The Law Society of British Columbia

Minutes

Benchers

Date:	Friday, July 10, 2015	
Present:	Ken Walker, QC, President	Dean Lawton
	David Crossin, QC, 1st Vice-President	Peter Lloyd, FCA
	Herman Van Ommen, QC, 2nd Vice-President	Jamie Maclaren
	Haydn Acheson	Sharon Matthews, QC
	Joseph Arvay, QC	Nancy Merrill
	Satwinder Bains	Maria Morellato, QC
	Edmund Caissie	Greg Petrisor
	Pinder Cheema, QC	Claude Richmond
	Jeevyn Dhaliwal	Phil Riddell
	Lynal Doerksen	Elizabeth Rowbotham
	Thomas Fellhauer	Sarah Westwood
	Craig Ferris, QC	Tony Wilson
	Martin Finch, QC	
	Miriam Kresivo, QC	
Excused:	David Corey	
	David Mossop, QC	
	Lee Ongman	
	Cameron Ward	
Staff Present:	Tim McGee, QC	Jeffrey Hoskins, QC
	Deborah Armour	Michael Lucas
	Taylore Ashlie	Jeanette McPhee
	Renee Collins Goult	Doug Munro
	Lance Cooke	Tim Travis
	Su Forbes, QC	Alan Treleaven
	Andrea Hilland	Adam Whitcombe

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Johanne Blenkin	Chief Executive Officer, Courthouse Libraries BC
	Kari Boyle	Director of Strategic Initiatives, Mediate BC Society
	Maureen Cameron	Director of Membership and Communications, Canadian Bar Association, BC Branch
	Anne Chopra	Equity Ombudsperson, Law Society of BC
	Jennifer Chow	Vice President, Canadian Bar Association, BC Branch
	Prof. Catherine Dauvergne	Dean of Law, University of British Columbia
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Gavin Hume, QC	Law Society Member of the Council of the Federation of Law Societies of Canada
	Prof. Bradford Morse	Dean of Law, Thompson Rivers University
	Wayne Robertson, QC	Executive Director, Law Foundation of BC
	Rob Seto	Director of Programs, Continuing Legal Education Society of BC
	Krista Simon	President, Trial Lawyers Association of BC
	Monique Steensma	CEO, Mediate BC Society

INTRODUCTION

After noting absences, Mr. Walker introduced Dr. Catherine Dauvergne, the new Dean of the Peter A. Allard School of Law. Dean Dauvergne thanked Mr. Walker, and briefed the Benchers on current law school projects, including programming changes to develop an international human rights clinic, a women's clinic, a centre for business law, including small business needs, and a fuller suite of clinical, "hands-on" offerings. She noted as well the departure of several long-standing faculty members, and the corresponding addition of new faculty. In the Fall, the school will be awarding the $100,000 Allard prize in international integrity for people committed to transparency in governance, and looking for bilingual judges for the Laskin Moot.

Mr. Walker thanked Dean Dauvergne, and stressed the importance of a good working relationship between law schools and Benchers.

CONSENT AGENDA

1. Minutes

a. Minutes

The minutes of the meeting held on June 12, 2015 were approved as circulated.

The *in camera* minutes of the meeting held on June 12, 2015 were approved as circulated

b. Resolutions

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend rule 3.7-9 of the Code of Professional Conduct for British Columbia as follows :

i. In the first line, by inserting the following words at the end of the sentence:

"as soon as practicable"

ii. In paragraph (a) (i) by striking the words "has withdrawn" and substituting:

"is no longer acting"

iii. by adding the following paragraph:

"(a.1) notify in writing all other parties, including the Crown where appropriate, that the lawyer is no longer acting;"

iv. At the beginning of paragraph (g), by adding the following words:

"notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer is no longer acting and"

v. At the end of paragraph (g) by adding the following words:

"and any other requirements of the tribunal"

EXECUTIVE REPORTS

2. President's Report

Mr. Walker briefed the Benchers on various Law Society matters to which he has attended since the last meeting. He provided a summary of the June 25 Executive Committee meeting, at which the Committee reviewed next steps towards paralegal certification, the most recent budget projections, and the plan for executive development as part of succession planning. The Committee also discussed the status of work being done at the regulatory and advisory committee level, noting that the Lawyer Education Advisory Committee anticipates completing its review of the admissions program by December, and the Tribunal Program Review Task Force hopes to have a report to the Benchers for decision by September.

Additionally, Mr. Walker attended the Magna Carta dinner at the Lawyers Inn, the Victoria Bar Association dinner, and the Kamloops regional Call to the Bar which, with the addition of the first graduating class from Thompson Rivers Law School, was the largest ever in Kamloops at 18 new lawyers.

He also congratulated Mr. Arvay on his Award of Justice from the Advocate Society, which recognizes the finest traditions of advocacy in the context of socially or politically unpopular causes, and Ms. Bains, on her receipt of the Order of Abbotsford in recognition of her outstanding community contributions.

Finally, Mr. Walker noted that the date for the 2016 Retreat has been changed to accommodate conflicting schedules; the new date approved by the Executive Committee is June 2-4.

3. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (attached as Appendix 1). With this report, he proposed to begin a series of briefings for the Benchers to provide context for the ongoing review and assessment of our strategic initiatives.

He began his series of briefings with discussion of an article by Professor Andrew Perlman which is a comprehensive review of international advances and innovations around the provision of legal services by lawyers and other providers. Issues raised in the article, including the competency of providers and the relevancy of consumer preference, can inform our own assessment of the direction we are taking with non-lawyer legal services.

Thus far, as part of our strategic priority to facilitate increased access to legal services, we have focused on the potential role of non-lawyers. However, other regulators have taken a different path, such as focusing on increasing access through alternative business structures. Review and assessment of other such approaches can help inform our decisions and the work we are doing.

Mr. McGee underscored the dynamic nature of the strategic plan, stressing the importance of ensuring that initiatives continue to make sense and hold up against competing views. Our current initiatives, seen as at the forefront of change, are being watched by others. Articles such as Professor Perlman's can help Benchers continue be well informed and engaged on strategic issues.

4. Briefing by the Law Society's Member of the Federation Council

Gavin Hume, QC briefed the Benchers as the Law Society's member of the Federation Council.

The Federation President, CEO and senior staff recently held their annual meeting with the Minister of Justice and senior government officials on current issues. Key matters related to draft legislation granting patent and trademark agents client communication privilege, access to justice, regulation of international trade and foreign legal services, and the Department of Justice's development of a Professional Responsibility Service.

When patent and trademark agents' communication privilege was discussed with the Minister of Justice, the Federation was told that there would be further consultation with law societies.

The Deputy Minister also raised questions about how law societies are dealing with the issue of money laundering, including how they are monitoring lawyer reporting following the recent Supreme Court of Canada decision. Mr. Hume noted the likelihood that individual law societies would be canvassed by the Federation or Federal government in the coming months. Mr. Walker queried whether, proactively, we could gather relevant statistics to share with the Federation. The Benchers indicated their interest in having a report showing lawyer compliance with our rules concerning money laundering. Ms. Armour and her staff will provide a report.

Mr. Hume also reported on other matters, including a meeting with the Public Prosecution Service of Canada to discuss the Model Code and mobility, the annual meeting with the CBA Executive to discuss issues of common interest focusing this year on access and the patent

agents' privilege issue, and the annual informal meeting between the President, CEO and the Chief Justice. He also reported on the annual meeting of CanLII and its ongoing successes.

Finally, Mr. Hume reminded the Benchers of the Federation's upcoming meeting in Winnipeg in September, focusing on Federation governance.

DISCUSSION/DECISION

5. Governance Committee Mid-Year Report

Committee Chair Miriam Kresivo, QC began by thanking the members of Committee for their commitment and hard work. She noted that their mid-year report focused on their work to date, including the items of Bencher governance education, terms of reference for committees, and options for electronic participation at Annual General Meetings (AGM's) and Bencher elections. The Committee has made recommendations and is seeking input and decisions from Benchers on the latter (see the written report at page 85 of the meeting materials for details).

a. Bencher governance education

After review of the Bencher evaluations completed in December, 2014, the Committee has agreed on changes to the process and is recommending changes to Bencher training and ongoing briefing to ensure a greater degree of participation, and to address emerging areas of concern. Additionally, a governance training session for Benchers has been arranged for December 4, 2015, to coincide with the orientation of new Benchers following the November elections.

b. Terms of Reference for Committees

The Governance Committee is recommending that all committees review and revise their terms of reference to ensure the terms are current and that the committees are working within them; the Governance Committee has begun with a revision of its own terms, and encourages the Chairs of each of the committees to undertake similar work.

c. AGM

The Governance Committee has been examining a variety of options aimed at increasing the accessibility of the AGM for members in communities outside of Vancouver, enabling us to maintain one live meeting and eliminate costly remote physical locations. These options include webcasting and electronic voting; while webcasting is feasible, the Committee has yet to find a technical option for real-time voting that meets our security requirements and is easily workable for our members. Electronic options used by other organizations, such as pre or post-meeting voting on resolutions, do not allow members their full voting entitlements, such as the right to vote on procedural motions raised during the meeting itself.

The Committee is recommending that this year's AGM be webcast, as an initial step toward full electronic participation, and that staff continue to explore workable options for electronic voting.

As another step, the Committee is also recommending the electronic distribution of AGM material, to replace the costly manual posting system. This will require a member resolution at the upcoming AGM.

d. Bencher elections:

Electronic voting has also been reviewed to facilitate increased member participation in Bencher elections. In this context, electronic voting options currently exist that would enable us to implement a fully electronic Bencher election this year, at a considerable reduction in cost compared to a manual election. Both Ontario and Alberta now conduct fully electronic elections, with a corresponding increase in the level of membership participation and accessibility. Transition to an electronic election would require a rule change, but does not require a member resolution.

A complicating factor is that the service provider best able to meet our technical and security needs is American, and houses information on an American-based server. British Columbian privacy legislation currently recommends against the use of American servers to house potentially private information. The information retained by the election service provider would be limited to public contact information and e-mail information, which, in some circumstances, could be construed as private.

Other concerns presented by the Committee include the management of the change in process, including the provision of adequate notice to the membership. It was noted that both Ontario and Alberta implemented transition provisions which involved offering both manual and electronic methods for at least one election cycle before going fully electronic.

To address concerns of privacy and of transition, the Committee presented an option of transitioning to an electronic process in next year's bi-election. The intervening time should allow for both ample notice of the change and exploration of Canadian providers able to meet our requirements; the smaller election should better allow the implementation of a new system.

Ms. Kresivo acknowledged the Committee's commitment to ensuring a timely transition to electronic systems that have increasingly become the norm in today's professional world; the Committee is also mindful of the logistics involved in such change. It is recommending that the Act and Rules Committee develop rules now enabling the Law Society to conduct Bencher elections electronically, but inviting discussion and input from the Benchers as to when and how to implement electronic elections.

Following Ms. Kresivo's report and recommendations, Mr. Walker asked for a motion that the Benchers put the following resolution to the members at the 2015 Annual General Meeting:

BE IT RESOLVED to authorize the Benchers to amend the Rules respecting general meetings to provide that the required notices of general meetings may be distributed by electronic means instead of by email as presently required.

(moved by Mr. Caissie, seconded by Mr. McLaren). In the discussion that followed, Ms. Kresivo confirmed that the membership has not yet been consulted about electronic distribution of AGM material, but as the change would not occur until next year, given that such a change requires a 2/3rds majority vote by the membership, there will be ample time for notice. Discussion also surrounded transition provisions, such as providing both electronic and hard copy materials to accommodate everyone. Ms. Kresivo noted that both Ontario and Alberta have become fully electronic, and that it is becoming increasingly rare for professionals not to have access to electronic information. In answer to questions, Mr. Whitcombe advised that, though we do not currently require provision of an email address, his recollection is that all but approximately 150 of our 13,000 members have provided an email address to us.

The motion was passed unanimously.

The Benchers then discussed the possibility of webcasting the 2015 AGM. Some questioned the additional costs and utility of webcasting without voting; Ms. Kresivo confirmed that webcasting represents a transition step towards full electronic participation. The Benchers also discussed whether or not we will be able to track online participation, to determine the location of the user, and whether the webcast will require secure login or be publicly available. Though the speculation was that identification of user location may not be possible, it was stressed that success will not necessarily be measured by the number or location of users. Rather, introduction of webcasting represents a message to members that we intend to transition away from remote physical locations, towards the fuller access provided by electronic participation. Regarding security, it has not yet been decided whether to secure the webcast through online login, or to provide wide access through the public website.

Following the discussion, the Benchers unanimously agreed that the 2015 AGM will be webcast.

Mr. Walker then summarized the options being discussed regarding Bencher elections, being: implementation of fully electronic elections this year; postponement of a fully electronic election to next year's bi-election; implementation of electronic distribution of election material this year but retention of paper balloting; or, a hybrid election this year or next which retains the manual paper balloting alongside electronic voting. He reiterated that the Governance Committee reached no consensus, and preferred to take direction from the Benchers.

Some favoured a fully electronic election this year, arguing it will increase access, it will be simpler and less expensive to run, and it will demonstrate that the Law Society is keeping pace with technological advancements that most members use already. Others preferred implementing a hybrid election next year, to allow for adequate planning and transition provisions. Some noted that whichever model is preferred, the information available on candidates should be increased and made more easily available, however others cautioned against voluminous electronic material.

There was a lengthy discussion on the ramifications of using an American provider to facilitate the electronic elections. It was reiterated that the only potentially private information involved would be email addresses of non-practicing or retired members; debate ensued regarding whether an email provided to the Law Society as regulator was by definition a business address, or whether it remained private information. Many sought more information on the privacy implications, and preferred to defer implementation of electronic elections until this issue could be resolved.

Taking into account the discussion and the concerns raised, Ms. Kresivo moved (seconded by Ms. Merrill) that the Law Society revise its Rules now to permit the Benchers to conduct a "hybrid" Bencher election for next year's bi-election, consisting of both paper and electronic voting and electronic distribution of election material, including information about the candidates.

The motion was passed by a vote of 18 to 6.

Following the vote, it was suggested that the Benchers consider revising the Rules to require the provision of an email address with the Annual Practice Declaration, to help facilitate electronic elections in the future.

REPORTS

6. Report on the Outstanding Hearing & Review Reports

There were no outstanding hearing decisions or conduct review reports this meeting.

7. Financial Report – May YTD 2015

Mr. Lloyd, Chair of the Finance and Audit Committee, summarized the May Year to Date Report, actual financial results to the end of May, together with projections to the end of the year. Ms. McPhee, Chief Financial Officer, then briefed the Benchers on the report (details of which are found at page 91 of the Agenda materials), noting a projected 2.3% negative variance

for the general fund, due in part to an increase in external counsel costs and lower than budgeted savings from staff vacancies.

Revenue and expenses for both the Trust Assurance Program and LIF are on track, with investment returns of 6.74% to the end of May.

In response to a question, Ms. Armour confirmed that external counsel normally provide discounted hourly rates.

Mid-Year Reports from the 2015 Advisory Committees:

- **Access to Legal Services Advisory Committee**

Mr. Riddell reported as chair, providing highlights of the committee's work in the first half of the year and outlining the committee's focus for the balance of the year (see the written report at page 104 of the meeting materials for details). In particular, he noted the committee's exploration of Mediate BC's concept to develop a roster of lawyers to provide independent legal advice in conjunction with its sliding scale mediation project. He indicated possible funding for the project would be explored with the Law Foundation and, if it were approved, some Law Society practice resources would have to be developed to support the project. He also noted the committee's consideration of possible projects to increase access to legal services in both an aboriginal and family law context. Mr. Riddell acknowledged the hard work of the committee members and thanked Doug Munro for his valuable assistance and guidance to the committee and its members.

- **Equity and Diversity Advisory Committee**

Ms. Bains reported as vice-chair, providing highlights of the committee's work in the first half of the year and outlining the committee's focus for the balance of the year (see the written report at page 117 of the meeting materials for details). In particular, she noted the committee's consideration of the Truth and Reconciliation Commission recommendations around the development of cultural competencies in law schools and PLTC, and the examination of the process around committee appointments. Ms. Bains also reviewed the Ombudsperson's Report. Ms. Bains acknowledged the hard work of the committee members and thanked Andrea Hilland for her valuable assistance and guidance to the committee and its members.

In ensuing discussion, Benchers noted the need to raise awareness of the Ombudsperson as a resource.

- **Rule of Law and Lawyer Independence Advisory Committee**

Mr. Crossin reported as chair, providing highlights of the committee's work in the first half of the year and outlining the committee's focus for the balance of the year (see the written report at page 142 of the meeting materials for details). In particular he noted the committee's proposal for public commentary on rule of law issues as a way to engage and communicate with members of the Bar and the public, as well as the committee's monitoring of legislation impacting solicitor client privilege in the name of national security. Much of the committee's efforts were directed to development of the Retreat Agenda discussing S. 3 of the Legal Professions Act. Mr. Crossin acknowledged the hard work of the committee members and thanked Policy and Legal Services Manager Michael Lucas, Lance Cooke and Doug Munro for their valuable assistance and guidance to the committee and its members.

- **Lawyer Education Advisory Committee**

Mr. Wilson reported as chair, providing highlights of the committee's work in the first half of the year and outlining the committee's continuing focus on Admission Program Review, including both articling and PLTC, for the balance of the year (see the written report at page 147 of the meeting materials for details). He encouraged Benchers to provide their feedback on the Admission Program. Mr. Wilson acknowledged the hard work of the committee members and thanked Director of Education and Practice Alan Treleaven for his valuable assistance and guidance to the committee and its members.

8. 2015-2017 Strategic Plan Implementation Update

Mr. Crossin, as chair of the Rule of Law and Independence Advisory Committee ("the Committee"), presented the committee's proposal for public commentary on rule of law issues, as noted above. The committee proposes to produce commentary from time to time on current issues by means of articles, blogs and other forms of media to demonstrate the importance and relevance of the rule of law. As an example, he cited the current debate on national security measures as an issue of fundamental importance meriting engagement with the Bar and the public.

Mr. Crossin (seconded by Mr. Petrisor) moved for the Benchers to adopt the following resolution:

Be it resolved that the Rule of Law and Lawyer Independence Advisory Committee be authorised, in the course of the Committee's monitoring activities, to selectively identify appropriate topics relating to the rule of law and to post a comment or brief article concerning such topics.

In discussion following, concern was expressed over ROLLIAC purporting to speak for the Law Society on major issues; if the issue is of importance, it should be for the Law Society itself to comment. In response, Mr. Crossin confirmed that the Committee's proposal does not contemplate it speaking in a representative role; debate ensued as to whether the Committee will be seen to be speaking representatively, whether or not that is the intent, and whether it should in fact speak representatively, despite its initial proposal. The distinction between providing educational commentary and taking a position was discussed, with many indicating the appropriateness of the former but not of the latter.

Mr. Walker noted that the proposal aligns with the strategic goal of promoting greater confidence in the rule of law and the administration of justice through public education. Those in agreement suggested this goal is sufficiently important to outweigh the risk of the Committee providing commentary before consulting with the Benchers as a whole, particularly if measures were established to ensure due diligence.

Mr. Crossin confirmed that ROLLIAC would proceed incrementally and respectfully, taking care to avoid positional language where possible, and consulting the Benchers if appropriate.

The motion was passed unanimously.

RCG
2015-07-10

The Law Society of British Columbia

CEO's Report to the Benchers

July 2015

Prepared for: Benchers

Prepared by: Timothy E. McGee

Current Events in Regulation

My report to the Benchers last month focused on operational mid–year reports and updates. I want to use this month's report to focus your attention on an excellent, thought provoking article entitled "Towards the Law of Legal Services" by Andrew Perlman, Professor of Law and Director of the Institute on Law Practice, at Suffolk University in Boston. This article has recently been released and is attached to this report together with a brief review of it entitled "Something's Afoot and it's time to Pay Attention: Thinking about Lawyer Regulation in a New Way" by Professor Laurel Terry, a frequent commentator in this area.

I would ask you to please set aside some time to read Professor Perlman's article and/or read Laurel Terry's review. To help with that request you will be pleased to see that the balance of my report fits onto one page.

What is special about the article in my view is that it speaks clearly and succinctly to most of the current main stream initiatives being pursued by regulators and others to reform the legal system in the western democracies. The author's insight and critique of those initiatives including, for example, alternative business structures, is particularly helpful for LSBC's own strategic thinking.

While I highly recommend the article in its entirety, I would draw your attention specifically to Part IV "Towards the Law of Legal Services" starting on page 35. In many respects, this section supports the decision of the Benchers in 2012 to pursue a strategy around expanding the availability of front line, non-lawyer, legal service providers. As the author says as the lead in to Part IV, "We need a law of legal services that can liberate but appropriately regulate new players". Critical questions such as who should be authorized, determining competency, the role of informed consumer choice, who addresses misconduct, and independence are all addressed by the author in this section of the article.

Like Laurel Terry you too may find yourself disagreeing in parts with Professor Perlman. However, I think that the more that we are informed and conversant with the topics and issues covered in the article, the better equipped we will be to make smart choices about our own strategic direction.

Financial Update

The Financial Report for the period year to date ending May 31 will be presented at the meeting for review and discussion.

Timothy E. McGee
Chief Executive Officer

Something's Afoot and it's Time to Pay Attention: Thinking About Lawyer Regulation in a New Way

http://legalpro.jotwell.com/somethings-afoot-and-its-time-to-pay-attention-thinking-about-lawyer-regulation-in-a-new-way/

Andrew M. Perlman, *Towards the Law of Legal Services,* Suffolk University Law School Research Paper No. 15-5 (2015), available at SSRN.

Laurel Terry

We all know about tipping points…when something that previously seemed rare or unlikely acquires enough weight or momentum that the balance or status quo changes. As I read Professor Andy Perlman's article called "Towards the Law of Legal Services" it occurred to me that we may be getting very close to a tipping point in the United States with respect to the issue of lawyer regulation.

Professor Perlman's article argues that the time has come to "reimagine" our lawyer-based regulatory framework. He asserts that instead of focusing on the "law of lawyering" – which is how people in our field often refer to what we study – we need to develop a broader "law of legal services" that would authorize, but appropriately regulate, the delivery of more legal and law-related assistance by people who do not have a J.D. degree. He argues that reimagining regulation in this fashion will spur innovation and expand access to justice.

What Professor Perlman is writing about is not a particularly new idea. For example, back in the 1980's and 1990's, Professor Deborah Rhode was writing about nonlawyer practice. The ABA issued a report on this topic in 1995.

What feels different at this point in time is the variety of directions from which these calls for reform are coming. For example, last year the ABA Task Force on the Future of Legal Education issued a report that included the following as part of one of its key findings: "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." In August 2014, the ABA established the Commission on the Future of Legal Services [not lawyers] which has been asked, inter alia, to "propose new approaches that are not constrained by traditional models for delivering legal services and are rooted in the essential values of protecting the public, enhancing diversity and inclusion, and pursuing justice for all." For those who might have missed the news, after more than ten years of effort, which was led largely by its Supreme Court, Washington had its inaugural class of Limited License Legal Technicians (LLLT) take the required exams and begin their 3,000 hours of supervised work. Other states are talking about or exploring related ideas.

And this is just in the U.S. As Steve Mark, Tahlia Gordon and I noted in our 2012 article on Global Trends, jurisdictions around the world are grappling with a variety of issues related to lawyer regulation, including the

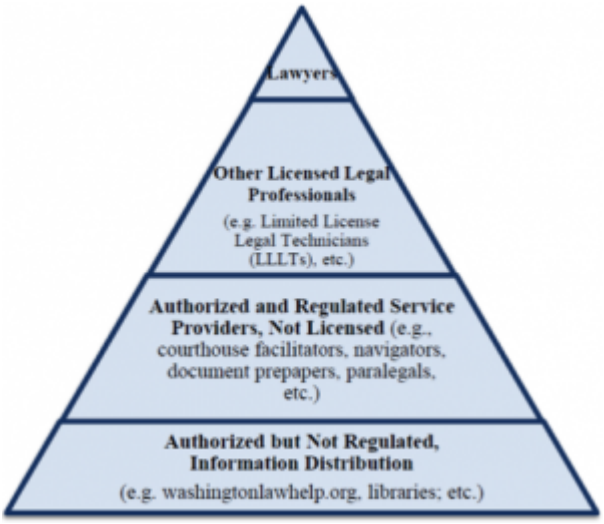
issue of ***what*** it is that should be regulated – lawyers or legal services. (We identified global trends regarding "***who*** regulates-***what*** or whom is regulated-***when*** regulation occurs-***where*** regulation occurs-***why*** regulation occurs-and-***how*** regulation occurs – the "who-what-when-where-why-and-how" of lawyer regulation.) Jurisdictions such as Australia, Canada, and the UK, are beginning to discuss or have already adopted an "entity" approach to regulation. Regulators in Ontario, Canada not only regulate lawyers, but have regulated paralegals for more than five years. Nova Scotia's "Transforming Regulation" initiative is very interesting and other Canadian provinces are exploring the issue of what it is they should be regulating.

It is against this backdrop that Professor Perlman's article is written. As a result of his experience as Chief Reporter (and one of the main technology gurus) for the ABA Commission on Ethics 20/20 and as Vice Chair of the ABA Commission on the Future of Legal Services, he brings to the article not only great familiarity with the issues, but a deep understanding of the difficulties involved in achieving the paradigm shift he recommends. But his methodical way of laying out the landscape and the arguments he offers may go a long way towards achieving the changes he recommends.

The first part of his article offers a hindsight look at the work of the Ethics 20/20 Commission, which was asked to evaluate what changes were needed to lawyer regulation in light of developments in technology and globalization. It also includes a response to some of the Commission's critics. Because I recently completed my own reflective essay about the work of the 20/20 Commission, I was much more interested in the subsequent part of his article, which was entitled "Towards a Law of Legal Services."

The "Towards a Law of Legal Services" section of Professor Perlman's article begins by describing the difficulties inherent in trying to define the practice of law. I found myself wholeheartedly agreeing with his conclusions in this section. I am continually dismayed when I hear lawyers, regulators, or judges suggest that the "solution" to some problem is to develop a better definition of the practice of law (and thus unauthorized practice of law or UPL). During the MDP debates in the 1990s, I came to the conclusion (see p. 872-873) that at least in the transactional setting, it is exceedingly difficult to develop – in an exclusive UPL sense, rather than an inclusive descriptive sense – a definition of what constitutes the practice of law. Thus, whenever I see "developing a definition of the practice of law" as the proposed solution to anything, I am dismayed since I do not believe that such efforts – even if properly motivated – will yield satisfactory results.

After explaining why it is difficult to define the practice of law, the article offers Professor Perlman's thesis that we "should ask a fundamentally different question: should someone without a law degree be 'authorized' to provide a particular service, even if it might be the "practice of law"? This section of the article includes this graphic to illustrate how one might respond to this question and begin to conceptualize a "law of legal services" that would supplemented the "law of lawyering:"



As Professor Perlman's text explained, "the bottom of the pyramid captures very routine law-related needs (e.g., the creation of a living will) that can be addressed by completing blank forms. Regulatory barriers should not prohibit people from making these forms available to the public through websites or otherwise. But as consumers' legal issues become more sophisticated, consumers typically need providers higher up on the pyramid. A central question for the law of legal service is this: at what point must a provider be subject to some kind of regulation?" (Professor Perlman's footnote acknowledged Paula Littlewood for conceptualizing the issue this way and creating a slightly different version of the pyramid.)

The article continues by discussing the principles (or regulatory objectives) that a "Law of Legal Services" might be designed to achieve, which is a topic near and dear to my heart. It also illustrates how the "Law of Legal Services" might work in specific contexts, such as automated legal document assembly. This section offers a proposal to regulate automated legal document assembly that could be "promulgated either as a court rule or statute." This section of the article also explains how Washington's Limited License Legal Technician regime fits within Professor Perlman's proposed approach. The article concludes with the following paragraph:

> The law of lawyering is undoubtedly important, but it offers few options for transforming the delivery of legal services. Nonlawyer ownership of law firms is one possible exception, but even that reform envisions a world where lawyers remain the exclusive deliverers of legal advice. The law of legal services reflects a different approach to regulatory innovation, one that seeks to authorize, but appropriately regulate, the delivery of legal and law-related assistance by more people who lack a traditional law license. At a time when legal services are increasingly unaffordable, the law of legal services may reflect a promising way to unlock innovation and reimagine the regulation of the twenty-first century legal marketplace.

There were certainly places in this article where I found myself disagreeing with Professor Perlman. For example, I thought he might have been unduly optimistic with respect to his conclusion about the access to justice results that will accrue by virtue of regulating legal services providers such as LLLTs because there may be too few licensed LLLTs to address the significant unmet legal need. As I have noted in previous Jots, I see a larger role for technology (see here and here) than he acknowledged in this article – LLLT's will help, but I don't think that they alone will solve our access to justice problems. My bottom line, however, is that I agree with much of what Professor Perlman said. *Towards the Law of Legal Services* is an important article about an important topic. Given the gigantic unserved legal needs in this country and the decades of our saying that we need to address this problem combined with our failure to do so, I think the time may be ripe to think about a

pyramid model of regulated legal services, in which lawyers are at the top of the pyramid, but not all clients necessarily need to see a lawyer. To steal (and paraphrase) a set of images that I heard Futures Commission Chair Judy Perry Martinez refer to at the 2015 ABA Midyear Meeting, a nurse may be a suitable provider to give a flu shot, a physician's assistant may be a suitable provider to treat a cold, an Internist may be suitable to do an annual checkup, but you probably want a surgeon if you are having heart surgery. A patient may choose to go to an MD for all of these services, but that does not mean that the regulatory system should require a "one provider fits all" system. Just as there is a continuum of medical needs (and providers), perhaps the time has come to discard our mode of thinking in which we divide the world into "legal services/not legal services, with the former requiring a lawyer and the latter not. Perhaps the time has come to envision legal services as a continuum or a pyramid where clients can choose the type of provider they want – and we recognize that a legal services provider need not be at the apex of the pyramid in order to be regulated or in order to provide services that help clients address their legal needs.

It is true that this type of "pyramid approach" creates the potential for a tiered system of access in which lawyers are primarily utilized by those with greater financial resources and those with lesser financial resources receive services from someone lower on the pyramid. However, given the data that suggests that a large number of individuals currently need but do not receive any legal services at all, I consider this a second order problem that can be addressed through a process of incremental change.

In sum, I sense that we may be getting close to a tipping point in which we begin to take seriously the notion of a "law of legal services." Professor Perlman's thoughtful and measured article, his legal services "pyramid," and the model rule he includes in his article provide a useful way to start thinking about whether and how we might go about reimagining the regulatory space in which we operate.

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Towards the Law of Legal Services

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TOWARDS THE LAW OF LEGAL SERVICES

*Andrew M. Perlman**

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INTRODUCTION

Imagine that someone asks you how legal services are regulated in the United States. You might answer that lawyers need a license in the jurisdictions where they intend to practice, typically after graduating from an ABA-accredited law school and passing the bar examination.[1] You could explain that lawyers are governed by rules of professional conduct and subject to discipline, including disbarment, for failing to comply.[2] You also might mention the growing patchwork of state and federal regulations that govern lawyers' behavior.[3] Each of these answers offers a slightly different perspective on the regulation of legal services, but they share one common feature: they are all about lawyers.

This Article contends that the current lawyer-based regulatory framework should be reimagined if we hope to spur more innovation and expand access to justice.[4] Rather than focusing on the so-called "law of lawyering"[5]—the body of rules and statutes regulating lawyers—this Article suggests that we need to develop a broader "law of legal services"

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[1] *See generally* NAT'L CONFERENCE OF BAR EXAM'RS & SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Erica Moeser & Claire Huismann eds. 2015), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf, *archived at* https://perma.cc/VU22-YJM2?type=pdf. Of course, there are some exceptions to the general rule. For example, some states permit lawyers to gain admission without attending an ABA accredited law school. *Id.* at 8-11. Moreover, many states allow experienced lawyers from other jurisdictions to gain admission by motion. *Id.* at 34. Additionally, Wisconsin has the so-called diploma privilege, which allows lawyers to gain admission to the bar merely by graduating from a law school in the state. *See* WIS. SUP. CT. R. 40.03. New Hampshire has a more limited version of the diploma privilege. *See* N.H. SUP. CT. R. 42(XII).

[2] *See generally* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N & STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, 2013 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2013_complete_sold_results.pdf, *archived at* http://perma.cc/UQ2T-7TTZ.

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

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

[5] *See generally, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000); GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING (3d ed. 2014).

that authorizes, but appropriately regulates, the delivery of more legal and law-related assistance by people who do not have a J.D. degree and do not work alongside lawyers. For example, the Washington Supreme Court recently adopted a framework for allowing specially educated and separately regulated professionals—Limited License Legal Technicians (LLLTs)—to deliver a narrow range of family law services without a traditional law license.[6] Some observers predict that LLLTs will be able to offer assistance at a lower cost than lawyers and improve access to legal services.[7] This type of regulatory reform,[8] which falls outside the law of lawyering, illustrates the growing importance and potential utility of the law of legal services.

The idea of looking beyond the law of lawyering for ways to encourage innovation is conceptually different from many recent calls for regulatory reforms, which focus on expanding opportunities for lawyers and people without a law degree to work together through alternative business structures (ABSs).[9] To be sure, ABSs are a potentially important development, but they are necessarily a creature of the law of lawyering. Consider, for example, the authorization of ABSs under the United Kingdom's Legal Services Act (LSA).[10] Passed in 2007, the LSA requires ABSs to have a lawyer manager,[11] provides detailed regulations about a

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[6] WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28; *see also* Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 616 (2014).

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

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

[9] *See, e.g.*, Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3089 (2014); Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2845 (2012); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 37-45 (2012); Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 197, 234 (2014); *see also* William Henderson, *Connecting the Dots on the Structural Shift in the Legal Market*, LEGAL WHITEBOARD (Aug. 3, 2012), http://lawprofessors.typepad.com/legalwhiteboard/2012/08/connecting-the-dots-on-the-structural-shift-in-the-legal-market.html, *archived at* http://perma.cc/J6WB-SEHS. *But see* Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 44-46 (2014) (calling for greater attention to the myriad ways in which legal services could be delivered outside of ABSs); Levin, *supra* note 8, at 2615-17 (same).

[10] Legal Services Act, 2007, c. 29, pt. 5 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf, *archived at* http://perma.cc/V6RA-QCYP.

[11] *See id.* § 83, sch. 11; SOLICITORS REGULATION AUTH., SRA HANDBOOK: AUTHORISATION AND PRACTISING REQUIREMENTS: PRACTICE FRAMEWORK RULES R. 14 (12th ed., 2014), *available at* http://www.sra.org.uk/solicitors/handbook/practising/content.page; *Practice Notes: Alternative Business Structures*, L. SOC'Y § 5.1 (July 22, 2013),

lawyer's role in the ABS, and explains the role that people without a law degree can play relative to lawyers.[12] The LSA does not purport to regulate other professionals who want to deliver legal services completely apart from the legal profession. In other words, reforms focused on ABSs overlook regulatory innovations outside the law of lawyering—like the LLLT program—that hold the promise of an even greater impact on legal services.

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

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

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

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

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http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/, *archived at* http://perma.cc/5TD8-NPBP.

[12] Legal Services Act, § 82, sch. 11.

[13] *See ABA Commission on Ethics 20/20*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/FM6Y-W2A8.

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

[15] *See infra* Part II.

[16] *See infra* Part III.A.

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

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

marketplace with some form of regulatory oversight. To do so, we need to focus on developing the law of legal services rather than fixating exclusively on the law of lawyering and issues like ABS.

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

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

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

A central contention in this Article is that the law of lawyering is inherently limited in scope and that regulatory innovations must emerge from what I call the law of legal services. The differences between these two concepts are not self-evident and require some explanation.

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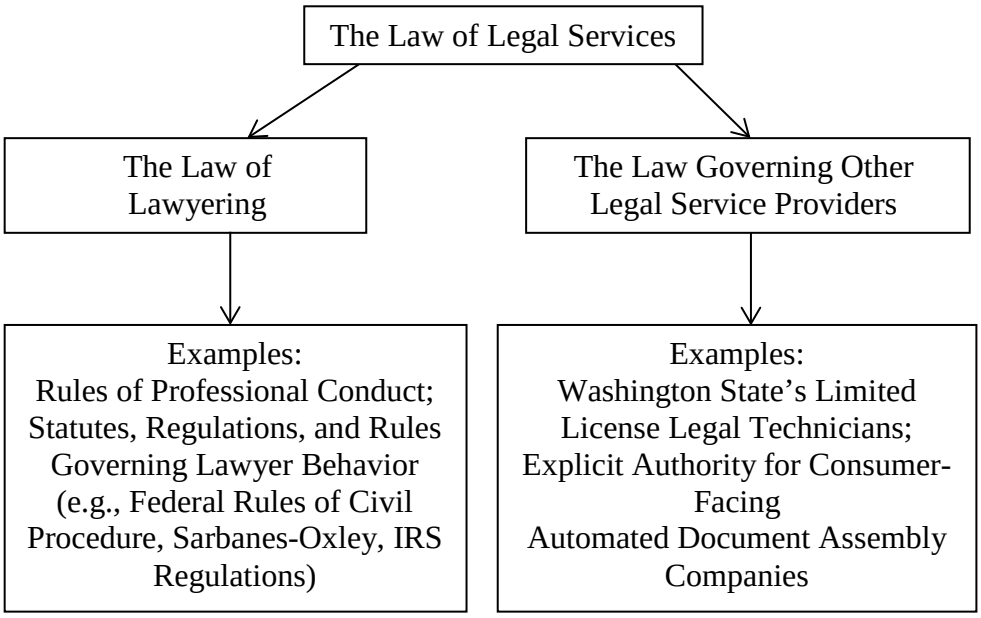
[19] *See* Crossland & Littlewood, *supra* note 6, at 612-13, 622 (offering an overview of the program); Elizabeth Chambliss, *Law School Training for Licensed "Legal Technicians"? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 587-89 (2014) (same).

[20] Evidence suggests that enforcement of unauthorized practice provisions is commonplace. *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2592-93 (2014). There is also evidence that automated legal document assembly companies are often the target of these enforcement actions. *See* Robert Ambrogi, *LegalZoom Suffers Setback in North Carolina*, L. STIES (May 19, 2014), http://www.lawsitesblog.com/2014/05/legalzoom-suffers-setback-north-carolina.html, *archived at* http://perma.cc/PK2K-RC8F; *see also* Report on Findings of Fact and Recommendation To Approve the Settlement Agreement, Medlock v. LegalZoom.com, Inc., No. 2012-208067 (S.C. Oct. 18, 2013), *available at* http://www.abajournal.com/files/SC_Supreme_Court_report_findings_fact_and_settlement_agreement.pdf, *archived at* http://perma.cc/BZD4-TMCC.

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



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

[21] *See* Leubsdorf, *supra* note 3, at 981-82 (cataloging various ways in which lawyers are now regulated).
[22] Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2012).
[23] Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. §§ 205.1 to 205.7).
[24] Treas. Circular No. 230, 31 C.F.R. pt. 10; *see also* Leubsdorf, *supra* note 3, at 981-82.
[25] Rules of civil procedure often govern the work product doctrine as well as frivolous pleadings. *See, e.g.*, FED. R. CIV. P. 11, 26(b)(3). Rules of evidence typically govern the attorney-client privilege. *See, e.g.*, FED. R. EVID. 502.
[26] *See, e.g.*, NEV. REV. STAT. ANN. § 603A.010 et seq. (West 2014) (setting out requirements for the protection of personally identifiable information with no exceptions for law firms); 201 MASS. CODE REGS. 17.01 et seq. (2015) (same).
[27] *See, e.g.*, HAZARD, JR. ET AL., *supra* note 5.

of the "Law Governing Lawyers."[28] Many widely used casebooks have similar names and a similar orientation.[29]

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

To be sure, the law of lawyering addresses some issues that involve the work of people who do not have a law license. For example, Model Rule 5.3 imposes on a lawyer the duty to supervise "nonlawyers"[32] within the lawyer's firm or to monitor nonlawyers outside the firm who work on client matters,[33] and Model Rule 5.5 instructs lawyers that they are not permitted to facilitate the unauthorized practice of law.[34] These provisions, however, do not directly regulate people who are not lawyers.

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

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

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

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

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

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

[33] MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013).

[34] *Id.* R. 5.5.

[35] D.C. RULES PROF'L CONDUCT R. 5.4(b)(3) (2007).

them to "abide by these Rules of Professional Conduct."[36]

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

The Canadian Bar Association recently issued a Futures Report that reflects a similar lawyer-centric approach.[40] The Report recommends ABSs and suggests a number of related regulatory innovations, but the Report expressly declines to address whether people without a law license should be permitted to deliver legal services in settings other than law firms or ABSs. The Report concludes that "[i]t is outside the scope of Futures' work to determine whether some legal activities should no longer be reserved [for lawyers] or what further role might be played by other regulated professionals."[41]

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

All of these liberalizations are not unimportant, but they are fundamentally law of lawyering reforms. As the discussion below

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[36] *Id.* R. 5.4(b)(2).

[37] *See supra* note 10-12.

[38] Legal Services Act, 2007, c. 29, §§ 13-17 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf, *archived at* http://perma.cc/V6RA-QCYP.

[39] *See* LEGAL SERVS. INST., THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE 2, 32 (2010), *available at* https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf, *archived at* https://perma.cc/H9HE-BLVU; *see also Will-Writing and Estate Administration*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm (last visited Jan. 21, 2015), *archived at* http://perma.cc/Y3P2-QHR6 (explaining concerns that some unreserved activities are unregulated).

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

[41] *Id.* at 19.

[42] Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45, 47-50.

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

suggests, the law of lawyering is necessarily limited in terms of its potential to bring about significant change. A different conceptual focus may help to drive even more fundamental innovations in the delivery of, and the public's access to, legal and law-related services.

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

The ABA Commission on Ethics 20/20 undertook the most recent law of lawyering reform effort in the U.S. Created in 2009 by then-ABA President Carolyn B. Lamm, the Commission was tasked with studying how the ABA Model Rules of Professional Conduct should be updated to address increasing globalization and changes in technology.[44] The Commission completed its work in February 2013, after successfully proposing numerous amendments to the Model Rules of Professional Conduct,[45] developing a new model court rule and amending another,[46]

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[44] *See* Press Release, Am. Bar Ass'n, ABA President Carolyn B. Lamm Creates Ethics Commission To Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), *available at* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730, *archived at* http://perma.cc/V537-6BSH. "The ethics commission will review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace." *Id.* To ensure a diversity of perspectives, President Lamm appointed commissioners from the judiciary, large law firms, small law firms, in-house legal departments, and academia. *See id.*; *see also ABA Commission on Ethics 20/20: About Us*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/R93H-WBCM (listing Commission members). The Commission was co-chaired by Jamie Gorelick, a partner at WilmerHale and former deputy attorney general under President Clinton, and Michael Traynor, former President of the American Law Institute. *ABA Commission on Ethics 20/20: About Us*, *supra*. The Commission had several law professor "reporters" who advised the Commission on the law of lawyering. Paul Paton served as the reporter for the Alternative Business Structures working group, and Anthony Sebok and Bradley Wendel served as the reporters for the Alternative Litigation Finance working group. They helped to draft the Commission's work product (including proposals, white papers, and explanatory memoranda), and guided substantive deliberations during working group discussions and Commission meetings. The Commission was aided by the ABA Center for Professional Responsibility, particularly Ellyn Rosen, who served as the Commission's lead counsel and helped the Commission navigate the ABA's political structure. In my view, one fair criticism of the Commission and related legal ethics reform efforts is that they have failed to include people who are not lawyers. *See* Gillers, *supra* note 31, at 410; Moliterno, *supra* note 14, at 152.

[45] *See ABA Commission on Ethics 20/20: Work Product*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/GE9E-W9U9. For two reports summarizing the Commission's work, *see* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INTRODUCTION AND OVERVIEW (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.pdf, *archived at* http://perma.cc/PHJ4-5RAB [hereinafter COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012] and COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INTRODUCTION AND

releasing a white paper on alternative litigation financing,[47] submitting an informational report on lawyer rankings,[48] and referring several discrete topics to other ABA entities.[49]

As described below, the Commission accomplished the narrow objective it was given: updating the law of lawyering to give lawyers the guidance they need to address 21st century legal ethics issues. It did so by focusing on four important developments in the practice of law: (1) the increased use of technology in the delivery of legal services; (2) the advent of Internet-based client development tools; (3) the frequent disaggregation of law and law-related legal services through outsourcing; and (4) greater demand for lawyer mobility.[50]

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

A. Technology and the Delivery of Legal Services

The Commission's work produced several changes to the Model Rules that address issues arising out of technology's transformation of the

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OVERVIEW (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.pdf, *archived at* http://perma.cc/W3RF-2MYU [hereinafter COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013].

[46] The Commission successfully proposed a new Model Rule on Practice Pending Admission and amended the Model Rule on Admission by Motion. Memorandum, 2012 Annual Meeting of the American Bar Association and Meeting of the House of Delegates 12 (Aug. 29, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2012_hod_select_committee_report_annual_meeting.doc, *archived at* http://perma.cc/9BDK-B555 [hereinafter Memorandum, 2012 Annual Meeting].

[47] COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES: ALTERNATIVE LITIGATION FINANCE (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf, *archived at* http://perma.cc/4KGR-TECF [hereinafter COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE].

[48] COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATION REPORT TO THE HOUSE OF DELEGATES: NO. 7 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rankings_2011_hod_annual_meeting_informational_report.pdf, *archived at* http://perma.cc/V32X-S957 [hereinafter COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT NO. 7].

[49] *See infra* Part II.E.

[50] The Commission's reports reveal far more detail about the nature of (and reasons for) the changes than what appears below. Those reports can be found at *ABA Commission on Ethics 20/20: House of Delegates Filings*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/MT4G-7Y42.

delivery of legal services, including the duty of confidentiality, technological competence, and the inadvertent disclosure of information.[51]

1. The Duty of Confidentiality in a Digital Age

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

To address these issues, the Commission proposed—and the ABA's 560 member policymaking body, the House of Delegates, adopted—Model Rule 1.6(c).[54] The Model Rule now requires lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[55] New comment language identifies a number of factors lawyers should consider when determining whether their efforts have been "reasonable," including but not limited to "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[56]

2. Technological Competence

Prior to the Commission's work, the Model Rules had not made any

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[51] ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 3-4 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12 (noting the adoption of Resolution 105A, as revised, by House of Delegates).

[52] Andrew Perlman, *Protecting Client Confidences in a Digital Age: The Case of the NSA*, JURIST (Mar. 5, 2014), http://jurist.org/forum/2014/03/andrew-perlman-client-confidences.php, *archived at* http://perma.cc/9ADY-9HR6.

[53] Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 THE PROF. LAW., no. 4, 2014, at 1, 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532995.

[54] ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 4; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[55] MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2013).

[56] *Id.* cmts. 18-19. The Commission decided not to propose more detailed guidance, concluding that many specific recommendations, such as how to safeguard information stored on a mobile device, are likely to be outdated within a few years.

explicit reference to the word "technology."[57] The Commission concluded that today's lawyers need to remain apprised of relevant technology, including the benefits and risks from its use.[58] An amendment to what is now Comment [8] to Model Rule 1.1 captures this new reality (underlined language is new):

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology,</u> engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[59]

The Commission did not try to define technological competence, recognizing that a lawyer's skillset necessarily needs to evolve along with technology itself.[60] But the change has underscored the evolving nature of a lawyer's ethical duty of competence and has proven to be among the most discussed pieces of the Commission's work.[61]

3. The Increased Frequency of Inadvertent Disclosures

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

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[57] *See generally* MODEL RULES OF PROF'L CONDUCT (2011).

[58] ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 3 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF.

[59] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013) (emphasis added); *see also* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

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

[61] A search for "rule 1.1" /s competence /s technology and da(aft 08/01/2012 and bef 08/01/2014)" in Westlaw's Journals and Law Reviews database yields more than 40 references to the new provision within the two years since it was adopted.

[62] *See* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 5-6.

[63] *See id.*

[64] *Evaluation of Rules of Professional Conduct (Report No. 401)*, A.B.A. (Feb. 4-5, 2002), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics2000_report_hod_022002.authcheckdam.pdf, *archived at* http://perma.cc/T4HT-NZAS (noting adoption of proposed changes to Rule 4.4); *Ethics 2000 Commission: Report on the Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html (last visited Jan. 29, 2015), *archived at* http://perma.cc/FYR5-WBER (providing Ethics 2000 Commission's proposed changes to the Model Rules of Professional Conduct).

In light of the rapidly changing nature of the problem, the Commission concluded that the Model Rule and its accompanying comments could be usefully updated.[65] For example, the Model Rule had previously described a lawyer's duties when receiving inadvertently disclosed "documents," a word that offered limited guidance when the disclosure involved electronic information.[66] The Model Rule was amended to clarify that "electronically stored information," not just information in tangible form, can trigger Model Rule 4.4(b)'s notification requirements.[67] Moreover, the phrase "inadvertently sent" is now defined to give lawyers more guidance as to its meaning.[68] And new comment language addressed the particular problem of metadata, noting that the receipt of metadata—embedded electronic data that is not visible on the face of a file or document—triggers the Model Rule's notification duties, but only if the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.[69]

4. Odd and Ends

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

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[65] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 2-3, 6-7 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_technology_and_confidentiality_posting.authcheckdam.pdf, *archived at* http://perma.cc/V9QG-35GN.

[66] *See id.* at 6.

[67] *See* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 5-6 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[68] *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2013).

[69] *See id.*

[70] *See id.* R. 1.0 cmt. 9; *see also* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 2-3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[71] *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(n); *see also* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 1-3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[72] MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 4 (2011).

[73] MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 4 (2013); *see also* ABA Comm'n on

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

B. Technology and Client Development

The law of lawyering's banality is similarly illustrated by the Commission's work on ethics issues arising from new client development tools. The Commission found that a growing number of lawyers now use online marketing methods, including law firm websites, blogs, social and professional networking sites, pay-per-click ads, and lead generation services.[74] Although these tools are new and evolving, the Commission concluded that basic "principles underlying the existing Rules—preventing false and misleading advertising, protecting the public from the undue influence of solicitations, and safeguarding the confidences of prospective clients—remain valid."[75] For this reason, the Commission's proposals focused on explaining how the Model Rules should apply to new settings rather than developing an entirely new regulatory structure. The proposals addressed several common practical problems.

1. Prospective Clients in a Digital Age

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

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Ethics 20/20, Res. No. 105A rev., at 4 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[74] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105B 1-5 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.pdf, *archived at* http://perma.cc/L9VT-PZCA [hereinafter COMM'N ON ETHICS 20/20, REPORT: RES 105B].

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

[76] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b)-(d).

[77] *See id.*

[78] *See* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 2-3.

were amended to make clearer when a lawyer's interactions with the public, including online interactions, give rise to a prospective client relationship.[79]

2. Paying for "Recommendations"

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

3. Defining Solicitations in the Internet Era

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

All of these changes have contributed to the law of lawyering by

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[79] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18 (2013); ABA Comm'n on Ethics 20/20, Res. No. 105B, at 1-2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.pdf, *archived at* http://perma.cc/3KCY-9L9S; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[80] MODEL RULES OF PROF'L CONDUCT R. 7.2(b).

[81] COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 3-4.

[82] *See* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 5; ABA Comm'n on Ethics 20/20, Res. No. 105B, at 4-5; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[83] MODEL RULES OF PROF'L CONDUCT R. 7.3 & cmts. 7, 9; ABA Comm'n on Ethics 20/20, Res. No. 105B, at 6-8; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12; *see also* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 3-7. There was some discussion about liberalizing Rule 7.2 and lifting all restrictions on paying for recommendations. *See* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 6. It was ultimately rejected, but even if adopted, the change would have had a relatively limited impact on the delivery of legal services.

[84] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3.

[85] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1 (2013); ABA Comm'n on Ethics 20/20, Res. No. 105B, at 6 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.pdf, *archived at* http://perma.cc/3KCY-9L9S; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12; *see also* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 7-8.

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

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

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

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

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[86] COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105C 1 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.pdf, *archived at* http://perma.cc/ME2S-8SN3.

[87] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 6; ABA Comm'n on Ethics 20/20, Res. No. 105C, at 2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.pdf, *archived at* http://perma.cc/AKN6-33AL; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[88] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 & cmts. 3-4; ABA Comm'n on Ethics 20/20, Res. No. 105C, at 2-3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[89] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass'n, Formal Op. 121 (2009); Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. 07-2 (2008); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 762 (2003); N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006); N.C. State Bar, 2007 Formal Op. 12 (2008); Ohio Ethics Comm'n, Advisory Op. 2009-06 (2009); COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR ASS'N, REPORT ON THE OUTSOURCING OF LEGAL SERVICES OVERSEAS (2009), *available at* http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf, *archived at* http://perma.cc/P9ST-2WWQ; COUNCIL OF BARS & LAW SOC'YS OF EUR., CCBE GUIDELINES ON LEGAL OUTSOURCING (2010), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf, *archived at* http://perma.cc/7EDQ-GE62.

D. The Globalization of Legal Services

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

1. Liberalizing the Model Rule on Admission by Motion

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

2. The Model Rule on Practice Pending Admission

The Commission found that lawyers increasingly need to relocate to a new jurisdiction and start practicing there on shorter notice than an admission by motion procedure allows and that a temporary and more immediate practice authority would provide a useful bridge.[96] The new

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

[91] *See id.*

[92] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105E 2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e_filed_may_2012.authcheckdam.pdf, *archived at* http://perma.cc/JVD2-5KDM [hereinafter COMM'N ON ETHICS 20/20, REPORT: RES. 105E].

[93] *See id.*

[94] *See* MODEL RULES ON ADMISSION BY MOTION R. 1(c) (2012); Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[95] ABA Comm'n on Ethics 20/20, Res. No. 105E, at 2, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e.authcheckdam.pdf, *archived at* http://perma.cc/BSM4-M8EQ; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

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

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

3. Greater Mobility for Foreign Lawyers

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

4. Choice of Rule Provisions

The increasing globalization of law practice has made it difficult for lawyers in certain contexts to be able to determine which jurisdiction's ethics rules apply when determining whether a conflict of interest

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ual_meeting_105d_filed_may_2012.pdf, *archived at* http://perma.cc/W9SZ-MH8L [hereinafter COMM'N ON ETHICS 20/20, REPORT: RES. 105D].

[97] *See* COMM'N ON ETHICS 20/20, REPORT: RES. 105D, *supra* note 96, at 2; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

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

[99] *See* ABA Comm'n on Ethics 20/20, Res. No. 107C (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107c_redline_with_floor_amendment.authcheckdam.pdf, *archived at* http://perma.cc/M2BM-P6JW; AM. BAR ASS'N, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES: 2013 MIDYEAR MEETING 6 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_midyear_summaryofaction.authcheckdam.pdf, *archived at* http://perma.cc/W77K-SUC4 [hereinafter ABA, SUMMARY OF ACTION: 2013 MIDYEAR].

[100] *See* ABA Comm'n on Ethics 20/20, Res. No. 107A rev., at 2 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.authcheckdam.pdf, *archived at* http://perma.cc/83TS-8GDE; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 5-6.

[101] *See* ABA Comm'n on Ethics 20/20, Res. No. 107B rev. (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf, *archived at* http://perma.cc/45BL-2BLV; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 6.

exists.[102] This problem is particularly pronounced for law firms with offices abroad, where the rules on conflicts are considerably different from those found in the U.S.[103] To address this issue, new language was added to Comment [5] of Model Rule 8.5 (Choice of Law) to expressly authorize lawyers and clients, subject to numerous restrictions, to specify which jurisdiction's conflict rules will apply to the relationship.[104]

5. Conflicts Checking When Moving Firms

Greater lateral movement among law firms and increased merger activity among firms have made it necessary for lawyers to disclose some types of confidential information to lawyers in other law firms in order to identify potential conflicts of interest.[105] The Commission found that the Model Rules did not explain how these necessary disclosures could occur in a manner that was consistent with the duty of confidentiality.[106] To address this problem, Model Rule 1.6 (Confidentiality of Information) was amended to clarify that lawyers have the authority to disclose discrete categories of information to other firms to ensure that conflicts of interest are detected before lawyers are hired or firms merge.[107] At the same time, the amendments make clear that such disclosures are impermissible if they would "compromise the attorney-client privilege or otherwise prejudice the client."[108] Comment language was revised to provide even more detailed guidance.[109]

E. Other Work Product and Referred Issues

In addition to recommending changes to the Model Rules, the Commission produced reports on lawyer rankings and alternative litigation

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[102] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 1-2 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_choice_of_rule_resolution_and_report_final.pdf, *archived at* http://perma.cc/7UJV-CF96.

[103] *See id.*

[104] *See* ABA Comm'n on Ethics 20/20, Res. No. 107D, at 2-3 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107d.authcheckdam.pdf, *archived at* http://perma.cc/RNL8-MCSV; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 7.

[105] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105F, at 1 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105f.pdf, *archived at* http://perma.cc/N5NW-2AYT.

[106] *See id.*

[107] *See* ABA Comm'n on Ethics 20/20, Res. No. 105F rev. (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105f.authcheckdam.pdf, *archived at* http://perma.cc/XC4T-QLM2; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[108] ABA Comm'n on Ethics 20/20, Res. No. 105F rev., at 2.

[109] *See id.* at pp. 2-3.

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

III. RESPONDING TO CRITICS OF THE COMMISSION

Some commentators have criticized the modest scope of the Commission's work, claiming that the Commission should have done more to achieve needed reforms within the law of lawyering.[113] I believe that these criticisms are misplaced for two reasons. First, as the preceding discussion suggests, the Commission fulfilled its charge by generating needed guidance on a number of important everyday practice and ethics issues. Second, and more importantly, the critics overestimate the extent to which the law of lawyering can produce meaningful reform. The reality is that bold changes like ABS may actually be less significant than proponents believe, and truly meaningful changes need to take place entirely outside of the law of lawyering.

A. The Commission Offered Needed Guidance

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

This criticism contains more rhetoric than reality. As Part II describes, the Commission has helped lawyers navigate the increasingly

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

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

[112] *See* Memorandum from Jamie Gorelick and Michael Traynor to Paula Frederick, ABA Commission on Ethics 20/20 – Ethics Opinion Referrals (September 6, 2011) (on file with author); Memorandum from Jamie Gorelick and Michael Traynor to Paula Frederick, The Commission's Proposal Concerning ABA Formal Opinion 91-360 (November 22, 2011) (on file with author).

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

[114] Moliterno, *supra* note 14, at 160.

common ethical issues associated with legal process outsourcing, Internet-based advertising, confidentiality obligations when changing employment, the receipt of inadvertently sent information, and cybersecurity, among many other issues. The Commission also enabled more lawyer mobility by liberalizing the Model Rule on Admission by Motion, creating a new Model Rule on Practice Pending Admission, and facilitating clients' use of foreign lawyers.[115] These changes have not produced a fundamental structural shift in the law of lawyering, but they do address important practical issues that lawyers regularly encounter in the 21st century.

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

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

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

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[115] *See supra* Part II.D.
[116] Moliterno, *supra* note 14, at 153-54.
[117] *See supra* Part II.A.1.
[118] *See supra* Part II.B.3.
[119] *See supra* Part II.B.2.
[120] *See supra* II.A.2.
[121] *See supra* Part II.D.4.
[122] These opinions are publicly available for a period of time after they are released, but they are then placed behind a paywall.
[123] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009); *supra* Part II.D.5.
[124] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); *supra* Part II.C.
[125] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010); *supra* Part II.B.1.
[126] *See* COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013, *supra* note 45, at 5-7 (documenting U.S. jurisdictions with already-liberalized rules allowing foreign lawyers greater authority to practice in U.S.); COMM'N ON ETHICS 20/20, REPORT: RES. 105D, *supra* note 96, at 2-3; (identifying several jurisdictions that have adopted approaches similar to the Model Rule on Practice Pending Admission); COMM'N ON

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

Finally, the Commission's work has proven to be helpful even when it did not produce any doctrinal changes. For example, the Commission's report on the ethics of alternative litigation finance has been a valuable resource for lawyers, clients, and litigation funders on how to identify and avoid the various ethics-related issues arising in this context.[129] The Commission's work on ABSs could serve as a blueprint for future efforts in this area, either within the ABA or at the state level.[130] And referrals to other ABA entities have led to useful outcomes, such as a recently issued Formal Opinion that addresses a choice of law problem relating to ABSs.[131] In sum, the claim that the Commission's work was inconsequential understates the Commission's accomplishments or fails to appreciate the breadth of new issues that lawyers now face.

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

A related, and more important, criticism is that the Commission should have sought "bolder" structural changes.[132] Critics, however, typically cite only two "bold" changes the Commission should have pursued within the law of lawyering: further liberalizing the rules on multijurisdictional practice and easing restrictions on the rules prohibiting ABSs.[133] As explained below, the Commission actually helped to

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ETHICS 20/20, REPORT: RES. 105E, *supra* note 92, at 1 n.5 (noting the widespread adoption of the Model Rule on Admission by Motion).

[127] *See* Policy Implementation Comm., Ctr. for Prof'l Responsibility, Am. Bar Ass'n, *State by State Adoption of Selected Ethics 20/20 Commission Policies and Guidelines for an International Regulatory Information Exchange*, A.B.A. (Jan. 27, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.pdf, *archived at* http://perma.cc/5KWU-EW85 (revealing a significant number of additional jurisdictions studying the Commission's changes).

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

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

[130] *See* Letter from Jamie S. Gorelick & Michael Traynor, Co-Chairs, Comm'n on Ethics 20/20, Am. Bar Ass'n, to ABA Entities et al., For Comment: Discussion Paper on Alternative Law Practice Structures (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf, *archived at* http://perma.cc/2GXY-FTUU.

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

[132] *See supra* note 113.

[133] *See, e.g.*, Moliterno, *supra* note 14, at 155. To be sure, some have argued that the

liberalize the multijurisdictional practice rules, and additional changes would have had relatively little practical effect on the delivery of legal services.[134] With regard to ABSs, any proposals in this area were unlikely to be adopted by the House of Delegates at that time, and even less intuitively, such a change may not have been as transformative as proponents claim.[135]

1. Multijurisdictional Practice as Marginalia

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

To be sure, multijurisdictional practice authority could be usefully expanded and clarified in the future, such as by making it even easier for lawyers to practice temporarily in jurisdictions where they are not licensed. For example, the Model Rules might be amended to offer the clarity and simplicity of states like Colorado, where lawyers from other U.S. jurisdictions are permitted to practice on a temporary basis with very few limitations.[140] That said, the Model Rules were liberalized significantly in 2002 by the ABA Commission on Multijurisdictional

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

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

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

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

[137] *See id.*

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

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

[140] *See* COLO. R. CIV. P. 204, 205; COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 107A, at 2-3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_model_rule_5_5_foreign_in_house_resolution_report_final.authcheckdam.pdf, *archived at* http://perma.cc/BY4Q-XWU3.

Practice,[141] and the practice authority given to lawyers in states like Colorado is not much more expansive than the Model Rules already provide as a practical matter.[142] Thus, there is little reason to believe that any additional temporary practice authority in the Model Rules will have any significant effect on the delivery of legal services or the structure of the profession. Put simply, additional changes in this area would not have produced any "bold" changes in the practice of law or the delivery of legal services.

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

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

a. Any Proposal to Allow ABSs Would Likely Have Failed

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

The Kutak Commission was responsible for drafting the Model Rules in the late 1970s and early 1980s, and its initial proposed draft of Model Rule 5.4 allowed for the creation of an ABS.[143] The ABA House of Delegates rejected the idea for a variety of reasons, but concerns about competitive threats to the profession loomed large.[144] For example, during

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[141] *See generally* AM. BAR. ASS'N, REPORT OF THE COMMISION ON MULTIJURISDICTIONAL PRACTICE (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/intro_cover.pdf, *archived at* http://perma.cc/5AGL-FYAE; COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT TO THE HOUSE OF DELEGATES: REPORT 201B (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201b.pdf, *archived at* http://perma.cc/83QE-5ANM.

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

[143] *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (Proposed Final Draft May 30, 1981), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.authcheckdam.pdf, *archived at* http://perma.cc/M9ST-JUZ3.

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

the House debate, a member asked whether the proposal would have allowed Sears Roebuck to open a law office in each of its stores.[145] The Commissions' reporter—Professor Geoffrey Hazard—answered "yes," and the proposal was promptly defeated.[146] Contemporaneous accounts suggest that the House's vote was strongly motivated by concerns about competition from "nonlawyers"—the so-called "fear of Sears."[147]

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

The MDP Commission responded by trying to conduct the requested "additional study" and released a revised recommendation and report the following year.[152] The House again rejected the recommendation by a three to one margin and adopted a resolution saying that MDPs were

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[145] *See id.*

[146] JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 165-66 (2013).

[147] *Id.* Today, the fear would undoubtedly be of Walmart. Indeed, in Canada, lawyers have stalls at an increasing number of stores. *See* Debra Cassens Weiss, *Is Wal-Mart Law Coming to the US? Retailer Adds Lawyers on Site for Toronto-Area Shoppers*, A.B.A. J. (May 8, 2014), http://www.abajournal.com/news/article/is_walmart_law_coming_to_the_us_retailer_adds_lawyers_on_site_for_canadian_, *archived at* http://perma.cc/QJ37-W2A4. Similarly, Sam's Club has struck a deal with LegalZoom to offer Sam's Club members a special discount. *See* Debra Cassens Weiss, *LegalZoom Products Will Be Sold at a Discount Through Sam's Club*, A.B.A. J. (Oct. 27, 2014), http://www.abajournal.com/news/article/legalzoom_products_will_be_sold_at_a_discount_through_sams_club/, *archived at* http://perma.cc/2KWR-QT3J. What is notable about these developments is that the rules on ABSs are not an impediment. Lawyers in Canada are not controlled by Walmart, and LegalZoom is not a law firm. Thus, despite all of the concern about changes to Model Rule 5.4, legal services are creeping into chain stores through the backdoor (or the front sliding door).

[148] *See generally Commission on Multidisciplinary Practice*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html (last visited Jan. 31, 2015), *archived at* http://perma.cc/QXL7-ZQVU.

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

[150] *See id.* at 2-13.

[151] *Id.* at 2-4.

[152] *See id.* at 2-5.

inconsistent with the profession's "core values."[153] Signaling that it did not want to revisit the issue, the House concluded flatly that "[t]he law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised."[154] The House also passed a separate resolution that "discharged" the MDP Commission, preventing the MDP Commission from bringing any additional work to the House for its consideration.[155]

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

The discussion draft contained numerous other restrictions as well, such as caps on the percentage of ownership that other professionals could have and making lawyers responsible for ensuring that the other professionals' behavior was consistent with the rules of professional conduct.[158] In essence, this structure would have been more restrictive than the approach the District of Columbia has taken for more than 20 years.[159] It also would have been much more modest than the proposals put forward by the MDP Commission or the Kutak Commission before it.

Despite the incremental nature of the discussion draft, it prompted a markedly negative reaction.[160] The Commission received 29 comments in

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[153] *See id.* at 2-5 to 2-6.
[154] *Id.* at 2-6.
[155] *See id.* at 2-7.
[156] *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130. Even the name of the document—a discussion draft—reflected the contentious nature of the issue. Other draft proposals were released as "draft resolutions," but the controversy surrounding ABS was so intense that the Commission decided to call its initial draft a "discussion draft" to minimize the implication that it might become an actual proposal.
[157] *See id.* at 2.
[158] *See id.*
[159] *See id.*
[160] *See Alternative Law Practice Structures Comments Chart*, A.B.A.,

response to the discussion draft, and only 6 of those comments supported changes in this area.[161] Opposition came from important constituencies, including state bar associations,[162] and they began mounting a significant political effort to oppose any changes in this area.[163] The voices in support of change could best be characterized as lukewarm.[164]

At the same time, the Commission could not uncover empirical support for the idea that ABSs would benefit the public.[165] There is considerable academic speculation that changes in this area will have a

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http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf (last updated Aug. 28, 2012), *archived at* http://perma.cc/M33L-GUZ5 (providing a list and links to comments on Discussion Paper).

[161] *See id.*

[162] *See* Letter from Susan A. Feeney, President, N.J. State Bar Ass'n, to Natalia Vera, Senior Research Paralegal, Comm'n on Ethics 20/20, Am. Bar Ass'n, Alternative Law Firm Structures (Jan. 31, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/njstatebarassociation_alpsdiscussiondraft.authcheckdam.pdf, *archived at* http://perma.cc/37S9-DTQ9; Letter from Joseph A. Kanefield, President, State Bar of Ariz., to Natalia Vera, Senior Research Paralegal, Comm'n on Ethics 20/20, Am. Bar Ass'n, ABA Commission on Ethics 20/20 Alternative Law Practice Structure (Mar. 12, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/statebarofarizona_alpsdiscussiondraft.authcheckdam.pdf, *archived at* http://perma.cc/MH5V-AA9D; Letter from John G. Locallo, President, Ill. Bar Ass'n, to Jamie S. Gorelick & Michael Traynor, Co-Chairs, Comm'n on Ethics 20/20, Am. Bar Ass'n, Fee Sharing and Alternative Law Practice Structures (Mar. 19, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/isba_comments_alpsdiscussiondraftandalpschoiceoflawinitialdraftproposal.authcheckdam.pdf, *archived at* http://perma.cc/D5CM-CNB9; Letter from Joseph E. Neuhaus, Chair, Comm. on Standards of Attorney Conduct, N.Y. State Bar Ass'n, to Comm'n on Ethics 20/20, Am. Bar Ass'n, Comments of the New York State Bar Association Committee on Standards of Attorney Conduct on Ethics 20/20 Issue Paper Concerning Alternative Business Structures (June 9, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/newyorkstatebarassociationcommitteeonstandardsofattorneyconduct_issuespaperconcerningalternativebusinessstructures.authcheckdam.pdf, *archived at* http://perma.cc/9H5W-PPLQ.

[163] *See* ILL. STATE BAR ASS'N & SENIOR LAWYERS DIV., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 10A (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_annual_meeting_10a.doc, *archived at* http://perma.cc/74R7-AUL8 [hereinafter ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A].

[164] The experience brings to mind Niccolo Machiavelli's famous quote: "[t]here is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order, this lukewarmness arising partly from fear of their adversaries . . . and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience of it." NICCOLÒ MACHIAVELLI, THE PRINCE 22 (Luigi Ricci trans., Grant Richards 1903).

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

beneficial effect,[166] but hard data to support this conclusion did not exist, either in the District of Columbia or countries that currently allow ABSs.[167] As a result, the Commission would have found it difficult to satisfy the House's request from a decade earlier to "demonstrate[ ] that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients." The Commission ultimately cited this paucity of evidence as one of the primary reasons it decided to drop further efforts to amend Model Rule 5.4, explaining that it had "considered the pros and cons . . . and concluded that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model."[168]

Notably, any proposal would have met with considerable resistance even if the Commission had been able to produce evidence that a change would benefit the public without attendant harms.[169] Indeed, the Commission learned that some members of the House of Delegates were opposed to change as a matter of principle.[170]

The opposition was so intense that it continued even after the Commission announced that it would not propose any changes in this area. The opposition centered on the Commission's ongoing study of two discrete choice of law issues relating to ABSs. The first issue, which the Commission called the "inter-firm fee division" issue,[171] was whether a lawyer in a jurisdiction that prohibited ABSs could divide a fee with a *different* law firm that happened to be structured as an ABS and located in a jurisdiction where such ABSs were permissible.[172] The Commission developed a possible proposal to amend a Comment to Model Rule 1.5 to say that such fee divisions are permissible.[173]

The second issue, which the Commission called the "intra-firm fee

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

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

[168] Press Release, Comm'n on Ethics 20/20, Am. Bar Ass'n, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf, *archived at* http://perma.cc/S3J4-LZGB.

[169] Joan C. Rogers, *Speakers Debate Nonlawyers' Role in Firms at First Ethics 20/20 Commission Hearing*, 26 Laws. Man. on Prof. Conduct (ABA/BNA) 110 ABA/BNA Lawyers' Manual on Professional Conduct, 26 Law. Man. Prof. Conduct 110 (Feb. 17, 2010).

[170] *Id.*

[171] *See* Comm'n on Ethics 20/20, Am. Bar Ass'n, *Initial Draft Proposal for Comment: Choice of Law-Alternative Law Practice Structures*, A.B.A. 2 (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.pdf, *archived at* http://perma.cc/H942-7YW5.

[172] *See id.* at 2-3.

[173] *See id.*

sharing" issue,[174] concerned the problem of a law firm with multiple offices, at least one of which was located in a jurisdiction that prohibited ABSs and at least one of which was located in a jurisdiction (such as the District of Columbia or England) that allowed ABSs and had owners who were not lawyers.[175] The Commission developed a possible proposal that would have amended a Comment to Model Rule 5.4 to say that, as a matter of choice of law principles, such fee sharing should be permissible.[176]

There was a concerted effort within the House to stop the Commission from the mere study of these two narrow choice of law issues. A group spearheaded by the Illinois State Bar Association sought to pass a resolution—Resolution 10A—that would have reaffirmed the resolution passed in 2000 in response to the MDP Commission's work, asserting that MDPs are "inconsistent with the core values of the legal profession" and that "[t]he law governing lawyers [in this area] . . . should not be revised."[177] Proponents of Resolution 10A apparently believed that the earlier resolution meant that no rule relating to "nonlawyer ownership" – even rules relating to choice of law principles concerning existing jurisdictional variations in the area – should be revised. The Report accompanying Resolution 10A revealed this objective:

> The Commission has indicated that it intends to continue its consideration of the previously recommended amendments to Model Rule 1.5 and 5.4 which if adopted would change the current policy. Because of that intention, it is imperative that the House give its guidance and unambiguous direction as to how the Commission should proceed. A reaffirmation of the existing policy will make it clear that any forthcoming proposal should meet the test of the policy reaffirmed. The proposals that have been offered for consideration have been given great public distribution encouraging the public perception that the profession is interested in allowing nonlawyers to invest in and own law firms. *The American Bar Association should wait no longer to make it clear to the public that this is not going to happen. The evils of fee sharing with nonlawyers* in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.[178]

Resolution 10A was postponed indefinitely after a hotly contested debate,[179] but the attempt to short-circuit the Commission's deliberations

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[174] *See id.* at 3.
[175] *See* Comm'n on Ethics 20/20, *supra* note 171, at 3.
[176] *See id.* at 6.
[177] *See* ILL. STATE BAR ASS'N & SENIOR LAWYERS DIV., AM. BAR ASS'N, *supra* note 163.
[178] *See id.* at 4 (emphasis added).
[179] Debra Cassens Weiss, *ABA House Postpones Resolution Reaffirming Opposition to Nonlawyer Ownership of Law Firms*, A.B.A. J. (Aug. 6, 2012),

of the modest choice of law issues related to ABSs nicely illustrates the opposition to the Commission's position in this area.[180]

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

Having said all of this, I do agree with critics who say that the Commission should have at least tried to propose some changes to the Model Rules in this area. First, there is always a chance that a modest proposal similar to the discussion draft would have succeeded. Second, even though the Commission lacked empirical data to show that such a change would have been beneficial, it could have generated useful new ideas about structuring law firms in innovative ways without any serious risks. After all, the discussion draft reflected an approach more restrictive than the one in place for more than 20 years in the District of Columbia, where there have been no reports of harm.[181] Moreover, far more permissive approaches have emerged abroad, again without any evidence of harm.[182] Third, I do not believe that such a proposal would have jeopardized the Commission's other proposals, especially if it had been offered in February 2013 after the Commission's other work already had been approved. Indeed, a much more aggressive proposal had not undermined the work of the Kutak Commission thirty years earlier. Finally, even if the proposal failed, I believe it would have prompted a useful discussion about ABSs. But again, it is highly unlikely that the Commission could have brought about any significant change at that time.

In light of these experiences, I believe that there are two ways to facilitate reform in this area. First, the ABA can encourage states to experiment with variations to their versions of Model Rule 5.4. History reveals that the ABA does not typically initiate controversial changes to

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http://www.abajournal.com/news/article/resolution_confirms_aba_stance_against_nonlawyer_ownership_of_law_firms/, *archived at* http://perma.cc/TVN8-PU6W; Minutes of the Meeting, CPR/SOC Joint Comm. on Ethics & Professionalism (Aug. 4, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/cpr_soc_minutes_08_04_12_chicago.authcheckdam.pdf, *archived at* http://perma.cc/EA7X-TPW6.

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

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

[182] LEGAL SERVS. CONSUMER PANEL, CONSUMER IMPACT REPORT 15 (2014), *available at* http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf, *archived at* http://perma.cc/KCY9-XZ9T (explaining, in the U.K., "[t]here have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data").

the Model Rules of Professional Conduct. For example, the liberalization of the advertising rules, expanded confidentiality disclosure options when clients commit crimes and frauds, and screening for laterally hired lawyers to prevent the imputation of conflicts of interest were incorporated into the Model Rules only after numerous states had made similar changes.[183] Of course, there is some value in having a nationally uniform body of ethics rules,[184] but there are strong arguments against a rigid adherence to uniformity.[185] After all, states regularly adopt variations to the Model Rules.[186] There is no reason why states should refrain from developing variations to the rules on ABSs. The District of Columbia has experimented in this area without any adverse consequences,[187] and the State of Washington recently took a step in this direction as well.[188] Greater state-based experimentation could produce additional information about possible benefits. Taking advantage of the states as the so-called "laboratories of democracy"[189] would produce invaluable information about how useful ABSs actually are and could lead to changes in the Model Rules in the future.

The second approach is to focus reform efforts on the law of legal services. Once the law in this area is more fully developed, I believe the legal profession's resistance to ABSs will eventually wane. Lawyers will have less to fear from people who do not have a law license after those people are appropriately regulated and shown to help the public. Moreover, as professionals without a law degree play a more prominent role in the delivery of those services outside of law firms, lawyers will recognize that they have much to lose if the traditional and strict prohibitions on partnering with people who lack a law license continue. Put another way, a loosening of restrictions on ABSs – changes in the law of lawyering – will not by itself drive dramatic changes to the delivery of legal services. Rather, the reverse may be true. Liberalizing and appropriately regulating how people without a law license deliver legal and law-related services (the development of the law of legal services) will ultimately spur changes to the law of lawyering and the delivery of legal services in the United States.

In sum, there is little question that the Commission could not have

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

[184] *See, e.g.*, Robert A. Creamer, *Uniform Legal Ethics Rules? Yes—National Norms for a National Economy*, 22 PROF. LAW., no. 2, 2014, at 29, 30-31.

[185] *See, e.g.*, Stephen Gillers, *Uniform Legal Ethics Rules? No—An Elusive Dream Not Worth the Chase*, 22 PROF. LAW., no. 2, 2014, at 33, 35-36.

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

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

[188] http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=garpc5.09&pdf=1

[189] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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

b. Limited Data the Transformative Potential of ABSs

A less intuitive and more important reason to be skeptical of the "boldness" criticism is that, at the time of the Commission's deliberations, there was far less evidence supporting the idea that ABSs will produce helpful transformative change than many proponents of ABSs have implied. For example, in a 2014 article in the American Lawyer, Professor Gillian Hadfield was quoted as saying that, "[w]hen the 20/20 Commission concluded there was no compelling need for reform [regarding ABSs], it didn't research the public interest. . . . The only research it did was to survey lawyers and ask them if they wanted rule changes. That's not defensible."[190]

Hadfield's quote reflects a misunderstanding of the Commission's process and the actual evidence it sought. The Commission engaged in a significant effort to try to uncover empirical data on this subject, an effort that was ably led by Professor Paul Paton (now the Dean of the University of Alberta School of Law). Paton was the Commission reporter who had primary responsibility for this area, and importantly, he was a proponent of change.[191] He and the Commission's lead counsel, Ellyn Rosen (now the Deputy Director of the ABA Center for Professional Responsibility), searched for empirical or experiential evidence from the U.K., Australia, and the District of Columbia regarding public benefits from ABSs. They found little to none.[192] This is not to suggest that ABSs will not ultimately be helpful, but it is inaccurate to suggest that the Commission did not try to uncover the evidence about how ABSs might affect the public interest.

Significantly, preliminary data from abroad has been released since the Commission finished its work, and it suggests that the effects of change in this area may not be the panacea that proponents of ABS make it out to be. For example, early evidence from the U.K. suggests that alternative business structures (ABS) have not yet had a significant effect on how legal services are delivered there. The U.K. authorized ABSs in

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[190] *See* Susan Beck, *Emerging Technology Shapes Future of Law*, AM. LAW. (Aug. 4, 2014), http://www.americanlawyer.com/id=1202664266769/Emerging-Technology-Shapes-Future-of-Law, *archived at* http://perma.cc/3HAR-F2GB; *see also* Hadfield, *supra* note 9, at 44 (making a similar observation).

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

[192] *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6-8.

2007 (by statute) and has allowed firms to register as an ABS since 2012.[193] As of January 2015, approximately 350 firms had taken advantage of the opportunity,[194] and there is limited evidence that these entities have appreciably changed the legal services market in the U.K.[195] A 2013 survey reveals that 77% of entities registering as an ABS had not changed how they marketed themselves after becoming an ABS;[196] 91% had not changed their target client base;[197] and 83% had not changed their practice areas.[198] When asked how they differ from firms that are not an ABS, 41% said that they did not differ at all.[199] Only 22% said that being an ABS enabled them to be more competitively priced.[200]

Drawing on this data, Robert Cross, a member of the U.K. Legal Services Board, concluded in June 2014 that "[v]ery little has changed as far as the types of services they provide or whom they provide them to. The answer whether the ABS revolution has driven change would appear to be no."[201] He believes that recent innovations in the U.K. are not the result of ABS, but rather a product of broader and largely unrelated economic trends, such as technology and globalization.[202] A recent Consumer Impact Report reaches a similar conclusion, asserting that there have been "[m]any examples of innovation following the liberalisation measures, although no single transformative change [has occurred] and MDPs are yet to take off as has been hoped."[203] Of course, these results are very preliminary and may change considerably over time, especially if ABS licenses are granted more liberally,[204] but there is currently little evidence supporting the conclusion that ABSs are having a transformative effect on the delivery of legal services in the U.K.[205] And to the extent

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[193] *See supra* notes 11, 38-39 and accompanying text.

[194] *See Register of Licensed Bodies (ABS)*, SOLICITORS REGULATION AUTH., http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page (last visited Feb. 1, 2015); *see also* LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 14 (noting that "there has been frustration about the take up of ABS, particularly the small numbers of multi-disciplinary practices").

[195] *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 14.

[196] *See* LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS: AN EMPIRICAL ANALYSIS 55 (2013), *available at* https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-ANNEX.pdf, *archived at* https://perma.cc/A83C-E5HA.

[197] *See id.* at 56.

[198] *See id.*

[199] *See id.* at 58.

[200] *See* LEGAL SERVS. BD., *supra* note 196, at 58.

[201] Robert Cross, Research Manager, Legal Servs. Bd., Presentation at UCL International Access to Justice Conference: Balancing Regulatory Risk 20 (June 20, 2014), *available at* https://research.legalservicesboard.org.uk/wp-content/media/UCL-AtoJ-Conference-presentation-20-June-2014.pdf, *archived at* https://perma.cc/GX44-AJ6J.

[202] *See id*. at 21.

[203] LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 5.

[204] *See id.* at 10 (explaining that "[t]here have been concerns about the [U.K. Solicitors Regulation Authority's] licensing process holding back new entrants, particularly multi-disciplinary practices").

[205] *See* Noel Semple, *Access to Justice: Is Legal Services Regulation Blocking the Path*, 20 INT'L J. LEGAL PROFESSION 267 (2013); *see also* LEGAL SERVS. BD., *supra* note 196,

ABSs are having a significant effect, those effects appear to be disproportionately benefiting business clients, not ordinary consumers.[206]

The Law Society of Upper Canada recently released a report that raises a similar cautionary note.[207] It cites the testimony of scholars who conducted an economic analysis of ABS and concluded that "the introduction of the ABS model should facilitate innovation, but would not cause dramatic change to the way in which legal services are provided in Ontario."[208] Indeed, the authors of that study explain that "[e]xperience in the UK and Australia suggests that liberalization does invite change, although the pace of change appears to be much more evolutionary than revolutionary, at least to date."[209]

A research fellow at Harvard Law School recently reached the same conclusion. He conducted "the most extensive empirical investigation to date on the impact of non-lawyer ownership by focusing on its effects on civil legal services for poor and moderate-income populations."[210] He found that, "perhaps counter-intuitively, there is little evidence from the country and case studies to indicate that [ABSs] substantially improved access to civil legal services for poor to moderate-income populations."[211] The author posits four possible reasons for this conclusion:

> First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where non-lawyer ownership is allowed. . . .
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> Second, many of the legal sectors, like personal injury and social security disability representation, that have seen the greatest investment by non-lawyers will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies. . . .
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> Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy

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at 82.

[206] *See* LEGAL SERVS. BD., *supra* note 196, at 6.

[207] Alt. Bus. Structures Working Grp., Law Soc'y of Upper Can., *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper*, L. SOC'Y UPPER CAN. 14, http://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf (last visited Feb. 1, 2015), *archived at* http://perma.cc/6BKY-ACJ3.

[208] *Id*.

[209] Edward M. Iacobucci & Michael J. Trebilcock, *An Economic Analysis of Alternative Business Structures for the Practice of Law*, L. SOC'Y UPPER CAN. 59-60 (Sept. 20, 2013), http://www.lsuc.on.ca/uploadedFiles/ABS-report-Iacobucci-Trebilcock-september-2014.pdf, *archived at* http://perma.cc/L86X-77PF; *see also* Malcolm Mercer, *A Different Take on ABS—Proponents and Opponents Both Miss the Point*, SLAW (Oct. 31, 2014), http://www.slaw.ca/2014/10/31/a-different-take-on-abs-proponents-and-opponents-both-miss-the-point/, *archived at* http://perma.cc/EU2N-WNWV.

[210] Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism* 4 (Harvard Law Sch. Program on the Legal Profession, Research Paper No. 2014-20, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878&download=yes.

[211] *Id*. at 40.

> to standardize or scale. . . .
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> Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have ability to do so, either because they do not believe they need a legal service or there are cultural or psychological barriers to accessing the service.[212]

The idea that ABS does not drive transformative change is consistent with developments in the United States, where there has been considerable innovation throughout the legal industry despite the absence of ABS. These innovations have emerged from startups that offer automated document assembly, expert systems, e-discovery services, legal process outsourcing, online law practice management tools, data analytics, among other services.[213] In other words, significant innovations are simply taking place outside of law firms altogether and (as Mr. Cross suggested) are being driven by extant trends, such as rapid advanced in technology and globalization, not ABSs.[214]

This background suggests that, rather than focusing so fixedly on ABS as the key to unlocking transformative change, it may be more useful to develop regulations that facilitate but appropriately regulate the involvement of more people who do not have a law license in the delivery of legal services. Of course, these two reform options are not mutually exclusive, but if regulatory reform efforts focus on ABS alone, I believe we will overlook reforms that could produce even more useful changes.

In sum, the Commission can hardly be faulted for failing to produce "bold" reforms, because the law of lawyering is ultimately a poor vehicle for transforming the delivery of legal services. Although ABSs are a possible exception, I believe that bold regulatory reform requires us to think outside the law of lawyering box. We need a law of legal services that can liberate but appropriately regulate new players.

IV. TOWARDS THE LAW OF LEGAL SERVICES

To this point, I have argued that the law of lawyering does not offer significant reform options and that a more promising way to promote innovation is through the development of a parallel regulatory framework that permits, but appropriately regulates, greater involvement in the delivery of legal services by people who do not have a law license.[215]

This new framework is important for two reasons. First, people

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[212] *Id.* at 40-41 (internal footnotes omitted).

[213] *See generally* SUSSKIND, *supra* note 60 (offering an overview of a range of new legal industry providers).

[214] *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 14 (noting that "it is difficult to separate the impact of the [U.K.'s] competition reforms from other drivers of change such as economic conditions, changes to legal aid availability and litigation funding reforms").

[215] I am not the first person to make the argument for pairing liberalization and regulation in the legal services industry. *See, e.g.*, RICHARD SUSSKIND, *supra* note 60; Gillers, *supra* note 31, at 415 (making a similar suggestion); Rhode & Ricca, *supra* note 20, at 2607-08.

without a law degree are playing an increasingly valuable and pervasive role in the delivery of legal and law-related services outside of law firms and ABSs.[216] Examples include automated document assembly services, expert systems, electronic discovery, and legal process outsourcing. Labeling these services as the unauthorized practice of law does not make good policy sense and is in many cases inaccurate, but permitting all of them to operate without any regulatory oversight is also potentially problematic, particularly with regard to consumer facing services. It is thus becoming more important to consider the possibility of regulation where it is needed while ensuring that these new services can flourish and meet marketplace demands. In other words, it is more necessary today than it was just a couple of decades ago to develop a coherent body of law addressing the role that people without a law license play in the legal industry.

Second, states have begun to experiment with the law governing other legal service providers in ways that extend well beyond mere liberalizations of unauthorized practice provisions. For example, Washington State's LLLTs are not lawyers, but they can deliver some kinds of legal services and advice after obtaining specialized training and licensing.[217] Additional states are considering similar innovations.[218]

These developments suggest that we need to think more holistically about the regulation of legal and law-related services and not focus so exclusively on the law of lawyering. That is, we need to develop a system that falls somewhere between the U.K. approach, where people who lack a law license are afforded considerable freedom to operate without any regulatory oversight, and the United States, where such individuals are often forbidden to engage in many kinds of law-related work or challenged if they do.

A. A Flawed Approach: Trying to Define the "Practice of Law"

When developing the law in this area, it is important to avoid the Siren call of defining the "practice of law." Such efforts typically result in a division of the world into two groups – those who "practice law" and those who do not. Those who practice law are required to be lawyers, and those who do not are largely free of any direct regulation or oversight.

There are at least two problems with this binary approach. First, we do not always need to choose between highly regulated lawyers and completely unregulated "others." It is possible to have a third group who can deliver legal and law-related services and advice while being subject to appropriate training and licensing. These kinds of innovations are not

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[216] *See* CBA Futures Report, *supra* note 40, at 19.

[217] *See infra* Part IV.D.2.

[218] *See* Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, A.B.A. J. (Jan. 1, 2015), http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the/, *archived at* http://perma.cc/6ZMZ-26CS.

possible, or at least made more difficult, if the definition of "law practice" is the sole focus of attention.

A second and related problem is the intractability of defining the "practice of law." Numerous scholars have observed that existing definitions are vague and not much more helpful than the standard for defining obscenity: we know it when we see it.[219] Courts have acknowledged the "impossibility" of defining law practice,[220] and in 2003, an ABA Task Force on the Model Definition of the Practice of Law concluded that it could do no better, effectively giving up on the effort and suggesting that states should come up with their own definitions.[221] Moreover, some efforts to define the practice of law could implicate antitrust and related concerns.[222]

B. A Better Approach: Defining Who Should be Authorized

Rather than trying to define the practice of law, we should ask a fundamentally different question: should someone without a law degree be "authorized" to provide a particular service, even if it might be the "practice of law"? By focusing attention on whether the provider is competent to deliver a service, we can more effectively achieve what really matters: protecting the public.

Consider, for example, the work of accountants. An accountant arguably "practices law" under many plausible definitions of "law practice." Accountants analyze various features of tax law and make customized recommendations to clients based on their particular circumstances. [223] Accountants also produce a wide array of documents for clients that have important legal implications (e.g., tax returns). The reason that accountants are permitted to do their work without a law degree has nothing to do with the definition of "law practice." Rather,

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[219] *See supra* note 30.

[220] *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *4 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999); Bd. of Comm'rs of the Utah State Bar v. Petersen, 937 P.2d 1263, 1268 (Utah 1997).

[221] TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS'N, REPORT (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.pdf, *archived at* http://perma.cc/PV25-L82K; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS'N ET AL., REPORT TO THE HOUSE OF DELEGATES (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.pdf, *archived at* http://perma.cc/NX47-ZTZZ.

[222] Letter from R. Hewitt Pate, Acting Assistant Attorney Gen., Dept. of Justice, et al., to Task Force on the Model Definition of the Practice of Law, Am. Bar. Ass'n, Comments on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), *available at* http://www.usdoj.gov/atr/public/comments/200604.htm, *archived at* http://perma.cc/9PJE-5RWC.

[223] CBA Futures Report, *supra* note 40, at 19 (noting that accountants, financial planners, and human resources professionals all "offer guidance and advice to their clients about rights and entitlements").

accountants are permitted to provide their services without a law degree because the public benefits from it.[224] Put another way, accountants are appropriately "authorized" through an extensive licensing regime that ultimately benefits (and protects) the public.[225] Financial planners and other kinds of licensed professionals are similar in this regard.[226]

The idea of rejecting a formal definition of the "practice of law" and focusing instead on whether a provider should be authorized to deliver a service (whether or not it is the "practice of law") is not new. The New Jersey Supreme Court has made the point this way:

> [Authorities] consistently reflect the conclusion that the determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking *whether the public interest is disserved* by permitting such conduct. The resolution of the question is determined by *practical, not theoretical*, considerations; the public interest is weighed by analyzing the competing policies and interests that may be involved in the case . . . .[227]

According to this view, we should ask whether the public's interests will be served by permitting someone without a law degree to provide a particular service (whether or not it is the practice of law) and, if so, determining what kinds of oversight or licensing might be necessary.[228] The challenge, of course, is figuring out what the public's interests actually are and (as the New Jersey Supreme Court suggests) identifying and "analyzing the competing policies and interests" at stake.

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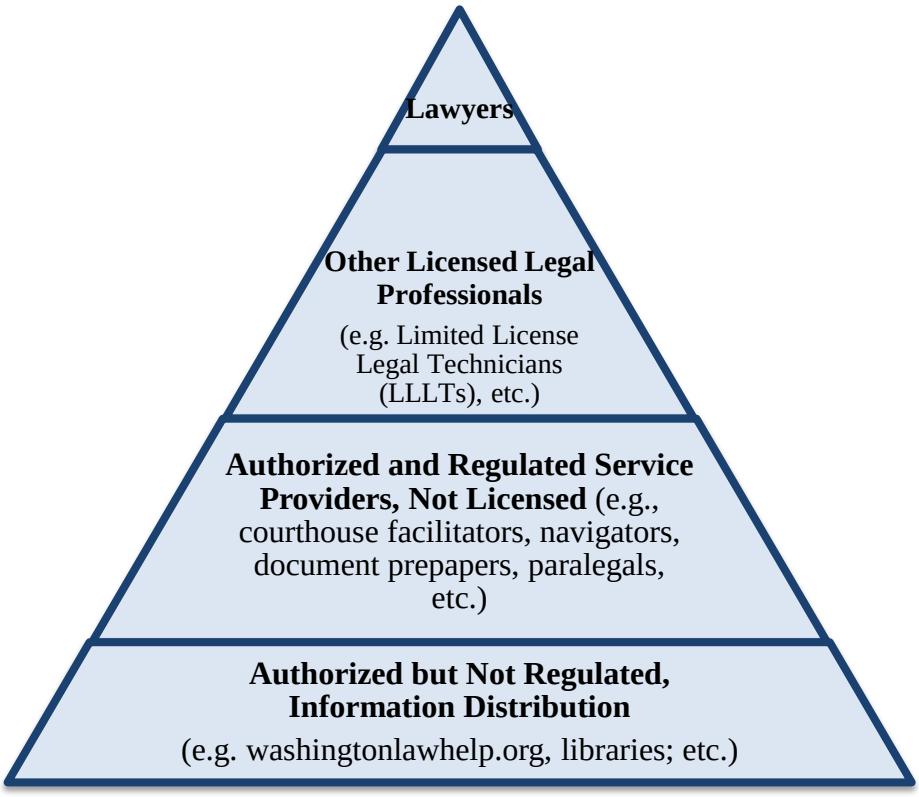
[224] *See, e.g.*, Rhode, *Professionalism in Perspective*, *supra* note 30, at 714.
[225] *See id.*
[226] *See id.*
[227] *In re* Opinion 33 of the Comm. on the Unauthorized Practice of Law, 733 A.2d 478, 484 (N.J. 1999) (emphases added) (quoting *In re* Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1352 (N.J. 1995)).
[228] Other professions adopt a similar approach. For instance, in the medical profession, people other than doctors provide a growing range of medical-related services. The growth and state approval of pharmacy clinics staffed by people who are not doctors is one example.



This pyramid reflects one way to think about the question.[229] The bottom of the pyramid captures very routine law-related needs (e.g., the creation of a living will) that can be addressed by completing blank forms. Regulatory barriers should not prohibit people from making these forms available to the public through websites or otherwise. But as consumers' legal issues become more sophisticated, consumers typically need providers higher up on the pyramid. A central question for the law of legal service is this: at what point must a provider be subject to some kind of regulation?

C. Identifying Principles for the Law of Legal Services

The following is a non-exclusive list of possible policies and interests that may be useful to consider when answering this important question. This list is certainly not the first attempt to define "regulatory objectives." Bar associations and scholars have tried to do the same, and the list below is informed by those efforts.[230]

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[229] I am grateful to Paula Littlewood for conceptualizing the issue this way and creating a slightly different version of this pyramid.

[230] *See, e.g.*, *Legal Profession Uniform Law Application Bill 2014* (NSW) (Austl.), *available at* http://www.parliament.nsw.gov.au/prod/parlment/NSWBills.nsf/1d436d3c74a9e047ca256e690001d75b/07eb41c6b04dca11ca257ca600183bba/$FILE/b2013-122-d11-House.pdf, *archived at* http://perma.cc/DJH2-ZDQL; Legal Services Act, 2007, c. 29 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf, *archived at* http://perma.cc/V6RA-QCYP; Gillers, *supra* note 31, at 371-74; Laurel S.

To be clear, these considerations do not always point in one direction. In some cases, they suggest that additional oversight or regulation of might be necessary where it is currently absent. In other cases, they suggest that we should permit people who do not have a law license (or technology-enabled tools developed by such people) to deliver more legal and law-related services than is currently allowed, but with appropriate regulatory oversight. By identifying a list of relevant considerations, we can more effectively determine who should be permitted to provide legal and law-related services and the extent to which those who are so permitted should be subject to regulation.

1. Competence

The public has an obvious interest in ensuring that legal and law-related services are competently delivered. The goal is to figure out which services require a formal legal education (i.e., a J.D.), which services could be performed competently with training short of a law degree, and which ones do not need any specialized training at all.

The question here is not whether people without a law degree can perform a service as well as a lawyer, though there is evidence that they can.[231] The focus should be on whether a particular service can be performed competently by someone who does not have a traditional law license, not who can perform the service the *best*. After all, even when services must be performed by lawyers, we have never concluded that only the most skilled lawyers must handle a matter. The touchstone should be competence.[232]

Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 PROF. LAW., no. 1, 2013, at 28; Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012); *Consultation on Proposed Regulatory Objectives—Your Input is Requested*, N.S. BARRISTERS' SOC'Y (June 24, 2014), http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-07-07_ConsultationPartI&II.pdf, *archived at* http://perma.cc/9Y4A-7HNP; *Draft Regulatory Objectives—2014-05-16*, N.S. BARRISTERS' SOC'Y (May 16, 2014), http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-05-16_DraftRegObj_CouncilReview.pdf, *archived at* http://perma.cc/8UKP-84AL; Ethics & Prof'l Responsibility Comm., Can. Bar Ass'n, *Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide*, CAN. B. ASS'N, http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf (last visited Feb. 2, 2015), *archived at* http://perma.cc/8BPS-SEAX; *Regulation of Legal Services in England and Wales: Law Society Response*, THE LAW SOC'Y (Sept. 2, 2013), http://lawsociety.org.uk/representation/policy-discussion/regulation-of-legal-services/, *archived at* http://perma.cc/YZ3G-4VWP.

[231] RHODE, *supra* note 4, at 15 (explaining that "research concerning nonlawyer specialists in other countries and in American administrative tribunals suggests that these individuals are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest"); Levin, *supra* note 8, at 2614; Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 58-59 (2003); Rhode, *Professionalism in Perspective*, *supra* note 30, at 709; Rhode, *The Delivery of Legal Services*, *supra* note 30, at 214 n.49.

[232] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

Another reason to avoid comparing the skills of lawyers and "others" is that it is often a false choice. A significant percentage of the public does not have the ability to pay for a lawyer,[233] so even if lawyers might be able to perform some tasks more effectively than someone without a law degree, the choice for many people is between a person who lacks a law license and no help at all. The ultimate question, therefore, should be whether people who do not have licenses are capable of competently providing assistance in a particular area, not whether lawyers are necessarily better.

Undoubtedly, there will be disagreement about who is competent to provide a particular service. Experimentation outside the U.S. (such as in the U.K., where very few services are reserved for lawyers) might provide useful insights, but data is often going to be lacking. Moreover, even if there is general agreement that people are *capable* of providing a specific service competently without a law license, there may be disagreement about the likelihood that such people actually provide that service competently and whether (and how) the public needs to be protected against the risk of incompetence. There also may be deep disagreement about how certain we need to be that the legal or law-related service can be performed competently by people who do not have a traditional law license. And even when our confidence level is high, we might still disagree about the extent to which regulation or oversight is necessary to provide the sufficient level of comfort.

In the absence of hard data (e.g., from abroad or from U.S. jurisdictions that already experiment in this area, such as Washington State), it is generally fair to say that the more standardized and repeatable the service, the more likely it is that a person without a law degree should be able to perform it competently, perhaps with some training or regulatory oversight. For example, technology-assisted tools, such as automated document assembly tools and expert systems, can reduce the likelihood of errors by making some services (e.g., the incorporation of a business) highly standardized. Other services may be highly standardized because of how routinely they can be performed (e.g., some areas of domestic relations law),[234] even in the absence of technology. The bottom line is that regulators need to consider the likelihood that a person without can competently deliver a particular service by examining available data (if any), the level of training needed to deliver the service, whether any regulation or oversight is necessary to provide the necessary assurance of competence, and the extent to which the process required for delivering the service is highly standardized and easily repeatable.

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[233] *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf, *archived at* http://perma.cc/S668-66T6.

[234] *See, e.g.*, WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app. (2013).

2. Free Markets and Consumer Choice (and Some Limits)

When the competence factor cannot be clearly resolved, regulators should generally defer to the market by allowing people to make their own choices. The public has a strong interest in freely choosing service providers and taking into account any number of relevant considerations, such as cost, the provider's training and experience, and consumer reviews.

On the other hand, markets can fail, and there are at least two ways they could fail in this context. First, the public is not always going to be able to assess the risk of choosing someone who does not have a law license, because many kinds of legal and law-related services are "credence goods" – services whose quality is difficult to measure or assess.[235] For example, the ordinary consumer can have a difficult time assessing whether some kinds of transactional document are well drafted and address a reasonable range of contingencies or existing law. If the public has difficulty assessing how well a service is performed, there is a greater need for regulation (though not necessarily a need to use lawyers; people who are not lawyers could be subject to rigorous licensing and regulation). In contrast, if the quality of the service can be readily determined or if the service is delivered to sophisticated clients (e.g., large companies), these kinds of concerns are less likely to arise.

Another possible problem is that a completely free market could have externalities in certain situations. For instance, if someone who is not a lawyer is permitted to represent people in court without any regulatory oversight or licensing, that person could act in ways that adversely affect third parties or the administration of justice (e.g., asserting frivolous claims).

The point here is that freedom of choice is an important consideration, but regulators also need to consider the extent to which the public can reasonably assess the quality of the services, the extent to which regulations could address any problems with such assessments, the existence of reasonably likely and significant externalities, and whether any regulatory remedies exist to address these possible externalities (e.g., a licensing system that increases the likelihood of quality and provides an administrative remedy for improper conduct).

3. Informed Consumer Choice

Regulators have an interest in ensuring that the public has sufficient and accurate information to make an informed choice about whether to use a particular provider. The needed transparency could take a number of forms. For example, regulators could require people who are not lawyers to prominently disclose their status (i.e., that they are not lawyers and are not a law firm), obtain affirmations from consumers that they understand that the service is not being delivered by a law firm and that a lawyer or

[235] *See* Hadfield, *supra* note 9, at 48 (making a similar observation).

law firm might be preferable in certain situations, disclosing the extent to which a lawyer has been involved in the creation or delivery of the service (and the identity and licensing jurisdiction of any such lawyers), and the implications for protections that might otherwise attach (e.g., the attorney-client privilege, the work product doctrine, the duty of confidentiality). Regulators also could require all advertising materials to satisfy the same standard lawyers follow under Model Rule 7.1 – i.e., advertising must be truthful and not misleading.[236]

The particular requirements will necessarily vary depending on the service and type of provider, but if consumers are given a greater range of options for obtaining legal services, it is reasonable to insist that consumers also have access to adequate information to make an informed choice.

4. Accessibility and Availability of Remedies for Incompetence

No matter who performs a legal or law-related service, there is a possibility it will be performed incompetently. In such cases, consumers deserve access to appropriate remedies. For licensed professionals, remedies are readily available through discipline or disbarment. When the provider is not licensed, however, other options may be necessary.

One possibility is litigation. To make this remedy realistic, regulators may need to require some service providers to carry insurance, prohibit them from disclaiming liability (e.g., in a "click through" agreement), or restrict the use of contractual provisions making litigation excessively difficult (e.g., provisions that require arbitration in some distant location or the application of the substantive law of a jurisdiction having nothing to do with the work done). These requirements can help to mitigate some of the concerns about giving the public the freedom to choose non-traditional providers.

One problem is that litigation is not always an available remedy. For example, if someone uses an automated document assembly service to create a will and it turns out to have been negligently created (e.g., it did not reflect important features of state law), the negligence might not be discovered until many years later, perhaps long after the company responsible for the service ceases to exist. Insurance requirements may help to address these kinds of concerns, but the point is that litigation is not a panacea.

The insufficiency of litigation in some contexts does not mean that the public should have to use lawyers. After all, if a lawyer drafts a will incompetently, similar problems can arise. The lawyer or firm responsible for the will may be long gone by the time any negligence is discovered, or the lawyer may not have carried sufficient (or any) malpractice insurance.[237] The point is that after-the-fact negligence lawsuits do not

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[236] MODEL RULES OF PROF'L CONDUCT R. 7.1.

[237] Only one state—Oregon—requires lawyers to carry malpractice insurance, *see*

always offer an adequate remedy for incompetence. In these situations, regulators might reasonably conclude that some kind of licensing should be required so that discipline (including the loss of the license) is an available remedy and an additional incentive to ensure competence.

5. Addressing Other Forms of Misconduct

Even if providers of legal services are competent, they may engage in conduct that harms their clients, third parties, or the justice system. For example, if people who are not lawyers are permitted to represent clients in some types of civil cases, we would want to ensure that they follow the same kinds of rules as lawyers, such as rules prohibiting the filing of frivolous claims,[238] making false statements to the court,[239] and communicating with represented people.[240] Lawyers are subject to discipline and court sanctions for violating these rules, and regulators should ensure that, in some contexts, mechanisms exist to sanction any other advocates who engage in similar misconduct. This oversight might require the use of a licensing system that facilitates discipline or the loss of a license in appropriate cases. In other contexts, it might be sufficient to allow for monetary penalties. The point here is that regulators should consider whether mechanisms are needed to prevent or address misconduct that is not remediable through litigation.

6. Faith in the Justice System and the Rule of Law

Democratic societies require a widely shared commitment to the rule of law and faith in the system of justice.[241] In some cases, these goals can

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Standing Comm. on Client Protection, Am. Bar Ass'n, *State Implementation of ABA* Model Court Rule on Insurance Disclosure, A.B.A. 8 (Oct. 16, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.pdf, *archived at* http://perma.cc/G9Z7-J349, and a not insignificant percentage of lawyers carry no malpractice coverage, *see* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 549-50 (1994) (concluding "[a] significant number of lawyers, especially those struggling to make a living in handling small matters for individual clients, have neither malpractice coverage nor substantial personal assets that could be called upon to satisfy a malpractice judgment"); James M. Fischer, *External Control Over the American Bar*, 19 Geo. J. Legal Ethics 59, 90-91 (2006) (citing a study suggesting that between 25% and 55% of the bar has no malpractice insurance but contending that the statistics may be overstated); Ron Smith, *Task Force Suggests Malpractice Insurance Plan*, J. KAN. B. ASS'N, Apr. 1999, at 3 Journal of the Kansas Bar Ass'n, 68-APR J. Kan. B.A. 3 (1999) (stating that about 35% of Kansas lawyers have no malpractice insurance).

[238] *See* FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 3.1 (2013).

[239] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3.

[240] *See id.* R. 4.2.

[241] *See generally* THE RULE OF LAW: NOMOS XXXVI (Ian Shapiro ed., 1994) (exploring the relationship between democracy and the rule of law); *see also* STEPHEN MAYSON, LEGAL SERVS. INST., LEGAL SERVICES REGULATION AND 'THE PUBLIC INTERETS' 11 (2011), *available at* http://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf, *archived at* http://perma.cc/34JZ-

be more effectively achieved by requiring the use of – and assuring a right to – a lawyer. For example, even if a properly trained person who is not a lawyer could offer the same service as a lawyer in the criminal defense context, the Constitution wisely grants a right to counsel.[242] Without it, a fundamental feature of our system of justice could be legitimately called into question.[243]

It is not possible to address here the much larger debate about the civil *Gideon* movement, including which legal services should be provided as a matter of right,[244] though the meager government support for legal services is a significant problem that needs to be addressed.[245] The point here is that regulators should consider the importance of a particular service when deciding whether to grant a right to it, and if so, whether a lawyer should be the one to provide it. Moreover, assuming a service is not provided as of right, regulators need to consider the extent to which allowing people who are not lawyers to deliver the service will improve access to that service and enhance faith in social institutions by (for example) making the service more affordable and accessible.

7. Professional Independence and Other Client-Related Protections

Some 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.[246] 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.[247]

8C5B (making a similar observation in the context of articulating regulatory objectives).

[242] U.S. CONST. amend. VI.

[243] Laura I. Appleman, *The Community Right to Counsel*, 17 BERKELEY J. CRIM. L. 1, 2 (2012) (tracing the history of the right to counsel and concluding that "counsel privileges were at least partially intended to stabilize the social order and reinforce community interests").

[244] *See* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106 (2013). *Compare* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503-06 (1998) (summarizing the arguments in favor of expanding the right to counsel), *with* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2121 (2012) (offering empirical data that raises the question of whether a right to counsel actually makes a difference in terms of outcomes and exploring the implications for the civil *Gideon* movement).

[245] *See* Gillian K. Hadfield, *Innovating To Improve Access: Changing the Way Courts Regulate Legal Markets*, J. AM. ACAD. ARTS & SCI., Summer 2014, at 83.

[246] *See, e.g.*, ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163, at 1; Lawrence J. Fox, *MDP Redux—Slay the Dragon Again . . . Now!*, A.B.A. 1 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/fox_alpsdiscussiondraft.authcheckdam.pdf, *archived at* http://perma.cc/ML2U-YF3L.

[247] *See* ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163, at 1.

When evaluating these concerns, regulators should consider three points. First, some of these concerns apply equally well to lawyers. For instance, lawyers already have an incentive to prioritize profits over client needs. Lawyers who charge flat fees can make more money if they cut corners.[248] 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.[249] And lawyers who bill by the hour regularly spend more time than is necessary to solve a client's problems.[250] In other words, lawyers are also susceptible to the pressures of increased profits at a client's expense.

Second, regulators could address many of the disparities between lawyers and other professionals with regard to client protections. For example, it is possible to impose confidentiality obligations on other providers in contexts where they handle particularly sensitive information.[251] Similarly, the attorney-client privilege could be extended to include other licensed legal professionals, as has been done in Washington State.[252] Or rules could preserve professional independence by prohibiting these other professionals from taking instructions from anyone other than clients.[253]

Finally, to the extent that lawyers are able to offer clients more protections in certain contexts does not mean that clients should be *forced* to hire lawyers to solve legal and law-related problems. If someone who is not a lawyer is competent and conflict-free and if clients are made reasonably aware of the risks of selecting that person, the public should be given a choice of providers.

D. Illustrating the Law of Legal Services

To see how the regulatory objectives described above could be used to develop a more robust law of legal services, it is useful to consider two distinct groups of providers: those who are currently offering legal and law-related services and those who could be if they were so authorized.

1. Approaches to Existing Market Actors: Automated Document Assembly as an Example

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[248] *See, e.g.*, Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 118-119 (2003).

[249] *See* GEOFFREY C. HAZARD, JR. ET AL., *supra* note 29, at 799-800 (summarizing the ways in which a lawyer's and client's interests are not necessarily aligned when using contingent fees).

[250] *See generally id.* at 789-91 (summarizing the literature on billable hour fraud and fee padding); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008) (offering an overview of the problem and citing numerous authorities documenting the problem).

[251] *See* WASH. CT. R.: GEN. RULES R. 31.1.

[252] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28. Ct. Admission to Practice Rule 28(k)(3) (2013) (extending attorney-client privilege to LLLTs).

[253] *See supra* note 251, at R. 5.4.

The number of people who are not lawyers and are already involved in the delivery of legal or law-related services is growing rapidly. They provide automated legal document assembly for consumers,[254] law firms, and corporate counsel;[255] expert systems that address legal issues through a series of branching questions and answers;[256] electronic discovery; legal process outsourcing;[257] legal process insourcing and design;[258] legal project management and process improvement; knowledge management;[259] online dispute resolution;[260] data analytics;[261] and many other services.[262] This section explores automated legal document assembly in detail, but the overarching question for all of these new providers is the same: whether they should be subject to regulation or oversight and, if so, what any such regulations should look like.

Some background principles should guide the discussion. First, regulations are more likely to be necessary when a service is offered directly to the public. When a service is purchased or used by lawyers, such as when a lawyer uses an electronic discovery service, indirect regulatory oversight already exists. Lawyers have an ethical responsibility

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[254] *See, e.g.*, *Our Products & Services*, LEGALZOOM, http://www.legalzoom.com/products-and-services.html (last visited Feb. 2, 2015), *archived at* http://perma.cc/T3Y8-XVY7.

[255] *See, e.g.*, *Document Services*, HOTDOCS, http://www.hotdocs.com/products/document-services (last visited Feb. 2, 2015), *archived at* http://perma.cc/HX5J-36BP.

[256] *See, e.g.*, *About*, NEOTA LOGIC, http://www.neotalogic.com/about (last visited Feb. 2, 2015), *archived at* http://perma.cc/BWB8-YN3K.

[257] These services include a range of legal processes, including some that are closely related to the delivery of legal services, such as legal research and document preparation.

[258] This category includes companies that design legal service delivery for corporate legal departments and supply the legal talent to execute the vision under the supervision of in-house counsel. *See* William Henderson, *Is Axiom the Bellwether for Disruption in the Legal Industry?*, THE LEGAL WHITEBOARD (Nov. 10, 2013), http://lawprofessors.typepad.com/legalwhiteboard/2013/11/is-axiom-the-bellwether-for-disruption-in-the-legal-industry-look-what-is-happening-in-houston.html, *archived at* http://perma.cc/F8ZE-4WEP; *see also* Jennifer Smith, *Companies Curb Use of Outside Law Firms: Staff Attorneys, Which Don't Bill by the Hour, Are Cheaper, Often More Efficient*, WALL ST. J., http://online.wsj.com/articles/companies-curb-use-of-outside-law-firms-1410735625 (last visited Feb. 2, 2015).

[259] Knowledge management enables lawyers to find information efficiently within a lawyer's own firm, such as by locating a pre-existing document that addresses a legal issue or identifying a lawyer who is already expert in the subject.

[260] *See, e.g.*, *About*, MODRIA, http://modria.com (last visited Feb. 2, 2015), *archived at* http://perma.cc/4VM4-FMDS (a company that, prior to being spun off from eBay, helped to develop its online consumer dispute resolution system).

[261] *See, e.g.*, *What We Do*, LEX MACHINA, https://lexmachina.com/what-we-do/ (last visited Feb. 2, 2015), *archived at* https://perma.cc/3NGF-QLRU (Lex Machina analyzes large data sets to predict outcomes in certain kinds of cases).

[262] *See, e.g.*, John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3002-15 (2014); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3057-58 (2014) (describing the increasingly important role new providers are playing in the delivery of legal services despite the existence of UPL statutes).

to supervise or monitor the "nonlawyer assistance" they use when representing clients.[263]

Second, even when a service is sold directly to the public, we should avoid the binary thinking that has characterized regulatory responses to date. For example, some states have accused automated legal document assembly companies (typically, LegalZoom) of the unauthorized practice of law and sought to shut them down,[264] while other regulators have taken a laissez faire approach and done nothing at all.

A third way is possible and desirable. We can recognize that consumer-facing services are often useful to the public and should be authorized to operate, yet acknowledge that there may be a need for some modest regulation.[265] This approach promotes innovation by giving existing providers and potential newcomers greater assurance that they will not be sued by regulators, while ensuring that consumers are adequately protected.

The automated document assembly industry provides a useful test case for this "third way."[266] The consumer facing portion of this industry is frequently accused of unauthorized practice, so it has the most to gain if states expressly authorize these kinds of services. At the same time, these services deserve close scrutiny because they sell directly to consumers and do not have lawyers as intermediaries.[267] In the section below, I apply the principles identified in Part IV.C and then propose a possible regulatory model.

a. Applying the Regulatory Principles

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[263] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013).

[264] *See, e.g.*, Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, A.B.A. J. (May 19, 2014), http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina, *archived at* http://perma.cc/B6AA-54NS; Terry Carter, *LegalZoom Business Model Ok'd by South Carolina Supreme Court*, A.B.A. J. (Apr. 25, 2014), http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court/, *archived at* http://perma.cc/7JR9-V4FS; *see also* Assurance of Discontinuance, *In re* LegalZoom.com, Inc., (Wash. Super. Ct. Sept. 15, 2010), *available at* http://www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf, *archived at* http://perma.cc/P65E-RBTQ (describing a settlement in Washington State).

[265] *See* Gillers, *supra* note 31, at 415 (making a similar suggestion).

[266] Despite the recent growth of automated legal document assembly, this market segment is hardly new. Pioneers have been developing these kinds of tools since the 1980s. *See, e.g.*, Marc Lauritsen, *Second International Conference on Substantive Technology in the Law School*, LAW. PC, no. 6, 1992, at 10. What has changed is that these tools are more powerful and pervasive.

[267] The idea of pursuing a "third way" regulatory approach in this context is not new. For example, Deborah Rhode and Lucy Buford Ricca have argued that, when thinking about innovative companies, "the key focus should not be blocking these innovations from the market, but rather using regulation to ensure that the public's interests are met." Rhode & Ricca, *supra* note 20, at 2607-08; *see also* Gillers, supra note 31, at 415 (making a similar suggestion); Rhode & Ricca, *supra* note 20, at 2594 (quoting a bar official making the same point).

An important initial question for the consumer facing automated document assembly industry is whether it can competently deliver services to consumers. The answer undoubtedly turns on the nature of the service and the sophistication of the provider. For example, Consumer Reports asked experts to assess wills generated by three leading online providers and found that:

> [u]sing any of the three services is generally better than drafting the documents yourself without legal training or not having them at all. But unless your needs are simple—say, you want to leave your entire estate to your spouse—none of the will-writing products is likely to entirely meet your needs. And in some cases, the other documents aren't specific enough or contain language that could lead to 'an unintended result,' in [the] words [of one law professor, who was an expert reviewer].[268]

This report suggests a need for some caution, but at the same, it does not imply that we need an outright ban either. After all, more than one million consumers have used LegalZoom alone in just the last ten years,[269] and there is no reliable evidence of incompetence. In fact, the automated nature of the process likely reduces the chance of some kinds of errors.[270] In sum, there is no reason to think that this industry should be banned, but regulator also should have legitimate concerns about competence and adequate consumer disclosures.

The next consideration is consumer choice. Consumers are overwhelmingly interested in these kinds of services, as evidenced by the sheer number of people who have been willing to pay for them.

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[268] *Legal DIY Websites are No Match for a Pro: They Provide Services for a Fraction of What You'd Pay a Lawyer*, CONSUMER REPORTS.ORG (Sept. 2012), http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm, *archived at* http://perma.cc/MZM2-HSJ7. The U.K. recently undertook a significant review of will preparers who are not lawyers and concluded that they should not be subject to new regulation. *See* MINISTRY OF JUSTICE, DECISION NOTICE RE: EXTENSION OF THE RESERVED LEGAL ACTIVITIES (2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198838/Will_writing_decision_notice.pdf, *archived at* https://perma.cc/5VCK-WFCP. *But see* LEGAL SERVS. BD., SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES: FINAL REPORTS 14 (2013), *available at* http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm, *archived at* http://perma.cc/3YFN-R9XQ (recommending that will preparation services be considered an activity reserved for lawyers); LEGAL SERVS. CONSUMER PANEL, REGULATING WILL-WRITING § 4.47 (2011), *available at* http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf, *archived at* http://perma.cc/8KL5-UF4V (advising that such providers be subject to new regulation, but acknowledging that automated form providers were not carefully studied).

[269] *LegalZoom Celebrates 10 Years*, LEGALZOOM (Feb. 2011), https://www.legalzoom.com/articles/legalzoom-celebrates-10-years, *archived at* https://perma.cc/M6C3-G2TC.

[270] *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 268, § 4.45 (making a similar observation).

LegalZoom, which is just one of many players in the industry, filed an S-1 with the Securities and Exchange Commission in 2012, when the company was considering an initial public offering. In the year prior to the submission (2011), the company had reported $156 million in revenue.[271] As mentioned above, in its first ten years in business (from 2001 until 2011), LegalZoom had served more than one million customers.[272] Because LegalZoom is just one provider in the industry, these statistics suggest that consumers are increasingly aware of automated document assembly products and want to use them.

Regarding the issue of choice, it is important to remember that consumers are not always choosing automated document providers over lawyers. Because lawyers typically charge higher prices, the choice for many consumers is between an automated document assembly service and no service at all. So even if we assume for the sake of argument that lawyers always deliver higher quality documents than automated document assembly services, many consumers might reasonably decide to select an automated document assembly service, either because they cannot afford a lawyer or because they are willing to sacrifice quality for a lower price. As long as the services are delivered competently, consumers should have the freedom to make this choice.

For similar reasons, new providers are arguably advancing our shared commitment to the rule of law and faith in the system of justice. If more people can afford legal and law-related services because of the existence of consumer facing automated document assembly services, these services ultimately help to preserve the public's faith that our legal system is available to everyone.

Despite these benefits, there are at least two reasons to consider some regulatory oversight. First, as suggested in Part IV.C, many of the services offered are "credence goods,"[273] so the public is not in the best position to assess the quality of the products offered.[274] Second, some products (e.g., simple wills) have important legal effects, so mistakes and negligence can have significant consequences for consumers and third parties.

Together, these considerations suggest that some consumer protections are worth considering. For example, it might be reasonable to ensure that consumers have legal recourse in the event a service is incompetently performed (e.g., via lawsuits). One possibility is to prohibit providers from asking consumers to waive their rights to a lawsuit or resolve disputes in fora having nothing to do with the service performed. For similar reasons, it would be reasonable to require providers to carry

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[271] *See* Tomio Geron, *LegalZoom Files for IPO of Up to $120 Million*, FORBES (May 11, 2012), http://www.forbes.com/sites/tomiogeron/2012/05/11/legalzoom-files-for-ipo/, *archived at* http://perma.cc/KUC6-P9PW.

[272] *See LegalZoom Celebrates 10 Years*, *supra* note 269.

[273] *See supra* Part IV.C.2.

[274] LEGAL SERVS. CONSUMER PANEL, *supra* note 268, § 1.5 (making a similar point in the context of wills).

adequate insurance.[275]

Consumers are also entitled to accurate information about the limitations of the services offered. For instance, companies offering automated document assembly services should have to explain the nature of their products (i.e., that they are not offered by a law firm), whether lawyers were involved in preparing the substantive language for the forms or had a role in determining the questions to be asked, the licensing jurisdictions of any such lawyers, and the implications of using the service for protections that might otherwise attach (e.g., the attorney-client privilege, the work product doctrine, the duty confidentiality).[276] It also might be reasonable to restrict advertising using the same basic standard lawyers must follow under Model Rule 7.1 – i.e., the advertising should be truthful and not misleading.[277]

b. A Potential Regulatory Approach

The draft provision below, which could be promulgated either as a court rule or statute,[278] offers one way to resolve the competing policy considerations at stake.[279] Section 1 authorizes the delivery of automated legal document assembly tools, and Section 2 imposes some modest requirements on people who offer those services. Although the requirements in Section 2 are arguably more onerous than necessary, they may offer some comfort to those who are skeptical of the benefits of authorizing these providers and thus might provide a politically viable way

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[275] Granted, lawyers in nearly every state (except Oregon) are not subject to the same insurance mandate, *see supra* note 237, but the failure of regulatory authorities to mandate insurance for lawyers is not a justification for failing to impose the obligation in other contexts where it is appropriate.

[276] As explained earlier, regulators might be able to address some of the disparity between the protections afforded to the public when they use lawyers as opposed to other service providers. *See supra* Part IV.C.3. For example, regulators could impose confidentiality obligations on other providers in contexts where they handle particularly sensitive information.

[277] MODEL RULES OF PROF'L CONDUCT R. 7.1 (2013). Another consideration mentioned in Part IV.C is whether providers might cause harm to third parties. To date, there is no evidence of such harms arising from this industry, and there is no reason to expect that automated document assembly services are likely to create these kinds of harms in the future. If this assumption is erroneous, regulators could consider a system of licensure, but in the meantime, such additional oversight seems unnecessary.

[278] This Article does not address the question of who should be responsible for producing these reforms. Possible options include state legislatures, state supreme courts, and even Congress. The ABA could produce model rules or provisions, or the American Law Institute could reframe the Restatement of the Law Governing Lawyers to focus on the Law of Legal Services. The Conference of Chief Justices could take on a similar project. The primary goal of this Article is to provide the framework for reimagining the law in this area, not to identify who should be responsible for creating it.

[279] Stephen Gillers has recommended a similar approach. *See* Gillers, *supra* note 31, at 417; *see also* Richard Granat, *North Carolina Lawyers Oppose Access to the Legal System*, E-LAWYERING BLOG (July 7, 2014), http://www.elawyeringredux.com/2014/07/articles/unauthorized-practice-of-law/north-carolina-oppose-access-to-the-legal-system/, *archived at* http://perma.cc/W2X9-PL6P.

to implement the "third way" approach.[280]

Definition.

A "Legal Forms Provider" is any person or entity offering law-related forms or documents to the public, including forms or documents generated automatically through guided questions and answers.

Section 1. Legal Forms Providers are authorized to operate in this jurisdiction subject to the limitations in Section 2.

Section 2. If a Legal Forms Provider is not otherwise authorized to practice law in this jurisdiction, is offering forms or documents traditionally offered primarily by lawyers, and is automatically generating the forms or documents through guided questions and answers,[281] the Legal Forms Provider must:

a. Disclose prominently that the Legal Forms Provider is not a lawyer or law firm;
b. Require consumers to affirm their understanding that the service is not being offered by a lawyer or law firm before consumers complete any forms or documents;
c. Disclose prominently whether any lawyers participated in the creation of the forms and, if so, identify the names and licensing jurisdictions of any such lawyers;[282]
d. Disclose prominently that the forms are not a substitute for legal advice provided by a lawyer or law firm and that some protections normally afforded to a client's communications with a lawyer or law firm, such as the attorney-client privilege or work product doctrine, may not apply;
e. Maintain insurance coverage against errors and omissions in the amount of at least $500,000 per claim and an aggregate coverage of the greater of either $5 million or 5% of annual gross revenue from the sale of forms or documents in the prior calendar year;
f. Allow consumers the right to file a lawsuit against the Legal Forms Provider and not disclaim or limit the Legal Forms Provider's liability or dictate where any lawsuits against the

[280] At least one jurisdiction has tried this kind of approach. *See* H. 663, 2013-2014 Gen. Assemb., First Sess. (N.C. 2013), *available at* http://www.ncga.state.nc.us/sessions/2013/bills/house/html/h663v4.html, *archived at* http://perma.cc/TSR4-2Y3C.

[281] The purpose of this phrase is to exclude automated document assembly services that are traditionally provided by other kinds of professionals, like accountants (e.g., TurboTax) and financial services professionals. This provision is also intended to exclude from regulation any services offering do-it-yourself blank forms without any substantive guidance.

[282] *See* Gillers, *supra* note 31, at 417 (making a similar recommendation).

Legal Forms Provider are filed;[283]

g. Disclose prominently whether any personally identifiable information provided by the consumer will be made available to a third party and, if so, obtain the consumer's affirmation that the consumer understands this fact;
h. Employ advertising and marketing methods that are truthful and not misleading.

Section 3. Any person or entity that violates Section 2 is not authorized to provide the services identified in Section 1 and is engaged in the unauthorized practice of law under [jurisdiction's unauthorized practice of law statute].

A few of these provisions require some explanation. First, the phrase "traditionally offered primarily by lawyers" is needed to ensure that the regulation does not apply to services that are already adequately regulated. Consider, for example, automated tax document assembly services, like TurboTax. Arguably, that product fits within Section 1, because it helps consumers to create automated law-related documents (i.e., tax forms) through guided questions and answers. There is no public policy reason to subject these kinds of services to the requirements set out in Section 2, because accounting is already subject to a separate regulatory regime. The goal here is to bring within the scope of regulation any law-related document assembly that has historically been reserved primarily for lawyers and where no other regulation currently exists. It is not intended to regulate services that have long been offered by others.

The word "public" in the definition of "Legal Forms Provider" is intended to exclude any services that are sold exclusively to lawyers or corporate counsel. As explained earlier, lawyers have an ethical duty to select competent providers,[284] so any risks arising from these services are significantly mitigated when lawyers serve as intermediaries. For this reason, Section 2 only applies to services offered directly to the public.

In Section 2, the phrase "automatically generating the forms or documents through guided questions and answers" is intended to make clear that the restrictions do not apply to Legal Forms Providers who offer blank legal forms for consumers to complete. The former services raise more consumer protection concerns because they involve some assessment of the questions that should be asked and imply an understanding of relevant laws or regulations.

The insurance provision is designed to ensure that, if a form is improperly prepared, there is sufficient insurance coverage to compensate people who might have been adversely affected. Because providers are offering the same form to many people simultaneously, providers should have insurance with sufficiently high single occurrence and aggregate limits.

In the end, this approach is designed to encourage potential innovators

[283] *See id.* (making similar recommendation).
[284] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013).

who might otherwise fear accusations of unauthorized practice. Indeed, some of them appear to be in favor of some regulation in exchange for clearer authority to operate. For example, lawyers for LegalZoom recently submitted comments to the ABA Commission on the Future of Legal Services and argued that "[w]e need to focus on 'right' regulation and not "over" or "no" regulation."[285] In short, this approach seeks to accomplish a rare feat for new industry regulations: protecting consumers while spurring innovation and growth.

2. Approaches to New Market Actors: Limited License Legal Technicians as an Example

The law of legal services can also create new delivery options. For example, Washington State's LLLTs have less formal training than lawyers but receive targeted instruction designed to enable them to provide a narrow range of legal and law-related services.[286] In much the same way as healthcare providers other than doctors now deliver some kinds of services at walk-in pharmacy clinics and in numerous other contexts, LLLTs are legal service providers other than lawyers who have the authority to deliver some kinds of legal services and advice outside of a traditional law firm.[287] The question for this group of potential providers is whether they should be given the authority to deliver legal and law-related services at all and, if so, what the appropriate regulation and oversight should look like.

a. Background on the LLLT Program

In 2012, after a dozen years of study and vigorous debate,[288] the Washington Supreme Court adopted a rule authorizing LLLTs as a new category of licensed legal professionals.[289] The rule establishes a LLLT Board, which is responsible for administering the LLLT program and identifying practice areas suitable for LLLTs.[290] In March 2013, the

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[285] *See, e.g.*, Letter from Chas Rampenthal, Gen. Counsel, LegalZoom.com, Inc. & James Peters, Vice President, New Market Initiatives, LegalZoom.com, Inc. to Comm'n on the Future of Legal Servs., Am. Bar Ass'n, Comments on the ABA Issues Paper on the Future of Legal Services, *available at* http://www.americanbar.org/content/dam/aba/images/office_president/chas_rampenthal_and_james_peters.pdf, *archived at* http://perma.cc/KYG2-Y3BQ.

[286] *See* Crossland & Littlewood, *supra* note 6, at 616-18.

[287] *See id.* at 613-14 (drawing an analogy to the medical profession).

[288] *See id.* at 612.

[289] *See id.* at 611. Washington State actually has three categories of licensed legal professionals: lawyers, LLLTs, and Limited Practice Officers (LPOs). LPOs are "authorized to select, prepare, and complete documents in a form previously approved by the Limited Practice Board for use in closing a loan, extension of credit, sale, or other transfer of real or personal property." *Limited Practice Officers*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Limited-Practice-Officers (last visited Feb. 2, 2015), *archived at* http://perma.cc/8NGS-CWQF.

[290] *See* Crossland & Littlewood, *supra* note 6, at 616.

Washington Supreme Court unanimously approved the Board's recommendation to make domestic relations the first LLLT practice area.[291] In particular, LLLTs will be authorized to participate in child support modification actions, dissolution and legal separation actions, domestic violence actions, committed intimate relationship actions, parenting and support actions, parenting plan modifications, paternity actions, and relocation actions.[292]

To obtain the necessary license, LLLTs are required to obtain at least an associate degree from a community college, receive specific practice area education at a law school, pass three exams (a core education exam, a practice area exam, and an ethics exam), and acquire 3,000 hours of substantive law-related experience (e.g., in a lawyer's office, either before or after passing the examination).[293] The inaugural group of LLLTs is expected to complete this program and become authorized to practice in spring 2015.[294]

The LLLT program has helped to generate new discussion about the possibility of licensing new categories of legal professionals. A recent report by the ABA Task Force on the Future of Legal Education highlighted the development and recommended greater experimentation in this area:

> *Broader Delivery of Legal and Related Services:* The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services.[295]

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[291] *See id.*

[292] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app., Regulation 2 (2013).

[293] *See* Crossland & Littlewood, *supra* note 6, at 616-18.

[294] *See* Chambliss, *supra* note 19, at 580; *see also* Anna L. Endter, *Washington Limited License Legal Technician (LLLT) Research Guide*, GALLAGHER L. LIBR., U. WASH. (Jan. 22, 2015), https://lib.law.washington.edu/content/guides/llltguide, *archived at* https://perma.cc/D2YF-585M; *Limited License Legal Technicians (LLLT)*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians (last visited Feb. 2, 2015), *archived at* http://perma.cc/4CZG-RDWN.

[295] TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf, *archived at* http://perma.cc/UU5J-

Similarly, the new ABA Commission on the Future of Legal Services has created a Regulatory Opportunities Working Group to study developments in Washington State,[296] and the Working Group is chaired by Washington State Bar Association Executive Director Paula Littlewood and Chief Justice Barbara Madsen of the Washington Supreme Court. Chief Justice Madsen signed the order authorizing LLLTs in Washington State, and Paula Littlewood was instrumental in the program's adoption and implementation.

Washington State is not the only jurisdiction looking at LLLTs. The California State Bar Board Committee on Regulation, Admission and Discipline Oversight created the California State Bar's Limited License Working Group, which on June 17, 2013 recommended that California offer limited-practice licenses.[297] The working group recommended that people without a law degree be authorized to provide "discrete, technical, limited scope of law activities in non-complicated legal matters in 1) creditor/debtor law; 2) family law; 3) landlord/tenant law; 4) immigration law."[298] The recommendation for limited-practice licenses is still in its early stages and will need to work its way through the California State Bar and eventually the California Supreme Court.

b. Application of the Regulatory Principles

The regulatory principles identified in Part IV.C suggest that the LLLT program is well worth considering. With regard to competence, properly trained professionals who do not have a law degree could effectively perform a fair number of legal and law-related services, especially given the level of required training before LLLTs are authorized to deliver services. A useful analogy here is to the medical field, where people who are not doctors deliver a significant percentage of health-related services.[299] Nurses, pharmacists, and medical technicians regularly perform tasks that arguably involve the practice of medicine. Indeed, many states have expanded access to medical services by permitting medical professionals other than doctors to provide routine medical care, such as at "Minute Clinics" in pharmacies.[300] The LLLT

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[296] *See* Letter from ABA Comm'n on the Future of Legal Servs., to ABA Entities et al., Issues Paper on the Future of Legal Services 2 (Nov. 3, 2014), *available at* http://www.americanbar.org/content/dam/aba/images/office_president/issues_paper.pdf, *archived at* http://perma.cc/2TCS-U8HP.

[297] *See* Memorandum from Staff, Limited License Working Grp., Legal Aid Ass'n of Cal. to Members, Limited License Working Grp., Legal Aid Ass'n of Cal. 2 (June 17, 2013), *available at* http://www.laaconline.org/clientimages/53618/working%20group%20recommendations_june%202013.pdf, *archived at* http://perma.cc/7WZ7-NE7Y.

[298] *Id.* at 3.

[299] *See* Crossland & Littlewood, *supra* note 6, at 613-14 (drawing the analogy to the medical profession).

[300] Bruce Japsen, *CVS Doubles Up Walgreen in Retail Clinics as Obamacare Patients Seek Care*, FORBES (June 5, 2014),

model is premised on a similar idea: useful services can be delivered competently in a limited scope by professionals with less extensive training than those who have traditional licenses.

The LLLT program ensures competence by limiting the work that LLLTs can perform.[301] Before a new area of practice is permitted, the LLLT Board must conclude that LLLTs can deliver the services competently, and the Washington Supreme Court must agree.[302] Moreover, the LLLTs must take subject matter specific coursework before obtaining a LLLTs license, and they must pass a special exam for each practice area in which they want to be licensed.[303] These restrictions and requirements provide a high level of confidence that LLLTs will be competent in their designated areas of specialty.

In many ways, the LLLT training and licensing process is arguably a greater guarantee of competence than the training most law students receive. After all, lawyers are permitted to practice in any area once they obtain a license, even if they have never had any formal training in the subject. In contrast, LLLTs are permitted to deliver services only in the very specific areas where they have had training. Put another way, there is no more reason to be concerned about the competence of LLLTs who practice in a narrow area than the competence of lawyers who only receive very general training and are permitted to practice in nearly any area of their choosing.

Another way to think about the competence issue is that the LLLT program helps to reduce the number of unauthorized providers. As the Washington Supreme Court observed, "[t]here are far too many unlicensed, unregulated and unscrupulous "practitioners" preying on those who need legal help but cannot afford an attorney. Establishing a rule for the application, regulation, oversight and discipline of non-attorney practitioners establishes a regulatory framework that reduces the risk that members of the public will fall victim to those who are currently filling the gap in affordable legal services."[304]

The facilitation of consumer choice also favors the LLLTs program. Just as consumers have benefited from having the option of visiting pharmacies to obtain routine medical care, consumers will benefit from having the option of choosing a LLLT to provide some kind of legal services. If a LLLT can perform a legal service competently and at a lower cost than a lawyer, consumer should have the right to select a LLLT.

At the same time, the transparency principle is important in this

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http://www.forbes.com/sites/brucejapsen/2014/06/05/cvs-dominates-walgreen-in-retail-clinics-as-obamacare-patients-seek-care/, *archived at* http://perma.cc/FAP9-P443.

[301] Order at 2, 10-11, *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005 (Wash. June 14, 2012).

[302] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28(C)(2)(a) (2012).

[303] *See id.* R. 28 (C)(2)(c); WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app., Regulation 8 (2013).

[304] *See* Order, *supra* note 301, at 10.

context to ensure that consumers who use LLLTs are fully aware that LLLTs are not lawyers, that a LLLT's services are necessarily limited, and that a LLLT has training that differs in kind relative to lawyers. For this reason, Washington State currently prohibits LLLTs from advertising in such a way that "could cause a client to believe that the [LLLT] possesses professional legal skills beyond those authorized by the license held by the [LLLT]."[305]

The regulatory principle of ensuring adequate consumer remedies is also easy to satisfy. Because LLLTs are licensed and subject to their own rules of professional conduct, they will be subject to discipline or license revocation if they engage in inappropriate conduct.[306] LLLTs also can be required to carry insurance; indeed, an insurance market has emerged in Washington State to serve the emerging LLLT category.[307]

Finally, the LLLT option also fosters faith in the justice system and the rule of law by expanding the options that people have to access needed legal and law-related services.

In the end, the LLLT program serves the public interest and advances the regulatory objectives that should form the core of the law of legal services. The Washington Supreme Court made the point nicely in its order creating the LLLT program:

> [T]he basis of any regulatory scheme, including our exercise of the exclusive authority to determine who can practice law in this state and under what circumstances, must start and end with the public interest; and any regulatory scheme must be designed to ensure that those who provide legal and law related services have the education, knowledge, skills and abilities to do so. Protecting the monopoly status of attorneys in any practice area is not a legitimate objective.[308]

As the Washington Supreme Court itself conceded, the LLLT program is a relatively modest reform and will not "solve the access to justice crisis for moderate income individuals with legal needs."[309] It nevertheless provides a useful starting place for thinking about how the law of legal services could bring about changes that are qualitatively different from, and potentially more dramatic than, reforms relying solely on the law of lawyering.

V. CONCLUSION

The law of lawyering is undoubtedly important, but it offers few options for transforming the delivery of legal services. ABS is one possible exception, but even that reform envisions a world where lawyers

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[305] WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28(H)(4).
[306] *See id.* R. 28(C)(2)(h)(3)(A).
[307] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app., Regulation 12.
[308] Order, *supra* note 301, at 7.
[309] *Id.* at 11.

remain the exclusive deliverers of legal advice. The law of legal services reflects a different approach to regulatory innovation, one that seeks to authorize, but appropriately regulate, the delivery of legal and law-related assistance by more people who lack a traditional law license. At a time when legal services are increasingly unaffordable, the law of legal services may reflect a promising way to unlock innovation and reimagine the regulation of the twenty-first century legal marketplace.