABS status. The LSB was given the power to recommend to the Lord Chancellor when this transitional period should end. So far, the LSB has chosen not to exercise this power, and special bodies continue to operate without the need for ABS conversion.

8.5.2 Law centres and clinics

As the annual report for 2017-18 of the Law Centres Network said (2018: page 6): “Law Centres are unusual organisations operating in complex circumstances. When introduced, their model of a law practice, that is a registered charity, was pioneering in the UK.” Law centres continue to face a tough funding environment, and the financial sustainability of many of them remains a constant challenge.

44. For further details, see Gould 2015: paragraphs 10.182-10.229.

In relation to law centres, charities and other non-commercial advice services, the SRA's current Handbook provides (practice framework rule 4.16):

If you are employed by a law centre or advice service operated by a charitable or similar non-commercial organisation you may give advice to and otherwise act for members of the public, provided:

- (a) no funding agent has majority representation on the body responsible for the management of the service, and that body remains independent of central and local government;
- (b) all fees you earn and costs you recover are paid to the organisation for furthering the provision of the organisation's services;
- (c) the organisation is not described as a law centre unless it is a member of the Law Centres Federation; and
- (d) the organisation has indemnity cover in relation to the legal activities carried out by you, reasonably equivalent to that required under the SRA Indemnity Insurance Rules.

The position will be different when the SRA's new Handbook comes into force during 2019, when there will be few restrictions on the provision of reserved and non-reserved activities.

Nevertheless, one of the many challenges for law centres is that the SRA is not the only relevant regulator, and they must (Law Centres Network (2018: page 7) "comply with up to seven regulatory bodies, so it is critical that LCN keep abreast of regulatory changes, updating and supporting Law Centres to remain compliant. It is also important that LCN inform regulatory bodies about our unique situation to ensure that our work is not held back by new barriers."

The impact of regulatory costs and burdens on law centres and pro bono clinics can be disproportionate, and care must therefore be taken in the structuring of the regulatory framework to find the appropriate balance between that burden, on the one hand, and protection of public and consumer interests, on the other. As Law Works has explained (2018: page 9):

Clinics need to be able to adapt to a changing landscape. Many clinics have told us how important a supportive regulatory environment is for pro bono and encouraging legal volunteering.

8.5.3 Conclusion

Whether or not the focus of regulation is changed, the position of special bodies will need to be considered. As in other instances, it might be that a combination of provider-focused regulation (cf. paragraph 7 above) with a differentiated approach to before-, during- and after-the-event measures could offer a risk-based and proportionate approach. This might be able to deliver regulatory outcomes that protect potentially vulnerable citizens without undermining the valuable work that voluntary and non-for-profit special bodies provide, albeit often with some challenges to their financial stability.

Under the current framework, the SRA is already offering scope to special bodies for innovation through its SRA Innovate 'sandbox' initiative⁴⁵. It says⁴⁶:

We want to do more to allow greater flexibility for solicitors and freedom for firms to innovate, compete and grow. This will help improve access to quality services at affordable prices. Our consultation *Looking to the future* explores how we can provide a framework for all bodies delivering reserved legal services. This includes charities and not for profit organisations that are classed as "Special Bodies". Under transitional arrangements, these bodies are entitled to

45. Cf. paragraph 2.3.2.

46. From: <https://www.sra.org.uk/solicitors/innovate/sra-innovate.page>.

carry out reserved legal activities without being authorised to do so by a legal services regulator.

We want to collaborate with special bodies to develop an approach where if regulated by us in the future, we would only directly oversee the solicitor services that bodies provide.

We are also keen to speak to any that wish to explore being authorised and regulated by us now. This may be, for example, because they see benefits in being able to show that they uphold the same standards as other types of organisations entitled to deliver reserved legal activities to the public. Or to be ahead of the game should existing transitional arrangements be brought to an end at some point in the future. Our SRA Innovate work aims to support anyone who wishes to provide legal services in new ways to benefit the public.

We are open for business and, as the information on these pages show, we can offer a flexible approach to regulation that recognises the special circumstances of organisations operating successfully outside the for-profit sector.

It is perhaps questionable whether such ‘quasi-regulatory’ approaches represent the best solution to the presently uncertain position of special bodies.

8.6 Unauthorised providers

As the Review’s working papers have demonstrated, the structure of legal services regulation at the moment leaves a gap for ‘unauthorised providers’ quite legitimately to offer non-reserved legal services to the public, with little or no scope for bringing them within the scope of the statutory framework.

I should emphasise that the label ‘unauthorised’ is not used in any pejorative sense, or in a way that might be taken to imply that such providers are giving less competent advice, or service of a lower quality. To the contrary: the LSB’s research into will-writing showed, for example, that there was little difference in technical competence as between authorised and unauthorised providers (cf. LSR-0 2019: paragraph 4.5 and footnote 50).

The CMA also found only marginal and not statistically significant differences in relation to clarity of information given by providers, including about costs (CMA 2016: paragraphs 4.37-4.38).

8.6.1 *The nature and role of unauthorised providers*

The CMA market study specifically addressed the challenges to regulation of unauthorised providers (2016: paragraphs 2.38-2.41):

- 2.38 Unauthorised provision of legal services encompasses a wide range of provider types, including advice services such as Citizens Advice, legal helplines associated with insurance products, document providers that enable consumers to draft their own legal papers and paid-for services such as will writers, McKenzie Friends and HR companies.
- 2.39 Unauthorised providers appear to play an important role as a starting point for consumers seeking assistance in navigating the market or potentially as a source of free advice. For example, the LSB and Law Society’s recent survey of consumer legal needs found that Citizens Advice was the most commonly known source of advice (known by 81% of respondents). In some cases, these advice organisations also provide legal help. In the CMA’s consumer survey, the only or main legal services provider for 5% of respondents was an advisory service or legal advice centre. A very small number of respondents used charities and council advice services as their only or main provider.
- 2.40 In addition to advisory services and legal advice centres, other types of unauthorised providers used by respondents to our individual consumer survey included financial

providers/financial advisers (4%), insurance companies (4%), trade unions (2%) and legal helplines (1%).

- 2.41 The focus of our market study has been on paid-for legal services. In this area, the use of for-profit unauthorised providers whose main focus is to provide legal services appears to be much more limited across most areas of law. In our individual consumer survey, we found that around 4% of respondents had used these kinds of providers as their only or main provider. Similarly, the LSB found that for-profit unauthorised providers account for around 3% of all legal problems where assistance was sought. In certain legal services areas, unauthorised providers account for a greater share of supply. For example, the LSB found that around 7% to 9% of purchased wills originate from unauthorised providers and that online divorce providers account for 10% to 13% of total divorces. By contrast, 4% to 5% of employment services and 2% of conveyancing services (involving DIY and automated providers) are provided by paid-for unauthorised providers.⁴⁷

The current position results in a deliberate exclusion of unauthorised providers from the regulatory framework and any possibility of participating in it on a voluntary basis. For as long as the framework remains based on authorisation derived predominantly from title, this position will continue. A shift away from this, to regulation of activities, individuals, entities or providers (as discussed in paragraphs 3 and 5-7 above), could extend the regulatory reach to bring presently unauthorised suppliers into regulation.

Where regulation is applied on a more targeted, and risk-based, assessment of the need for regulatory intervention, such an extension would not necessarily represent a wholesale regulatory annexation of presently unregulated activities. Even more so if the form of intervention – as discussed in paragraphs 8.2 to 8.4 above – is also structured to reflect the appropriate before-, during- and after-the-event focus.

It seems likely that, for example, some providers of legal services relating to, say, immigration and employment might be offering their services to the public, and might be straying knowingly or unknowingly into the carrying on of reserved activities as well as non-reserved activities. If the relevant regulator (perhaps the Office of the Immigration Services Commissioner or the Claims Management Regulator) only acts in response to specific complaints, these instances might go undetected or unaddressed. A different approach to the regulation of higher-risk legal activities might improve consumer protection without inevitably removing sources of cost-effective help from the market or unwittingly turning a blind eye to regulatory breaches.

However, regulatory intervention comes at a cost, and is possibly a disadvantage to currently authorised providers relative to unauthorised providers. However, the answer to this might not be to bring those who are presently unauthorised within the regulatory framework. As the CMA wrote (2016: paragraph 5.46):

We recognise that, in a more competitive market for legal services characterised by consumers being better able to shop around and drive competition, these differences in regulatory costs may start to put solicitors at a disadvantage in comparison to unauthorised providers. However, ... we believe that the better approach to tackling this issue in the short term is to take further steps to reduce regulatory costs on solicitors, rather than to impose regulatory costs on currently unauthorised providers.

47. Further details can be found at: LSB (2016) [Mapping of for profit unregulated legal services providers](#), and Economic Insight (2016) [Unregulated legal service providers: Understanding supply-side characteristics](#) (a report for the LSB).

8.6.2 McKenzie Friends

The position of McKenzie Friends in the current framework creates different views and challenges. The CMA market study referred to this type of support as follows (CMA 2016: footnote 96):

Litigants in person may use a 'McKenzie Friend'⁴⁸ who can provide moral support, take notes, help with case papers and quietly give advice on any aspect of the conduct of the case. McKenzie Friends have no independent right to act as advocates (ie they have no rights of audience) or to carry on the conduct of litigation. A judge may grant such rights on a case-by-case basis, but only in exceptional circumstances. Traditionally, this lay support has been provided on a voluntary basis by a family member or friend, although for some time there have been a small number of people who charge a fee for this service. However, the majority of McKenzie Friends act on a non-fee charging basis. See the Courts and Tribunals Judiciary Practice Guidance (2010), McKenzie Friends: Civil and Family Courts.

The exercise of the judicial discretion referred to by the CMA would seem, at one level, to drive a coach and horses through the provisions of the Legal Services Act for prior authorisation in respect of the reserved activities of exercising a right of audience and conducting litigation. On the other hand, a refusal to exercise that discretion could leave a vulnerable, unrepresented litigant with no support at all and place a judge in a potentially very difficult or even compromising situation. In circumstances where there has been a marked increase in self-representation and lack of representation, 'some help is better than no help' is a compelling refrain.

The CMA report adds (CMA 2016: paragraphs 4.74 and 4.75):

Certain representative bodies have expressed concerns in relation to the services provided by fee-charging 'McKenzie Friends'. Furthermore, the Judicial Executive Board is currently considering the approach that courts should take in relation to McKenzie Friends and whether there should be a prohibition on fee recovery by fee-charging McKenzie Friends.

The evidence that we have reviewed is mixed but does not suggest that there are significant quality issues relating to the use of McKenzie Friends. We also note that there may only be as few as 40 to 50 fee-charging McKenzie Friends currently active in the legal services sector and, as a result, we have not examined this any further.

The Judicial Executive Board has recently concluded its examination of McKenzie Friends. Its conclusion has already been recorded in LSR-2 (2019: paragraph 4.2.1) but bears repetition in the current context (Judicial Executive Board 2019: page 3):

It is for the government to consider appropriate steps to be taken to enable [litigants in person] to secure effective access to legal assistance, legal advice and, where necessary, representation.

The role of the judiciary is to apply the law concerning the provision of legal assistance, the right to conduct litigation and rights of audience according to the law established by the Legal Services Act 2007, the common law and precedent.

The JEB remain deeply concerned about the proliferation of McKenzie Friends who in effect provide professional services for reward when they are unqualified, unregulated, uninsured and not subject to the same professional obligations and duties, both to their clients and the courts, as are professional lawyers. The statutory scheme was fashioned to protect the consumers of legal services and the integrity of the legal system. JEB's view is that all courts should apply the current law applicable to McKenzie Friends as established by Court of Appeal authority.

48. The CMA notes that the Legal Services Consumer Panel has classified McKenzie Friends into four types: (i) the family member or friend who gives one-off assistance; (ii) volunteer McKenzie Friends attached to an institution/charity; (iii) fee-charging McKenzie Friends offering the conventional limited service understood by this role; and (iv) fee-charging McKenzie Friends offering a wider range of services including general legal advice and speaking on behalf of clients in court.

As with unauthorised providers (cf. paragraph 8.6.1 above), it might be that an approach to the regulation of advocacy and litigation focused on the assessed risks to the public and consumer interests in these legal activities, and appropriate forms of targeted intervention, might lead to a different approach to regulation and supervision. Again, this could improve the assured quality of representation and consumer protection without removing sources of cost-effective help from the market or adopting a pragmatic judicial ‘work-around’ to the current requirement of authorisation.

8.7 In-house lawyers

An increasing number of lawyers work ‘in-house’ for corporate, government, local government and other institutional employers. Their regulatory position is slightly different to those in private practice, since their client is usually their employer⁴⁹. For the most part, professional regulation has been created and developed with private practice in mind. As a result, the regulatory provisions for in-house lawyers have sometimes needed to be ‘moulded’ to reflect a different client relationship or work setting, or ‘grafted on’ to the main structure.

A Review provides an opportunity to reflect on whether the regulatory provisions that apply to in-house lawyers could be better crafted, bearing in mind the many different contexts in which in-house lawyers now work.⁵⁰

Vaughan & Oakley (2016) nevertheless found in a study of City of London corporate finance lawyers that “they were largely unenthusiastic, disinterested and unconcerned about the ethics of what they and their clients were doing” (2016: page 74). Such ‘ethical apathy’, as Vaughan & Oakley describe it, is disturbing and perhaps raises questions in the context of large-firm corporate practice whether it is the lawyers who might need regulatory protection from the potentially over-bearing expectations of their more powerful employers.

8.8 Rules versus outcomes

The LSB has developed and published five regulatory standards that it expects approved regulators to meet⁵¹, of which outcomes focused regulation (OFR) forms part. The CMA regards this as the best approach (CMA 2016: paragraph 5.43): “on balance, we believe that OFR represents the best method for ensuring that regulatory rules are appropriately flexible so as to reflect changes in the market over time”.

The LSB has elaborated on the standards and OFR as follows (LSB 2017: paragraph 1.2):

5. The standards are outcomes-focused. We do not generally prescribe how the regulators should demonstrate they meet the standards. We recognise this will vary across the regulators and performance against some outcomes may need to be assessed within the context of the specific regulator. However, there are some instances where we have described what we consider equates to required performance, for example, the use of the civil standard of proof in the enforcement process.

The focus on OFR is now therefore clearly established within the current framework. It is not, however, without concerns or critics. OFR is frequently cited as a reason for lack of

49. Details can be found, for example, for solicitors at: <https://www.sra.org.uk/solicitors/handbook/practising/part2/rule4/content.page>; and for barristers at: <http://handbook.barstandardsboard.org.uk/handbook/part-3/#2589>.

50. See Oxera (2014), Legal Services Board (2015b), Moorhead et al (2016) and Moorhead et al (2018).

51. See: https://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/Regulatory_Standards_Action_Plans_2015_16.htm.

clarity for firms in what will be considered by the regulator to constitute compliance with its outcomes. Such uncertainty can lead to an increased regulatory burden and cost on firms, as well as inhibiting more innovative approaches to the provision of legal services and perhaps deterring new providers from entering the market.

The CMA recognised these concerns. It referred to SRA research (CMA 2016: paragraph 5.39):

A review of OFR conducted by the SRA in 2013 suggested that it had been responsible for an increase in regulatory costs and a Law Society survey around the same time found that 60% of firms surveyed believed that the cost of compliance had risen since the introduction OFR. However, the SRA's OFR review also found that 85% of firms would continue to undertake the same administrative practices even if all regulatory requirements by the SRA were lifted.

Nevertheless, as stated above, the CMA supports OFR, adding (CMA 2016: paragraph 6.55):

we believe that the current issues are likely to relate to the implementation and the design of the current regulation (particularly the link between the design of the outcomes and the regulatory principles) rather than an inherent problem with OFR. Moreover, a more effective OFR could be achieved by defining a clear overall primary objective for legal services regulation.

(The question of regulatory objectives was addressed in LSR-0 2019: paragraph 4.2, and arises again in LSR-4 2019: paragraph 9.)

It remains to be considered during this Review whether a more differentiated approach to regulatory intervention, based on targeted scope and the use of a combination of before-, during- and after-the-event regulation, as discussed earlier in this paper, might provide a better foundation for OFR.

9. Conclusions

The question of regulatory focus is far from straightforward. It would seem that the current framework has two structural constraints. The first is that a narrow set of reserved legal activities does not ensure that all of the activities that should be regulated in the public interest are identified, and the application of reservation is accordingly inadequate. Second, providing regulated entry into the legal services sector through authorisation for one of those limited activities resulting primarily from a professional title creates a barrier and cost for potential market entrants.

The combination of these constraints creates further consequences. The first is that new entrants who only wish to operate in non-reserved areas are forced to (i) operate in a non-regulated environment; (ii) incur unnecessary (and, in a business context, artificial) costs of becoming qualified or authorised for reserved activities that they do not wish to offer; or (iii) submit to voluntary regulation that might leave their clients less well protected.

The second consequence is that there is no current route to consistently regulating substitutive legal technology. This creates an additional dimension to the existing regulatory gap.

Under the current regulatory framework, title-based authorisation leads to before-the-event authorisation for one or more of the reserved legal activities, and during- and after-the-event regulation then flows for all that the authorised person does. There is no scope for more risk-based, targeted and proportionate intervention that would allow for the separate imposition of before-, during- and after-the-event regulation as appropriate to different public interest needs and consumers' circumstances.

However, it is not clear that the present mix of regulating activities, titles, individuals and entities can obviously give way to a simpler, coherent alternative.

Questions

For the purposes of this review:

1. What do you see as the principal advantages and disadvantages of moving away from regulation based on title? On balance, would you support such a move?
2. Is the distinction between supportive and substitutive legal technology (in paragraph 2.3) helpful? Do you have any evidence or views in relation to the regulation of substitutive legal technology (see paragraphs 3.6, 4.6, 5.4, 6.5 and 7.2)?
3. Is there scope for and value in adopting a dual approach to activity-based and title-based jurisdiction (as explored in paragraph 3.4)?
4. Are there any benefits or limitations to activity-based regulation not identified in paragraph 3.7?
5. Do you have any evidence or views that elaborate on the brand value of professional titles, as seen and understood (or not) by consumers and the public?
6. Does the SRA's current approach of authorising all solicitors and ABSs to carry on all reserved activities for which the SRA is an approved regulator a credible one in an age of increasing specialisation?
7. Is there any merit in the distinction explored in paragraph 4.5 between the regulation of title and of authorisation for conducting reserved activities?
8. Are there any benefits or limitations to title-based regulation not identified in paragraph 4.7?
9. Are there any benefits or limitations to the regulation of individuals not identified in paragraph 5.5?
10. Is there value in permitting greater scope for the direct authorisation of individuals who do not hold a professional qualification (such as social and care workers, former police officers, professional McKenzie Friends, and paralegals)?
11. Are there any benefits or limitations to regulation of entities not identified in paragraph 6.6?
12. Should the position of special bodies be clarified through the introduction of a permanent (rather than transitional) status within the regulatory framework? If so, how should that permanent status be constructed?
13. Is there any merit in an approach to regulation focused on providers (without necessarily distinguishing individuals, entities, title-holders or technology)?
14. Are there any benefits or limitations to regulation of providers not identified in paragraph 7.3?
15. Is a 'layered' approach to matching degrees of risk and forms of regulatory intervention (as suggested in paragraph 8.1) a sensible one?
16. Should any consumer of legal services be allowed access to the jurisdiction of the Legal Ombudsman, irrespective of whether the provider is an authorised person?
17. What do you see as the relative merits and practicalities of authorisation, licensing and certification as forms of before-the-event regulation (paragraph 8.2)?
18. What is the available evidence of claims in respect of the mishandling of client money in conveyancing transactions or in estate administration?

19. Is there a case to be made for re-accreditation of competence (in addition to containing professional development) as a way of assuring consumers and raising public confidence in legal services?
20. Should there be a high threshold for the inclusion in regulation specific to the legal sector of any duplication or extension of regulatory requirements imposed by general law or non-sector-specific regulation (such as data protection, money laundering, proceeds of crime, and bribery)?
21. Should conduct complaints be dealt with in the future by a common approach to disciplinary systems, forums for hearings, and standards of proof?
22. Should all paid-for legal services offered by for-profit providers fall within the scope of legal services regulation, even if only through access to after-the-event redress?
23. Does outcomes-focused regulation remain the most appropriate style for modern, risk-based and cost-effective regulation of legal services?

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

**Formal Opinion 2014-1: ETHICAL CONSIDERATIONS FOR LAWYERS
CONTEMPLATING BUSINESS ARRANGEMENTS WITH NON-LEGAL
ORGANIZATIONS**

TOPIC: Relationships with Non-Legal Organizations

DIGEST: A New York lawyer must consider a wide range of ethical issues before entering into a business relationship with a non-legal organization. A New York lawyer is contemplating an arrangement with a non-legal organization based in another state, where: (1) the New York lawyer would review forms prepared by the non-legal organization on behalf of its customers to determine whether they comply with certain applicable legal requirements; and (2) the non-legal organization would pay the lawyer a percentage of the fees paid by the customers to the non-legal organization, pursuant to a pre-determined fee schedule. The New York lawyer asks whether this arrangement is permissible under the New York Rules of Professional Conduct (the “New York Rules” or the “Rules”).

This question is particularly relevant in the current legal environment, where attorneys may be considering a variety of creative business arrangements to enhance their economic opportunities. Attorneys considering such arrangements must be mindful of a substantial number of ethical issues. As many as twenty-one different Rules may bear on whether a New York lawyer is permitted to enter the arrangement described above, including Rules 1.1(a), 1.2(a), 1.2(c), 1.4, 1.5(a), 1.5(b), 1.6(a), 1.7(a), 1.8(f), 1.10(e), 1.10(f), 5.4(a), 5.4(c), 5.5(a), 5.5(b), 5.8(a), 5.8(b), 7.2(a), 7.2(b), 8.5(a), and 8.5(b).

A New York lawyer may also need to consider additional issues, such as whether the contemplated arrangement complies with relevant substantive laws and court rules, as well as with the rules of professional conduct in jurisdictions other than New York State. These additional issues fall outside the jurisdiction of the Committee on Professional Ethics (the “Committee”), which is limited to interpreting the New York Rules.

RULES: 1.1(a), 1.2(a), 1.2(c), 1.4, 1.5(a), 1.5(b), 1.6(a), 1.7(a), 1.8(f), 1.10(e), 1.10(f), 5.4(a), 5.4(c), 5.5(a), 5.5(b), 5.8(a), 5.8(b), 7.2(a), 7.2(b), 8.5(a), 8.5(b)

QUESTION: Is a New York lawyer permitted to enter into a business relationship with a non-legal organization based in another state, where: (1) the New York lawyer would review forms prepared by the non-legal organization on behalf of its customers to determine whether they comply with certain applicable legal requirements; and (2) the non-legal organization would pay the lawyer a percentage of the fees paid by the customers to the non-legal organization, pursuant to a pre-determined fee schedule?

OPINION

A New York lawyer (the “Lawyer”) would like to enter into a business arrangement with a non-legal organization (“NLO”). The Lawyer is originally from a foreign country, but resides and is admitted to practice law in New York. A branch of the Lawyer’s practice involves advising U.S. citizens who are seeking to apply for citizenship in the Lawyer’s country of origin (the “Foreign Country”). According to the inquiring Lawyer, citizenship applications are processed through the Foreign Country’s authorized local consulate for the applicant’s state of residence (the “Local Consulates”).

The Lawyer is considering entering into a business arrangement with an NLO based in another state that provides services to U.S. citizens who wish to apply for citizenship in the Foreign Country. Under the proposed arrangement, the NLO would prepare citizenship applications for its customers and would send the draft applications to the Lawyer for review to ensure they comply with applicable legal requirements (the “Legal Review”). The Lawyer would not meet with or communicate directly with the NLO’s customers. The NLO charges its customers pursuant to a standard fee schedule, and proposes to pay the Lawyer a percentage of these fees.

An arrangement such as the one described above implicates a wide range of ethical issues.¹ At a minimum, before entering into such an arrangement, the Lawyer should consider the following key questions and determine whether the arrangement complies with the Rules discussed below.

1. Is The Lawyer’s Conduct Governed by the Professional Responsibility Rules of New York or Some Other Jurisdiction?

A critical threshold question is which jurisdiction’s professional responsibility rules apply to the Lawyer’s conduct. The analysis depends on whether, in addition to being licensed in New York, the Lawyer is authorized to practice law in any other jurisdictions, such as the Foreign Country, the state where the NLO is based, or any jurisdictions where the Local Consulates are located. A New York lawyer who is also licensed to practice in one or more other jurisdictions may be governed either by the New York Rules or the rules of another jurisdiction, depending on the type of conduct involved. *See* Rule 8.5(b) (setting forth the framework for determining which jurisdiction’s rules apply to a New York lawyer’s conduct). If the Lawyer is also licensed in a jurisdiction other than New York, the Lawyer should examine Rule 8.5(b)(2) to determine which jurisdiction’s professional responsibility rules apply to the Lawyer’s conduct.²

¹ This opinion does not purport to contain an exhaustive list of ethical rules that should be considered before entering into a business arrangement with an NLO. Depending on the facts and circumstances of a particular arrangement, additional ethical rules may be relevant. In addition, the Lawyer may need to consider other issues, such as whether the contemplated arrangement complies with the rules of professional conduct in jurisdictions other than New York state, as well as any relevant substantive legal issues (such as the applicability of statutes, regulations, or court rules). These additional issues fall outside the Committee’s jurisdiction, which is limited to matters involving the New York Rules.

² Although the Lawyer’s conduct may be governed by the *rules* of another jurisdiction, the Lawyer is still subject to the *disciplinary authority* of New York, regardless of where the conduct occurs. *See* Rule 8.5(a). The Lawyer may also be subject to the disciplinary authority of other jurisdictions where he or she is admitted. *See id.*

On the other hand, if the Lawyer is licensed to practice only in New York, then the Lawyer's conduct would be governed by the New York Rules. *See* Rule 8.5(b)(1). The remainder of this opinion assumes that the Lawyer is licensed to practice law only in New York and, thus, a New York disciplinary authority examining the Lawyer's conduct would apply the New York Rules. If that is the case, the Lawyer should consider the following questions.

2. Does the Lawyer's Conduct Constitute the Unauthorized Practice of Law in Another Jurisdiction?

New York Rule 5.5(a) states that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."³ As noted above, the inquiry references several other jurisdictions, such as the Foreign Country, the state where the NLO is based, and the jurisdictions where the Local Consulates are located. Under Rule 5.5(a), the Lawyer must determine whether performing the Legal Review will violate the regulation of the legal profession in any jurisdictions other than New York. If so, the conduct would also violate Rule 5.5(a). This Committee is not empowered to opine on whether an attorney's conduct constitutes the unauthorized practice of law in another jurisdiction.

3. Is the NLO Engaged in the Unauthorized Practice of Law?

Rule 5.5(b) states that "a lawyer shall not aid a nonlawyer in the unauthorized practice of law." As Comment [2] to the Rule explains, "whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."⁴ Before entering into any arrangement with the NLO, the Lawyer should determine whether the NLO's conduct constitutes the unauthorized practice of law.

The question of whether an entity is engaged in the unauthorized practice of law is an issue of substantive law, which falls outside the Committee's jurisdiction. To determine whether the NLO is engaged in the unauthorized practice of law, the Lawyer would need to evaluate the types of services the NLO provides to its clients in light of the relevant legal authorities that define what it means to engage in the practice of law.⁵ If the NLO is engaged in the unauthorized practice of law, the Lawyer's involvement in the contemplated relationship would likely violate Rule 5.5(b).

³ Whether a person is practicing law in a jurisdiction does not necessarily depend on where that person is physically located. In addition, as a general matter, a lawyer is ethically permitted under the New York Rules to advise a client on the law of a foreign jurisdiction as long as the lawyer is competent to do so and doing so does not violate any other law. *See* New York State Bar Association ("NYSBA") Ethics Op. 375 (1975).

⁴ New York has also enacted statutes and issued court rules prohibiting the practice of law by nonlawyers. *See* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 1158 (West 2013) ("Simon").

⁵ Even if the NLO is providing services that could also be performed by a lawyer, that does not necessarily mean the NLO is engaged in the unauthorized practice of law. *See* NYSBA Ethics Op. 832 (2009) ("Many services do not fall neatly into the category of legal services because they may legally be undertaken by both lawyers and nonlawyers."). On the other hand, this arrangement may raise a red flag for disciplinary authorities, who may be concerned that the NLO is acting as a conduit for conveying legal advice or legal services to its customers. *See, e.g., In re Lefkowitz*, 47 A.D.3d 326 (1st Dep't 2007) (attorney aided the unauthorized practice of law by representing immigration clients at hearings and interviews where: (1) lawyer was paid by nonlawyer entity to represent clients; (2) nonlawyer entity prepared the immigration applications and had the "primary financial and substantial relationship with" the clients; and (3) the work done by the nonlawyer entity "involved some legal analysis").

4. Does the Lawyer’s Contemplated Arrangement with the NLO Constitute an Impermissible Multidisciplinary Practice?

Multidisciplinary practice “means a venture that offers both legal and non-legal services to the public.” NYSBA Ethics Op. 930 (2012). Such ventures have traditionally been viewed as “incompatible with the core values of the legal profession.” Rule 5.8(a) (emphasizing the importance of maintaining the “complete independence” of lawyers). Under certain limited conditions, however, lawyers are permitted to “enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services.” *Id.* Rule 5.8(b)(1) permits such relationships only with non-legal professional services firms that are “included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules.” That list is currently limited to “Architecture, Certified Public Accountancy, Professional Engineering, Land Surveying, and Certified Social Work.” NYSBA Ethics Op. 976 (2013). The list does not include businesses that provide immigration services. Accordingly, if the proposed arrangement with the NLO constitutes multidisciplinary practice (which the Committee lacks sufficient information to determine), it is prohibited under Rule 5.8. *See id.* (“[F]rom the fact that the Company is not among the types of nonlegal professional service firms that have been approved for cooperative business arrangements, it follows that the proposed arrangement is impermissible.”).

5. Does the Contemplated Payment Structure Constitute Improper Fee Splitting?

Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer except in three instances, none of which is applicable here.⁶ Rule 5.4(a) reflects “traditional limitations on sharing fees” with nonlawyers. Rule 5.4, cmt. [1]. The purpose of the fee-sharing prohibition is to remove incentives for nonlawyers to interfere with the professional judgment of lawyers in legal matters, and to remove incentives for nonlawyers to engage in other objectionable conduct. *See Simon*, at 1137.

When analyzing Rule 5.4(a), a relevant consideration is whether the persons seeking citizenship are paying the NLO more, less or exactly the same for the Lawyer’s Legal Review as they would pay if they were paying for the Lawyer’s services directly. *See* NYSBA Ethics Op. 942 (2012) (discussing the differential between the amount paid by the client to a non-legal firm and the amount paid by a non-legal firm to the attorney). If the NLO obtains a financial benefit by including the Lawyer’s legal fees in its overall charges (*i.e.*, if the NLO charges the client more for legal services than it pays the Lawyer), then the arrangement could constitute impermissible fee

⁶ The exceptions to Rule 5.4(a)’s general prohibition against sharing legal fees with a nonlawyer are as follows:

(1) an agreement by a lawyer with the lawyer’s firm or another lawyer associated in the firm 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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and (3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

splitting.⁷ *See id.* It should be noted that a disciplinary authority would likely view the proposed payment arrangement as having the indicia of fee-splitting and, thus, would likely subject it to close scrutiny.

6. Does the Contemplated Payment Structure Constitute the Payment of a Referral Fee?

Rule 7.2(a) provides that, except in certain limited circumstances, a lawyer “shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client.” Here, the NLO is arguably “obtain[ing] employment” for the Lawyer by having the Lawyer review application forms for the NLO’s clients. Although the Lawyer is not directly paying the NLO a fee to obtain this work, the proposed payment structure could result in an indirect referral fee. For example, if the amount the NLO pays the Lawyer out of the fees it receives from its clients is less than the Lawyer would charge those clients directly for the same services, then this could be construed as the Lawyer giving something of value to the NLO in exchange for “obtain[ing] employment by a client.” Rule 7.2(a). In other words, the difference between the fee the Lawyer would normally charge for the Legal Review and the fee the NLO pays the Lawyer for those same services could constitute an indirect referral payment to the NLO. We note, however, that it is not necessarily a violation of Rule 7.2(a) to offer a “preferential rate” to clients from a particular referral source. Nassau County Ethics Op. 01-4 (2001) (negotiation of a discounted legal fee does not constitute something “of value” given by the lawyer in exchange for participating in a lawyer referral network); *see also* NYSBA Ethics Op. 897 (2011) (lawyers may participate in Groupon-type “deal of the day” program by offering discounted fees to participants in the program). The difference here is that, by paying the Lawyer a percentage of the fee paid by the client, the NLO is arguably pocketing the difference between the Lawyer’s regular rate and the discounted rate the Lawyer is offering to the NLO’s clients.

One exception to this prohibition against referral fees is that a lawyer “may be recommended, employed or paid by, or may cooperate with” one of the organizations described in Rule 7.2(b)(1)-(4). Rule 7.2(b). An attorney is permitted to “pay the usual and reasonable fees or dues charged by” such an organization, provided “there is no interference with the exercise of independent professional judgment on behalf of the client.” Rule 7.2(a)(2). Based on the limited information provided, the NLO does not appear to be any of the types of organizations described in Rule 7.2(b)(1)-(3) (“a legal aid or public defender office,” or “a military legal assistance office,” or “a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule”). The only remaining possibility is Rule 7.2(b)(4), which refers to “any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries” that also meets the conditions in Rule 7.2(b)(4)(i)-(vi). Before entering into the proposed arrangement with the NLO, the Lawyer should determine whether the NLO meets the qualifications of Rule 7.2(b)(4).

⁷ New York has also enacted criminal penalties against fee sharing with nonlawyers. *See* N.Y. Jud. Law § 491 (prohibiting nonlawyers from dividing a legal fee with an attorney). The Committee cannot opine on whether Section 491 would apply to the proposed arrangement, but the Lawyer should examine the case law construing that statute.

7. Who Is the Lawyer's Client?

Another critical consideration is whether the Lawyer would be representing the NLO or the individuals applying for citizenship (or both⁸). “Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.” New York Rules, Scope ¶ 9; *see also* Restatement of the Law (Third) The Law Governing Lawyers (“Restatement”) § 14 (Formation of a Client-Lawyer Relationship), cmt. f. The question of who the Lawyer represents under the contemplated arrangement is beyond the jurisdiction of this Committee.⁹ If the Lawyer represents the individuals applying for citizenship, however, the business arrangement also raises concerns about the Lawyer’s ability to meet other ethical obligations to those clients, including duties under Rules 1.1(a), 1.2(a), 1.2(c), 1.4, 1.5(a), 1.5(b), 1.6(a), 1.7(a), 1.8(f), and 5.4(c).¹⁰ We next examine how each of these rules might apply in the situation where the Lawyer’s attorney-client relationship is with the individuals applying for citizenship.

(a) Rule 1.1(a) – Competence

Rule 1.1(a) requires a lawyer to “provide competent representation to a client.” Competent representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1(a). Furthermore, “[c]ompetent handling of a particular matter includes inquiry into and analysis of factual and legal elements of the problem, and use of methods and procedures meeting standards of competent practitioners.” *Id.*, cmt. [5]. If the Lawyer’s clients are the persons seeking citizenship, the Lawyer owes a duty of competence to each of them as individuals. If the Lawyer has no contact with these clients, the Lawyer might be unable to gather sufficient factual information to allow the Lawyer to analyze the relevant legal issues and to exercise the skill, thoroughness and preparation needed to provide competent representation, as required by Rule 1.1(a). In addition, the Lawyer would not be in a position to ensure that the NLO is implementing the legal advice in a competent manner.

(b) Rule 1.2(c) – Limited Scope Representations

The Lawyer should consider whether the contemplated arrangement constitutes a so-called “limited scope representation.” If so, the Lawyer would need to comply with Rule 1.2(c), which provides that any limits to the scope of representation must be “reasonable under the circumstances” and that the attorney must obtain “informed consent” from the client to limit the

⁸ If the answer is “both,” the Lawyer would also have to consider the New York Rules governing obligations to jointly-represented clients. *See generally*, Rule 1.7(a)(1) & cmts. [29]-[33] (discussing “Special Considerations in Common Representation”). In addition, the Lawyer needs to collect sufficient information about the client and the matter to determine whether the representation creates a conflict of interest. *See* Rule 1.10(e)-(f) (law firm must “implement and maintain a system by which proposed engagements are checked against current and previous engagements” and “[s]ubstantial failure” to do so constitutes a separate violation of the Rules).

⁹ It bears noting, however, that a lawyer’s failure to clarify who the lawyer represents could result in the lawyer entering into an attorney-client relationship unintentionally. *See* Restatement § 14, cmt. f.

¹⁰ Again, the Committee does not intend this to be an exhaustive list of ethical rules that should be considered if the Lawyer’s clients are the individuals applying for citizenship. There may be other ethical considerations, as well as substantive legal issues (such as the applicability of statutes, regulations, or court rules) that are outside the jurisdiction of the Committee.

scope of representation. *See generally* Rule 1.2, cmts. [6]-[8] (explaining limited scope representation). If the Lawyer is not communicating directly with the client (*i.e.*, the person applying for citizenship in this scenario) the Lawyer may not be in position to determine whether the limits on the representation are “reasonable under the circumstances” or to obtain “informed consent” from the client to limit the scope of the representation. Rule 1.2(c).

(c) Rule 1.4 and Rule 1.2(a) – Communication and Consulting with Clients

Rule 1.4 requires a lawyer to keep the client reasonably informed about the status of the client’s matter and to comply with a client’s reasonable requests for information. A lawyer is further obliged to explain a matter to the client so that the client may make informed decisions regarding the representation. In addition, Rule 1.2(a) provides that, as required by Rule 1.4, a lawyer “shall consult with the client as to the means by which [the client’s objectives] are to be pursued.” Again, if the Lawyer’s clients are the individuals seeking citizenship and the Lawyer has no direct contact with them, it would be difficult to comply with the communication requirements of Rule 1.4 and the consulting requirements of Rule 1.2(a). Moreover, the proposed arrangement appears to give the Lawyer little, if any, control over what the NLO may be communicating to the clients about the Lawyer, the scope of the Lawyer’s representation, or the nature of the Legal Review. This creates a risk that clients could be misled by statements made by the NLO, which the Lawyer has no opportunity to correct. A disciplinary authority would likely scrutinize such an arrangement closely because of such risks.

(d) Rule 1.5 – Avoiding Excessive Fees

Rule 1.5(a) provides that “a lawyer shall not make an arrangement for, charge, or collect an excessive or illegal fee or expense.” Furthermore, “[a] fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive.” Rule 1.5(a). The Rule identifies eight nonexclusive factors to consider when determining whether a fee is excessive, including: time and labor required; novelty and difficulty of the questions involved; fees customarily charged in the locality for similar services; amount involved and results obtained; nature and length of the professional relationship with the client; and experience, reputation and ability of the lawyer or lawyers performing the services. *See* Rule 1.5(a)(1)-(8). In addition, Rule 1.5(b) states “a lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the clients will be responsible.”

In the proposed business arrangement, it appears that the Lawyer may have no role in determining the amount of the fee charged to the client for the Legal Review. According to the inquiry, the fee would be a set percentage of a pre-determined fee schedule established by the NLO. Under Rule 1.5(a), however, it is the *attorney’s* duty to ensure that the fee charged to a client is not excessive. Although a pre-determined fee schedule prepared by an attorney and relating exclusively to legal services is not necessarily improper, the inquiry suggests that the NLO is dictating the fee schedule, a portion of which relates to the Lawyer’s Legal Review. If that is the case, such an arrangement likely violates Rule 1.5(a) because it cedes control over the setting of legal fees to a nonlawyer. Furthermore, because the Lawyer would have no direct contact with the persons seeking citizenship, the Lawyer might be unable to communicate to the client the basis or rate of the fee and expenses, as required by Rule 1.5(b).

(e) Rule 1.6(a) – Confidentiality

Rule 1.6(a) prohibits a lawyer from “knowingly revealing confidential information,” absent informed consent or other exception. Under the contemplated arrangement, the NLO would be exposed to the information that is passed between the Lawyer and the individual clients. In order to comply with Rule 1.6’s confidentiality obligations, the Lawyer would need to obtain informed consent from the individual clients concerning the disclosure of these communications to the NLO. *See* Rule 1.6(a)(1). The decision to waive confidentiality has serious implications, not the least of which is that it opens the door for third parties to obtain those communications. If the Lawyer is not communicating directly with the individual clients, he or she would not be in a position to communicate “information adequate for [the clients] to make an informed decision” or to explain “the material risks of the proposed course of conduct and reasonably available alternatives,” as required by the New York Rules. Rule 1.0(j) (defining “informed consent”). Thus, the clients would not be able to make an informed decision about whether to waive confidentiality.

(f) Rule 1.7(a) – Personal Conflict of Interest

Rule 1.7(a)(2) states, in relevant part, that “a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer’s professional judgment on behalf of the client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” The proposed arrangement with the NLO could create “divided loyalties” if the Lawyer is “dependent on [the NLO] for case referrals and legal fees.” *Lefkowitz*, 47 A.D.3d at 328 (attorney who received immigration referrals and legal fees from nonlawyers had “divided loyalties”). Although such personal conflicts may be waivable under Rule 1.7(b), it is unlikely that the client is in a position to give informed consent to waive the conflict.

(g) Rule 1.8(f) – Accepting Compensation From One Other Than a Client

If the client is the person seeking citizenship and not the NLO, the payment arrangement implicates Rule 1.8(f), which prohibits a lawyer from accepting “compensation for representing a client, or anything of value related to the lawyer’s representation of the client, from one other than the client” unless certain conditions are met.¹¹ Under the proposed arrangement, the Lawyer is being paid by the NLO, rather than the individual seeking citizenship. Accordingly, the Lawyer must comply with the requirements of Rule 1.8(f), including: (1) obtaining the client’s “informed consent” to the payment arrangement; (2) ensuring there is “no interference with the lawyer’s independent professional judgment or with the client lawyer relationship”; and (3) protecting the client’s confidential information from the non-client (in this case the NLO).

¹¹ Similarly, Rule 5.4(c) prohibits a lawyer from permitting “a person who . . . pays a lawyer to render legal service for another to direct or regulate the lawyer’s professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer’s duty to maintain the confidential information of the client under Rule 1.6.”

CONCLUSION

A New York lawyer must consider a wide range of ethical issues before entering into a business relationship with a non-legal organization. Here, a New York lawyer wishes to enter into an arrangement with a non-legal organization based in another state, where: (1) the New York lawyer would review forms prepared by the non-legal organization on behalf of its customers to determine whether they comply with certain applicable legal requirements; and (2) the non-legal organization would pay the lawyer a percentage of the fees paid by the customers to the non-legal organization, pursuant to a pre-determined fee schedule. Before entering into a business relationship with a non-legal organization, the lawyer should analyze the contemplated arrangement under New York Rules 1.1(a), 1.2(a), 1.2(c), 1.4, 1.5(a), 1.5(b), 1.6(a), 1.7(a), 1.8(f), 1.10(e), 1.10(f), 5.4(a), 5.4(c), 5.5(a), 5.5(b), 5.8(a), 5.8(b), 7.2(a), 7.2(b), 8.5(a), and 8.5(b) to determine whether it is ethically permissible.

A New York Lawyer may also need to consider additional issues that are beyond the jurisdiction of this Committee, such as whether the contemplated arrangement complies with the rules of professional conduct in jurisdictions other than New York State and whether it complies with all relevant substantive laws and court rules in New York or elsewhere.

International Developments and their Impact on U.S. Lawyer Regulation

One thesis of this talk is that it is important for U.S. lawyers to be aware of international lawyer regulation developments. Because of the extensive international networks that exist¹ and the range of perspectives among U.S. stakeholders, it is almost inevitable that developments that take place outside the United States will come up during U.S. lawyer regulation discussions.

International lawyer regulation developments have addressed issues related to the “who, what, when, where, why, and how” of lawyer regulation.² These developments raise questions about:

Who regulates lawyers?
Whom (or *What*) should be the object of regulation?
When should regulators act?
Where are lawyers (or their activities) regulated?
Why should lawyers be regulated?
How should lawyers be regulated?

There are several reasons why this “*who-what-when-where-why-and-how*” set of questions is a powerful device for understanding international (and domestic) lawyer regulation developments. First, these questions are easy to remember. Second, these questions provide a framework for analyzing in a methodical fashion an international development that may be complicated and unfamiliar. Third, and most significantly, this *who-what-when-where-why-and-how* framework makes it easier to “decouple” intertwined issues. For example, a U.S. regulator might decide to follow the lead of the 2007 UK Legal Services Act and adopt its own version of regulatory objectives (the “*why regulate*” question) even if that U.S. regulator did not want to follow the UK’s lead with respect to the question of “*who* should regulate lawyers” or the question of “*whom* (or *what*) is the object of regulation.”³ The pages that follow briefly elaborate upon some of the important *who-what-when-where-why-and-how* international lawyer regulation developments and provide examples of U.S. situations in which stakeholders already have or might in the future cite these international developments.

¹ See, e.g., Laurel S. Terry, *International Developments, International Networks, and their Impact on U.S. Legal Ethics and Lawyer Regulation*, Akron L. Rev. __ (2019)(forthcoming).

² See Laurel S. Terry, Tahlia Gordon, and Steve Mark, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 Fordham L. Rev. 2661 (2012). See also Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 Saskatchewan L. Rev. 145 (2013).

³ See Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22(1) Prof. L. 28 (Dec. 2013) (recommended that U.S. regulators follow the UK’s lead by adopting jurisdiction-specific regulatory objectives, but did not recommend that U.S. regulators follow other aspects of the 2007 UK Legal Services Act).

Who Regulates Lawyers:

In recent years, there have been dramatic changes around the world with respect to who it is that regulates lawyers. [Australia](#) has enacted several different laws in the past twenty years that have addressed the issue of “*who regulates lawyers.*” Australia’s two most populous states have enacted the Legal Profession Uniform Act and have a new [overarching regulator](#) – the Legal Services Council and the Commissioner for Uniform Legal Services Regulation. The [2007 UK Legal Services Act](#) dramatically changed the identity of lawyer regulators in England and Wales. As a result of this legislation, the overarching regulator is the [Legal Services Board](#) (LSB) which is required to have a nonlawyer Chair and a nonlawyer majority. Changes in “who” regulates lawyers have also taken place in Scotland [the [Legal Services \(Scotland\) Act](#) (2010)] and in Ireland. One of the issues that was particularly [controversial](#) in the early drafts of Ireland’s [legislation](#) was the question of whether lawyers should play any role at all in the regulatory system. Some of the pressure on Ireland and other countries came from the so-called “Troika,” which consisted of the International Monetary [IMF], the European Central Bank, and the European Commission. In 2012, the ABA and the Council of Bars and Law Societies of Europe (CCBE) sent a [joint letter](#) to the IMF to “express their growing concern about the independence of the legal profession” and to note that it was “a disturbing trend in places like Greece, Ireland and Portugal where the economic crisis and the intervention of the Troika have led Governments to propose radical reforms of the legal profession.” Important international developments related to the issue of “*who regulates lawyers*” also include antitrust initiatives in the [European Union](#), the Organisation of Economic Cooperation and Development [[OECD](#)], and [elsewhere](#) that focused on lawyer regulation issues, including the issue of separating the regulatory and “representational” arms of bar associations.

Because the issue of “*who regulates lawyers?*” is also relevant in the United States and because international networks promote the free flow of information, international developments such as these have or will become part of U.S. lawyer regulation conversations. For example, the issue of “who regulates lawyers” is currently being addressed by the Washington Supreme Court’s [Bar Structure](#) Work Group, which held its first meeting in March 2019. Among other things, this group will analyze the impact on the unified State Bar of Washington of the U.S. Supreme Court’s [No. Carolina State Board of Dental Examiners v. FTC](#) and [Janus v. Am. Fed. of State, County, and Municipal Employees](#) cases. Legal Zoom cited the Dental Board case when it filed a [\\$10.5 million antitrust suit](#) against the North Carolina Bar Association because of the bar’s efforts to prevent LegalZoom from selling two prepaid legal services plans in North Carolina. This suit [settled](#), but there have been other challenges based on the North Carolina Dental Board case, as this ABA Center for Professional Responsibility [webpage](#) documents. Even before the Supreme Court’s [Dental Board](#) case, there had been challenges to the status quo of “*who regulates lawyers.*” For example, there have been [legislative proposals](#) in Arizona and South Carolina to change who it is that regulates lawyers; the South Carolina bill would have placed authority for bar admission and attorney discipline in a newly created Commission under the Department of Labor. In 2017, Anthony Davis, Jim Jones, and others [co-wrote an article](#) in the Georgetown Journal of Legal Ethics that included a proposed federal statute that would, *inter alia*, authorize lawyer multijurisdictional practice whenever federal law or interstate commerce was involved. In 2019, Anthony Davis urged [The Future of Lawyering Committee](#) of the Association of Professional Responsibility Lawyers [APRL] to endorse this article’s proposal.

International intergovernmental developments, as well as foreign developments, have affected U.S. conversations about “*who regulates lawyers*.”⁴ For example, in December 2016, the United States received its [Mutual Evaluation](#) from the intergovernmental organization called the Financial Action Task Force [FATF]. This FATF report recommended as one of its “priority actions” that the United States “[a]pply appropriate [anti-moneylaundering] obligations on the basis of a specific vulnerability analysis, to lawyers...” A lawyer who is on the ABA Board of Governors and one of the most knowledgeable FATF experts in the country has called for the adoption of a new [ABA Model Rule](#) that requires client due diligence efforts. Commentators that include [this author](#) and Akron Professor [Jack Sahl](#) have emphasized that if U.S. lawyers are not able to show that they have – and honor – client due diligence obligations, they may find themselves subject to onerous obligations imposed on them through federal legislation.

Another international intergovernmental development that has affected U.S. lawyer regulation conversations is the World Trade Organization’s General Agreement on Trade in Services or GATS. The GATS was the first global agreement that applied to trade in legal services. The GATS has changed who talks about U.S. lawyer regulation and it arguably has indirectly affected the content of U.S. lawyer regulation. For example, in 2015, the Conference of Chief Justices [CCJ] adopted a [resolution](#) that urged its members to adopt the ABA’s model resolutions regarding limited practice rights for [inbound](#) foreign lawyers. The ABA has a [Standing Committee on International Trade in Legal Services](#) [ITILS] whose mission includes monitoring U.S. trade negotiations such as the GATS negotiations so that the ABA ITILS can “educate and engage in outreach to interested entities.” The ABA ITILS webpage shows the many instances in which it has been asked to communicate with federal government officials and foreign lawyers and bar associations regarding U.S. state regulation of lawyers. In sum, there have been significant international developments with respect to “*who regulates lawyers*” and these developments have become part of U.S. stakeholder conversations regarding this issue.

Whom (or What) Is the Object of Regulation:

There have been significant international developments that address the **object** of regulation rather than the who the regulator is – in other words, the issue of “*whom (or what) is regulated*.” Some international discussions have focused on whether the object of regulation should be **providers** (e.g., lawyers, barristers, solicitors, paralegals, etc.) or whether the object of regulation should be “legal **services**” regardless of whom provides these services. In the past, there was a more complete overlap between the concepts of *providers* and *services* because legal services were the things provided by lawyers. Today, however, there is an increasing likelihood of divergence between these concepts. What we might call “legal services” are increasingly provided by those who are not licensed lawyers. For example, a shareholder-owned company such as [LegalZoom](#) arguably provides legal services, yet they are not regulated as lawyers and do not hold themselves out as providing “legal services.” Lists of legal services “start-up” companies found [here](#) and [here](#) show the large number of “providers” in the legal services “space.”

⁴ See, e.g., Laurel S. Terry, [U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing](#), 59 N. Y. L. S. L. Rev. 487 (2015); Laurel S. Terry, [From GATS to APEC: The Impact of Trade Agreements on Legal Services](#), 43 Akron L. Rev. 875 (2010); Laurel Terry, [The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”](#) 2008 J. Professional Lawyer 189 (2008).

Australia and the UK are international jurisdictions that have had some of the most significant developments related to the issue of *whom (or what) should be regulated*. Australia was the first country to have a publicly traded law firm – [Slater & Gordon](#). In the UK, the [2007 Legal Services Act](#) changed the law regarding “*what (or whom) is regulated*” and paved the way for “alternative business structures” [ABS] that include nonlawyer partners and ownership. The “frontline regulator” for solicitors began issuing ABS licenses [in 2012](#); it published a [study](#) in mid-2018 that reported that there were more than 700 ABSs and that ABSs were no riskier and were more innovative than other business models. Those [who have established or invested in ABS firms](#) include entities related to The Cooperative, hedge funds, all Big 4 accounting firms, British Telecom, US law firms, Legal Zoom, and LexisNexis.

Canadian provinces (and [academics](#)) have also been addressed the question of “*whom (or what) should be regulated*.” The [Law Society of Ontario](#), for example, has [successfully](#) regulated paralegals for the past five years. More recently, its *Compliance-Based Entity Regulation Task Force* has considered entity regulation issues. The Prairie Provinces of Alberta, Manitoba, and Saskatchewan are also exploring [entity regulation](#). [British Columbia](#) and [Nova Scotia](#) already have the power to regulate law firms as well as individual lawyers.

The question of “*whom (or what) is regulated*” is also a topic of interest in the United States. After more than [ten years](#) of effort, which was largely led by its Supreme Court, Washington now permits – and [regulates](#) – Limited License Legal Technicians (LLTs). The Arizona and Utah Supreme Courts have also [adopted](#) limited licenses rules; their providers are called Certified Legal Document Preparers (AZ) and Licensed Paralegal Practitioners (UT). [New York](#) has adopted a “Court Navigator” [program](#) in which non-lawyers help clients at the courthouse. U.S. bar associations have also examined the issue of “*whom (or what) should be regulated*.” For example, the State Bar of California, which is a unified bar, has a [Task Force on Access Through Innovation of Legal Services](#) that is examining [three broad topics](#), one of which is non-lawyer ownership and investment in law firms. A March 2019 [memo](#) to its *Subcommittee on UPL and Artificial Intelligence* was entitled “Provider regulation vs. ‘Legal Advice Device’ regulation.” The memo explained that the committee had received a proposal whose regulating AI legal “devices” whose inspiration for was the FDA’s process for approval of medical devices. The ABA has also considered the issue of “*who or what is regulated*.” When the [ABA Task Force on the Future of Legal Education](#) issued its 2014 final report, one of its [key findings](#) was that “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.” The [ABA Commission on the Future of Legal Services](#) issued its final report in August 2016 and one of [its findings](#) was that the “traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.” [Recommendations](#) 2.2, 2.3, and 2.4 in that Report addressed the issue “*whom (or what) should be regulated*” and encouraged continued exploration of new regulatory models. In many of the U.S. initiatives described above, it is common to find stakeholders citing “access to

justice” data and noting that some of the *whom (or what) is regulated* international developments have articulated goals that include expanding access to legal services.

When Should Lawyer Regulation Occur:

A third contemporary issue concerns timing and the issue of “*when should lawyer regulation occur?*” Much of the interest in this “*when to regulate*” issue was prompted by data from New South Wales, Australia. After the adoption of a new law that allowed incorporated law practices (ILPs), the New South Wales regulator required ILPs to complete a “self-assessment” form that asked the lawyer completing the form to evaluate the ILP’s performance with respect to ten common problem areas.⁵ An [empirical study](#) concluded that after implementation of this system, client complaints were reduced by approximately two-thirds and another survey found that most of the surveyed ILPs [reviewed or changed their internal systems](#).⁶ Canadian regulators are among those who have taken notice of this Australian data. After conducting a [pilot project](#) and issuing several reports, Nova Scotia [adopted](#) a profession-wide mandatory self-assessment program. [British Columbia](#), [Ontario](#), and the [Prairie Provinces](#) have all launched self-assessment pilot projects in an effort to help *prevent* lawyer problems, rather than waiting until after the problems arise to respond.

The question of “*when should regulation occur*” is of increasing interest in the United States. After [hearing](#) about the Australian data, the Colorado Supreme Court Office of Attorney Regulation Counsel developed a set of [self-assessment](#) forms that are voluntary (but can be used for CLE credit). Illinois was also familiar with the Australian experience and it has [implemented](#) a mandatory self-assessment program for Illinois lawyers who represent private clients but do not have malpractice insurance. Although some Illinois lawyers are *required* to complete Illinois’ online interactive [self-assessment course](#), all Illinois lawyers can take the free eight-module course and receive CLE credit. Other states and organizations are also interested in this issue. The National Organization of Bar Counsel [NOBC], which is an organization of lawyer regulators, has prepared an [FAQ document](#) on proactive legal regulation. The [committee](#) members who worked on this document included regulators from Australia, Canada, and the UK. The ABA expects to introduce a resolution at the August 2019 Annual Meeting that would encourage jurisdictions to consider adopting proactive management-based regulation or PMBR.⁷ I am among those who have cited international developments when urging U.S. regulators to take a more proactive, prevention-oriented approach to lawyer regulation.⁸

⁵ The ten issues that New South Wales included in its self-assessment form are similar to problem areas that one sees in U.S. legal practice and elsewhere. See Appendices 2 and 3 [here](#). The ten issues included client complaints about lawyer communication, delay, fees, missed deadlines, and conflicts of interest among other things. *Id.*

⁶ For a four-page blog post summarizing some of this data, see Laurel Terry, *When it Comes to Lawyers... Is an Ounce of Prevention Worth a Pound of Cure?*, JOTWELL (July 13, 2016) (reviewing Susan Saab Fortney, *Promoting Public Protection through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation System*, 23 Prof. Law. 16 (2015)), <https://legalpro.jotwell.com/when-it-comes-to-lawyers-is-an-ounce-of-prevention-worth-a-pound-of-cure/>.

⁷ See the *Ounce of Prevention* Jotwell post, *supra*, for a discussion of the origin of the PMBR acronym.

⁸ See Laurel S. Terry, [The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System](#), 20 Lewis & Clark L. Rev. 717 (2016). This article contained two recommendations. It urged regulators to adopt a mindset in which they view their mission as trying to prevent problematic lawyer behavior, as well as responding to such behavior after it occurs. It also urged them to add to lawyer bar dues statements two questions about Rule 5.1 and have a webpage with practice management and other resources.

Where Should Lawyers or their Activities be Regulated:

The fourth question listed above was “*where should lawyers or their activities be regulated.*” Regulators traditionally have regulated those who were licensed in their jurisdiction (and perhaps those who practiced in their jurisdiction [even if they weren’t licensed there.](#)) As a result of technology, lawyers can practice across borders using their phones and email and can choose to have only a “virtual” office. Despite these developments, lawyer regulatory systems are primarily geography-based, which means that difficult issues can arise when lawyers practice electronically. For example, in Canada there have been disagreements between regulators and virtual law firms (see n. 138 [here](#)). The size of the legal profession’s monopoly affects the complexity of this “*where should lawyers be regulated*” issue. If the reserved activities (or monopoly) are limited to court appearances, as is true in some countries, then this issue is less difficult than in [jurisdictions](#) in which the profession’s monopoly includes transactional work.

International developments, such as trade negotiations, play a role in keeping this thorny and unresolved issue front and center. For example, the GATS requires WTO Member States (which is most countries in the world, including the United States) to use four “[Modes of Supply](#)” its legal services specific commitments (if any). “Mode 1” involves virtual legal practice, in which the legal services “product” rather than the legal services “provider” crosses an international border. Thus, the GATS has forced regulators, lawyers, and government trade negotiators to [discuss](#) what UPL laws do and don’t allow with respect to virtual law practice.

U.S. regulators and [lawyers](#), like those elsewhere, face challenging issues that arise because our geographic-based system of licensing doesn’t match the virtual world in which we live and the ways in which lawyers electronically (by phone, internet, or email) deliver services across borders. In 2002, as the quid-pro-quo for expanded multijurisdictional practice rights, the ABA amended [Model Rule of Professional Conduct 8.5](#) to make lawyers accountable to the disciplinary systems of jurisdictions in which lawyers provide services, as well as jurisdictions in which they are licensed. After the ABA’s Feb. 2013 [adoption](#) of several model rules regarding limited practice rights for inbound foreign lawyers, the ABA adopted its [Guidelines for an International Regulatory Information Exchange](#) that promote international accountability. (Several years later the International Bar Association adopted the [IBA Guidelines for an International Regulatory Information Exchange Regarding Disciplinary Sanctions against Lawyers](#) which help promote international accountability and look substantially similar to the ABA’s Guidelines.) There have been other settings in which U.S. lawyers and regulators have discussed the issue of *where should lawyers or their activities be regulated*. This was a major focus of the work of [the ABA Commission on Ethics 20/20](#), which addressed [some but certainly not all](#) of the regulatory issues that technology and globalization have created. As noted in the “*what (or whom) is regulated*” discussion, a number of regulators and others (e.g., the [California Task Force](#) and [APRL](#) task force) currently are examining issues that are related to the “locus” of regulation. The issue of lawyers who have [virtual offices](#), rather than “bricks and mortar” offices is just one subset of this issue of “*where should lawyers or their activities be regulated.*”

Why Should Lawyers Be Regulated (i.e., what are the goals or ‘regulatory objectives’ of regulation):

While “purpose” statements in legislation are not new, the 2007 UK Legal Services Act brought heightened interest to their use in lawyer regulation settings. [Section 1](#) of the UK Act was entitled “The Regulatory Objectives” and set forth the goals that it said UK lawyer regulation should be trying to achieve. Following the adoption of the UK Legal Services Act, international commentators pointed out the benefit of jurisdictions adopting explicit statements of their regulatory goals.⁹ Several jurisdictions, including some in [Australia](#) and [Canada](#), thereafter adopted or revised objectives that set forth the goals they were trying to achieve – in other words, *why lawyers should be regulated*.

U.S. regulators are increasingly interested in the topic of regulatory objectives. In 2016, upon the recommendation of the ABA Task Force on the Future of Legal Services, the ABA adopted a [resolution](#) encouraging U.S. jurisdictions to adopt the *ABA Model Regulatory Objectives for the Provision of Legal Services*. The Supreme Courts in Colorado, Illinois, and Washington have [adopted](#) their own versions of regulatory objectives and other U.S. jurisdictions are considering adopting a statement that sets forth their views about *why lawyers should be regulated*. (You can see U.S. and foreign regulatory objectives, with cites and links, at this “[Examples of Regulatory Objectives](#)” [document](#) that I post on my website. I am among those who have [called upon](#) U.S. jurisdictions to adopt regulatory objectives for legal profession regulation, although I prefer the Nova Scotia version to the ABA version.) Regardless of which particular regulatory objectives a jurisdiction adopts, it is undeniable that international developments have influenced U.S. views about the value of explicitly stating the regulator’s views about *why lawyers should be regulated*.

How Should Lawyers Be Regulated:

The final issue in the *who-what-when-where-why-and-how* framework is the issue of *how should lawyers be regulated*. International developments have addressed this issue, too. For example, the Solicitors Regulation Authority [SRA] is the “frontline” regulator for solicitors in England and Wales. In 2011, it debuted a new “[Handbook](#)” that emphasized its “outcomes-based” approach to regulation, rather than detailed prescriptive rules. In a webpage that is no longer active, the SRA described [outcome based regulation](#) as follows: “Outcomes-focused regulation [OFR] focuses on the high-level principles and outcomes that should drive the provision of legal services for consumers. It replaces a detailed and prescriptive rulebook with a targeted, risk-based approach concentrating on the standards of service to consumers. There is greater flexibility for firms in how they achieve outcomes (standards of service) for clients.” The SRA expects to replace its Handbook in 2019 with [Standards and Regulations](#), [including](#) one code for individuals and one code for firms. Although references to “outcomes focused” regulation has faded, the SRA has increased its references to its “[risk-based](#)” regulation. [Other jurisdictions](#) have also embraced a “risk-based approach” to regulation. Another “*how to regulate*” issue concerns the evidence needed to justify regulation and who has the “burden of proof.” This issue [has arisen](#) in the Organisation of Economic Cooperation and Development

⁹ See, e.g., Laurel S. Terry, Steve Mark, and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 Fordham L. Rev. 2685 (2012), <https://ir.lawnet.fordham.edu/flr/vol80/iss6/14/>.

[OECD]. (Similar issues have also arisen in [antitrust initiatives](#) around the world that have focused on the regulation of the legal profession.) The OECD's Services Trade Restrictiveness Index [[STRI](#)] initiative, and its [analysis](#) of legal services, includes “*how to regulate*” issues.

In my view, until recently, there had been relatively little discussion of the “*how to regulate*” issue compared to the discussion of the other *who-what-when-where-why-and-how* issues. Many years ago, Professor Mary Daly wrote a [law review](#) article that focused on the differences between rules and standards and contrasted U.S. legal ethics rules with the approach taken in other countries. During the U.S. MDP [multidisciplinary practice] debates, there was some discussion of the differing approaches to this “burden of proof” [issue](#), but the issue did not receive extensive analysis. The situation seems to be changing, however. In 2014, Fordham's Stein Center for Law and Ethics [published](#) papers from its Colloquia on “The Legal Profession's Monopoly” and several articles addressed the “*how to regulate*” issue. U.S. and Canadian legal regulators now have a listserv and try to schedule a networking session during the ABA's [annual](#) legal ethics conferences. These ABA ethics meetings have included discussions of Canadian regulators' “risk-based” approach to regulation. The question of “*how should lawyers be regulated*” may soon receive additional attention in the United States because of Professor Elizabeth Chambliss' forthcoming [Evidence-Based Regulation](#) article. After observing that the United States is moving towards an evidence-based lawyer regulation system, she offers “strategies for institutionalizing independent research norms within the profession and making empirical assessment a required feature of professional self-regulation.” While this article relies primarily on U.S. developments that include the Supreme Court's No. Carolina Dental Board case, the international developments cited above are likely to increase the pressure on U.S. lawyer regulators to rely on evidence- that is, to change *how* they regulate lawyers.

Conclusion:

As this brief summary has shown, there have been significant lawyer regulation developments outside the United States. One way to think about these developments and to help untangle their many threads is to use the *who-what-when-where-why-and-how* framework set forth in the articles cited in footnote 2 of this document.¹⁰ In my view, the *who-what-when-where-why-and-how* framework makes it easier to recognize lawyer regulation issues and also to “decouple” lawyer regulation issues and analyze them separately. Finally, this framework makes it easier to recognize similarities and differences among U.S. and international developments.

This summary has also shown that because of the extensive international networks that exist among lawyer regulation stakeholders,¹¹ one should expect that lawyer regulation developments elsewhere in the world will be discussed in the United States and may prompt changes. In short, I think all lawyers should be aware of international developments, international networks, and their impact on U.S. legal ethics and lawyer regulation.

¹⁰ In addition to the information found in the articles cited supra note 2, you can find additional information at <https://tinyurl.com/laurelterryslides> and at https://works.bepress.com/laurel_terry/.

¹¹ I discuss these international networks in my forthcoming Akron Law Review article; in Laurel S. Terry, *The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years*, 30 Georgetown J. of Legal Ethics 365 (2017), http://works.bepress.com/laurel_terry/68/; and in Laurel S. Terry and Carole Silver, *Transnational Legal Practice* [2014], 49 ABA/SIL [n.s.] 413 (2015), http://works.bepress.com/laurel_terry/22/.