ISSUES COMMITTEE
SUBCOMMITTEE TO STUDY REGULATORY CHANGE
North Carolina State Bar
Zoom Conference Call
November 19, 2020
2:00pm to 4:00pm

Ethics Act Statement

It is the duty of Committee members to avoid conflicts of interest and appearances of conflicts of interest in performing the duties as a member of the Committee to Study Regulatory Change and the North Carolina State Bar. Any member of the Committee who is aware of any personal conflicts or appearances thereof with respect to the matters before this Committee should disclose those at the meeting.

Agenda

I. Welcome

II. Approval of September 29, 2020 Minutes

III. Discussion with Lucy Ricca, Executive Director of Utah’s Office of Legal Services Innovation

IV. Goals for Next Quarter

V. Adjourn
The Issues Committee’s Subcommittee to Study Regulatory Change met by Zoom videoconference on September 29, 2020. Mark Henriques, the chair of the subcommittee, presided. The following members of the subcommittee were present: Heidi Bloom; A. Todd Brown; Ashley Campbell; Barbara R. Christy, State Bar President-Elect; Warren Hodges; Jeff Kelly; Joshua Malcolm; Dewitt F. “Mac” McCarley; Stephen Robertson; and Camille Stell. Also present were State Bar President C. Colon Willoughby and State Bar Vice President Darrin Jordan. The following guest was also present: Jeff Ward, Director of the Duke Center for Law & Technology. The following members of the staff were in attendance: Alice Neece Mine, executive director; Brian Oten, ethics counsel and director of special programs; and Mary Irvine, IOLTA director.

At approximately 2:02 pm, Mr. Henriques called the meeting to order and presided. He advised the members of the subcommittee of their responsibilities under the State Government Ethics Act. No conflicts or potential conflicts of interest were noted.

The first order of business was the review and approval of the minutes from the subcommittee’s prior meeting on September 2, 2020. Upon motion duly made and seconded, those minutes were approved.

Next, Mr. Henriques called on Mr. Oten to provide the subcommittee with an update on Arizona’s recent efforts in regulatory change. Mr. Oten informed the subcommittee that the Arizona Supreme Court approved the creation of licensed legal paraprofessionals, who would be empowered to provide limited legal services to the public. The Arizona Supreme Court also amended their Rules of Professional Conduct with the goal of lessening regulatory restrictions on the practice of law to facilitate improved access to justice. Specifically, the court amended their Rules of Professional Conduct on advertising largely in accordance with the ABA’s amendments to the Model Rules on advertising, and the court eliminated the prohibition on fee sharing with nonlawyers from Rule 5.4.

Mr. Henriques then introduced our guest for the meeting, Jeff Ward, Director of the Duke Center for Law & Technology. Mr. Ward began with a presentation on the ways technology can be utilized to improve legal services in North Carolina, including improved access to services for the public and improved efficiency in practice for lawyers. Mr. Ward stressed that the legal profession in North Carolina needs to address a “yawning gap” in access to justice through reform that is “multi-pronged, justice-driven, consumer-centered, data-informed, creative, tech-aware, outcomes-oriented, and immediate.” Mr. Ward then addressed a variety of myths regarding law and the practice thereof, technology, and regulation efforts/ideas. Mr. Ward’s identified legal myths included the myth that our legal system works and is accessible to all, that the current system works for lawyers, and that current regulatory efforts ensures integrity. Mr. Ward’s identified technology myths included that technology solves the access to justice gap, technology competes with and displaces lawyers, and that technology innovations are simply “money grabs.” Mr. Ward’s identified regulatory myths included the argument that law already has what it needs under
the current system, that these efforts are a call for de-regulation, and that reform efforts can or should wait.

During and after Mr. Ward’s presentation, Mr. Ward and subcommittee members engaged in in-depth discussion on the various myths, explanations, and possible opportunities related to regulatory change initiatives occurring throughout the country. Some observed that traditional billing practices in the legal profession offer no incentive or motivation for innovation and efficiency. Others discussed the concern of creating and implementing technological innovation in the practice of law that might only be available to the highest-paying clients. When asked what particular concern should be prioritized by the committee, Mr. Ward turned the subcommittee’s attention to Rule 5.4 and the prohibition on nonlawyer ownership/fee sharing. Mr. Ward observed that client problems are not exclusively legal problems, and that partnerships with nonlawyer services could create opportunities for clients to address the entirety of their problem(s) in a more efficient and more productive manner. Mr. Ward suggested that, if the legal profession were tasked with re-writing the Rules of Professional Conduct, it is unlikely that Rule 5.4’s current structure would be the agreed upon approach to the issue of nonlawyer ownership. Mr. Ward suggested that the legal profession needs to signal to the innovation community that it is ready and willing to engage in new thinking and design opportunities for the provision of legal services, and amending Rule 5.4’s strict prohibition on nonlawyer partnerships would be one way to create innovation opportunities that make an impact. Mr. Ward stressed throughout, however, that data analysis was critical for evaluating the effectiveness of any regulatory change and/or innovative efforts. To this end, Mr. Ward praised the model started in Utah with the regulatory sandbox, including the stepped approach for alternative business structures to begin operating in the state, to report their efforts (including successes and failures) for analysis, and the focus on ultimately creating an environment that is focused on improving legal services provided to the people of that state.

With the scheduled end of the meeting approaching, Mr. Henriques and the other subcommittee members thanked Mr. Ward for his presentation and engaging discussion. Mr. Henriques suggested the subcommittee continue to meet on a monthly basis, with the next meetings focused on specific regulatory ideas being explored and implemented in other states; notably, the regulatory sandbox and licensed paraprofessionals. Ms. Mine and Mr. Oten will work with Mr. Henriques to establish the content for the next meetings and poll the subcommittee members for availability at a later date.

There being no further business to come before the subcommittee, the meeting was adjourned at approximately 4:00pm.

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Brian Oten, Subcommittee Staff Counsel
Lucy Ricca
Executive Director at Office of Legal Services Innovation, Utah Supreme Court
Palo Alto, California • 500+ connections

Join to Connect

About
Experienced Executive Director with a demonstrated history of working in the law practice industry. Skilled in strategic planning, fundraising, networking, academic research and policy work.

Activity
Very cool panel from last month - worth checking out.
Shared by Lucy Ricca

The nomination period is currently open for the first-ever Alli Gerkman Legal Visionary Award! It was such an honor to work under Alli Gerkman's...
Liked by Lucy Ricca

Great in-depth reporting on the Utah project!
Shared by Lucy Ricca

Join now to see all activity

Experience
Lucy Ricca

Center on the Legal Profession Stanford Law School
Jul 2018 - Present 2 years 5 months
Stanford, California

(IAAELS) Institute for the Advancement of the American Legal System
1 year 1 month

• Special Project Advisor
  Sep 2019 - Sep 2020 1 year 1 month

• Special Project Advisor
  Sep 2019 - Sep 2020 1 year 1 month

Executive Director
Stanford Center on the Legal Profession
Jun 2013 - Sep 2019 6 years 4 months

Law Clerk
United States District Court, Western District of Virginia
Sep 2011 - Aug 2012 1 year
Abingdon, Virginia
Conduct legal research, draft bench memoranda and opinions in cases including criminal, complex civil litigation, class actions, and patent.

Attorney
Orrick, Herrington & Sutcliffe LLP
Sep 2006 - Sep 2011 5 years 1 month
San Francisco, CA
Specialize in complex commercial litigation, white collar criminal defense, securities litigation and general commercial litigation. Experience in antitrust and appellate litigation.

Paralegal
Williams & Connolly LLP
Sep 2002 - Aug 2003 1 year

Education

University of Virginia School of Law
JD
2003 - 2006
Activities and Societies: Virginial Journal of International Law, Notes Development Editor
An initiative of the Utah Supreme Court

supported by SJI, NCSC, and IAALS

The Office of Legal Services Innovation

The Office of Legal Services Innovation, a division of the Utah Supreme Court, is authorized to oversee the Utah legal Sandbox for new and innovative legal business models and services. The Office will accept and review applicants to the Sandbox and make recommendations to the Supreme Court as to those applicants to be approved to offer legal services within the Sandbox.

APPLY TO PARTICIPATE IN THE SANDBOX

Regulatory Reform Fact Sheet

Regulatory Reform FAQs
Read the August 2019 report “Narrowing the Access-to-Justice Gap by Reimagining Regulation”

'The August 2019 report from the Utah Work Group on Regulatory Reform describes the mission and road maps and details proposals that will guide the Implementation Innovation Office’s work.'
Get updates on the Innovation Office’s Work

Stay in the loop by signing up for occasional updates from the Innovation Office.

YOUR NAME

YOUR EMAIL

YOUR ORGANIZATION

TYPE OF ORGANIZATION

Law Firm

Submit
SUPREME COURT REGULATORY REFORM – REVISED – EFFECTIVE AUGUST 31, 2020

Shortly after the Supreme Court adopted Rules 5.4A and 5.4B of the Rules of Professional Conduct, it became evident that the fee-splitting and fee-sharing provisions of Rule 5.4A should be included in the Sandbox envisioned by Rule 5.4B and Standing Order 15. In response to input from the Bar Commission and others, the Supreme Court unanimously voted to make the necessary changes.

The relevant provisions of Rules 5.4A and 5.4B have been combined into Rule 5.4. Rules 5.4A and 5.4B are repealed effective immediately. Combined Rule 5.4 and revised Standing Order 15 are adopted effective immediately.

Repealed Rules

RPC Rule 5.4A
RPC Rule 5.4B
Combined Rule and Revised Standing Order

Redline Combined RPC Rule 5.4
Clean Combined RPC Rule 5.4
Redline Revised Utah Supreme Court Standing Order No. 15
Utah Supreme Court Standing Order No. 15

This Standing Order establishes a pilot legal regulatory sandbox and an Office of Legal Services Innovation to assist the Utah Supreme Court with overseeing and regulating the practice of law by nontraditional legal service providers or by traditional providers offering nontraditional legal services. Unless otherwise provided, this Order shall expire on the second anniversary of its effective date.


Background

The access-to-justice crisis across the globe, the United States, and Utah has reached the breaking point. As to how affordable and accessible civil justice is to people, the 2020 World Justice Project Rules of Law Index ranks the United States 109th of 128 countries. As to that same factor, out of the thirty-seven high-income countries, the United States ranks dead last.

To put it into perspective, a recent study by the Legal Services Corporation found that 86 percent "of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help." Similarly, a recently published study out of California "[m]odeled on the Legal Services" study, concluded that 60 percent of that state’s low-income citizens and

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1 Access to justice means the ability of citizens to meaningfully access solutions to their justice problems, which includes access to legal information, advice, and resources, as well as access to the courts. See Rebecca L. Sandefur, Access to What?, DAEDALUS, Winter 2019, 49.


3 Id.

55 percent of its citizens “regardless of income experience at least one civil legal problem in their household each year.” The study also found that 85 percent of these legal problems “received no or inadequate legal help.”\textsuperscript{5} Closer to home, an in-depth April 2020 analysis of the legal needs of Utahns living at 200 percent or less of the federal poverty guidelines found that their unmet legal needs stood at 82 percent.\textsuperscript{6}

For years, the Utah Supreme Court has made combating the access-to-justice crisis confronting Utahns of all socioeconomic levels a top priority. To date, the Supreme Court, along with the Judicial Council and the Utah Bar Association, have worked ceaselessly to improve access to justice through many initiatives: the Utah Courts Self-Help Center, the Licensed Paralegal Practitioner Program, form reform, and the Online Dispute Resolution Program, to name but a few. What has become clear during this time is that real change in Utahns’ access to legal services requires recognition that we will never volunteer ourselves across the access-to-justice divide and that what is needed is market-based, far-reaching reform focused on opening up the legal market to new providers, business models, and service options.

In its boldest step toward bridging the access-to-justice gap, the Supreme Court has undertaken an effort to reevaluate and amend several of the regulations it has historically relied upon in governing the practice of law. This Standing Order and accompanying rule changes implement that effort. The Supreme Court believes that the regulatory reform set out in this Standing Order will shrink the access-to-justice gap by fostering innovation


and harnessing market forces, all while protecting consumers of legal services from harm.\(^7\)


In accordance with its plenary and exclusive authority and responsibility under article VIII, section 4 of the Utah Constitution to govern the practice of law, the Utah Supreme Court establishes the Office of Legal Services Innovation (Innovation Office). The Innovation Office will operate under the direct auspices of the Supreme Court and its purpose will be to assist the Supreme Court in overseeing and regulating nontraditional legal services providers and the delivery of nontraditional legal services.\(^8\) To this end, and subject to Supreme Court oversight, the Innovation Office will establish and administer a pilot legal regulatory sandbox (Sandbox)\(^9\) through which individuals and entities may be approved to offer nontraditional legal services to the public through nontraditional providers or traditional providers using novel approaches and means, including options not permitted by the Rules of Professional Conduct and other applicable rules. The Supreme Court establishes the Innovation Office and the Sandbox

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\(^7\) The Supreme Court’s decision to pursue changes regarding its governance of the practice of law is in keeping with (1) the Resolution of the Conference of Chief Justices and (2) the Resolution of the American Bar Association’s House of Delegates “to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public . . . .”

\(^8\) In Utah, the practice of law is defined by Utah Supreme Court Rule of Professional Practice 14-802. This Standing Order incorporates that definition. For an understanding of “nontraditional legal services providers” and “nontraditional legal services,” please refer to Section 3.3 (Regulatory Scope).

\(^9\) A regulatory sandbox is a policy tool through which a government or regulatory body permits limited relaxation of applicable rules to facilitate the development and testing of innovative business models, products, or services by sandbox participants.
for a pilot phase of two years from the effective date of this Standing Order. At the end of that period, the Supreme Court will carefully evaluate the program as a whole, including the Sandbox, to determine if it should continue. Indeed, unless expressly authorized by the Supreme Court, the program will expire at the conclusion of the two-year study period.

2. **Innovation Office**

In carrying out the responsibilities designated to it by the Utah Supreme Court, the Innovation Office, at all times, will be subject to the Supreme Court’s direction and control. Furthermore, the Innovation Office will have no authority to regulate any individuals, entities, or activities that are beyond the Supreme Court’s constitutional scope and mandate to govern the practice of law. With these overarching restrictions firmly in mind, the Innovation Office will have responsibility with respect to the regulation of non-traditional legal services provided by traditional legal providers and non-traditional and traditional legal services provided by non-traditional legal providers, including those services offered within the Sandbox and those that have been approved for the general legal market (“exit or exited the Sandbox”). The Innovation Office will be responsible for (1) evaluating potential entrants to the Sandbox and recommending to the Supreme Court which entrants should be admitted; (2) developing, overseeing, and regulating the Sandbox, including establishing protocols and monitoring nontraditional legal providers and services therein, as well as terminating an

10 By way of illustration, the Supreme Court has authorized real estate agents to advise their customers with respect to, and to complete, state-approved forms directly related to the sale of real estate. See Rule of the Utah Supreme Court Rules of Professional Practice 14-802(c)(12)(A). Outside of this grant, and the ability to modify it, the Supreme Court has no authority with respect to regulating real estate agents. That authority rests with the legislative and executive branches. By way of further illustration, some attorneys hold both J.D.s and M.D.s. The Supreme Court only governs the ability of these individuals to practice law. It has never interfered with their ability to practice medicine.
entrant’s participation in the Sandbox where deemed appropriate and in keeping with the regulatory principles set forth below; and (3) recommending to the Supreme Court which entrants be permitted to exit the Sandbox and enter the general legal market.\(^{11}\)

The Innovation Office will be funded initially by a grant from the State Justice Institute and in-kind contributions from the National Center for State Courts and the Institute for the Advancement of the American Legal System. The Innovation Office will have the authority to seek additional grant funding and may also be supported through licensing fees as noted in Section 4.9.

The Innovation Office will meet regularly and at least monthly, on a day and at a time and place of its convenience. It will also report monthly to the Supreme Court during one of the Court’s regularly scheduled meetings.

### 2.1 Office Composition

The Utah Supreme Court will appoint the members of the Innovation Office.\(^ {12}\) The Innovation Office will consist of a Chair, Vice-Chair, and nine additional members, all serving on a volunteer basis. Five of the members shall serve as the Executive Committee of the Innovation Office. The Executive Committee shall be composed of the Chair, Vice-Chair, Executive Director, and two additional members appointed by the Court. The Executive Committee will be responsible for setting the Agenda for each meeting of the Innovation Office and for making initial recommendations to the Innovation Office regarding applicants.

In the event of a vacancy, or on its own motion, the Supreme Court will appoint, depending on the vacancy, a new Chair, Vice-Chair, or member. The Court will strive to appoint nonlawyers

\(^{11}\) Innovation Office resources may limit the number of Sandbox entrants.

\(^{12}\) The Supreme Court Task Force on Regulatory Reform shall continue to operate pending the appointment of the members of the Innovation Office. Upon appointment of the members of the Innovation Office, Utah Supreme Court Standing Order 14 shall be vacated in accordance with the terms of that Standing Order.
(public members) as at least five of the members and will prioritize a membership body diverse across gender, race, ethnicity, sexual orientation, socioeconomic background, and professional expertise.

Innovation Office actions will be taken by majority vote by a quorum of the members.

2.2 Conflicts of Interests

The Utah Supreme Court acknowledges that instances may arise in which Innovation Office members may face conflicts of interest between their business or personal affairs and their member duties. A conflict of interest arises when members—or a member of their immediate family—have a financial interest in a Sandbox applicant or participant or in an entity that has successfully exited the Sandbox. For example, a member’s firm may apply to offer services as part of the Sandbox. Recognizing that transparency and public confidence are paramount concerns, the Supreme Court requires that in cases of conflict, the implicated member(s) disclose the conflict to the Innovation Office in writing and recuse from any involvement regarding that particular Sandbox applicant or participant. The Innovation Office will maintain a record of all conflicts and recusals and make all records related to conflicts and recusals publicly available.

2.3 Office Authority

Subject to the limitations set forth in the Standing Order and the ultimate authority and control of the Utah Supreme Court, the Innovation Office will have the authority to oversee the nontraditional provision of legal services (see Section 3.3.2 on Regulatory Scope) using an objectives-based and risk-based approach to regulation.

Objectives-based regulation specifically and clearly articulates regulatory objectives to guide development and implementation. Both the Innovation Office and the Sandbox participants will be guided in their actions by specific objectives.

Risk-based regulation uses data-driven assessments of market activities to target regulatory resources to those entities and
activities presenting the highest risk to the regulatory objectives and consumer well-being. Using risk-based regulation enables the Innovation Office to better prioritize its resources and manage risks in the Utah legal services market.

The Supreme Court grants the Innovation Office the authority to develop and propose processes and procedures around licensing, monitoring, and enforcement to carry out its mission in light of the Regulatory Objective and Regulatory Principles outlined in Section 3.\textsuperscript{13}

The Innovation Office must submit proposed processes, procedures, and fee schedules to the Supreme Court for approval as they are developed and before they take effect.

3. Regulatory Objective, Principles, and Scope

3.1 Regulatory Objective

The overarching goal of this reform is to improve access to justice. With this goal firmly in mind, the Innovation Office will be guided by a single regulatory objective: To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services. The Utah Supreme Court’s view is that adherence to this objective will improve access to justice by improving the ability of Utahns to meaningfully access solutions to their justice problems, including access to legal information, advice, and other resources, as well as access to the courts.

\textsuperscript{13} The Implementation Task Force on Regulatory Reform has already established an Innovation Office Manual. A copy of that manual may be viewed at sandbox.utcourt.gov.
3.2 Regulatory Principles

The Innovation Office will be guided by the following regulatory principles:

1. Regulation should be based on the evaluation of risk to the consumer.\textsuperscript{14}

2. Risk to the consumer should be evaluated relative to the current legal services options available.\textsuperscript{15}

3. Regulation should establish probabilistic thresholds for acceptable levels of harm.\textsuperscript{16}

4. Regulation should be empirically driven.\textsuperscript{17}

5. Regulation should be guided by a market-based approach.\textsuperscript{18}

\textsuperscript{14} The phrase “based on the evaluation of risk” means that regulatory intervention should be proportional and responsive to the actual risk of harm posed to the consumer, as supported by the evidence.

\textsuperscript{15} The phrase “relative to the current legal service options available” means that risk should not be evaluated as against an ideal of perfect legal representation by a lawyer. Risk should rather be measured as against the reality of current market options for consumers. In many cases, that means no access to legal representation or legal resources at all.

\textsuperscript{16} The phrase “probabilistic thresholds for acceptable levels of harm” (the chance a consumer is harmed) means the probability of a risk occurring and the magnitude of the harm should the risk occur. Based on this assessment, the Innovation Office will determine thresholds of acceptable risks for identified harms. Regulatory resources should be focused on areas in which, on balance, there is a high probability of harm or a significant impact from that harm on the consumer or the market.

\textsuperscript{17} The phrase “empirically driven” means that the regulatory approach and actions must be supported, whenever possible, by data from the legal services market.

\textsuperscript{18} The phrase “market-based approach” means that regulatory tactics should seek to align regulatory incentives with increased revenue or decreased costs for market participants in order to encourage desired behavior or outcomes.
3.3 Regulatory Scope

As noted, under the auspices of the Utah Supreme Court, the Innovation Office will be responsible for developing, overseeing, and regulating the Sandbox, including the oversight of nontraditional legal providers and services therein. The Supreme Court offers the following examples to help individuals and entities, lawyers and nonlawyers alike, understand the Innovation Office’s regulatory scope. These examples are just that and the list is not intended to be exhaustive.

3.3.1 Outside the Regulatory Scope

Individuals and entities that carry out the following activities are outside the Innovation Office’s regulatory scope, remain under the Utah Bar’s authority, and need not notify the Innovation Office:

Partnerships, corporations, and companies entirely owned and controlled by lawyers in good standing; individual lawyers with an active Utah Bar license; and legal services nonprofits:

(i) offering traditional legal services as permitted under the Rules of Professional Conduct; or

(ii) using new advertising and solicitation, fee-sharing, or fee-splitting approaches as contemplated by the Rules of Professional Conduct.¹⁹

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¹⁹ Partnerships, corporations, and companies entirely owned and controlled by lawyers; individual lawyers with an active Utah Bar license; and legal services nonprofits may not, however, engage in fee-splitting or fee-sharing in an effort to avoid the prohibition against outside ownership set forth in rule 5.4A of the Utah Rules of Professional Conduct.
3.3.2 Within the Innovation Office’s Regulatory Scope

Individuals and entities that carry out the following activities are within the scope of the Innovation Office’s regulatory authority and are subject to this Standing Order’s requirements:

(a) Partnerships, corporations, and companies entirely owned and controlled by lawyers; individual lawyers with an active Utah Bar license; and legal services nonprofits sharing or splitting fees with or partnering with a nonlawyer-owned entity not already authorized by the Innovation Office to offer legal services; as contemplated by Rule 5.4B;

(b) Nonlawyer owned entities, or legal entities in which nonlawyers are partial owners (for profit or nonprofit):

(i) offering legal practice options whether directly or by partnership, joint venture, subsidiary, franchise, or other corporate structure or business arrangement, not authorized under the Rules of Professional Conduct in effect prior to [Month] [Date], 2020, or under Utah Supreme Court Rule of Professional Practice 14-802; or

(ii) practicing law through technology platforms, or lawyer or nonlawyer staff, or through an acquired law firm.

3.3.3 Disbarred Lawyers and Individuals with Criminal History

Disbarred Lawyers. The Utah Supreme Court has determined that lawyers who have been disbarred present a significant risk

20 This list is not meant to be exclusive or exhaustive. There may be business arrangements, models, products, or services not contemplated in Section 3.3.2, which are welcome and should come through the Sandbox. The Sandbox is not, however, meant to enable lawyers not licensed in Utah to practice in Utah without authorization from the Utah State Bar.

21 For purposes of this Standing Order, a lawyer whose license has been suspended qualifies as a disbarred lawyer during the period of suspension.
of harm to consumers if in the position of ownership or control of an entity or individual providing legal services. Therefore, disbarred lawyers are not permitted to gain or hold an ownership interest of greater than 10 percent in any entity authorized to practice law under Rule 5.4B or this Standing Order.

In addition, any entity applying for authorization to offer services in the Sandbox must disclose the following:

(a) whether the entity has any material corporate relationship and/or business partnership with a disbarred lawyer, and

(b) whether a disbarred lawyer works with or within the entity, in either an employment or contractual relationship, and is in a managerial role in the direct provision of legal services to consumers.

Criminal History. The Supreme Court has determined that individuals with certain serious criminal histories may present an increased risk of harm to consumers if in the position of ownership or control of a legal service entity.

Any entity applying for authorization to offer services in the Sandbox must disclose the following:

(a) whether any individual holding an ownership interest of greater than 10 percent in the entity has a felony criminal history,

(b) whether the entity has any material corporate relationship or business partnership with an individual with a felony criminal history, and

(c) whether an individual with a felony criminal history works with or within the entity, in either an employment or contractual relationship, and is in a managerial role in the direct provision of legal services to consumers.

The Innovation Office, on receipt of any disclosures required above, will incorporate the information into the risk assessment of the entity as appropriate. To the extent permitted by law, the Innovation Office may also conduct independent criminal history checks.
Falsifying any information, including lawyer status and individual criminal history, is a basis for dismissal from the Sandbox and in the event the entity or individual has exited the Sandbox, a basis for loss of licensure. Other criminal and civil sanctions may also apply.

4. The Sandbox

The Sandbox is a policy tool by which the Utah Supreme Court, through the Innovation Office, can permit innovative legal services to be offered to the public in a controlled environment. The Innovation Office will develop, oversee, and regulate the Sandbox according to the guidance outlined in this Standing Order. Individuals and entities wanting to offer the public nontraditional legal business models, services, or products must notify the Innovation Office. Individuals and entities in the Sandbox will be subject to such data reporting requirements and ongoing supervision as the Innovation Office determines, so long as the requirements fall within its regulatory authority.

4.1 Application

All individuals and entities that fall within the Regulatory Scope (Section 3.3.2) must apply to the Innovation Office for authorization to enter the Sandbox.

4.2 Application Process

The objective of the application process is for the Innovation Office to determine that the legal service proposed by the applicant furthers the Regulatory Objective and does not present unacceptable levels of risk of consumer harm. The Innovation Office will develop an efficient and responsive process for intake, review, assessment, and response to applications.

The Utah Supreme Court contemplates that the application process will be iterative and will include communications between the Innovation Office and the various applicants, as necessary.

The Innovation Office will make a determination as to whether an applicant’s proposed legal service furthers the Regulatory Objective and does not present an unacceptable risk of consumer
harm. The Innovation Office will make recommendations to the Supreme Court regarding whether an applicant should be authorized and the associated requirements for the applicant (e.g., reporting, disclosure, risk mitigation, insurance requirements). In developing these requirements, the Innovation Office will consider the Regulatory Objective and Regulatory Principles.

If the Innovation Office does not find that an applicant’s proposed legal service furthers the Regulatory Objective or finds that it presents an unacceptable risk of consumer harm, the Innovation Office will deny the proposed authorization, and will include a brief written explanation supporting the finding. The Innovation Office will develop a process for appeal of a denial of a proposed authorization to the Supreme Court.

4.3 Authorization

As with the licensing of lawyers and Licensed Paralegal Practitioners, the Utah Supreme Court will ultimately be responsible for approving or denying authorization to nontraditional legal service providers.

An approved application means permission to offer the proposed legal service in the Sandbox as outlined in the approval and under the Innovation Office’s authority. Authorized participants and services are deemed authorized to practice law in Utah, albeit on a limited and temporary basis, under Utah Supreme Court Rule of Professional Practice 14-802.

Denial of authorization by the Supreme Court has the effect of returning the application to the Innovation Office. The Supreme Court may include a brief written explanation of the reasons for its decision not to authorize the applicant. This information may guide the applicant in how to potentially resolve concerns and revise its application for reconsideration for authorization. However, to be clear, some (perhaps many) applicants may not be approved to enter or exit the Sandbox.

Additionally, and to be clear, authorization to practice law does not impact any of the other requirements that may be imposed upon an entity (e.g., business license, tax commission registration, etc.).
4.4 Licensing (Exiting the Sandbox)

Sandbox participants that are able to demonstrate that their legal services are safe—i.e., that they do not cause levels of consumer harm above threshold levels established by the Innovation Office—may be approved to exit the Sandbox and may be granted the appropriate license to practice law by the Utah Supreme Court pursuant to Utah Supreme Court Rule of Professional Practice 14-802. Such providers and services will remain under the regulatory authority of the Supreme Court, through the Innovation Office and subject to such monitoring and reporting requirements as the terms of the license indicate and subject to the enforcement authority of the Innovation Office.

The Innovation Office will develop the process (subject to Supreme Court approval) by which providers and services exit the Sandbox. It is anticipated that this process will generally follow that outlined for application approval, including an assessment of the provider or service, a finding on the consumer safety of the provider or service, and a recommendation to the Supreme Court as to the scope of the license and associated requirements (e.g., reporting). The Innovation Office is authorized to make the licensing assessment, findings, and recommendations at both the individual or entity level and a more categorical level—i.e., to recommend that a category of legal service providers be licensed to practice law in Utah.

If the Innovation Office does not find that a participant’s proposed legal service furthers the Regulatory Objective or finds that it presents an unacceptable risk of consumer harm, the Innovation Office will deny the proposed licensure, and will include a brief written explanation supporting the finding. The Innovation Office will develop and propose the process for appeal of a denial of Sandbox exit to the Supreme Court.

4.5 Fees

The Innovation Office will have the authority to propose a fee schedule to the Utah Supreme Court. Unless otherwise required, fees paid will be used to fund the Innovation Office.
4.6 Monitoring and Measuring Risk

The Innovation Office will have the authority to develop the measurements by which it assesses and manages risk. The Innovation Office will identify specific harms presenting the most significant risk to the Regulatory Objective. All regulated providers, whether in the Sandbox or after exiting, have a proactive duty to report any unforeseen risks or harms of which they become aware.

As noted, the Innovation Office will have the authority to develop specific data reporting requirements to monitor consumer risk of harm as part of both Sandbox authorization and general licensing of proposed legal services. The Innovation Office will develop processes and procedures for intake, review, and assessment of incoming data at an individual provider level, across different market sectors, and across the market as a whole. The Innovation Office will have the authority to increase or decrease reporting requirements as indicated by the provider’s performance in the market and compliance with the Innovation Office’s requirements.

The Innovation Office will have the authority to take proactive actions to effect monitoring of providers and the market as a whole, including but not limited to market surveys, expert audits, anonymous testing, and “secret shopper” tests. The Innovation Office will also develop processes and procedures for intake, review, and assessment of information coming from sources such as media, other governmental or nongovernmental institutions, whistleblowers, and academia.

The Utah Supreme Court acknowledges that this regulatory approach does not remove all possibility of harm from the market and, in fact, contemplates that sometimes there may be no regulatory enforcement action even though some consumers may experience harm. Nevertheless, aggrieved consumers may seek relief and remedy through traditional channels of civil litigation or, if applicable, the criminal justice system.

4.7 Consumer Complaints

The Innovation Office will develop a process by which consumers may directly complain to the Office. The Innovation Office will
develop a process by which individual complaint information is fed into the larger data reporting system to contribute to the assessment of risk.

4.8 Enforcement

The Innovation Office will develop standards for enforcement authority upon regulated providers in line with the Regulatory Objective and Regulatory Principles. Enforcement will generally be triggered when the evidence of consumer harm exceeds the applicable acceptable consumer harm threshold. The Innovation Office will also develop the range of enforcement mechanisms it deems appropriate, including but not limited to education, increased reporting requirements, fines, and suspension or termination of authorization or license. Last, the Innovation Office will develop a process for appealing enforcement decisions to the Innovation Office, and then to the Utah Supreme Court.

Once the Innovation Office has developed these various processes and procedures, they will be submitted to the Supreme Court for review and, if appropriate, approval. Both the Supreme Court and the Innovation Office will strive to make the enforcement process as transparent, targeted, and responsive as possible.

4.9 Standards of Conduct

As stated in Rule 5.4(B), lawyers engaging with the nontraditional provision of legal services, as owners, employees, contractors, or business partners with Sandbox participants or licensed providers are required to uphold their duties as required by the Rules of Professional Conduct.

4.10 Confidentiality

The Innovation Office shall maintain a commitment to transparency in the execution of its mission. Identities of applicants to the Sandbox and the applications themselves are presumed to be public information and will be shared via the Innovation Office website.

Applicants may designate appropriate, specific information in the application and/or in any data reported as required by the Innovation Office as confidential business information under the
Government Records and Access Management Act (GRAMA). See UTAH CODE § 63G-2-305(1)-(2). The Innovation Office will maintain the confidentiality of such designated information and it will be redacted from the publicly released documents. Nothing, however, in this paragraph limits the ability of the Innovation Office to provide aggregate and anonymized data sets to outside researchers, subject to a duly executed data sharing agreement with the Court.

### 4.11 Reporting Requirements

The Innovation Office will be responsible for regular reporting to the Utah Supreme Court and the public on the status of the Sandbox, the Sandbox participants, licensed providers, and consumers.

The reports to the Supreme Court must be monthly. Reports to the Supreme Court must include the following:

- The number of applicants
- General information about applicants (e.g., type of legal entity, ownership makeup, target market, proposed type of service, legal need to be addressed, subject matter served)
- Numbers of (along with general information)
  - Applicants recommended for Sandbox entry
  - Applicants denied Sandbox entry
  - Sandbox applicants on hold
  - Applicants recommended to exit Sandbox
  - Applicants not recommended to exit Sandbox
- Numbers and demographic data (as available) on consumers served by the Sandbox and licensed providers
- Identification of risk trends and responses

The Innovation Office will, subject to existing law, have the authority to determine the nature and frequency of its reports to the public, but must, at a minimum, report the information identified above on an annual basis (keeping anonymity and confidentiality as required).
4.12 Jurisdiction
Entities authorized to practice law within the Sandbox and licensed to practice law on exiting the Sandbox are subject to the jurisdiction of this Court. Any false or misleading statements made by entities or their members throughout the regulatory relationship, whether during application, authorization, reporting, monitoring, or enforcement, whether discovered at the time or at any time afterward, will be independent grounds for enforcement and an aggravating factor in any enforcement proceeding based on other conduct. Any fraudulent or materially misleading statements made by an entity or its members to the Innovation Office or the Court may result in revocation of the entity’s authorization to practice law.

4.13 Termination of Pilot Phase
The Sandbox is a policy tool, adopted by the Utah Supreme Court to develop a new regulatory approach to nontraditional legal services and to inform the Supreme Court’s decision-making on rule changes necessary to support the expanded legal services market. The Supreme Court has set out a two-year period of operation for this pilot phase of the Innovation Office and Sandbox.

At the end of the pilot phase, the Supreme Court will determine if and in what form the Innovation Office will continue. Sandbox participants authorized and in good standing at the end of the two-year period and for whom there appears to be little risk of consumer harm will be able to continue operations under the authority of the Innovation Office or other appropriate entity should the Innovation Office cease to exist. Entities that have successfully exited the Sandbox will be able to continue operations under the authority of the Innovation Office or other appropriate entity should the Innovation Office cease to exist.
Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer may provide legal services pursuant to section (b) of this Rule only if there is at all times no interference with the lawyer’s:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer may permit a person to recommend, retain, or pay the lawyer to render legal services for another.

(c) A lawyer or law firm may share legal fees with a nonlawyer if:

(1) the fee to be shared is reasonable and the fee-sharing arrangement is reasonable and has been authorized as required by Utah Supreme Court Standing Order No. 15;

(2) the lawyer or law firm provides written notice to the affected client and, if applicable, to any other person paying the legal fees;

(3) the written notice describes the relationship with the nonlawyer, including the fact of the fee-sharing arrangement; and

(4) the lawyer or law firm provides the written notice before accepting representation or before sharing fees from an existing client.

(d) A lawyer may practice law with nonlawyers, or in an organization, including a partnership, in which a financial interest is held or managerial authority is exercised by one or more persons who are nonlawyers, provided that the nonlawyers or the organization has been authorized as required by Utah Supreme Court Standing Order No. 15 and provided the lawyer shall:
(1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and

(2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

Comments

[1] The provisions of this Rule are to protect the lawyer’s professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, manages the lawyer’s work, or recommends retention of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a), such arrangements must not interfere with the lawyer’s professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent). This Rule does not lessen a lawyer’s obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of being in a business relationship with a lawyer. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer’s duty to maintain client confidences would be compromised.

[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent).
Paragraphs (b) and (c) permit individual lawyers or law firms to pay for client referrals, share fees with nonlawyers, or allow third party retention. In each of these contexts, the financial arrangement must be reasonable, approved by the Utah Supreme Court for authorization under Supreme Court Standing Order No. 15, and disclosed in writing to the client before engagement and before fees are shared. Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer’s professional judgment, ensure the lawyer’s loyalty to the client, and protect client confidences.

Paragraph (d) permits individual lawyers or law firms to enter into business or employment relationships with nonlawyers, whether through nonlawyer ownership or investment in a law practice, joint venture, or through employment by a nonlawyer owned entity. In each instance, the nonlawyer owned entity must be approved by the Utah Supreme Court for authorization under Standing Order No. 15.
## Facts on Utah Reforms

<table>
<thead>
<tr>
<th>Overview</th>
<th>The Utah Supreme Court has authorized bold reforms to the regulation of lawyers and legal practice to increase Utahns access to legal help and to optimize the ability of legal practitioners to meet the challenges of economic and technological disruption. The reforms include allowing new providers of legal help, new business models for legal practitioners, and new methods of providing legal help. The reforms will take place under a new regulatory system focused on protecting consumers from harm. Ultimate authority over all new providers rests in the Utah Supreme Court.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Process</td>
<td>In late 2018, the Utah Supreme Court tasked Justice Deno Himonas and John Lund, past President of the State Bar, to form a working group to study and make recommendations to the Court on how to reform the regulatory structure of the legal profession to promote innovation to increase both access and affordability of legal services. The working group included leading Utah lawyers and leading academics, including two economists. The working group submitted its report to the Supreme Court in August 2019. On August 28, 2019, the Court voted unanimously to approve the report and form the Implementation Task Force on Regulatory Reform.</td>
</tr>
<tr>
<td>Report</td>
<td>Titled “Narrowing the Access to Justice Gap by Reimagining Regulation,” the report submitted to the Court by the working group proposed two main tracks for reform of the regulation of legal practice.</td>
</tr>
<tr>
<td></td>
<td>- Substantially loosening restrictions on the corporate practice of law, lawyer advertising, solicitation, and fee arrangements, including referrals and fee sharing;</td>
</tr>
<tr>
<td></td>
<td>- Simultaneously establishing a new regulatory body under the supervision and direction of the Supreme Court to advance and implement a risk-based, empirically-grounded regulatory process for legal service entities offering services in a pilot regulatory sandbox structure.</td>
</tr>
<tr>
<td>Implementation Task Force</td>
<td>The Implementation Task Force on Regulatory Reform is made up of leading legal professionals and academics. The Task Force has been working since September 2019 to formulate necessary rule changes and develop the</td>
</tr>
</tbody>
</table>
### Utah Legal Regulatory Reform: Basic Facts

#### Regulatory Approach

The Task Force is designing a new regulatory body to oversee new providers and methods of legal practice using an “objectives-based, risk-based” approach to regulation. This means that regulation of these new providers will be guided by a clear objective (goal) and effected by requiring detailed reporting from providers on risk of harm to consumers.

The objective set by the Supreme Court is: *To ensure consumers access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services.*

Where the data show that the risk of a particular service is too high (consumers are harmed more than they would be without the service), the provider is fined, suspended, or terminated. All licensing and enforcement decisions will rest finally with the Utah Supreme Court.

#### Sandbox

The new regulatory body will use a regulatory sandbox structure to pilot its model and to allow new providers and services a controlled environment in which to launch and test products, services, and models. A regulatory sandbox is a well-established policy tool through which regulators permit new models and services in a market under careful oversight to test the interest, viability, and consumer impact and inform policy development. In Utah, new legal practice providers and services will have to apply to enter the regulatory sandbox before they will be permitted to offer services in the legal market. If they are admitted, they will be able to offer services under careful oversight until they are able to show no increase in consumer harm.

#### Why

The Utah Supreme Court recognized that the current regulation of the legal system has created a crisis of access for regular Americans and a professional crisis for many American lawyers. The rules governing the practice of law...
are too complex, too strict, and divorced from the realities of 21st century American life. The rules have become economic restrictions, preventing lawyers from creating new business models, developing new partnerships, offering new kinds of services and products, and keeping out many potential innovators. As the way legal help is provided is changing rapidly because of technology and globalization, the Court recognized the need for a more open approach, able to be responsive and flexible with changing circumstances while focused on protecting consumers. Risk-based regulation is that approach.
Utah Regulatory Reform  
Frequently Asked Questions  

I. The Need for Reform  

Who is driving this reform movement?  
- The Utah Supreme Court is driving this reform. Galvanized by concerns around the access to justice gap in Utah and throughout the country, the Court has taken on multiple projects to increase people’s ability to get innovative, high quality, affordable resolution to their legal problems: online dispute resolution for small claims, licensed paralegal practitioners, and regulatory reform.  
- In fall 2018, the Court established a joint task force with the Utah State Bar to assess the potential of regulatory reform, loosening restrictions around the practice of law to open up the market for legal services. The task force was led by Justice Deno Himonas and former President of the Utah State Bar and Parsons Behle partner John Lund.  
- The task force submitted a report to the Supreme Court in August 2019 (Narrowing the Access to Justice Gap by Reimagining Regulation). The report was approved and the Court established an Implementation Task Force, including most of the initial members and adding several more leaders of the Utah legal profession, including former Chief Justice Christine Durham.  
- This Standing Order to establish an Oversight Board for the regulatory sandbox is a result of the Implementation Task Force’s work.  

Why do we need such dramatic changes to how law is practiced?  
- These are not such dramatic changes. It is simply allowing different kinds of organizations, other than 100% lawyer-owned firms, to provide legal services – much like has happened for decades in other professions like medicine and accounting, and in law in the U.K. and Australia.  
- The need for legal help is great: Each year thousands of Utahns face problems like employment disputes, divorce or custody proceedings, small business matters, wage theft, eviction, or consumer debt without any help at all. In Utah’s largest district, in 93% of all family and civil law disputes, one party did not have a lawyer.  
- Legal aid and pro bono legal help will never be able to meet the need. We need to change the rules controlling who can offer legal help and how law is practiced and so that people are able to get help in more ways when they need it.  

Is this going to completely devalue my degree and my career? What does this mean for lawyers, particularly as we enter another recession?  
- These changes will open up new opportunities for lawyers to practice law in new ways, in new business models, and with new colleagues.
- Fewer people are using lawyers’ services already – lawyers are too expensive and cannot meet people where and when they need help. We need new models for legal services, including technology, to increase consumer engagement and demand.

- Currently, 33% of attorney time is spent on business development and 48% is spent on administrative tasks. That leaves only 2.2 hours of billable time per 8 hour work day. By partnering with other professionals, lawyers will not have to bear the entire risk and responsibility of running a legal practice business, and can focus on practicing law.

**But isn’t this effort just a way to open up the market for the Big Four or legal tech companies?**

- No. The Big Four accounting firms already work with lawyers to provide multidisciplinary services in the U.S., and legal tech companies like Legal Zoom and Rocket Lawyer already serve thousands of Utahns in the context of the existing regulatory structure. Certainly they will be permitted to offer new services in the sandbox, including partnering with Utah lawyers, like anyone else.

- But the sandbox will allow for innovative services from a range of entities -- including multi-professional firms and retail businesses or online tools with lawyer staff. One potential example is the company EstateGuru, founded by Utah native Jon Chichoni, which offers a tech platform to facilitate and scale individual lawyers’ ability to offer estate planning services to consumers.

**How are you going to ensure lawyers’ professional independence?**

- Nothing in the proposed reforms removes a lawyer’s duties to his/her client under Utah’s Rules of Professional Conduct including those of competence, diligence, loyalty, and independence of judgement.

- To the extent any proposed business model could implicate a challenge to a lawyer’s independence in a way that could harm a consumer, the new regulator will address this as a potential risk to be identified, mitigated, and monitored.

- In jurisdictions that have permitted outside ownership or investment in legal practices, such as the UK and Australia, no evidence has emerged of consumer harm caused by compromised independence.

**II. Regulatory Sandbox**

**What is being proposed and how are things going to change?**

- The task force has made two major proposals focused on a careful and controlled approach to opening up the market for legal services:
  - (1) Changes to a number of the Utah Rules of Professional Conduct as follows:
    - Rule 5.4 will allow fee-sharing with nonlawyers.
    - Rule 5.4 will allow nonlawyer ownership investment, or partnership in law firms or other entities providing legal practice
services provided such entities are authorized by the Supreme Court.

- Rule 1.5(e) will be removed to permit fee-splitting among lawyers in the same office.
- Rule 7.1 and the comments will be strengthened and clarified to focus on false and/or misleading communications and the prohibition on interactions of coercion, duress, or harassment.
- Rules 7.2, 7.3, 7.4, and 7.5 will be removed and referral fees will be permitted, subject to Rule 7.1.

2. Establishment of a pilot of a new regulatory body under the authority and oversight of the Supreme Court to regulate (license, oversee, and, as necessary, enforce against) new legal providers and services within a structure called a regulatory sandbox.

- Under the new regulator, we hope to see new kinds of opportunities for lawyers and new kinds of legal services for consumers. This could include:
  - Lawyers in partnership with other professionals such as accountants or social workers.
  - Lawyers working as staff attorneys for companies offering legal services to the public. Such companies could include legal technology companies, consumer-focused companies such as banks or retail establishments.
  - Legal services, including legal advice, facilitated by technology or by nonlawyer experts.

What is a sandbox anyway?

- The Sandbox is a policy tool used to develop a new regulatory approach. It is akin to a pilot program, where a government body can change the rules in a very controlled and time-limited way, monitor how things go, collect data, and analyze the results. The “sandbox” metaphor is meant to convey a safe and bounded space for experimentation.

How are you going to protect consumers from bad legal help offered by unqualified providers? How are you going to protect the most vulnerable from being exploited?

- Nontraditional sandbox applicants will provide a self-assessment of the risk of consumer harm from their services, proposed actions to mitigate risk, and a consumer complaint process. If these are not satisfactory, then the applicant will not be able to enter.
- New providers will be required to submit regular reports to the new regulator, providing data on consumer complaints and satisfaction, and the regulator will also conduct audits, expert testing, and secret shopper actions to independently test quality -- with special attention to the most vulnerable populations.
If any of these new providers cause material harm to consumers, they will receive sanctions (loss of license, fines, etc.)

**Why isn’t the State Bar overseeing the sandbox?**

- In consultation with leaders of the State Bar, we decided it made sense to have a mix of lawyers and other professionals with expertise in providing services to consumers guide this process. The State Bar is well-equipped to oversee the licensing and ongoing oversight of individual lawyers. Overseeing entities requires different expertise, including staff with backgrounds in economics and data analysis to understand the impact on the legal services market.

**So why would anyone enter the sandbox if they don’t know whether their model will be allowed after the sandbox?**

- Any organization that enters the sandbox will be able to continue operating in Utah afterwards if they are able to demonstrate that their legal services are safe—i.e., that they do not cause levels of consumer harm above threshold levels established by the Innovation Office.

**Isn’t the sandbox just a back-door way of doing deregulation?**

- No. That’s why the sandbox is not just “we’re relaxing the rules for a while.” It says: “You need to apply to offer services under these new rules,” and nontraditional applicants will need to provide a self-assessment of the risk of consumer harm from their services, proposed actions to mitigate risk, and a consumer complaint process. If these are not satisfactory, they will not be approved.

- Moreover, the Innovation Office will collect data and monitor how these services are being provided in order to make sure that consumers are protected -- and have the authority to impose sanctions if there is too much risk, or harm is caused. This is a more proactive approach to consumer protection than how we generally regulate legal services, relying on complaints about lawyers after harm has occurred.

**Is there any evidence that allowing corporations to practice law will actually increase access to justice?**

- Yes. The U.K. and Australia have allowed these kinds of organizations, and it has led to more choices and better services for individuals and small businesses like fixed fees for divorce or help with child custody issues; affordable help drafting wills; and advice on employment matters.

- Today, there are too few options for people who aren’t poor enough to qualify for legal aid, but also can’t pay upwards of $200/hour to for legal help. These reforms will help change that.

**Are the organizations that enter the sandbox subject to ethics rules?**
- Lawyers working in the sandbox have all the same duties to their clients under the ethics rules like confidentiality, loyalty, independence of judgment, and conflicts. The sandbox relaxes the rules around the economic or business-model aspects (not ethics) of the Rules of Professional Conduct.
- The Innovation Office has the discretion to develop standards of conduct if necessary to guide providers in applicable professional and ethical duties.

It sounds like this is opening the door to the MBAs taking over the way they have in medicine. How is that going to be good for the profession?

- We see from medicine that allowing physicians to partner with professionals in other fields enables them to benefit from the best expertise on how to deliver great services in an efficient and effective way, and allows physicians to focus on delivering medical care. Major Utah health providers like Intermountain help demonstrate how this kind of approach can lead to the delivery of high-quality affordable care for consumers, and satisfied physicians who can focus on practicing medicine.

What do you mean by “nontraditional provision of legal services”?

- This refers to legal services that would not be permitted under the Rules of Professional Conduct for lawyers, which are not only ethics rules but also limits on the permissible economic or business models for legal services.
- So in the sandbox, under the authority of the Innovation Office and Supreme Court:
  - entities owned (in whole or in part) by people who are not lawyers can provide legal services;
  - law firms and other entities can enter into revenue and profit-sharing agreements with other professionals; and
  - organizations can use technology and people who aren’t lawyers to provide legal advice to consumers.
- In the U.K., where similar reforms were enacted, innovative firms and services have emerged such as: a firm in London that employs architects, accountants and solicitors, and serves as a “one stop shop” for design planning, architecture, tax and legal; Parental Choice, which helps parents find a nanny or au pair and also helps them understand their legal obligations as employers; and Co-Op Legal Services, owned by a well-established consumer-owned grocery chain that has used its brand and consumer-facing expertise to provide will-writing, family, employment and other consumer legal services at affordable prices.

Why is it a good idea to allow people who aren’t lawyers to provide legal advice?

- There are many areas – including housing, family law, and debt collection – where the legal issues are fairly routine, but someone with experience in that area (even if not a lawyer) can make a difference for individuals.
Studies on the use of such specialists in other countries, and in certain areas of federal practice in the U.S., show they are as effective if not more so than lawyers.

The choice in these areas is not between a lawyer or other professional; it is between some help or no help at all.

### III. Office of Legal Services Innovation

**So what is this Innovation Office anyway: is it a new government agency, or is it a part of the Utah Supreme Court?**

- It is an office under the authority of the Supreme Court, to which the Supreme Court has delegated the authority to oversee nontraditional providers of legal services. This is similar to the Court’s delegation of authority to the State Bar to regulate lawyers.
- Just like in medicine, there are licensing boards that regulate individual physicians, and other regulatory bodies that regulate hospitals and other health care organizations.

**Can the Supreme Court create a new government agency without an act of the legislature? Have other state Supreme Courts created new agencies like this before?**

- This is not a new government agency. It is an office under the authority of the Supreme Court. The Supreme Court has broad constitutional powers to oversee the provision of legal services, and this is within its authority to do that.
- New York and New Jersey both have the authority to regulate entities that provide legal services, but this is the first regulatory body, independent of the Bar, set up to do so in the U.S. A similar regulatory body exists in the U.K., where allowing these kinds of entities to deliver legal services has led to more choices and better services for consumers, particularly in areas like family law.

**How were the Innovation Office members chosen?**

- The Supreme Court looked for a range of community leaders with diverse skillsets and expertise. Some are lawyers, some are other professionals. It was important to have both experience in providing legal services, but also others who could think about providing services to consumers in ways that were different than traditional legal practice.
- Traditional legal practice and business models have failed to reach the majority of individuals and small businesses in Utah with pressing legal needs. We need new ideas.

**Will the Innovation Office meetings be public?**

- Yes. We want this to be as transparent as possible so all stakeholders can understand what is happening, and provide input on the process that is used.

**Will the applications be publicly available?**

- No. The organizations entering the sandbox need to have the confidence that their plans to provide legal services are not handed over to potential...
competitors before they even open their doors in Utah. Otherwise, they will not have sufficient incentive to enter the market in the first place.

How will this Innovation Office be funded?

- It will eventually be funded by fees from the providers who enter the sandbox. The startup costs will be borne by the Supreme Court which may seek external funding as well.
The Office of Legal Services Innovation

APPLY TO PARTICIPATE IN THE SANDBOX

Presenting to the Innovation Office

If any individual or entity would like to tell the Innovation Office about the products or services that they hope to supply through Sandbox participation, the Innovation Office is open to having individuals and entities present at one of their meetings in the near future.

Guidelines for presentations:

- Presentation is not a requirement for participation in the Sandbox but is meant only to facilitate conversation and ideas. Your presentation should be focused on the following points:
  1. how the Sandbox will allow you to innovate - be specific
  2. how might your proposed service, model, product benefit consumers
  3. what kind of data do you have about your target market now and with the intervention from your service
(4) do you have any proposals specific to covid

- These presentations and conversations will not supplant the necessity for formal consideration and vetting through the Sandbox application process once it is launched and will not entitle you to any special consideration.
- Please give us notice if there is anything in your presentation that needs to be kept confidential.
- Presentations will take place through Webex. You will be able to share a powerpoint or other documents.
- You will have a maximum of 30 minutes for presentation and questions and answers.
- The audience is the members of the Innovation Office: member information can be found here.

Please email sandbox@utcourts.gov for more information.

Events
<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wednesday, November 25</td>
<td>3:00pm</td>
<td>busy</td>
</tr>
<tr>
<td>Wednesday, December 9</td>
<td>3:00pm</td>
<td>busy</td>
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<tr>
<td>Wednesday, December 23</td>
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<tr>
<td>Wednesday, January 6, 2021</td>
<td>3:00pm</td>
<td>busy</td>
</tr>
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*Showing events until 1/15.* [Look for more](#)
Office of Legal Services Innovation: Decision Making Principles and Process

The regulatory actions of the Office will be limited to those that advance the Regulatory Objective: To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services.

Ensuring consumer access as described in the Regulatory Objective is the primary criteria around which Innovation Office decision making takes place. In striving to answer the question of whether a given action furthers the Regulatory Objective, the Office balances the incremental costs of improved information and the benefits of efficient action.

As dictated by the Regulatory Objective and Regulatory Principles, the Office bases its decisions on empirical evidence whenever possible, using data and numbers to identify and understand the potential harm that consumers currently experience and are likely to be exposed to with new services.

Every risk of harm to consumers cannot currently be quantified. Assessments of risk are inherently imprecise, as knowledge of all the relevant variables is incomplete and any given outcome depends on multiple and complex considerations. The reliance on empirical evidence should not imply a false precision. Judgement must be used where relevant and reliable data are absent.
Decision Process Objective:

Ensuring that any decisions made by the Office are unbiased and based on a proper and objective consideration of all facts, the Regulatory Objective, and the Regulatory Principles.

Decision Process Principles:

Equality of Access: All parties have the same opportunity to access decision makers.

Coherent: Decisions and the reasons therefore are reasonably and clearly explained.

Transparent: All parties know what information and arguments the Office is considering in rendering a decision.

Efficient: Decisions will be made in a timely manner.

Standard for sufficiency of data

The data considered alongside all associated information (about company, ownership, management, target population) must be of sufficient quality to inspire confidence in the regulatory action (authorization, licensing, enforcement).

Operational Decision Criteria:

For each identified risk of harm:

1. Consumer achieves an inaccurate or inappropriate legal result.
2. Consumer fails to exercise legal rights through ignorance or bad advice.
3. Consumer purchases an unnecessary or inappropriate legal service.

An applicant must show that:

The likelihood that the average person will experience a harm using the applicant’s service is not greater than the likelihood that the average person who might use their service will experience harm without the service.
WHAT WE KNOW AND NEED TO KNOW ABOUT THE LEGAL NEEDS OF THE PUBLIC

In contemporary market democracies, law reaches deeply into many aspects of daily life. Thousands of Americans every day find themselves facing troubles that emerge “at the intersection of civil law and everyday adversity,” involving work, finances, insurance, pensions, wages, benefits, shelter, and the care of young children and dependent adults, among other core matters. Though these different types of problems affect different aspects of people's lives and concern different kinds of relationships, they are defined by a central important quality: they are justiciable. They have civil legal aspects, raise civil legal issues, have consequences shaped by civil law, and may become objects of formal legal action.

This Paper reviews what we know about the civil legal needs of the public, focusing on the U.S. context but drawing on research from peer nations as well. In so doing, the Paper reveals some key gaps in our knowledge. Across a range of studies, we have good evidence that:

• Experience with civil justice situations is common and widespread, affecting all segments of the population. Many involve “bread and butter issues” at the core of contemporary life, affecting livelihood, shelter, or the care and custody of dependents.

• Populations that are vulnerable or disadvantaged often report higher rates of contact with civil justice situations, and greater incidence of negative consequences from these events.

• Most civil justice situations will never involve contact with an attorney or a court.

• The most important reasons that people do not take their civil justice situations to law are:
  *444 (1) they do not think the issues are legal or consider law as a solution; and
  (2) they often believe that they understand their situations, and are taking those actions that are possible.
• The cost of legal services or court processes plays a secondary role in people's decisions about how to handle the civil justice situations they encounter.  

Paradoxically, despite the stylized facts we often deploy in our arguments and advocacy, we do not know the answers to some of the million dollar questions. To be specific, we do not know:

• How many civil justice situations are actually civil legal needs;

• How many civil legal needs go unmet; and

• How civil legal needs affect the people who experience them and society at large.

I. WHAT WE KNOW

A. Civil Justice Situations Are Common and Widespread, Affecting all Segments of the Population

Our best evidence on the frequency of civil justice situations comes from surveys of the public. The typical method for assessing the prevalence of civil justice situations is to first develop a list of specific events that people might experience, each carefully selected to raise issues in civil law. These lists describe the events in lay rather than legal terms, so that they are recognizable to the people who may have experienced them. 9 In the U.S. context, studies frame these situations for respondents not as legal issues or justice problems but rather as “things that were happening” or “situations you may have experienced.” 10 Such lists might include, for example, situations such as: “being behind on and unable to pay utility bills,” “being fired,” or “insurance companies unfairly rejecting claims.” 11 The list is presented to a representative sample of people or *445 households, who are asked whether they have experienced each event during some reference period, such as three years or eighteen months. 12

Though extant studies query many of the same events, there is no scholarly consensus on what exactly would constitute the full landscape of possible justiciable situations experienced by the public. Most studies inquire about situations related to consumer matters, government benefits, employment, housing, relationship dissolution and child custody, debt, and discrimination. 13 Some ask about immigration, health, and other issues. 14 Even the most extensive lists produce underestimates of the incidence and prevalence of justice situations: people forget some of the events they have experienced and so fail to report them. 15

Civil justice situations are experienced across the population, by rich and poor, young and old, men and women, all racial groups, and all religions. 16 All of the national data in the U.S. context are decades old, but conservative estimates based on their reports suggest as many as half of American households are experiencing at least one significant civil justice situation at any given time. 17 More contemporary studies find even higher prevalence rates. 18 In “Middle City,” a middle-sized city in the Midwest, a 2013 survey found that two thirds of *446 a representative sample of adults reported experiencing at least one civil justice situation in the eighteen months prior to the survey. 19 The United States is a large nation, and these figures imply well over 100 million Americans living with civil justice problems, many involving what the American Bar Association has termed “basic human needs,” such as livelihood, debts and credit, shelter, and the care of dependents. 20
While these rates may seem high, the pattern is common across developed nations. Depending on how many civil justice events are queried, which kinds are queried, and the length of the reference period for their occurrence, surveys of the public in a range of market democracies find that between a fifth and two thirds of people or households report civil justice situations. This tremendous volume of civil justice activity is a consequence of the fact that contemporary societies have institutionalized in civil law a large share of the routine stuff of life. For example, employment law shapes our work relationships; probate and family law shape our personal relationships; we conduct our relationships with the people and organizations that provide us goods and services under the rule of contract law and the supervision of government regulators. We live in a “law-thick world” where many common relationships and routine activities are governed by laws and regulations and can become objects of formal legal action by someone under some aspect of these.

B. Vulnerable and Disadvantaged Populations Report Higher Rates of Contact with Civil Justice Situations, and More Negative Consequences of Them

Civil justice situations affect not only the poor or other vulnerable groups, but occur across the population. Little research systematically compares civil justice experience across groups. However, that work often finds that, while all groups experience civil justice problems, the weight of them does not fall equally. For example, in the Middle City study, poor people (those eligible for federally funded civil legal assistance) were about 30% more likely to report civil justice problems than were people with incomes in the top quintile. African Americans and Hispanics were more likely to report problems than were Whites. People who are unemployed, who suffer from an illness or disability, and people who are younger report more situations than the employed, the well, and the elderly. Certain life transitions--relationship dissolution and job loss, for example--are also associated with an increased incidence of civil justice problems.

Little research documents the consequences of civil justice situations in the United States (see below), but work that does so finds that not only problems but also adverse consequences of those problems are unequally distributed. Justice situations and their adverse impacts often cluster in the lives of the people who experience them. These “mounting problems” pile upon some groups in the population more quickly than others. In the Middle City study, poor people were significantly more likely than higher income people to report negative consequences from the experience of civil justice situations, such as lost income, fear, and ill health.

II. MOST CIVIL JUSTICE SITUATIONS WILL NEVER INVOLVE CONTACT WITH AN ATTORNEY OR A COURT

While civil justice problems are common in the United States, turning to the legal system to try to handle them is not. A minority of the American public's civil justice problems are ever taken to lawyers in the hopes of securing advice or representation. The Middle City study found that people took just over a fifth (22%) of their civil justice situations to someone outside their immediate social network, and only some of those made it to lawyers: 8% involved contact with a lawyer and 8% had court involvement of some sort. The most recent U.S. national survey, from the early 1990s, found that 24% of situations were taken to attorneys, and 14% involved courts. When ordinary Americans face civil justice problems, turning to law is a relatively uncommon response.

Though Americans seldom go to law with their justice problems, they frequently try to do something about them. The most common course of action is self-help: trying to handle the situation on one's own. When Americans do connect with assistance, they go to a wide range of sources, including churches, housing counselors, social workers, city agencies, national membership organizations, the Better Business Bureau, and their elected representatives. In the Middle City study, people reported doing “nothing” in response to 16% of situations. Doing nothing is more common for some groups than for others. A study of people's experiences with money and housing problems found that poor people were more likely to do nothing about
such problems than were people who were not poor. As we will see below, perhaps surprisingly, the cost of doing something was not a prominent reason reported for inaction.

III. PEOPLE OFTEN DO NOT THINK OF JUSTICE PROBLEMS IN TERMS OF LAW OR RIGHTS, NOR CONSIDER LAW AS A SOLUTION

Among the most important reasons that people do not take their justice problems to lawyers or other legal professionals is that they usually do not think of the problems as legal. As socio-legal scholars have long recognized, the legal nature of any given civil justice problem is socially constructed. A range of *449 studies reveals that people often do not think of justiciable events in terms of law or rights. Whether investigating suburbia, cattle ranchers, small towns, poor mothers, churchgoers, or people harassed in public, researchers consistently find that problems that look legal to lawyers do not seem particularly legal to the people who experience them. Only 9% of the civil justice problems reported in the Middle City study were described by the person who experienced the problem as “legal.” People were much more likely to describe their justice situations as “bad luck/part of life” or “part of God's plan”–that is, in terms that suggest that people may understand these events as things that simply happen. People often describe being resigned to their civil justice problems. For a substantial minority of problems, about a fifth, Middle City residents described the problem in a way that suggested that they might not believe third party intervention was appropriate; instead, these problems were understood as “private (i.e., not something to involve others with)” or “family/community” matters, “i.e., something to be dealt with within the family/community.” Thinking of a justice problem as “legal” plays a large role in whether or not people consider lawyers as a solution. Perhaps among the most surprising findings of contemporary research in the U.S. context is that people do not typically highlight the cost of legal services as a main reason for not turning to law for the justice problems that they face. When asked to assess lawyers in the abstract, Americans can recite the prevailing wisdom that lawyers are too expensive and value their fees more than justice. But surveys of Americans who have actually used lawyers' services find that the majority are happy with what they paid. Studies of the actual costs of common legal services, while rare, find that many routine services are affordable for middle income families. In the national study conducted in the 1990s, moderate-income households reported that they did not seek legal help because of cost for 6% of problems; the remaining 94% of their justice situations were handled in other ways, for other reasons. For problems not taken to anyone outside the respondent's immediate social network, the Middle City study asked respondents why they did not do so. In Middle City in 2013, cost explained the failure to seek assistance for 17% of reported justice problems; the reason for not seeking further help for the other 83% of problems was something else, not cost. In Middle City, the most common reasons people reported for not seeking help are revealed to be variants on, “I don't need any.”

Even when lawyers are free we see an interesting lack of recourse to them. Studies in other countries where people receive substantial government subsidies for lawyers' fees--up to the point of no cost at the point of service for some portion of the population--find that people do not turn to law even when they do not have to pay any money to do so. This does not mean that cost plays no role in shaping how people handle their justice problems. It does suggest that the role it plays is more subtle than we might expect.

IV. WHAT WE NEED TO KNOW

We know that there is a tremendous amount of civil justice activity, in the sense of a high volume of justiciable events. Because people's rights under law are by definition implicated in civil justice situations, some observers conceptualize these situations as “legal needs,” by which they usually mean situations or events that require the assistance of an attorney. When civil justice
situations are thought of as legal needs, all available evidence reveals that such needs typically go unmet. Only a small minority of people ever acquire an attorney, as we saw above. Thus we have the commonly cited figures of today, such as that 80% of the legal needs of the poor go unmet. However, we have no idea whether or not this “fact” is true.

The conventional understanding greatly oversimplifies the idea of “need.” If a justice problem is a situation that has civil legal aspects, raises civil legal issues, and has consequences shaped by civil law, we can consider a legal need as a special case of this phenomenon: a legal need is a justice problem that a person cannot handle correctly or successfully without some kind of legal expertise. Not all justice situations are legal needs in this sense. People are perfectly capable of handling some situations on their own without understanding the legal aspects of those problems, in the sense that the problem is resolved in a way that is roughly consistent with the law but without reference to it or contact with it. Without a doubt, many situations are resolved in this way. Neighbors work out tree-trimming agreements without finding out where property lines are or consulting homeowners’ association rules. Married couples separate without divorcing and informally arrange child custody and support agreements, and unmarried couples do the same. Landlords and tenants devise informal arrangements that balance flexibility about timely rent payments with flexibility about timely repairs. The research challenge is figuring out when these informal solutions are consistent enough with formal norms not to threaten the rule of law and social order, and when they are badly unlawful. Sometimes we do want to make sure that people resolve their justiciable problems with explicit reference to law. For those situations where we do, people’s justice situations become legal needs.

Identifying these situations is not a purely empirical task, but is further a matter of policy goals and normative commitments. For example, we can ask empirically whether legal services affect how situations turn out, such as whether representation by lawyers changes the outcomes of court cases. But there are normative aspects here as well. For example, we as a society have decided that if people want to end a marriage, they ought to go through law to do it. You do not have to go to court to get approval to marry, but you do have to do so to get permission to divorce. This decision was made long ago, when lawmakers and others believed it was important for society, through law, to engage in some surveillance and regulation of the dissolution of these intimate personal relationships. A time may come when that normative position changes; for now, people have to use law to end marriages, doing so requires some kinds of legal expertise.

Once we could agree on the set of situations that require legal expertise either technically or normatively, we would then be in a position to ask when the need for that expertise goes unmet. This can be made into an empirical question. Demonstrably, attorneys are not the only means of providing legal expertise. People can sometimes, without the assistance of lawyers, acquire the information they need to understand their rights and possible remedies, make informed decisions between different courses of action, and take the necessary actions to enact their rights under law or otherwise solve their problems in ways that are consistent with the law. Indeed, this capacity among members of the public is the foundation of the “self-help” approach that informs many courts’ initiatives to increase the public’s access to justice. It also is part of the logic of limited scope representation (aka unbundling), which distributes to the client some of the work that was historically performed by a full-service attorney. The United States does not have a functioning legal services “system” for any group in the population: there is no integrated network of coordinated providers and institutions. If such a system did exist, one highly desirable feature of it would be the capacity to connect people to the least expensive and intrusive service necessary to meet their actual legal needs. This service would not always be an attorney.

Our current knowledge about which justice situations actually require lawyers to provide the necessary legal expertise is thin. Legal expertise is today available from a wide range of sources, both human and not, from Internet resources like LawHelp, to the Nolo “Law for All” software products and books, to court-based self-help programs, to nonlawyer personnel who assist litigants in navigating courthouse buildings and legal processes. These many different sources of legal assistance meet some number of legal needs in an adequate fashion. We simply have no idea how many are adequately served. Asking litigants and potential clients about their experiences does not go far in answering this question. As we saw above, people often believe they understand their situations, the possible courses of action, and the likely outcomes. Sometimes they are correct, and sometimes they are disastrously wrong. Lay people can be poor judges of whether they have enacted their rights, because they
may well have no idea what their rights are and what remedies are actually available to them. Consequently, they may believe that they have handled a situation well, when in fact more or different legal expertise could have completely changed the game. In sum, at present, we have no idea of the actual volume of legal need, and no idea of the actual volume of unmet legal need.

We are beginning to learn the answers to these questions, however. One clever means of determining whether something is a legal need is to employ an old trick from medicine: diagnosis by treatment. In the justice context, we ask whether, if we give people some kind of legal assistance, it makes any difference \*454 in outcomes that we care about. If it does, we might declare that kind of situation a legal need. We have a few of these studies, and their findings are quite interesting. The preeminent scholar using this technique is Jim Greiner, who in a series of increasingly sophisticated field experiments explores lawyers’ impact in unemployment hearings, eviction cases, social security claims, and consumer debt. \*79 In a study of indigent claimants in unemployment tribunals, Greiner and his colleagues randomly assigned claimants to either an offer of representation by a lawyer-supervised law student working in a clinical program or to no offer of representation. \*80 Because the assignment was random, the merits and other aspects of the two groups of cases did not systematically differ: there would have been sure winners and bad losers in both groups. \*81 The results achieved by the claimants offered representation were no better than those experienced by people who were not offered representation, and in some respects could be considered worse. \*82 Similar findings emerge in non-experimental research as well. A study from the 1970s comparing divorce filings prepared by lay people using a self-help kit to those prepared by lawyers famously found that the lay people did better than the lawyers, making fewer omissions in the documents. \*83 A synthesis of findings from 40 years of research across a range of studies of the impact of lawyers on case outcomes, using a technique known as “meta-analysis,” found that lawyers did not always out-perform lay people representing themselves, and that nonlawyer advocates sometimes achieved results comparable to those attained by fully qualified attorneys. \*84 Among other things, these findings suggest that, at least in some kinds of legal matters, people can be quite successful at handling their own civil justice situations--if our benchmark of success is the outcomes achieved by legally trained professionals. \*85 One commentator urges us to “celebrate the null finding”: a finding of no impact of attorneys can be a demonstration that some courts and some legal processes are already accessible to the public. \*86

Using the findings from this kind of work to determine what justice situations constitute legal needs and how to meet them will require some careful thought. Generalizing from a single study will not work. These studies typically \*455 consider specific populations in specific courts or tribunals engaged in specific kinds of cases, such as indigent tenants in Manhattan housing courts \*87 or people contesting state income tax bills in Wisconsin. \*88 Interventions that are necessary to achieve the outcomes desired in policy for some populations may not be needed for other populations. \*89 An obvious example would compare the legal needs of highly educated people to populations where mental illness, illiteracy, language proficiency, or cognitive impairments reduce people’s capacity to take action on their own behalf. Similarly, interventions that are needed into situations that are complex (e.g., an adult child attempting the conservatorship of an unwilling parent) will not be needed when the law and the facts are simple (e.g., the uncontested divorce of a childless couple with few assets in a no-fault jurisdiction). In the U.S. context, we are just beginning to see the kinds of comparative research projects that can give information about when different kinds of legal expertise are necessary. A recent study of lawyers’ impact on case outcomes in lower civil courts and tribunals compares that impact across different hearing fora and fields of law. \*90 This study finds that--for this subset of ordinary litigation--“lawyers affect case outcomes less by knowing substantive law than by being familiar with basic procedures.” \*91

Existing legal services, even when they do meet apparent legal needs, may not be the simplest, cheapest, most lawful, or most effective way to meet legal need. Simply because lawyers appear impactful under the current state of affairs does not mean that they are the best solution to problems we observe. Sometimes, the right route is systemic reform; a narrow focus on existing solutions and their effectiveness can blind us to that. \*92 For example, courts around the country are moving to simplify legal actions through the use of plain language forms. If a court action requires a pleading, the litigant has to figure out what law applies, what that law says, what counts as evidence and how to present her case in legal terms that court staff understands. When courts replace pleadings with plain language forms with fixed choice options, much of the legal \*456 expertise necessary to draft the pleading becomes commodified in the form. \*93 “Legal needs” are here met for many people by straightforward simplifications of process, without the provision of a live legal expert. A few projects are comparing the efficacy of different modes of providing legal expertise, but our evidence base is as yet quite small. \*94
It is also not always clear who has the legal need. One of the most striking findings of some of this work is that legal needs may actually be better understood as belonging to the court or the justice system, rather than to the litigant or potential client. Some courts are, frankly, lawless: judges and other court staff behave in ways that are inconsistent with the law's requirements. As one study notes:

Evidence of some of the largest potential impacts of lawyers on case outcomes emerges from settings in which cases are often treated perfunctorily or in an ad hoc fashion by judges, hearing officers and clerks ... Observers in such settings report that judges often shortcut the law: They do not hold landlords to statutory burdens of proof ...; they fail to examine eviction notices to confirm their validity and proper service ... In some courts, parties are rarely sworn in before giving testimony ... Judges often do not require landlords to rebut self-representing tenants' defenses to eviction or otherwise do not recognize their defenses ... Because lawyers know the rules and when they are being violated, their presence may encourage court staff to obey them and so enhance people's chances of winning their cases.

In these situations, an important source of the legal expert's impact is through making the court act lawfully. If courts would simply follow their own rules about, for example, who bears the burden of proof and what counts as evidence, much apparent "legal need" on the part of litigants would likely vanish.

*457 V. WE KNOW LITTLE ABOUT THE CONSEQUENCES OF THESE SITUATIONS, EITHER FOR THE PEOPLE WHO EXPERIENCE THEM OR FOR SOCIETY AT LARGE

The same law that constitutes as legally actionable many everyday problems also shapes the consequences of those problems for the people who experience them and for society at large. Successfully resolving justice problems may mean the difference between stable housing, predictable cash flow, custody of one's children, employment, and access to credit on the one hand, and bad credit, uncertain housing, family separation, unemployment, or bankruptcy on the other. Evidence from other jurisdictions suggests that legal needs can lead not only to hardships for those who experience them, but to costs that are borne more broadly, such as the costs to society of temporary shelter for those made homeless by legal needs, income support for those unemployed due to legal needs, and lost productivity from and medical care for those made ill by legal needs. We believe these consequences can be substantial, but we have little systematic research.

U.S. research into the consequences of civil justice problems has been limited largely to investigations of how people's experiences with courts and legal system staff affect law's legitimacy, as exemplified in the vibrant literature on procedural justice. On the criminal side, recent studies have demonstrated how the workings of the U.S. criminal justice system affect both the people who have contact with that system and society. Thus, we have studies of the *458 impact of incarceration and arrest on people's access to employment and housing, as well as studies of how social patterns of incarceration have shaped the outcomes of presidential elections and fundamental conditions in labor markets.

Yet relatively little attention has graced any study of the consequences of civil justice troubles in the United States. The Middle City study cited above found that people reported lost income, fear, lost confidence and--most frequently--negative impacts on health as a consequence of justice problems. A recent study using data from the Fragile Families and Child Well-Being study of low-income mothers found that the experience of eviction was associated with increased material hardship and parenting stress, as well as a higher incidence of depression for mothers and reports of worse health for both mothers and their children. The consequences of some civil justice problems are severe, wide-ranging, and damaging not only to those who experience them but to their families and to society at large. We just do not know very much about which justice problems have these impacts, and for whom.
Linking back to the question of whether justice problems with adverse consequences are best understood as legal needs, the knowledge gap yawns wide here, as well. We simply do not know much about the relative efficacy of legal as opposed to other kinds of interventions. If our goal is to prevent these problems and their costly consequences, legal intervention will be part of the answer sometimes, but probably not all the time. Taking the example of eviction, maybe the generating problem is a lack of affordable housing, or a lack of decent jobs for people without college degrees or who live in certain areas. If those are the real problems, representation in an eviction case by an attorney may not be much of a solution. We have a great deal to learn, but we are beginning, slowly, to learn the answers to these questions.

*459 VI. CONCLUSION

We live in a society with scarce resources where we must make difficult decisions about allocation. Currently, we decide how to allocate legal expertise based largely on three factors: potential clients' willingness to seek legal assistance; potential clients' ability to pay; and, the willingness and interests of specific local providers to do particular kinds of work. In this context, socioeconomic inequalities become justice inequalities, and “geography is destiny,” in the sense that available services are determined not by people's actual needs but rather by what happens to be available where they happen to live. Probably, we bear large social costs that could be eliminated if we allocated existing resources in different ways. We can imagine a more rational and more democratic approach, where we decided what needs to target after informed public discussion, based on information about the likely costs and benefits. To have that discussion, we will need a better understanding of what existing legal needs actually are, when they truly go unmet, and how they affect us, as individuals and as a society.

Footnotes


3. See infra Part I.A.

4. See infra Part I.A.

5. See infra Part I.B.

6. See infra Part II.

7. See infra Part III.

8. See infra Part III.


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11  Id. at 7.

12  See Albert W. Currie, The Legal Problems of Everyday Life, in 12 SOCIOLOGY OF CRIME, LAW, AND DEVIANCE: ACCESS TO JUSTICE 1, 5 (Rebecca L. Sandefur ed., 2009); PLEASENCE ET AL., PATHS TO JUSTICE, supra note 9, at 6, 22.

13  PLEASENCE ET AL., PATHS TO JUSTICE, supra note 9, at 20-21 tbl.5.

14  Id.

15  See Pascoe Pleafence et al., Failure to Recall: Indications from the English and Welsh Civil and Social Justice Survey of the Relative Severity and Incidence of Civil Justice Problems, in SOCIOLOGY OF CRIME, supra note 12, at 44.

16  ACCESSING JUSTICE, supra note 10, at 7; Rebecca L. Sandefur, Access to Civil Justice and Race, Class, and Gender Inequality, 34 ANN. REV. OF SOC. 339, 340 (2008) [hereinafter Access to Civil Justice].

17  AM. BAR ASS'N, CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS; MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 8 tbl.3-1 (1994) [hereinafter LEGAL NEEDS AND CIVIL JUSTICE]. See generally BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 100 (1977) (stating that the mean number of problems reported were 4.8 per person); MATTHEW SILBERMAN, THE CIVIL PROCESS: A SEQUENTIAL MODEL OF THE MOBILIZATION OF LAW 33 (Donald Black ed., 1985) (stating that in a Detroit based survey of 1038 householders there were 2778 “everyday disputes” reported); Richard E. Miller & Austin Sarat, Grievances, Claims, and Disputes: Accessing the Adversary Culture, 15 L. & SOC’Y REV 525, 536 (1980-1981) (stating that at least forty percent of households reported a grievance in a three year time frame).

18  ACCESSING JUSTICE, supra note 10, at 7. The temptation to tell a story about change over time may be strong when looking at these two surveys, but should be resisted for the present. The ABA study asked about 67 specific civil justice situations, while the Middle City study asked about 98. At the very least, one would want to compare findings for the subset of situations that is comparable across the two studies, before drawing conclusions about changes in the American public’s behavior since the 1990s. See generally PLEASENCE ET AL., PATHS TO JUSTICE, supra note 9, at 1 (discussing “methodological issues, bringing together findings, assessing the impact of, and providing guidance and resources for the future development of surveys of justiciable problems”).

19  Id. at 4, 7.

20  Id. at 7, 16 (citing The Impact of Counsel, supra note 1, at 56; Importance of Doing Nothing, supra note 1, at 113.

21  PLEASENCE ET AL., PATHS TO JUSTICE, supra note 9, at 30.

22  Currie, supra note 12, at tbl.1 (reviewing findings from a dozen studies in eight countries); PLEASENCE ET AL., PATHS TO JUSTICE, supra note 9, at 5, 7-8 tbl.2 (reviewing the research design of studies in 14 countries).

23  Currie, supra note 12, at 2.


ACCESSING JUSTICE, supra note 10, at 8-9 Figure 3.

Id.

PLEAINESS ET AL., PATHS TO JUSTICE, supra note 9, at 30-31 tbls.7-9.


See ACCESSING JUSTICE, supra note 10, at 8, 10 (stating that low income households were more likely to report civil justice situations and negative consequences of those situations than higher income households).

See Pascoe Pleasence et al., Multiple Justifiable Problems: Common Clusters and Their Social and Demographic Indicators, J. EMPIRICAL LEGAL STUD. 301, 302 (2004) [hereinafter Multiple Justifiable Problems].


ACCESSING JUSTICE, supra note 10, at 9-10 Figure 4.

Id. at 11-12.

Id.

LEGAL NEEDS AND CIVIL JUSTICE, supra note 17, at tbl.5-1. See also Herbert M. Kritzer, To lawyer or Not to lawyer: Is that the Question?, 5 J. EMPIRICAL LEGAL STUD. 875 (2008).

ACCESSING JUSTICE, supra note 10, at 11.

Id.; see also Fulcrum Point, supra note 25, at 961 (stating that people use the solutions they know are available to them to solve their problems, and one of these solutions is to use self-help).

Laura Nader, Alternatives to the American Judicial System, in NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 3, 13 (Laura Nader ed., 1980); ACCESSING JUSTICE, supra note 10, at 11; Fulcrum Point, supra note 25, at 957-62 (describing the range of institutions of remedy that exist for people's civil justice problems in contemporary market democracies).

ACCESSING JUSTICE, supra note 10, at 11.

Importance of Doing Nothing, supra note 1, at 113 (citing LEGAL NEEDS AND CIVIL JUSTICE, supra note 17, at tbl.5-1; LEGAL NEEDS AND CIVIL JUSTICE, supra note 17, at tbl.5-1).

Importance of Doing Nothing, supra note 1, at 114.

See infra Part III.


ACCESSING JUSTICE, supra note 10, at 13.

ACCESSING JUSTICE, supra note 10, at 14.

Id.

Rebecca L. Sandefur, Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services, in MIDDLE INCOME ACCESS TO JUSTICE (Tony Duggan et al. eds., 2012) [hereinafter Money Isn't Everything]; Importance of Doing Nothing, supra note 1, at 123, 125.

ACCESSING JUSTICE, supra note 10, at 14.


Id. at 12.

Id. at 24.


Id. at 24.

Money Isn't Everything, supra note 50.

Id.

ACCESSING JUSTICE, supra note 10, at 12.

Id. at 13.

Fulcrum Point, supra note 25, at 969-76.

See, e.g., LEGAL NEEDS AND CIVIL JUSTICE, supra note 17.

See supra Part II.


See, e.g., Importance of Doing Nothing, supra note 1.
See, e.g., Rebecca L. Sandefur, Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact, 2015 AM. SOC. REV. 1 (2015) (presenting a meta-analysis of studies of lawyers’ impact on the outcomes of formal trials and hearings) [hereinafter Elements of Professional Expertise]; 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, 2124 (2012) (employing a randomized controlled trial to study impact of assistance by law students on outcomes in claims for unemployment) [hereinafter Randomized Evaluation]; D. James Greiner et al., How Effective Are Limited Legal Assistance Programs?: A Randomized Experiment in a Massachusetts Housing Court 5-6 (Mar. 12, 2012) (unpublished manuscript on file with Univ. of Chi. Sch. of Law) [hereinafter Limited Legal Assistance Programs].

See Ralph C. Cavanagh & Deborah L. Rhode, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 YALE L.J. 104, 115 (1976) (“First, it can be argued that, despite the advent of no-fault reforms, marital dissolution remains an adjudicatory process.”).

See generally John M. Graecen, Self-Represented Litigants and Court and Legal Responses to Their Needs: What We Know, http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf (unpublished paper prepared for Ctr. for Families, Children & the Courts, California Admin. Office of the Courts) (last visited Mar. 31, 2016) (finding that a significant number of pro se litigants felt the case was simple enough to handle alone and did not want to hire counsel); see also RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 27-31 (2002) (arguing, for example, that courthouses should be built and organized to effectuate quick resolution of cases for litigants who represent themselves; such methods may include technological advances, or a single desk where litigants may obtain the necessary forms for bringing a case).

See Forrest S. Mosten, Unbundling of Legal Services and the Family Lawyer, 28 FAM. L.Q. 421, 423 (“Unbundling these various services means that the client can be in charge of selecting from lawyers’ services only a portion of the full package and contracting with the lawyer accordingly.”).


See, e.g., WAYNE MOORE, DELIVERING LEGAL SERVICES TO LOW INCOME PEOPLE 387-94 (2011) (describing several different methods that litigants may choose instead of hiring counsel; such options include court-delivered self-help services, legal hotlines, and online social networks); Richard Zorza, The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes, 89 DEN. U. L. REV. 859, 866 (2012) (arguing that such a system “should direct cases into routes and services that involve the least cost and inconvenience for both litigants and the system, consistent with a fair determination”).


See Rebecca Sandefur & Thomas M. Clarke, Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA, HASTINGS L.J. tbl.1 (forthcoming 2016) (citing examples of such programs currently in existence). See THE NEW YORK CITY COURT NAVIGATORS PROGRAM, www.courts.state.ny.us/courts/nyc/housing/rap.shtml (allowing volunteers to aid eligible pro se litigants in state housing courts by offering general information, written materials, and one-on-one assistance).

See supra Parts II & III.
See, e.g., William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 L. & SOC'Y REV. 137, 159 (1988) (arguing that lay people come to court with varying expectations of justice that are often in contrast to the realities of the legal process).

See *Randomized Evaluation*, supra note 67, at 2143 (unemployment cases); *Limited Legal Assistance Programs*, supra note 67, at 3 (evictions); Dalí Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449, 450 (2013) (consumer debt) [hereinafter *Improving the Lives*].

See *Randomized Evaluation*, supra note 67, at 2143; *Limited Legal Assistance Programs*, supra note 67, at 3; *Improving the Lives*, supra note 79, at 450.

*Randomized Evaluation*, supra note 67, at 2143.

*Id.* at 2122.

See Cavanagh & Rhode, supra note 68.

*Elements of Professional Expertise*, supra note 67, at 12.

*Id.*


See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 420 (2001) (using low-income tenants in New York City's Housing Court as the specific population in a test to determine the effects of a program that provided legal representation).


PASCOE PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES: BUILDING ON THE EVIDENCE BASE* 17-18 (2014) (finding that those who opted not to take legal action were “more likely to be characterised by [social] disadvantage” and could, in most cases, be eligible for legal assistance).

*Elements of Professional Expertise*, supra note 67, at 4.

*Id.* at 2.


See, for example, the consumer credit answer form from New York City, Civil Court of the City of New York, CIV-GP-58b Written Answer Consumer Credit (12/08), https://www.nycourts.gov/courts/nyc/civil/forms/CIVGP58B.pdf (last visited Mar. 31, 2016).

See, e.g., *Limited Legal Assistance Programs*, supra note 67; *Improving the Lives*, supra note 79, at 452 (testing the effectiveness of financial counseling versus a lawyer's assistance in helping people escape from financial distress). See generally D. James Greiner et al., Lay Deployment of Professional Legal Knowledge (Aug. 2, 2015) (unpublished manuscript) (suggesting a different way to test proposed self-help materials, such as by having people view hand-drawn illustrations of legal disputes); *Elements of Professional Expertise*, supra note 67, at 4 (using results from a range of general civil cases to compare the effects of counsel-representation versus self-representation).

*Elements of Professional Expertise*, supra note 67, at 17.
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96 Id.

97 Id.

98 See, e.g., Laura K. Abel & Susan Vignola, Economic and Other Benefits Associated with the Provision of Civil Legal Aid, 9 SEATTLE J. SOC. JUST. 139, 145 (2010) (reviewing evidence of the impact of legal assistance to people facing challenges to their ability to meet basic human needs, such as the care and custody of dependents); Raisa Bahchieva et al. Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership, in CREDIT MARKETS FOR THE POOR 73, 76 (Patrick Bolton & Howard Rosenthal eds, 2005) (describing the hardships faced by many middle class families with debt); TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 171 (“In the midst of affluent modern America, a family can still be struck down overnight.”).


100 See generally Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. & SOC. SCI. 171, 193 (2005) (arguing that procedural justice is a “double-edged sword”; while it fulfills peoples' desire for their voice to be heard, it also potentially allows abuse by those in control of the processes); see also Tom R. Tyler, What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 L. & SOC'Y REV. 103, 127 (1988) (finding that people were concerned with the ethicality, honesty, and effort of the procedural authorities who were involved in their cases); Tom R. Tyler, Governing and Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government, 28 L. & SOC'Y REV. 809, 827 (1994) (arguing that the results from his research suggest that the use of fair decision-making procedures enhances the legitimacy of national-level governmental authorities).

101 See generally Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequity in the Contemporary United States, 115 AM. J. SOC. 1753, 1755 (2010) (for example, testing the effects of monetary sanctions imposed on criminal defendants and determining that this “legal debt” created further inequality within society).

102 See, e.g., Harris et al., supra note 101, at 1777 (finding that people with legal debt have limited access to status affirming institutions, such as housing, education, and economic markets); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 192 (2006) (finding that, in Florida, and during the 2000 presidential election, “[i]f disenfranchised felons had been permitted to vote, Al Gore would certainly have carried the state, and thus the election. There are more disenfranchised felons in Florida than in any other state (approximately 827,000 in 2000)”; Devah Pager, The Mark of a Criminal Record, 108 AM. J. SOC 937, 956 (2003) (finding that many employers use information about a potential employee's criminal history as a screening mechanism, without attempting to probe deeper into the content or complexities of the person's situation); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 119 (2006) (finding that men who have been incarcerated face significantly lower wages, employment rates, and annual earnings than those who have never been incarcerated and that high rates of incarceration make the U.S. unemployment rate appear lower than it truly is).

103 ACCESSING JUSTICE, supra note 10, at 3.


105 See generally id.; ACCESSING JUSTICE, supra note 10, at 3.

106 See ACCESSING JUSTICE, supra note 10, at 112 (“The probability of taking no action varies inversely with income, with poor households least likely to take any action to attempt to resolve problems.”). See also Rebecca L. Sandefur, Lawyers' Pro Bono Service and American-Style Civil Legal Assistance, 41 L. & SOC'Y REV. 79, 105 (2007) (arguing that the success of pro bono services depends upon the “willingness and capability of lawyers in pro bono programs to do whatever work is presented to them,” and it is essential that legal aid services enlist both law firms and individual lawyers in their efforts).
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107 See Access to Civil Justice, supra note 16, at 346-49 (arguing that the justice system can not only reflect but also create inequality).

108 ACCESS ACROSS AMERICA, supra note 72, at v.

67 SCLR 443
HOW TO REGULATE LEGAL SERVICES TO PROMOTE ACCESS, INNOVATION, AND THE QUALITY OF LAWYERING

Scholars and critics have for decades advocated change in the professional regulation of legal services markets in order to solve the ever-widening gap in access to justice. One of the central obstacles to change has been concern about the impact of opening legal markets to new practitioners and business models on central professional values such as competence, loyalty, and independence. This Article argues that good regulatory solutions are available to ensure that more open and flexible professional models -- ones that allow the practice of law by alternative providers and business structures -- deliver high quality, lower cost, greater innovation, and more access to those currently excluded from our justice systems. Part I explores the rationale for regulating the legal services market, and argues that oversight structures should be more responsive to differences in the risks that consumers face in various legal contexts. Part II surveys regulatory options: prescriptive, performance based, management based, and competitive or meta-regulation. Part III reviews the promising strategies that the United Kingdom has recently pioneered to promote access, innovation, and quality. Part IV analyzes regulatory options for the United States and the applicability of U.K. approaches in this country. Attention also focuses on the contributions and limitations of Washington's recent program to recognize limited license legal technicians. We conclude with proposals for more effective national regulatory models.

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INTRODUCTION

The case has been made for decades: our existing approaches to regulating the American legal profession increase costs, decrease access, stifle innovation, and do little to protect the interests of those who need or use legal services. Ordinary Americans routinely manage complicated legal circumstances with little or no professional help; the great majority of lawyers' work is done for large corporate clients, and the trend has only worsened in the last decades. The number of people showing up in court without legal assistance to manage problems with housing, family, domestic violence, consumer credit, and other challenges continues to mount -- in a recent New York study, the percentage of unrepresented litigants topped ninety-five percent in several routine categories. A lack of legal assistance with municipal and traffic violations has played no small part in the
abusive use of arrest warrants and fines in poor communities. Even in criminal matters where the *Gideon* right to counsel is constitutionally guaranteed, the inadequacy of legal help is staggering.

The traditional response of the organized bar to the crisis in access to justice has been to promote increased funding for legal aid, increased pro bono obligations on practicing attorneys, and the creation of a government-funded “civil *Gideon*” right to counsel in some civil matters. But it is also painfully clear that these responses are wholly inadequate. Providing even one hour of attorney time to every American household facing a legal problem would cost on the order of $40 billion. Total expenditures on legal aid, counting both public and private sources, are now just 3.5% of that amount. Fewer than two percent of all American lawyers work in legal aid or public defender jobs and pro bono work accounts for less than two percent of legal effort. Providing just one hour of pro bono assistance per problem to households facing legal difficulties would require over 200 hours of pro bono work per year by every licensed attorney in the country. No amount of volunteerism, ethical exhortation, or political pressure for increased taxation to fund legal services can ever fill the gap.

The principal obstacle to increasing access to legal assistance is the cost of the business model in which legal services have conventionally been available to ordinary consumers. That model relies on individual *one-on-one* lawyering, through traditional solo and small firm practices, generally billed on an hourly basis. The model foregoes the cost-reducing benefits of scale, branding, technology, and the ordinary efficiencies that would come from having lawyers specialize in legal functions, while others (software engineers, financial analysts, business managers, marketing experts, and so on) specialize in all the other functions. Why has the traditional model of legal service delivery not achieved greater efficiencies and lower costs?

The American approach to professional regulation is not the only answer, but it is clearly a major contributing factor. That approach is expressed primarily in the expansive rules on unauthorized practice of law and the restrictions on the corporate practice of law and fee sharing. Under that approach, all (paid) legal help must be provided by holders of an expensive graduate degree -- the J.D. -- who pass a state bar exam and hold a valid license from a state bar association. Legal services must be provided by a law firm that is owned, managed, and financed exclusively by lawyers. Lawyers who are employees of other entities can offer legal services only to their employer, not the public. Lawyers cannot enter profit- or revenue-sharing contracts with providers of complementary goods and services. These rules make the markets for legal services among the most, if not the most, intrusively regulated in the modern economy. Even the practice of medicine is far more openly organized, particularly since the advent of health maintenance organizations.

The fierce preservation of a legal professional regulatory model first adopted in the 1930s but substantially abandoned in other professions rests on two driving forces. The first is sheer protectionism. As much as we would like to deny that lawyers are using their special access to the regulatory levers to protect themselves from competition by alternative providers and business models, this is clearly part of the story. Anticompetitive behavior is, of course, a temptation for any self-regulating profession, as the U.S. Supreme Court recently acknowledged in a landmark decision finding that regulatory boards that are controlled by members of a profession are not exempted from application of the antitrust laws in the absence of active supervision by the state.

The second impediment to new models for regulating legal services is the sincere worry that changes to the doctrines prohibiting the corporate practice of law and fee sharing and the relaxation of the boundaries of the unauthorized practice rules will unleash a flood of shoddy, fraudulent, and/or unethical behavior upon the public. Lawyers working for corporations, it is feared, will defer to their shareholders and act in the best interests of their employers rather than clients. In the absence of unauthorized practice rules, many worry that innocent consumers could be bilked out of thousands of dollars by scam artists with no legal expertise to offer.

This apocalyptic scenario is of instrumental use to those who want to cast protectionist motives in high-minded rhetoric. But the scenario also, we think, haunts those in the profession who recognize the need for change to promote access but who worry that the unintended consequences will take us in the wrong direction. And it is to this latter group that we address our analysis in
this Article. Our aim is to demonstrate that there are a number of standard and well-developed regulatory approaches available to give comfort to this audience. (And, we would like to think, take the wind out of protectionist sails.) Indeed, the regulatory models we explore would not only release the potential for innovation and cost-reducing efficiencies in the practice of law, they would improve protections for consumers. That is a win-win for the profession, as well as for access to justice.

Our Article is organized as follows: We first explore the reasons for regulating the provision of legal services -- what are the risks that any approach to regulation seeks to mitigate? We consider here what other mechanisms might operate, even in the absence of specialized regulation, to serve the interests of the consumers of legal services. Against that backdrop, we can better appreciate when and where regulation can improve upon the unregulated marketplace. Next we survey various regulatory approaches. This overview helps to put the problem of regulating legal services in context, as an instance of the more general problem of regulation. We then explore in more detail how the major challenges that worry the profession?including allowing nonlawyer controlled entities to supply legal services, allowing lawyers to share profits or revenues with nonlawyers, and allowing practice by lay specialists?are managed in the United Kingdom. Finally, we propose some concrete options for adapting these regulatory approaches to the American environment.

*I1196 1. WHY REGULATE LEGAL SERVICES?

Although many Americans speak as though markets are natural objects on which government regulation is imposed, all markets are regulated markets. Standard economy-wide regulation shapes any market for services through contract and fraud law, public policy limits, antidiscrimination legislation, truth-in-advertising oversight, health and safety protections, and antitrust rules. In an industry regulated by just these basic regulations, the principal protection for consumers is market-based. Those who supply poor services do not get repeat business. Low quality providers do not grow their client base through a good reputation. Consumers protect themselves by researching their options, choosing known and trusted brands, trying out the service with a small or low-stakes job or a probationary or free trial period, monitoring performance closely, or by switching providers.

Markets can also produce their own regulatory rules through market mechanisms. Where consumers face some difficulty in assessing quality, for example, voluntary groups can form to certify performance. Certifiers?such as professional groups, educators, or quality watchdogs?can establish standards of education or practice that providers have to meet to earn the certifier's seal of approval or the right to advertise that they possess certification.

Government-led regulatory frameworks buttress this market-based protection by providing consumers with legal oversight and state-supplied sanctions. The Federal Trade Commission and state departments of consumer affairs, for example, monitor and take action against misleading advertising. State and federal antitrust authorities can investigate, enjoin, and sanction anticompetitive conduct. Consumers can sue, individually and in class actions, for violations of many of these and other statutory rules, as well as contract and tort laws.

The more extensive regulation of traditional professional services such as law, medicine, dentistry, architecture, and engineering rests on concerns about the potential failure or attenuation of these basic market, legal, and regulatory mechanisms. These professional services are characterized by three key features. First, the service requires, at least in some core cases, substantial specialization and expertise on the part of the provider. Second, it can often be difficult if not impossible for the consumer of the services to judge the quality of the services provided, even after the fact; the services comprise what economists call a “credence good.” Third, the stakes are often substantial; the consumer is relying to a significant degree on the quality and fidelity of the service provider. If people's health or liberty or large portions of their wealth are at issue and they have to trust their well being to the discretion and judgment of a service provider, the case is easier to make for greater regulation.

*I1197  Note that by “quality” here we mean many of the features that professionals think of as ethical attributes of service provision. So quality in lawyering means not only the competence of the service, but also the factors that lawyers allow to influence their performance. Do the lawyers choose strategies that are in clients’ best interest? Do the lawyers avoid conflicts of interest? Do the lawyers maintain the confidentiality of client information? Do the lawyers keep the client properly informed and do the lawyers remain adequately apprised of their clients' changing needs and circumstances?
Quality also includes attributes that service professionals sometimes do not think of as part of their job or as either legitimate or important expectations on the part of consumers. Other industries understand these attributes in terms of customer service. Are phone calls returned promptly and reliably? Does the professional convey respect and empathy for the client? Does the provider make it easy for the client to understand her situation, make choices, and implement solutions? Does the provider treat the client's time as valuable? Does the provider listen to what the client is saying? Is the provider an agreeable person to work with? Are the provider's procedures and modes of communication intuitive, easy to navigate, and appealing?

Table 1 gives a snapshot of failures of quality in legal services. It shows the frequency of different types of errors in claims made against legal malpractice insurance in Missouri from 2005 through 2014. It is clear that many failures in legal practice involve attributes of service delivery other than legal knowledge or judgment.

<table>
<thead>
<tr>
<th>Error or Omission</th>
<th>Number of Closed Claims</th>
<th>Number of Paid Claims</th>
<th>Average Paid per Claim</th>
<th>Total Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to ascertain deadline correctly</td>
<td>301</td>
<td>84</td>
<td>$131,962</td>
<td>$11,084,808</td>
</tr>
<tr>
<td>Planning or strategy error</td>
<td>261</td>
<td>73</td>
<td>$241,574</td>
<td>$17,634,902</td>
</tr>
<tr>
<td>Failure to know or properly apply law</td>
<td>171</td>
<td>53</td>
<td>$96,574</td>
<td>$5,118,422</td>
</tr>
<tr>
<td>Procrastination/lack of follow up law</td>
<td>129</td>
<td>34</td>
<td>$230,188</td>
<td>$7,826,392</td>
</tr>
<tr>
<td>Inadequate investigation</td>
<td>122</td>
<td>36</td>
<td>$120,483</td>
<td>$4,337,388</td>
</tr>
<tr>
<td>Failure to follow client's instructions</td>
<td>111</td>
<td>17</td>
<td>$211,126</td>
<td>$3,589,142</td>
</tr>
<tr>
<td>Failure to file documents (no deadline)</td>
<td>102</td>
<td>26</td>
<td>$70,962</td>
<td>$1,845,012</td>
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<tr>
<td>Failure to react to calendar</td>
<td>96</td>
<td>40</td>
<td>$61,955</td>
<td>$2,478,200</td>
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<tr>
<td>Malicious prosecution of abuse of process</td>
<td>85</td>
<td>14</td>
<td>$23,774</td>
<td>$332,836</td>
</tr>
<tr>
<td>Failure to calendar properly</td>
<td>75</td>
<td>41</td>
<td>$67,707</td>
<td>$2,775,987</td>
</tr>
<tr>
<td>Fraud</td>
<td>74</td>
<td>14</td>
<td>$57,871</td>
<td>$810,194</td>
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<tr>
<td>Conflict of interest</td>
<td>62</td>
<td>15</td>
<td>$239,342</td>
<td>$3,590,130</td>
</tr>
<tr>
<td>Clerical error</td>
<td>50</td>
<td>13</td>
<td>$24,742</td>
<td>$321,646</td>
</tr>
<tr>
<td>Failure to obtain clients' consent</td>
<td>47</td>
<td>8</td>
<td>$25,885</td>
<td>$207,080</td>
</tr>
<tr>
<td>Violation of civil rights</td>
<td>39</td>
<td>4</td>
<td>$101,250</td>
<td>$405,000</td>
</tr>
<tr>
<td>Math calculation error</td>
<td>21</td>
<td>7</td>
<td>$52,094</td>
<td>$364,658</td>
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<td>Improper withdrawal from representation</td>
<td>19</td>
<td>5</td>
<td>$54,342</td>
<td>$271,710</td>
</tr>
<tr>
<td>Error in public record search</td>
<td>16</td>
<td>6</td>
<td>$68,768</td>
<td>$412,608</td>
</tr>
<tr>
<td>Libel or slander</td>
<td>14</td>
<td>1</td>
<td>$15,000</td>
<td>$15,000</td>
</tr>
<tr>
<td>Failure to anticipate tax consequences</td>
<td>12</td>
<td>3</td>
<td>$455,000</td>
<td>$1,365,000</td>
</tr>
<tr>
<td>Lost file, document or evidence</td>
<td>5</td>
<td>1</td>
<td>$17,500</td>
<td>$17,500</td>
</tr>
<tr>
<td>Other</td>
<td>549</td>
<td>68</td>
<td>$72,266</td>
<td>$4,914,088</td>
</tr>
</tbody>
</table>

*1198 TABLE 1: MISSOURI MALPRACTICE CLAIMS 2005--2014

*1199 A principal reason to regulate professional services is to raise the likelihood that consumers of legal services receive the quality that they (explicitly or implicitly) expect in those settings in which the ordinary regulated market does not adequately police quality. These are settings in which consumers (patients, clients, constituents) put themselves in a professional's hands and are not in a position to second-guess the choices the professional makes and where the failure to live up to the obligation that trust creates carries potentially serious consequences. They are settings in which we do not expect that reputation alone will police conduct and where it is expensive to pursue a breach of contract or tort claim given the difficulty a consumer will face in identifying and then proving professional failures. They are settings in which the problems go beyond those covered by standard marketplace regulations such as restrictions on fraud, advertising or anticompetitive conduct.
A second reason to regulate professional services beyond ordinary marketplace regulation arises from society's interest in the provision of competent and ethical behavior. There may be externalities arising from the service provided to a particular individual. Fidelity to the rule of law promotes public confidence in the legal system and supports compliance with legal rules. In high stake matters, the public cares about how members of the community are treated. Society and third parties suffer from inadequate representation of those facing deportation, eviction, or loss of child custody.

However, the risk that the market and basic marketplace regulation will not adequately police quality is not the same across all quality attributes, consumers, and cases. Consumers can judge some attributes of service reasonably well. In those cases, with sufficient scale and some means for consumers to share experiences (online reviews, for example), providers can develop reputations and trusted brands. Many elements of customer service are in this category, such as returning phone calls, treating clients with respect, keeping clients informed, and providing easy-to-navigate materials and websites. Other quality dimensions can be judged by individuals who lack specific legal expertise and so can also contribute to reputations as well as decisions to pursue ordinary remedies for breach of contract or negligence. Many of these show up on the list of malpractice errors in Table 1, including: failing to ascertain a deadline correctly, procrastination, failing to file documents, failing to calendar properly or to react to a calendar entry, making a clerical error, failing to obtain consent, making an error in a math calculation, making an error in a public record search, and losing files or documents. These are errors arising from poor organization and process management -- a type of error that larger organizations with sufficient scale and resources to develop and implement systematic protocols can avoid more easily than individuals or small firms.

*1200 In other cases, the stakes are relatively low and hence the need for costly specialized regulation is harder to justify. Courts and legislatures make judgments all the time about the relative importance of the stakes in a case and the consequences of short-changing the quality of legal attention they receive. They do this when they decide, for example, to prohibit the use of lawyers in small claims cases. Cases involving small dollar amounts often (but not always) are relatively low stakes for the parties involved.

Not all consumers need the same kind of protection. Consumers with substantial market power need less protection than lone individuals -- the former have a good threat against poor quality providers. Those who are repeat purchasers are in a better position to protect themselves through choice, monitoring, and the threat to switch providers than one-time purchasers. Experienced or sophisticated customers, and those purchasing a large volume of services, have an incentive to invest in research about service options and can judge quality better than inexperienced, vulnerable, or small-volume purchasers.

Finally, some quality problems are just less frequent than others. The likelihood of a math error in online tax preparation software, for example, is very low. The potential for missing the opportunity to reduce estate taxes is limited to the tiny number of estates that exceed the multi-million dollar thresholds for estate taxes. The likelihood of any error is lower in cases that arise infrequently than in those that are commonplace. One of the factors leading deadline errors to top the list of Missouri malpractice claims (in addition to the ease of proof) is the sheer number of situations in which there is a deadline to be met; errors in public record searches might be much less frequent simply because there are many fewer searches of this kind that lawyers have to conduct compared to the number of deadlines of which lawyers have to keep track.

In short, attention to the differences in risks to quality in the legal services industry is a critical consideration in intelligent regulation. And, as subsequent discussion suggests, it is systematically ignored by conventional approaches to regulation of the legal profession. That means that providers of law-related services bear the costs of regulation across the board, despite the fact that in many cases the risks are low and can be handled well by market incentives and ordinary marketplace regulation.

II. WHAT ARE THE REGULATORY OPTIONS?

There are four principal methods for regulating services when the incentives created by ordinary marketplace regulation are inadequate. 22 The traditional approach to regulation is prescriptive, sometimes called *1201 command-and-control. Prescriptive regulation supplies specific and sometimes highly detailed rules about the training and qualifications that providers must possess, the practices they must follow, and/or the business models and techniques they must use to deliver the service. Violations of these rules can trigger fines or criminal sanctions. In addition, prescriptive rules can serve as prerequisites for a valid license to supply the service. Rule violations can then lead to license revocation.
By contrast, the second approach, performance- or outcomes-based regulation specifies results that a provider has to achieve, but does not specify how the provider has to achieve those results. Tort law is a familiar form of performance-based regulation. As noted earlier, tort law exposes service providers to damages if their services end up causing someone harm -- liability might be strict or only attach if the harm was due to professional negligence. Unlike a prescriptive regulatory regime, however, tort law does not specify upfront what specific behaviors or procedures a professional has to follow; it is only after performance has fallen short of some level that certain behaviors give rise to remedies. More generally, performance-based regulation is implemented by specialized regulators, who may audit performance and/or rely on complaints from consumers, to identify when required outcomes have not been achieved.

Both prescriptive regulation and performance-based regulation aim at the same target: ensuring that the quality of service delivered meets certain standards. The principal difference, however, is that with prescriptive regulation the regulator is relying on a prediction that the training and practice requirements specified in the regulations will produce the desired outcomes. With performance-based regulation, the regulator only targets behaviors that failed to produce desired outcomes in fact. Prescriptive regulation thus can miss the mark in two ways: (1) regulation might be ineffective, meaning that undesirable outcomes persist despite the requirements; and (2) regulation might be excessive, meaning that requirements could be relaxed or eliminated with no ill effects on outcomes. On the other hand, validated prescriptive regulations -- that is, those for which there is good empirical evidence of a reasonably tight nexus between the rules and the likelihood of bad results -- might be superior to performance-based regulations. This could happen, for example, if regulators are better at figuring out what practices reduce bad outcomes than practitioners are. For this reason, performance-based regulation is often preferable when there are multiple and possibly complex ways of potentially reducing undesirable results, when there is substantial uncertainty about the relationship between training, practices, and outcomes, and when practitioners are in a better position to innovate than state regulators.

A fourth approach, one that is relatively novel in the regulatory world, is meta-regulation or competitive regulation. Under this approach, government regulators regulate regulators. That is, the particular rules and processes that are imposed on providers are developed by possibly private, possibly multiple, third-party regulators. Those regulators are in turn subject to oversight by the state. The government requires providers to specify a regulator from among a set of approved regulators. The regulator that directly oversees the provider might be the state itself, or an entity such as a professional association that is responsible to the state. There are several other elements that figure in the design of regulation. Regulators can choose among different methods to identify regulatory violations. They can be reactive -- responding to complaints from consumers or others, or proactive -- engaging in regular auditing of providers and their practices. They can enforce regulations by revoking, suspending, or placing conditions on a license; publishing a violator's name; requiring remediation of inadequate service; and/or imposing fines. They can be enforced administratively through the creation of criminal liability for violations and/or through the creation of a private right of action that allows a consumer who has suffered a loss to sue, individually or as a member of class, for damages or other remedies.

*1202 Sometimes uncertainty extends even to the determination of what appropriate performance standards should be. A third approach, systems- or management-based regulation, has developed in response to this challenge. Under this approach, regulators specify neither required practices nor required outcomes. Instead, they require regulated providers to engage in a process of reviewing their practices and outcomes and to develop internal procedures for achieving goals they identify through this process. The procedures and goals are then approved and the regulator monitors compliance with the plan.

*1203 developed by the regulated entity. The regulator that directly oversees the provider might be the state itself, or an entity such as a professional association that is responsible to the state.
injunctive relief. They can regulate individual providers and/or the entities through which providers supply their services. They can require providers to take out insurance and/or establish compensation funds to cover losses when quality fails to meet required standards. Last, they can choose to finance the cost of regulation in multiple ways: through general tax revenues, transaction-specific sales taxes, licensing fees, professional dues, and/or revenues generated from fines.

The design of a regulatory system has to take into account all of these considerations, and then assess the actual benefits of a particular approach as against the costs. On both dimensions, regulation of the American legal profession is seriously misaligned with the objective of ensuring that consumers have affordable access to quality legal help as they navigate a complex legal environment. As we, and many others, have noted elsewhere, existing professional regulation focuses almost exclusively on ensuring particular quality attributes -- loyalty, independence, and confidentiality -- for those few clients able to afford to hire lawyers at current rates under current business models.\(^{26}\) Even for these clients, the protections available come at too high a cost, inhibiting innovation of lower cost and higher quality approaches to solving legal problems.\(^{27}\)

**III. HOW THE UNITED KINGDOM REGULATES TO PROMOTE ACCESS, INNOVATION, AND THE QUALITY OF LAWYERING**

Many current discussions of the need for reform of the American approach to legal professional regulation eventually circle around to the United Kingdom's alternative model. This model diverges substantially from the modern American approach, and it is because of the ways in which it diverges that it succeeds in promoting access and innovation *\(^{1204}\) without sacrificing the quality of lawyering. In this Part, after a quick summary of the American approach, we show how the U.K. model achieves these goals.

The modern American approach to regulating the practice of law dates to the late nineteenth and early twentieth centuries, led primarily by deliberate efforts in the American Bar Association to regulate admissions and practice and to wrest control from state legislatures and lodge it in state supreme courts.\(^{28}\) The resulting scheme, however, went far beyond the common law history of granting courts the power to determine who could appear before them. In effect, state courts delegated authority to bar associations to set rules (most of which followed the lead of the ABA Model Rules) that encompass all aspects of the practice of law. The power of these rules to exclude practitioners who did not meet bar standards or adhere to bar practice requirements (such as prohibitions on the corporate practice of law and fee-sharing) was often buttressed with legislation making it illegal to practice law without the authorization of the state supreme court.\(^{29}\) As many have recounted, the boundaries of this regulatory authority have always been expansive, with the definition of what constitutes the “practice of law” stretching to incorporate effectively everything done by lawyers: legal advice, drafting, negotiation, representation, and support in dispute resolution processes.\(^{30}\) Moreover, state supreme courts have claimed an inherent authority, grounded in the constitutional separation of powers, to regulate the legal profession in all of its activities.\(^{31}\)

The British approach to regulation of the legal profession has never followed the same path. From the earliest days, the United Kingdom has always had multiple legal professions -- originally barristers, solicitors, attorneys, and scriveners.\(^{32}\) At no time has the provision of legal advice or the drafting of documents (other than those required to participate in a lawsuit or convey real estate) been subject to regulation. And since the passage of the Legal Services Act (“LSA”) of 2007, the regulatory approach in the United Kingdom has diverged even further from the American model.

\(^{1205}\) The current regulatory approach of the LSA begins with designation of regulatory objectives. These regulatory objectives are:

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rules of law;
(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of regulated services . . .;

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.

The professional principles mentioned in (h) are set out in the Act:

(a) that authorised persons should act with independence and integrity,

(b) that authorised persons should maintain proper standards of work,

(c) that authorised persons should act in the best interests of clients,

(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and

(e) that the affairs of clients should be kept confidential.

Thus, the U.K. professional principles thus track all of the core values of the legal profession as articulated by the ABA -- with the important difference that the LSA adds a commitment to promoting competition and does not elevate as a goal in itself the preservation of a single (self-regulated) profession.
The strategy of the LSA is to designate particular instances of legal work as reserved activities and then to require that those activities only be performed by “authorized persons.” These reserved activities are:

(a) the exercise of a right of audience;

(b) the conduct of litigation;

(c) reserved instrument activities;

(d) probate activities;

(e) notarial activities;

(f) the administration of oaths.

This is where we see a major difference between the British and American approaches. The American bar associations and state courts effectively open the practice of law to bar-licensed attorneys only while reserving the right to add to the category of the practice of law down the line. This approach forces alternative providers to seek carve-outs for things like document assembly, supplying blank contracts (real estate agents), tax advice (accountants), non-profit assistance to immigrants in some hearings, and appearances before some federal administrative bodies such as the U.S. Tax Court, the Patent Office, and the Social Security Administration. The U.K. approach, in contrast, carves out specific activities for licensed lawyers, and leaves the residual open for competition from alternative nonlawyer providers.

A second major difference is that the category of “authorized person” in the United Kingdom includes multiple legal professions and licenses. Currently in the United Kingdom there are nine different professional licenses or designations for those performing reserved activities: solicitor, barrister, legal executive, notary, licensed conveyancer, patent attorney, trademark attorney, costs lawyer, and chartered accountant. Professionals practicing under these licenses have nonexclusive authorization to perform particular reserved activities and hence there is interprofessional competition. Barristers, solicitors, and legal executives can perform all reserved activities with the exception of notarial activities, which only notaries can perform. Notaries, however, can, alongside licensed conveyancers, also engage in reserved instrument and probate activities; neither can exercise a right of audience or conduct litigation. Patent and trademark attorneys can appear in court, conduct litigation, and engage in reserved instrument activities. Costs lawyers can appear in court and conduct litigation. Chartered accountants can engage in probate activities only; they are the only legal professionals who cannot administer oaths.

Regulation of each of these professions is carried out by a different approved regulator. The Law Society regulates solicitors and the Bar Council regulates barristers, for example. Approval and oversight of these front-line regulators is carried out by the Legal Services Board (“LSB”), an independent administrative body that is accountable to Parliament and operates out of the Ministry of Justice. With the exception of the Chief Executive (who is appointed by the Board), Board members are appointed by the Lord Chancellor. The Legal Services Act requires the LSB to have a lay chair and a majority of lay members. The Act also requires front-line regulators, which operate as trade associations promoting the interests of their members, to establish
independent regulatory arms (the Solicitors Regulatory Authority and the Bar Standards Board, for example). Under the authority of the Act, the LSB has established internal governance rules requiring the regulatory bodies set up by approved regulators to be governed by a board with a nonlawyer chair and a majority composed of nonlawyer members.

This is an example of what we earlier called competitive or meta-regulation: a legal practitioner who wishes to conduct litigation, for example, can choose from which professional body authorized to regulate that particular activity she wants to secure a license. This means that not only are existing practitioners engaged in interprofessional competition across dimensions such as cost and quality, so too are the front-line regulators in competition in the design and implementation of their regulatory requirements.

*1208 Competition between regulators occurs under the umbrella of oversight by the LSB, which must approve regulators’ rules and processes. Ultimately, the LSB is responsible for ensuring that regulators are fostering regulatory objectives. This involves reviewing, for example, proposed rule changes, monitoring the performance of the approved regulators, conducting research and investigation of the performance of legal services markets, and making recommendations to the Lord Chancellor about changes to the regulatory scheme implemented by the Legal Services Act. In carrying out its activities, the LSB is required to consult with the Lord Chief Justice (the head of the judiciary), the U.K. antitrust authority (the Office of Fair Trade), and a Consumer Panel.

The U.K. scheme also provides for the licensing of entities. These are known as alternative business structures (“ABS”), which supply an alternative to the law firm through which lawyers have traditionally offered their services. The LSB approves and oversees the bodies authorized to license ABSs. There are five licensing authorities: the Solicitors Regulatory Authority, the Bar Standards Board, the Council of Licensed Conveyancers, the Institute for Chartered Accountants, and the Intellectual Property Regulation Board (which regulates both patent and trademark attorneys). Collectively, as of 2015, these five licensing authorities had licensed over 800 entities, including solo practitioner entities, law partnerships, for-profit corporations, entities owned by unions and other non-profit organizations, and cooperatives. Most are private, not publicly listed, companies and include such recognizable names for Americans as Ernst & Young, LegalZoom, KPMG, and PriceWaterhouseCoopers. Slater & Gordon LLP -- an Australian firm with approximately twelve percent of the U.K. market in personal injury law in 2015 -- is one of the few publicly traded companies on the list.

The regulation of ABSs is two-pronged: the entity is regulated and the authorized persons within the entity are regulated. Both are subject to losing their license or authorization to practice in the event of a breach of the rules of a licensing authority (in the case of an entity) or an approved regulator (in the case of an authorized person). The licensing authority must approve anyone who holds a material or interest in an ABS. Approval is based on a determination that the holding of the restricted interest in the ABS will not interfere with the regulatory objectives of the LSA or the duties of the entity and any authorized person it employs to comply with their regulatory duties. Reserved activities must be carried on within the entity only through people authorized to perform those activities. There must be at least one manager who is authorized to engage in the reserved activities for which the ABS is licensed. Unauthorized persons -- owners, managers, employees -- are subject to the regulation of the licensing body and obligated to refrain from doing anything that might cause the licensed body or the authorized persons within it to violate their professional duties. An ABS is required to have a Head of Legal Practice, approved by the licensing authority. That individual serves as a compliance officer responsible for ensuring that only authorized persons carry out reserved activities and that unauthorized persons (including owners and managers) do not violate their duty under the Act not to cause the licensed body or its employees and managers to breach applicable regulations. The LSA also requires approved regulators to have systems in place to protect confidentiality. The traditional privilege against disclosure of confidential information covers any authorized provider or licensed entity.

The U.K. approach foregoes none of the traditional framework of professional regulation. It preserves all of the profession's long-held duties. And it preserves the capacity of the professional body to revoke individual lawyers' authorization to practice regardless of practice setting.
In terms of enforcement, the U.K. scheme relies on multiple strategies in addition to license revocation. It is a criminal offense punishable by fine or imprisonment for an entity to carry on a reserved activity through someone who is not an authorized provider. Approved regulators can also impose substantial fines: the maximum fines approved by the LSB are £250 million for an ABS and £50 million for a manager or employee. Regulators can disqualify individuals from serving as owners or managers of an ABS. Licensing authorities are authorized to intervene and take over management of an ABS that has violated regulations when necessary to protect clients. Approved regulators carry out annual compliance surveys and spot checks. They can also impose supervision on individuals and entities, as well as conditions on licenses.

The U.K. regulatory approach also takes other steps to protect the interests of clients. The major approved regulators require individual lawyers and ABSs to hold indemnity, in essence malpractice, insurance. Those licensed by the Solicitors Regulatory Authority (the largest licensing authority) must have client compensation funds. The LSA establishes an Office of Legal Complaints (“OLC”), with which any consumer can lodge a grievance. The OLC operates a Legal Ombudsman scheme, consisting of a chief ombudsman (who must be a layperson) and an assistant ombudsman. Ombudsmen are authorized to resolve complaints by remedies such as apologies, fee rebates, compensation, and rectification of errors.

The U.K. approach thus substantially relaxes or eliminates the traditional restrictions on the business models within which lawyers can practice and the financial and managerial relationships they can enter into with nonlawyers without sacrificing the professional values that have so worried American judges and bar associations.

These tradeoffs -- between the benefits arising from greater competition and flexibility in business models and the risks to consumers of failures of the quality they expect or are entitled to -- are in fact an overt part of the regulatory framework. The U.K. approach is self-consciously risk and outcome-based; it identifies the nature of risks and the outcomes that regulation seeks to achieve. For example, in its rules for determining whether to approve a regulator, the LSB has set out a chart that specifies the evidence it will be looking for to confirm that specific principles and risks are addressed. To gain approval, the regulators must “ensure that authorised persons must keep clients’ money separate from own . . . [and] must be able to compensate clients[;]” “demonstrate how regulated persons and entities are indemnified against losses arising from claims[;]” have a code of conduct that “enshrines the primacy of acting in the client interest and subjugates other pressures, be they commercial or otherwise to that principle[;]” and “ensure that definitions of appropriate skill and competence are proportionate in order to ensure both value and professionalism[.]”

The largest approved regulator, the Solicitors Regulation Authority (“SRA”), has defined four outcomes they expect to achieve and adopted an explicit risk framework to guide approvals for ABSs. They have expressly stated that their approach “is in contrast to our historical rules-based approach: we no longer focus on prescribing how those we regulate provide services, but instead focus on the outcomes for the public and consumers that result from their activities.” They focus “attention and activity upon issues, firms and potential risks that pose the greatest threat to our regulatory outcomes.” The SRA publishes annually a Risk Outlook that reports their ongoing assessment of where the risks lie.

*1210 How well is the U.K. approach working? As one of us has documented elsewhere, the evidence to date is promising. Both as a result of the longstanding acceptance of the idea that useful legal help can be provided by a variety of legal and lay professionals, and as a result of the licensing of ABSs, the U.K. framework includes many more options for English and Welsh consumers of legal services than the American model. Many of these options come in the form of unbundled services to support what in the United Kingdom is called “DIY” law and a wide range of advisory services to help people manage legal questions and issues that have not turned into lawsuits (yet). Total revenues in the legal sector increased eighteen percent between 2010 and 2014. There has been no loss of employment for lawyers. The number of practicing solicitors increased 2.3% from May 2014 to May 2015, and the number of vacancies advertised for law firms increased forty-eight percent in 2014. There has been substantial consolidation of practice, with the percentage of solo practitioners falling from forty-six to thirty-nine percent, and the percentage of firms with two to four partners growing from forty-one to forty-six percent between 2008 and 2011. As of 2013, ABSs were more likely than other practice entities to use technology: ninety-one percent reported having a website to deliver information and services, compared to fifty-two percent of solicitor firms using a website for advertising. Overall,
ABSs showed higher productivity and innovation\(^{72}\) and were statistically more likely to have seen an increase in revenues (fifty-seven percent compared to forty-nine percent).\(^{73}\) A 2015 study found that ABSs were thirteen percent to fifteen percent more likely to introduce new legal services and that twenty-five percent of all legal services providers had introduced a new or improved service in the three years following the introduction of ABS licensing. In short, “the major effect of innovation in legal services has been to extend service range, improve quality and attract new clients.”\(^{74}\)

Consumers are clearly benefitting from the U.K. changes. Although we lack systematic studies of the impact of changes on pricing, it is clear that the U.K. environment offers much more flat fee pricing than the \(^{1213}\) U.S. environment -- a pricing model that supports increased access by reducing uncertainty and risk and promoting transparent choices among providers. In 2014, 46% of consumers reported paying a fixed fee for services, up from 38% in 2012.\(^{75}\) Moreover, there are clear improvements in choice and perceptions of value, with the greatest gains in family law. The percentage of fixed fees in this area increased from 12% in 2012 to 45% in 2014. Between 2011 and 2014 the percentage of consumers saying they shopped around for services increased from 21% to 41%, and the perception that they had received value for their money increased from 50% to 62%.\(^{76}\)

There is no evidence of a flood of problems along lines that American commentators have raised. The SRA Risk Outlook for 2014/2015 indicates, for example, that dangers that the SRA in previous years had identified as possible risks -- a lack of due diligence over outsourcing arrangements and a lack of transparency in complex alternative business structures -- had failed to materialize.\(^{77}\) The rate of errors by unregulated will providers, while substantial, was equivalent to that of regulated solicitors, which led the government to reject a proposal to make will writing a reserved activity.\(^{78}\) Law firms with nonsolicitor managers and partners, known as Legal Disciplinary Partnerships (“LDPs”), generated fewer complaints on a revenue adjusted basis than solicitor-only firms from 2011 to 2013. ABSs resolved a higher percentage of complaints received than solicitor firms (93% compared to 83%).\(^{79}\) Although these are still early days, if anything the call has been for further loosening of restrictions to prompt even greater innovation and improvements for consumers.\(^{80}\)

\*1214 IV. AMERICAN OPTIONS

The U.K. regulatory scheme, which balances the need to promote innovation, quality improvements, and cost reductions against the potential for harm to consumers, has clear advantages over the approach in the United States. American unauthorized practice enforcement is not dependent on actual client harm.\(^{81}\) Nor do American discussions of regulatory reform rest on evidence of probabilities and harms. In a recent discussion, for example, one opponent of regulatory change told an ABA Commission that all legal services raise tremendous risks for clients that only licensed attorneys can manage.\(^{82}\) No evidence was cited and our previous discussion suggests why.

The need to guard against the way in which professional self-interest can cloud assessment of the public interest is a central feature of the U.K. approach. It ensures that regulatory bodies have lay chairs and a majority of lay members who are not the subjects of regulation. Acknowledgement of even sincere confusion between professional and public interest is also a central feature of American antitrust law. The U.S. Supreme Court has recently recognized that when the state delegates regulatory power to active market participants, as state supreme courts do,

> ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.\(^{83}\)

In what may be a new era for antitrust enforcement of self-regulated professions,\(^{84}\) bar associations and state supreme courts must ensure that their regulation of lawyers is based on systematic attention to real, not imagined, risks, and that those risks are appropriately balanced against the costs of regulations that raise costs, inhibit innovation, and fail adequately to protect
consumers. The evidence from the United Kingdom demonstrates that relaxation of many American restrictions on practice poses little risk and significant gains for the public.

As we have argued elsewhere, the four changes to regulation needed to improve access, reduce costs, promote innovation and improve quality are: (1) to develop a licensing scheme under which entities in addition to lawyer-only law firms are authorized to provide legal services; (2) to relax rules on the contractual relationships possible between lawyers and nonlawyers to allow revenue and profit sharing; (3) to expand the number and diversity of licensed legal professions; and (4) to allow some legal help to be provided by licensed nonlawyer experts or by lay individuals subject to ordinary protections of the market supplied by consumer protection, contract, and tort law.

While we believe that the ideal reforms would follow the British model and establish specific legal activities that require licensing, leaving the residual to the ordinary protections of the market, we recognize that such a shift is only likely to be acceptable in the United States on the basis of evidence that these protections achieve acceptable outcomes for American consumers. Although the U.K. evidence here is very promising, we realize that the American marketplace may differ from the U.K. marketplace, which has a long tradition of nonlawyer-based legal advice and assistance. In the United States, a wait-and-see approach that seeks to test the impact of relaxed constraints on the scope of authorized practice is consistent with the prudent outcomes- and risk-based approach to regulation that we advocate. Similarly, although we also think it would be ideal to have multiple separately regulated professional bodies, allowing a form of interprofessional regulatory competition as there is in the United Kingdom, this too seems like something that would need to emerge over time in a changed regulatory landscape in the United States.

For these reasons, we focus our discussion of American options on the development of a licensing regime in which attorneys have more flexible relationships with nonlawyers and legal services entities are able to operate at national scale. We propose that such a regime begin with a clear statement of guiding principles. These should include promotion of access to legal services through cost reduction and innovation as well as the observance of lawyers' traditional professional duties: competence, loyalty, independence, confidentiality, the avoidance of conflicts of interest, and the obligation to uphold the rule of law and the impartial administration of justice. An appropriate registration and licensing regime should then focus on identifying specific risks and balancing prescriptive rules with performance-based oversight. Regulatory enforcement should focus on cases in which risks have in fact materialized. Oversight should rest with independent regulators who have sufficient accountability to the state and public interest to satisfy the requirements of active state supervision and avoidance of anticompetitive conduct by practicing attorneys. The discussion below offers greater detail on how such a system might operate in practice. But first we address a major challenge in the American context: supporting the operation of entities and legal practices at national scale in light of the constraints of federalism and the long history of state-by-state regulation of lawyering.

In order to achieve national scale, entities ideally should have a single regulator. With fifty different regulators, the barriers to entry are significant, particularly in light of the way in which professional regulation is now conducted through bar committees that operate with little transparency and little active supervision from state courts. One obvious route to a single regulator is for Congress to create a national licensing authority, exercising authority under the Commerce Clause to regulate interstate commerce. Proposals for a national bar exam and system of admission are not new -- state-by-state licensing has been a longstanding barrier to mobility and national practice for attorneys. Prior objections to a centralized governance scheme have included concerns that federal licensing of attorneys is inconsistent with state courts' inherent regulatory power and that the federal bureaucracy necessary to administer the system would be vulnerable to political capture and would pose an undue risk to the independence of the profession.

A federal licensing authority for entities, however, need not entirely displace existing state-by-state bar admissions and regulation of attorneys. As we have seen with the U.K. example, the introduction of entity licensing need not terminate judicial control and discipline of lawyers. Nor need it displace professional control over education, bar admissions, and lawyer discipline. Licensing and regulation of ABSs in the United Kingdom is layered on top of lawyer licensing and regulation. Federal licensing of such entities in the United States could oblige entities to ensure that legal services are supplied in a manner that is consistent with professional principles, and could require that legal work be conducted under the responsible oversight of licensed attorneys. Failure to abide by these requirements would result in enforcement against the entity: criminal proceedings,
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fines, suspension, or revocation [*1218] of the entity's license, for example. Entities could be required to hold minimum levels of malpractice insurance, establish compensation funds, and cooperate with remedial orders emerging from an independent complaints resolution process (along the lines of the U.K. Legal Ombudsman).

The only substantial modification to state-by-state professional rules of conduct that would be required in such a regime would be authorization for state-licensed attorneys to practice within or with a licensed entity. [*90] This would mean modifying the rules that currently make it professional misconduct for an attorney to be an employee of an entity providing legal services to the public or to be in a revenue-sharing arrangement with an entity. State regulators could continue to prohibit any employment or fee-sharing relationships with *unlicensed* entities. All other professional duties imposed by state regulators on attorneys could remain in place: competence, the avoidance of conflicts of interest, loyalty to the client, independence and upholding duties to courts, and the fair administration of justice. Attorneys would still be subject to state-based discipline including suspension and revocation of a license for misconduct. Attorneys would still be required to meet state-based standards for admission to the bar. State courts would continue to determine who could appear before them.

Specific concerns about the impact of federal licensing on the independence of state-licensed attorneys and the inherent authority of state supreme courts to oversee the administration of justice in their states could be addressed with appropriate provisions in the federal licensing law or state statutes or court rules. For example, as with the U.K. regime, the client's privilege against the disclosure of confidential communications could be expressly extended through federal and state rules in order to cover communications shared between the attorney and the employees of a licensed entity. Express obligations on entity personnel not to interfere with the exercise of independence by attorneys with whom they work could be written into the federal licensing law -- as they are in the U.K. Legal Services Act -- and enforced with the threat of license revocation.

To facilitate a federal entity licensing regime, state laws prohibiting the unauthorized practice of law by corporate entities might have to be [*1219] amended to allow a valid entity license to be recognized as a complete defense to prosecution. Alternatively, we can imagine that courts would be bound to recognize federal preemption of state law as applied to licensed entities. State prosecutors could still pursue charges against unlicensed entities and individuals engaged in the unauthorized practice of law, although they should be required to have evidence of public harm. [*91] In effect, such a federal licensing scheme would leave in place existing state-based attorney regulation and unauthorized practices rules but create a safe harbor for entity practice.

An important advantage of federal licensing of entities is that a federal regulatory authority could achieve the independence from practicing attorneys necessary to ensure that oversight develops in the public interest and with protection of consumers as the primary consideration. Moreover, a fresh start on regulation makes it much more likely that a new regulatory authority could follow the U.K. model and adopt an outcomes- and risk-based approach to regulation that uses the data collection advantages of national scale to ensure that regulation is evidence based. Funding for a federal agency can also draw on license fees levied on regulated entities based on nationwide revenues. The United Kingdom's Solicitors Regulatory Authority, for example, in addition to collecting dues from solicitors, imposes licensing fees that scale with revenues. [*92] For an entity such as LegalZoom, with U.S. revenues thought to be on the order of $ 200 million, licensing fees at comparable rates would amount to about $ 350,000. [*93] For entities hitting the billion-dollar mark, as the largest U.S. corporate law firms do, the fee to become a licensed entity on a nationwide scale would approximate $ 1.5 million.

An alternative to a federal licensing body would be a cooperative regime between state regulators. This could take one of two forms. One possibility is the creation of a joint licensing authority among the fifty states. Individual state supreme courts could delegate the power to license and oversee entities to this joint agency. This approach, like the federal approach, retains the attractions of a single dedicated regulator and the potential for a fresh, independently funded and managed regulatory regime. State courts would, however, retain ultimate authority to revoke the power of the joint agency to license entities to practice in their state in the event that the agency failed to meet state standards.

[*1220] A second, but in our view inferior, possibility that does not involve federal legislation is the establishment of a national board for the development of uniform entity licensing standards and practices. Individual state supreme courts could then provide in their own rules requiring that compliance with the national standards and practices will meet state standards. Alternatively, on the model of drivers' licenses, states could recognize as valid entity licenses obtained in any state that met national standards. This is the approach followed in Australia for attorney licensing. There, lawyers are admitted by a state or territory, but under uniform
standards, so that their admission is recognized nationally. A drawback of this approach is that the burden of actual licensing and oversight would still fall on the states. In addition, as a practical matter, state supreme courts -- heavily burdened with overwhelming caseloads and inadequate budgets -- would still face the pressure they experience today to delegate substantial regulatory power to bar associations. That means that despite common nationwide standards, licensed entities could face the risk that the application and enforcement of standards would diverge across states and lack transparency. Such an approach might well fail to produce a single set of nationwide standards for entity practice.

The creation of a national entity licensing authority, whether as a creature of federal law or of cooperation among the state supreme courts in their rulemaking capacity, also holds out the potential for other regulatory reforms, beyond entity regulation, that can improve access, promote innovation, and improve the quality of lawyering. We noted earlier that a narrowing in the scope of legal practice for which a license is required in the first place -- along the lines of what is permissible in the United Kingdom for example -- would be likely to emerge in the United States only on the basis of evidence about actual risks of poor outcomes for consumers. A national licensing authority could move that process along by undertaking to license providers of designated likely low-risk activities. The national authority could then monitor performance in these market segments: collecting data on prices, serving as a central complaints office, auditing performance to assess the incidence of errors, for example. Licenses could be revoked on the basis of evidence that a provider has fallen beneath acceptable standards. Again, a major advantage of this approach is the capacity to collect evidence on a national scale in order to develop outcomes and risk-based regulation that appropriately balances the goals of access, innovation, and competition against legitimate concerns for client protection. Regulators, state and national, would then be able to determine which activities really do impose low risks of generating problems, and where enforcement resources should focus on to prevent the truly serious risks. The “notario” scams that haunt state regulators now merit close attention; the development of online advice platforms for routine legal questions may not.

In 2015, Washington State took the first steps toward such a licensing framework by recognizing limited license legal technicians (“LLLTs”). The program, adopted after twelve years of study, will enable graduates to handle out-of-court family matters without a lawyer’s supervision. Although only fifteen individuals were in the initial class, the program has already attracted considerable attention. In 2014, the ABA Task Force on the Future of Legal Education released a report calling for limited licensing and the expansion of training programs for such practitioners by law schools. California and Oregon are considering such proposals. New York has adopted a pilot program that allows trained nonlawyer “navigators” in specific locations in the Brooklyn Housing Court and Bronx civil court to answer questions by the trial judge and assist pro se litigants in preparing papers and negotiating settlements. A major virtue of limited licenses is that they can promise to provide higher quality, due to specialization, than that provided by general practitioners.

The Washington State experience, however, also speaks to the challenge of developing alternative licenses that promote access to justice within the framework of our existing state supreme court-based system of regulation. First, there is the reality that state supreme courts are already overburdened and lack the policymaking and regulatory oversight resources necessary to develop brand new regulatory regimes. Given this reality, the Washington State Supreme Court, which ordered the creation of the LLLT scheme, chose to vest responsibility for its development with an independent board, responsible to the court, composed of volunteers, a majority of whom are lawyer members of the Washington State Bar Association. Staffing is provided by the bar association. This has arguably led to the reproduction of the shortcomings of existing professional regulation -- an overreliance on prescriptive rules, with little in the way of evidence regarding the relationship between requirements and outcomes. In addition, the dominance of lawyer-members on the governing board generated an inherent conflict of interest: asking one set of professionals -- licensed J.D.s -- to develop and oversee a regime for professionals they see as their competitors. The Washington program came into being only by order of the Washington State Supreme Court over opposition from the Washington State Bar Association. The LLLT Board adopted stringent qualifications. Whether these qualifications and other practice requirements will discourage large numbers of applicants, and thus prevent robust price competition or inhibit significant efficiency gains, it is too soon to tell.

The development of a new national regulatory authority for entity licensing could, however, offer a path to the development of a more robust licensing alternative. One straightforward advantage is the economies of scale inherent in the development of a single set of requirements at a national level. Individual states could then determine whether to recognize these licenses.
Furthermore, the development of alternative professional licensing categories could emerge on the basis of actual evidence developed from entity oversight regulation. The great promise of expanded professional licensing, we believe, lies not in licensing individuals who then are required to practice within the inefficient business model of solo and small-firm lawyer practitioners, but rather in the development of specialized skills deployed within a larger organization. This is the model within which the multiple professionals in health care operate: as members of a broad-based health care team coordinated within a hospital or health care organization. That is, additional specialized and limited legal licenses make sense within the broader context of entity regulation. Within that framework and within those entities, many of the concerns lawyers now voice about alternative practitioners can be met much more effectively. The quality of practice by alternative practitioners operating on teams within an entity can be monitored both by the entity -- which is able to implement protocols and internal oversight mechanisms -- and by the entity regulator -- which has the ability to fine or revoke the license of an entity that fails to appropriately supervise those operating under a limited license. Our hope, then, would be that establishing a national licensing authority -- whether under federal law or as a result of joint action by state supreme courts and legislatures -- would lay the groundwork for an informed development of alternative licensing frameworks.

CONCLUSION

As scholars who have long advocated fundamental reform in the delivery of legal services and the regulation of the legal profession, we are not naïve about the political obstacles that stand in the way. But we are hopeful that recent changes in the conditions of practice and the examples from other nations can serve as a catalyst for rethinking current frameworks. Only through a substantial reconstruction of our regulatory approaches can we begin to make access to justice less of an aspiration than a reality.

Footnotes

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TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010).


This calculation is based on data in Hadfield & Heine, supra note 2. It uses a straight-line average of the percentage of households reporting at least one legal problem in state surveys (sixty-two percent), the average number of problems experienced by these households (three) and an estimate of an hourly rate of $ 200.


An ABA survey calculated that licensed attorneys provide on average 42.8 hours of pro bono services directly to people of limited means in 2012. AM. BAR ASS'N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 6 (2013). Assuming forty-eight forty-hour weeks of work for an average lawyer, this is a little over two percent of annual legal effort.

See supra basis for calculation note 7.

Hadfield, The Cost of Law, supra note 1, at 44.

Id. at 49.

With limited exception now in Washington State, which we discuss infra Part IV.

See, e.g., MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 2013). Washington, D.C. is a limited exception. D.C. RULES OF PROF'L CONDUCT r. 5.4(b) (2016) (allowing nonlawyer financial interest and managerial authority in law firm provided firm has as its sole purpose providing legal services and lawyers are responsible for nonlawyer participants).

Id.

Id.

For a history of professional regulation in medicine, see JAMES C. ROBINSON, THE CORPORATE PRACTICE OF MEDICINE: COMPETITION AND INNOVATION IN HEALTH CARE (1999).

Rhode's chronicles of these efforts span three decades. See Rhode, Policing the Professional Monopoly, supra note 1; Deborah L. Rhode & Lucy Buford Ricca, Protecting the Profession or the Public: Rethinking Unauthorized Practice Enforcement, 82 FORDHAM L. REV. 2587 (2014); see also RHODE, THE TROUBLE WITH LAWYERS, SUPRA note 1, at 42?44, 88?90.


22. For an overview, see Peter J. May, Regulatory Regimes and Accountability, 1 REG. & GOVERNANCE 8 (2007).


25. GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY (forthcoming Oct. 2016); CHRISTINE PARKER, THE OPEN CORPORATION (2002). Parker's use of the term “meta-regulation” is expansive and includes what we called management-based regulation, above -- where the “regulator” is the self-regulating provider.


30. Hadfield, Legal Barriers to Innovation, supra note 1, at 1707.


32. See generally Michael Burrage, From a Gentlemen's to a Public Profession: Status and Politics in the History of English Solicitors, 3 INT'L J. LEGAL PROF. 45 (1996) (examining the professional formation of English solicitors to understand its contemporary transformation).

33. Legal Services Act 2007, c. 29, § 1(1) (Eng. & Wales).

34. Id. § 1(3).

35. The maintenance of a single profession of law was added to the list of core values of the profession in the ABA House of Delegates' resolution in 2000 rejecting recommendations from the ABA Commission on Multidisciplinary Practice to allow lawyers to share fees with nonlawyer professionals. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, RESOLUTION OF HOUSE OF DELEGATES ADOPTING REVISED RECOMMENDATION 10F (2000). As discussed in Hadfield, Legal Barriers to Innovation, supra note 1, at 1692?94, this suggests lawyers have an ethical duty, comparable to their duty to protect the public, to make sure that only traditionally licensed lawyers provide any form of legal services. This minimizes, rather than promotes, competition.
Legal Services Act 2007, c. 29, § 12(1) (Eng. & Wales). Reserved instrument activities refer to transactions involving real and personal property (sales, long-term leases, liens, and so on) but do not include wills, short-term leases, powers of attorney or stock transfers that do not involve a trust or limitation on the transfer. See id. § 12(2).

See KRITZER, supra note 28, at 202?16.

The Legal Services Board estimated in 2015 that twenty to thirty percent of expenditures on legal services are made to unregulated providers, noting that “this is permitted under the Legal Services Act 2007, which provides that individuals or firms must only be authorised and regulated if they wish to provide one of the six ‘reserved legal activities.’” Unregulated Legal Services Providers, LEGAL SERVS. BOARD, http://www.legalservicesboard.org.uk/Projects/Unregulated_Legal_Services_Providers/index.htm (last visited May 29, 2016).

A Legal Executive is someone who has generally pursued a non-university training path to practice and has worked under the supervision of a licensed provider for a number of years. Legal Executives are able to engage in the same services as a solicitor or barrister under the Legal Services Act 2007. A Costs Lawyer is a practitioner who focuses specifically on resolving disputes involving the allocation of expenses under the British rule that allows a court to require a losing party to pay a portion of the winning party’s legal fees and costs. See Approved Regulators, LEGAL SERVS. BOARD, http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/ (last visited May 29, 2016).

Legal Services Act 2007, c. 29, § 20, sch. 4 (Eng. & Wales).

Id.

Id. § 2, sch. 1.

A layperson is defined as someone who has never been an authorized person with respect to a reserved legal activity. Id. § 2, sch. 1. Committees and subcommittees of the Board must also have a majority of lay members. Id. § 2, sch. 1, pt. 20(4).

Id. §§ 29, 30.

Id. § 20, sch. 4.

This includes investigations to determine whether regulatory boards are operating independently of the representative arm of an approved regulator.


See id.

Legal Services Act 2007, c. 29, § 89, sch. 13 (Eng. & Wales). In general a material interest means at least a ten percent ownership of shares (a licensing authority can establish a higher threshold) or the capacity to exercise “significant influence” over management by virtue of ownership or voting rights, either in the entity or its parent. Any change in ownership must be reported to the licensing authority and the authority can place conditions on ownership. Id. § 20, sch. 13.

Individual licensing authorities can impose further restrictions on owners. For example, the Bar Standards Board proposes to require all nonlawyer owners to also be managers. BAR STANDARDS BD., BAR STANDARDS BOARD HANDBOOK r. S 108 (2015).

Legal Services Act 2007, c. 29, § 16, sch. 11, pt. 3 (Eng. & Wales). This includes activities that are carried out by unauthorized persons but at the direction and under the supervision of an authorized person.

Id. § 16, sch. 9, pt. 2.
In some cases, submission to the regulatory authority is accomplished through contract. See BAR STANDARDS BD., SUPRA note 50, at r. S90.3.

Legal Services Act 2007, c. 29, § 11, sch. 11, pt. 2 (Eng. & Wales).

Id. § 17, pt. 3.

Id. § 190, pt. 8.

Id. §§ 14-17, pt. 3.


Legal Services Act 2007, c. 29, §§ 99-100, pt. 5 (Eng. & Wales).

Id. § 102, sch. 14, pt. 5.

See, e.g., BAR STANDARDS BD., LICENSING AUTHORITY APPLICATION 23 (2015) (regarding spot checks and sampling to confirm compliance); Legal Services Act 2007, c. 29, § 10(3)(b), sch. 16 (Eng. & Wales); id. § 85, pt. 5.

BAR STANDARDS BD., supra note 50, at r. C 76; SOLICITORS REGULATION AUTH., SRA INDEMNITY INSURANCE RULES 2013 (2013); CHARTERED INST. OF LEGAL EXECUTIVES, PROFESSIONAL INDEMNITY INSURANCE RULES 2015; INTELLECTUAL PROPERTY REGULATION BD., RULES OF CONDUCT FOR PATENT ATTORNEYS, TRADE MARK ATTORNEYS AND OTHER REGULATED PERSONS r. 17 (2015); INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND & WALES, PROFESSIONAL INDEMNITY INSURANCE RULES, at r. 3.1 (2011).

Legal Services Act 2007, c. 29, § 137, pt. 6 (Eng. & Wales). The value of compensation or the cost of rectifying errors cannot together exceed £ 30,000. Id. § 138, pt. 6. Both respondent and complainant are bound by the ombudsman's resolution as final if the complainant accepts the resolution. Id. § 140(4), pt. 6.


Id. The attention to risk is not just hortatory: the LSB denied the Council of Licensed Conveyancers application to become an approved regulator for litigation activities because the CLC “failed to demonstrate an appropriate understanding of the specific risks of the new activities” and failed to demonstrate that its proposed regulatory arrangements were outcomes focused and risk based. “Key to this,” they noted, the applicant needs to be able to demonstrate that they have a good understanding of the risks and issues presented by the activities and that proposed regulatory and operational arrangements have been designed or adapted to mitigate those risks. They need to be able to satisfy us that they have considered the different market in which they will be operating including (but not limited to) the types of clients that might use the new services and the different types of businesses (e.g. size, business models, ownership, financing arrangements) that may seek authorisation. An understanding of the risks and issues is necessary if the applicant is to be able to be effective at targeting is authorisation, supervision and enforcement arrangements and resources in a risk based way.]


The Risk Outlooks for 2014/2015 and 2015/2016 identified as priority risks: misuse of money or assets; money laundering; bogus law firms; lack of a diverse and representative profession; failure to provide a proper standard of
service, particularly for vulnerable people; breach of confidentiality as a result of failure of information security and cybercrime; a lack of independence due to pressure from large clients (including corporate employers of in-house lawyers); and improper or abusive litigation. SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2014/15 (2014) [hereinafter SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2014/15]; SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2015/16 (2015).

68 Hadfield, The Cost of Law, supra note 11, at 43; Hadfield, Innovating to Improve Access, supra note 1.


70 LEGAL SERVS. BD., MARKET IMPACT OF THE LEGAL SERVICES ACT 82 (2012).

71 Id.

72 Id. at 80.

73 LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS: AN EMPIRICAL ANALYSIS 6 (2013).


75 LEGAL SERVS. CONSUMER PANEL, TRACKER SURVEY 2014 BRIEFING NOTE: A CHANGING MARKET 4 (2014) (“The five areas where fixed fees are most common are: will-writing (71%); power of attorney (65%); conveyancing (66%); immigration (55%); and family (45%).”).

76 Id. Across all categories, choice satisfaction increased from 65% to 68%; shopping around increased from 21% to 23%; those finding it difficult to compare providers dropped from 28% to 14%; those using the same lawyer as before dropped from 25% to 21% and those perceiving value for their money increased from 57% to 63%. Id. at 1.

77 SOLICITORS REG. AUTH., SRA RISK OUTLOOK 2014/2015, supra note 67, at 8.


79 LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS 77-78 (2013). The SRA allowed solicitors to form Legal Disciplinary Partnerships with nonsolicitor owners who were also managers and partners beginning in 2009; these converted to ABS licenses (which allows approved nonlawyer owners who are not also managers or partners) in 2012 when ABS licensing first became available. Id.


81 Rhode & Ricca, supra note 18, at 2604.

82 Larry Fox, Submission to ABA Commission on the Future of Legal Services (July 2015).

Even the most routine divorce can and will cascade out of control.... All clients, particularly the poor, deserve real lawyer supervision, responsibility and control for all that is undertaken on their behalf. And that is because the only routine...
surgery is surgery that is being performed on someone else, and only a full-fledged lawyer will be able to identify when it is that the legal services required are anything but routine. *Id.* (emphasis added). Fox's approach rejects the very idea that risks vary across settings or that it can be possible to identify higher risk cases and divert those that need higher-level services to avoid bad outcomes into that appropriate level without sending all into high-cost solutions. There is after all a category of routine surgery and not all surgery calls for or is conducted by a specialist. And indeed much of health care is not surgery but routine treatment of routine medical needs. The medical profession relies heavily on non-MD professionals such as nurse practitioners, certified nurse anesthetists, pharmacists, and physical therapists to appropriately allocate expensive MD services where they are needed and reduce the cost of routine care. Fox offers no answer to the point that it is simply not possible, even with massive increases to legal aid and pro bono, to provide the millions of people who currently get no help on these important matters with services from “full-fledged” lawyers. Nor does he identify any evidence to suggest that this is necessary.

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85 Bar association leaders are hardly circumspect about the extent to which their regulatory actions are responsive to the interests of lawyers. In testimony before the ABA's Ethics 20/20 Commission, the chief deputy counsel in Colorado's office of attorney regulation maintained that a Colorado open-border policy, allowing attorneys licensed in other states to practice in Colorado up to the point of litigation, as long as they do not become domiciled there or open an office, has “worked well.” Former ABA president Carolyn Lamm responded that advocating such an approach would impair the Commission's credibility and would “not go over in the ABA House of Delegates.” Joan C. Rogers, *Ethics 20/20 Commission Gets Earful About Its Draft Proposals on Foreign Lawyers, MJP, 27 LAW. MANUAL PROF'L CONDUCT 669, 671 (2011) (quoting James Coyle and paraphrasing Carolyn Lamm). That objection underscores the problems of vesting so much authority over regulatory policy in the organized bar, which is anything but disinterested concerning issues affecting professional competition. Similarly, efforts by the 20/20 Commission to develop proposals for relaxed rules on nonlawyer participation in law firms was squelched by, among other things, opposition from the New York State Bar Association based on a survey of its members and the discovery that there was little demand among lawyers for change. For a discussion and citations, see Hadfield, *The Cost of Law,* *supra* note 1. We also note that Larry Fox has been unabashed in his comments to the ABA's Commission for the Future of Legal Services about the fact that he sees the significant commercial threat to lawyers -- and corporate law firms like the one at which he practices -- as a basis for putting the brakes on the Commission's reform agenda. He titles his submission to the Commission “A Message from the Legal Profession: SOS.” Mr. Fox also subsequently sent to the Commission an e-mail containing a link to a story about how accounting firms are making inroads into corporate M&A work in Australia under Australia's U.K.-style approach to regulation with the subject line “Help!”


87 The U.K. history of nonlawyer legal services also developed within the framework of extensive legal aid. Many of those providing such services have done so through publicly funded legal help centers or were paid for by government. Because of public funding, these providers have been under some government oversight, if only on the basis of maintaining their eligibility for and success in obtaining legal aid contracts. For evidence that nonlawyer legal services have provided high quality assistance in the United Kingdom in the context of legal aid, see Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales,* 37 LAW & SOC'Y REV. 765 (2003).

88 Although formal enforcement processes such as disciplinary proceedings against a licensed attorney and criminal proceedings against those charged with unauthorized practice are carried out with state court participation, most
regulatory oversight and intervention is carried out by bar committees composed entirely of practicing attorneys who open investigations and send out warnings or cease and desist letters without state court oversight or who refuse to register legal aid plans. See generally Complaint, Legalzoom.com, Inc., v. N.C. State Bar, 2015 WL 3499887 (M.D.N.C. June 3, 2015) (No. 15 Civ. 439). These are the practices found anticompetitive in the North Carolina Board of Dental Examiners case. See N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).


90 Depending on the business model pursued by the licensed entity, other changes might be needed to ensure that attorneys working with and within licensed entities are not at risk of violating state professional conduct rules. For example, bar associations sometimes suggest that lawyers who participate in websites that review or rate lawyers or who are identified as specialists are in violation of bar rules about advertising. See, e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Opinion 972 (June 26, 2013); S.C. Bar Ethics Advisory Comm., Opinion 09-10 (Mar. 22, 2010). Other possible changes include allowing attorneys to practice under a firm name other than a personal name and permitting licensed entities to direct work to a particular (appropriate) lawyer to perform services.

91 See Rhode & Ricca, supra note 18, at 2597?99.


93 Michael Carney, The $ 425 M Legalzoom Deal Is a Win for VCs, but Less Exciting for the Company or LA, PANDO (Jan. 6, 2014), https://pando.com/ 2014/01/06/the-legalzoom-deal-is-a-win-for-vcs-but-less-exciting-for-the-company-or-la/.

94 Murray Hawkins, Questions and Answers Australian Legal Education and Bar Admissions, 77 BAR EXAMINER 11, 18 (2008).


97 AM. BAR ASSN TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 3, 24-25 (2014).


100 See Moorhead et al., supra note 87. As Andrew Perlman notes, the LLLT 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.” Andrew M. Perlman, Towards the Law of Legal Services, 37 CARDOZO L. REV. 49, 110-11 (2015).

101 The Washington Bar Association opposed the LLLT program, citing concerns that it would institutionalize “second class, separate but unequal, justice” and “take work away from young, rural, and less affluent lawyers.” Holland, supra note
96, at 75 (quoting Washington Board of Governors). The chair of its Family Law Section claimed that legal technicians would lack the “competency to actually do for the poor what needs to be done. Just because you're poor doesn't mean your legal problems are simple.” Robert Ambrogi, Authorized Practice, 101 A.B.A. J. 72 (2015) (quoting Ruth Laura Edlund). California's consideration of a licensing program has drawn similarly harsh criticism from practitioners. One commentator said she was “astonished that [[the bar] would consider actions that would be detrimental to the honest attorneys who are trying to make a living in California.” Samson Habte, California and Oregon Task Forces Endorse Licensing of Nonlawyer “Legal Technicians,” 31 LAW. MANUAL PROF. CONDUCT 164 (2015).

102 The Board's responsibilities are set forth in Washington Courts, Limited Practice Rule for Limited License Legal Technicians, at r. 28C(2) (effective Sept. 3, 2013). Admission requirements include an associate's degree, forty-five core credits of paralegal instruction, fifteen “practice area” credits developed in collaboration with an ABA-approved law school, and 3000 hours of lawyer-supervised experience, as well as passage of core and practice area exams. ID. at r. 28(D)-(E); ID. at r. 28 app. Reg. 3. LLLTs must also satisfy character and fitness requirements and carry liability insurance. ID. at r. 28(D)(2); ID. at r. 28 app. Reg. 12.