

## **COMMITTEE TO STUDY REGULATORY REFORM**

Zoom Conference Call

July 27, 2020

10:00am to 12:00pm

### **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 Reform 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 June 4, 2020 Minutes
- III. Brief Update on Regulatory Reform Efforts
  - a. Washington State – Terminated LLLT Program
  - b. New York – Commission Created to Develop Comprehensive Vision for Future Court System
- IV. Presentation: Bill Henderson, author of the Legal Landscape Market Report (2018)
- V. Goals for Next Quarter
- VI. Adjourn

**Minutes of the Meeting of the Subcommittee to Study Regulatory Change  
June 4, 2020**

The Issues Committee's Subcommittee to Study Regulatory Change met by Zoom videoconference on June 4, 2020. Mark Henriques, the chair of the subcommittee, presided. The following members of the subcommittee were present: Barbara R. Christy, State Bar President-Elect; A. Todd Brown; Ashley Campbell; Warren Hodges; Jeff Kelly; Joshua Malcolm; Dewitt F. McCarley; Steve Robertson; Camille Stell; and Jeff Summerlin-Long. Also present were President C. Colon Willoughby, Jr., and Past-President G. Gray Wilson. Mandy Boltax, a rising 3L at Duke Law School and participant in Duke Law's Access Tech Tools Initiative, was present as a guest. 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.

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.

As the first order of business, the members of the subcommittee introduced themselves. At Mr. Henriques' invitation, each subcommittee member stated his or her area of particular interest relative to regulatory reform.

Next, Mr. Henriques reviewed the charge to the committee, including the following mission statement:

*Several states have adopted or proposed substantial changes to the structure of legal practice and delivery of legal services. This subcommittee will review and discuss these changes, with a focus on the actual impact these changes have had on lawyers and clients. We will consider how these changes may impact North Carolina and whether any of the changes should be considered for implementation in North Carolina. The subcommittee expects to issue one or more reports summarizing and assessing regulatory changes in other states. It does not plan to recommend specific changes for adoption by the Council.*

Mr. Henriques emphasized that the subcommittee will look for empirical evidence of what is actually working to improve access to justice in other jurisdictions. He explained that the subcommittee is not expected to recommend any particular course of action but, instead, will study what is happening in other states and make recommendations to the Issues Committee as to what next steps or regulatory change to pursue further.

The chair then called on Mr. Oten for the presentation of an overview of ongoing regulatory reform efforts in the United States (slides attached).

After the presentation, Mr. Oten briefly reviewed study materials available to the subcommittee.

Next, there was a discussion of the subcommittee's methodology. Professor Summerlin-Long stated that there would not be enough data from the recent regulatory reforms in other states to

generate data that will demonstrate a casual impact on access to justice. He added, however, that the lack of data is not a barrier to proposing reforms. He recommended pursuing some method of collecting data from the beginning in order to evaluate effectiveness of the reforms. He suggested utilizing academics to analyze the data.

Mr. Kelly observed that there is data about the underserved and the areas of law in which they are underserved. He noted that the NCBA's Future of Law Committee wants to look at pairing law students with different communities and supports a mission-focused "open sandbox" approach where proposals to address the known problem areas for the legally underserved can be safely studied. In response, Professor Summerlin-Long suggested a mixed jurisdiction and issues study, using eastern North Carolina as an example because it is NC community that is the most poorly served by legal services organizations.

In a discussion of process, it was agreed that the subcommittee would meet monthly. Ms. Mine stated that Professor William Henderson, the author of *Legal Landscape Market Report*, the report upon which the California State Bar's study of regulatory reform is based, would be asked to present to the subcommittee at its next meeting. Mr. Brown asked that at the August meeting representatives of the legal aid community present on what that community believes would be most helpful in improving access to justice. Ms. Stell suggested that Jeff Ward of the Duke Law's Access Tech Tools Initiative be asked to present. In response to her recommendation that representatives of tech companies present on the types of products in development that will facilitate access to legal representation, Mr. Kelly recommended inviting a presentation from Jeff Pheiffer, chief product officer at Lexis Nexis.

It was agreed that the subcommittee should hear from different perspectives, including stakeholders from the legal aid and tech development communities, and use that background to study the different ideas of regulatory reform.

There being no further business to come before the subcommittee, the meeting was adjourned.

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Alice Neece Mine, Subcommittee Staff Counsel



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ACCESS TO JUSTICE

## Washington Supreme Court sunsets limited license program for nonlawyers

BY LYLE MORAN ([HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/64793/](https://www.abajournal.com/authors/64793/))

JUNE 8, 2020, 3:35 PM CDT

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The Washington Supreme Court will "sunset" the state's Limited License Legal Technicians program that has permitted nonlawyers to perform some legal tasks within family law.

The court's 7-2 vote last Thursday to prohibit anyone not already in the LLLT pipeline to pursue the license comes just eight years after the court approved the creation of the first such legal license for nonlawyers in the country. Several other states have since approved—or have considered approving—similar programs.

Washington's high court formally announced its decision in a letter

([https://www.abajournal.com/files/Stephens\\_LLLT\\_letter.pdf](https://www.abajournal.com/files/Stephens_LLLT_letter.pdf)) Chief Justice Debra L. Stephens delivered late Friday to Washington State Bar Association leaders and the head of the LLLT Board. Despite delivering the news, Stephens was one of the two dissenters, alongside Justice Barbara A. Madsen, who was the chief justice when the court approved the LLLT program in 2012.

"The program was an innovative attempt to increase access to legal services," Stephens wrote in her letter. "However, after careful consideration of the overall costs of sustaining the program and the small number of interested individuals, a majority of the court determined that the LLLT program is not an effective way to meet these needs and voted to sunset the program."



*Image from Shutterstock.com.*

The first LLLTs were licensed in 2015, but as of last month there were fewer than 40 active technicians. The Washington bar also reported to the court in May that the bar's direct and indirect costs for administering the license had exceeded the revenues it had generated by nearly \$1.4 million.

The state bar's board had urged the court during a May meeting to consider a possible sunset of the program, highlighting that the court's order approving the LLLT program expressed an expectation it would be self-sustaining.

A business plan the LLLT board submitted to the court this spring indicated it believed the program could generate enough revenue to cover the state bar's direct expenses for administering the program by 2022 and cover all costs by 2029.

The plan was contingent on the court approving new practice areas for inclusion—as had been contemplated when the program was created—and reducing some of the requirements to become a LLLT. Stephens wrote in her Friday letter that the LLLT board's proposed practice areas expansion and rules revisions had been rejected.

In her written dissent ([https://www.abajournal.com/files/Madsen\\_Dissent.pdf](https://www.abajournal.com/files/Madsen_Dissent.pdf)), Madsen called the financial criticism of the LLLT program “hollow” and said the court’s decision effectuated “the elimination of an independent legal license.”

“What’s more, the court did so at a single meeting, without question or comment from LLLT license holders, legal practitioners, or the public at large,” Madsen wrote. “What took over a decade of toil to create, this court erased in an afternoon.”

She added, “In no other professional area would a regulated license be so summarily erased with so little thought given to those who will be most affected.”

Stephens wrote in her letter announcing the news that LLLTs in good standing may remain licensed and continue to provide services.

“Individuals already in the pipeline as of June 4, 2020, who can complete all the requirements to be licensed as a LLLT by July 31, 2021, may do so,” she wrote. “No new LLLTs will be admitted after that date.”

Steve Crossland, chair of the LLLT Board, said Monday he was not surprised by the court’s action given the resistance to the program from the state bar and some on the court.

“I think it is turf protection, and they are using budgetary analysis to justify their turf protection,” Crossland said in an interview.

Crossland also said his board is brainstorming ways the program could be maintained, including through potential litigation on antitrust grounds.

“When the actors—the bar association and the supreme court—are depriving citizens from services they need, that seems like a restraint of trade to me,” he said.

WSBA President Rajeev Majumdar said that immediately after being informed by the court about its decision, he and WSBA Interim Executive Director Terra Nevitt assured current LLLTs via email that “they will remain members of the bar with standing rights and privileges.”

“The court’s decision was no doubt very difficult to make, and we do not believe it lessens our commitment to finding innovative ways to close the gap between the many Washingtonians who need legal services and their ability to find accessible, affordable help—we are constantly evaluating how to convene and support our state’s Access to Justice network in ways that make the most impact for the most people,” Majumdar said in a statement released Monday. “While this pathway did not reach the results originally intended, we hope this will allow us to devote resources to exploring other avenues of improving access to the justice system in Washington.”

Meanwhile, the court’s decision to sunset the license comes amid an ongoing evaluation of the program by the National Center for State Courts.

A previous review (<https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/405>) of the LLLT program by the national center and the American Bar Foundation found it was “appropriately designed to provide legal services to those who cannot afford a lawyer but still wish or need assistance.”

**See also:**

**ABA Journal**

([https://www.abajournal.com/news/article/despite\\_kinks\\_in\\_program\\_nonlawyers\\_are\\_successfully\\_providing\\_some\\_legal\\_s](https://www.abajournal.com/news/article/despite_kinks_in_program_nonlawyers_are_successfully_providing_some_legal_s)):  
“Despite kinks in program, nonlawyers successfully providing some legal services in Washington state”

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The Supreme Court  
State of Washington

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June 5, 2020

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Re: Washington Supreme Court Votes to Sunset the Limited License Legal Technicians Program

Dear Mr. Crossland, Mr. Majumdar, and Ms. Nevitt:

I am writing to you on behalf of the Supreme Court to advise you that the court voted by majority Thursday, June 4, 2020, to sunset the Limited License Legal Technicians (LLLT) Program. The majority also rejected the LLLT Board's requested expansion of practice areas and proposed rule revisions.

The LLLT program was created in 2012 as an effort to respond to unmet legal needs of Washington residents who could not afford to hire a lawyer. Through this program, licensed legal technicians were able to provide narrow legal services to clients in certain family law matters. The program was an innovative attempt to increase access to legal services. However, after careful consideration of the overall costs of sustaining the program and the small number of interested individuals, a majority of the court determined that the LLLT program is not an effective way to meet these needs, and voted to sunset the program.

Current legal technicians in good standing may continue to be licensed and may continue to provide services. Individuals already in the pipeline as of June 4, 2020, who can complete all the requirements to be licensed as a LLLT by July 31, 2021, may do so. No new LLLTs will be admitted after that date.

Sincerely,

A handwritten signature in black ink, appearing to read "Debra L. Stephens", with a long, sweeping horizontal flourish extending to the right.

Debra L. Stephens, Chief Justice  
Washington State Supreme Court

# The Supreme Court

State of Washington

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Re: Washington Supreme Court Votes to Sunset the Limited License Legal Technicians Program

Dear Mr. Crossland, Mr. Majumdar, and Ms. Nevitt:

Today, the court issued a letter announcing its vote to “sunset” the Limited License Legal Technician (LLLT) “program.” Despite these benign words, let there be no mistake about the nature of the court’s action: the elimination of an independent legal *license*. What’s more, the court did so at a single meeting, without question or comment from LLLT license holders, legal practitioners, or the public at large. What took over a decade of toil to create, this court erased in an afternoon. I passionately disagree with the court’s vote as well as the way in which it was carried out.

Unlike the opaque process governing the court’s June 4, 2020 vote, I believe it is useful to review the history of the LLLT “program”—to use the court’s preferred terminology—before opining on its future. First, as a matter of definitions, limited legal technicians are those qualified by education, training, and work experience who are authorized to engage in the limited practice of law in specific subject areas. APR 28(B)(4). Turning to history, the LLLT license did not spring fully formed from the head of Zeus. Rather, it is the work of thousands upon thousands of hours dedicated to rectifying a simple truth: that access to

justice in this country is not equal. The Civil Legal Needs Survey of 2003 confirmed that almost 80 percent of low income and nearly 50 percent of moderate income Americans cannot access or afford legal services.<sup>[1]</sup> Critically important to addressing this disparity was protecting the public from the unauthorized practice of law. The solution to both was expanding the options for providing legal services. Thus, APR 28 was approved and the limited legal technician license was born.

The creation of the LLLT was by no means the end of our labors. In many ways it was only the beginning. Since 2012, stakeholders have crafted and this court has approved the contours of the LLLT license: educational requirements, scope of practice, and governing ethical rules. *E.g.*, APR 28; Order (July 12, 2013) (setting out educational requirements and scope of practice for LLLT, among other things); Order (Aug. 8, 2013) (establishing the admission and licensing requirements for LLLT applicants); Order (March 23, 2015) (adopting changes to Rules of Professional Conduct for Lawyers to coordinate those rules with the LLLT Rules of Professional Conduct); WASHINGTON LLLT EDUCATIONAL PROGRAM APPROVAL STANDARDS, WASHINGTON STATE BAR ASS'N (June 10, 2019). Throughout this rule-making process, we have heard from interested parties, students, legal professionals, and members of the public. The questions and comments from all sides have formed and shaped the LLLT from an ambitious plan into a concrete professional license. Make no mistake, LLLT is a new professional license.

2014 marked the first class of LLLT candidates and more have added to these ranks. THOMAS M. CLARKE & REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 5 (March 2017), [http://www.americanbarfoundation.org/uploads/cms/documents/preliminary\\_evaluation\\_of\\_the\\_washington\\_state\\_limited\\_license\\_legal\\_technician\\_program\\_032117.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf). The Public Welfare Foundation studied this new legal practice after its creation and found it was significant in helping create access to justice and was replicable. *See id.* at 14. As a testament to this, other states are considering adopting similar licenses: efforts are underway in states such as Utah, California, Oregon, Colorado, New Mexico, Minnesota, Massachusetts, and Connecticut; and in Canada, British Columbia. Simply put, countless individuals have contributed

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<sup>[1]</sup> The dire need for affordable legal services has not decreased. In 2017, 86 percent of litigants in civil cases received inadequate or no legal help. *2017 Justice Gap Report: Measuring the Civil Legal Needs of Low-income Americans*, Legal Services Corporation, June 2017, <https://www.lsc.gov/media-center/publications/2017-justice-gap-report>.

thousands of hours of their time and energy to devise, bring about, grow, and support the LLLT practice. Not to mention the men and women who have taken on the challenge of trailblazing this innovative, new profession in our state.

I recall this history in order to illustrate the depth of the court's misunderstanding in eliminating the LLLT license. Not only is the LLLT not simply a "program" that was easily created, and just as easily paused and canceled as budgets—or attitudes—permit, the LLLT is an independent legal license. As such, it warrants the respect of time and consideration before alteration, let alone total elimination. With yesterday's vote, the court *sua sponte* ended a completely viable licensing category that the public can draw on. There was no process. No questions. No comments. The public was not consulted. This is not how an institution should go about changing or dismantling such a bold initiative. In no other professional area would a regulated license be so summarily erased with so little thought given to those who will be most affected.

Not only was yesterday's vote a disservice to the stakeholders, current and aspiring LLLT license holders, and to the people of Washington, it stands in stark contrast to the way in which the LLLT license was crafted and directed for over a decade. The primary reason offered by the Washington State Bar Association Board of Governors for eliminating the LLLT "program" is cost: it is too expensive to maintain and lawyers should not have to underwrite the cost. This ignores the fact that the cost of growing and maintaining this group of licensed professionals is less than 1 percent of the Association's budget. It also ignores the many thousands of dollars the Bar expends every year investigating *lawyer* misconduct and does not acknowledge the lack of grievances against LLLT practitioners. I find the Board of Governors' cost rationale a hollow one. While current LLLT license holders are "grandfathered in" and allowed to continue practicing, there has been no evaluation offered about the cost of this decision and whether there would be any appreciable change in the cost of administering the LLLT license. As a fiscal matter, the silence on this point speaks loudly, as does the lack of deliberation on other options to address concerns expressed by the Bar while maintaining this professional license and the valuable services it provides in the pursuit of access to justice.

Today's decision also resonates on another level, both abstract and imminently tangible. Just this week, my colleagues and I authored a letter examining the systemic racism that has plagued our country since its inception. We accepted the role judges and the legal community at large have played in maintaining this reality, and recommitted our efforts to ending racial disparity in our governmental, community, and social institutions. The elimination of the

Dissent to Sunset of LLLT

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LLLT license, which was created to address access to justice across income and race, is a step backward in this critical work. It is not the time for closing the doors to justice but, instead, for opening them wider.

With these considerations in mind, I respectfully dissent.

Sincerely,

A handwritten signature in black ink that reads "Barbara A. Madsen". The signature is written in a cursive, flowing style.

Barbara A. Madsen  
Justice



Home / Web First / How the Washington Supreme Court's LLLT program...

ACCESS TO JUSTICE

## How the Washington Supreme Court's LLLT program met its demise

BY LYLE MORAN ([HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/64793/](https://www.abajournal.com/authors/64793/))

JULY 9, 2020, 1:46 PM CDT

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When the Washington Supreme Court announced in June 2012

([https://www.abajournal.com/files/2012\\_court\\_order\\_LLLTs.pdf](https://www.abajournal.com/files/2012_court_order_LLLTs.pdf)) it had adopted a rule permitting the licensing of nonlawyers to undertake some legal tasks, the news provoked the usual chorus of criticism from attorneys that it would result in members of the public receiving substandard legal assistance.

However, the court majority that backed the nation's first Limited License Legal Technicians initiative said it was an attempt to provide the public with greater access to affordable legal services amid a growing need for such help.

With the court's blessing, LLLTs were subject to stringent licensure requirements and allowed to practice within family law. By 2015, the initial cohort of LLLTs were licensed and the program sparked discussions in other states

([https://www.abajournal.com/magazine/article/washington\\_state\\_moves\\_around\\_upl\\_using\\_legal\\_technicians\\_to\\_help\\_close\\_the](https://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the)) about whether to implement a similar legal paraprofessional license.

Eventually, the LLLT program even won over the Washington State Bar Association's board of governors, as the panel unanimously approved a resolution in 2016 indicating its strong endorsement of the limited license rule and ongoing implementation efforts. The bar's board also voted to make LLLTs members of the bar and agreed to a bylaw change that would give a board seat to either a LLLT or the one other type of nonlawyer licensee



*Image from Shutterstock.com.*

the bar regulates.

But in a stark 180-degree turn, the limited license program rapidly lost the support of the bar's board and the court as the makeup of both bodies changed.

Since 2017, the court has rejected requests to allow LLLTs to practice in areas beyond family law, while the state bar refused to allow its technology to be used for LLLT candidates' education and secured court approval to eliminate the board seat that could have gone to a LLLT.

"It seems like any opportunity that they've had, they've acted in a way to quiet, limit or undermine this license," says Sarah Bove, a Redmond-based LLLT.

These actions, which limited license advocates believe were driven by lawyer protectionism, made it more difficult for the LLLT program to attract new applicants and generate additional revenue so it could move toward financial self-sufficiency.

Meanwhile, in May, the state bar's treasurer raised cost concerns and an apparent lack of interest in the LLLT program when suggesting the court consider sunseting the initiative. Citing similar reasons, the supreme court voted 7-2 in June to sunset the program

(<https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program>).

## Opposition to new practice areas

Barbara A. Madsen was the Washington Supreme Court's chief justice when it voted 6-3 to adopt the limited license rule in 2012 and when it approved the LLLT board's proposal to make family law the first practice area for technicians in 2013. "She made it happen," says Steve Crossland, the LLLT board's chair since its creation. "She is a real champion of access to justice."

But Madsen, who remains on the court, was replaced as chief by Mary Fairhurst in 2017. By that point, two other justices who had voted for the LLLT rule had left the court and been replaced by new justices.

In recent years, the court has largely rebuffed the LLLT board's other formal and informal proposals to add new practice areas in hopes of attracting more candidates and serving a wider segment of the public.

In 2017, a majority of the court approved the LLLT board's request to broaden the family law practice area, but it rejected a proposed new area of elder care and health law, according to a letter ([https://www.abajournal.com/files/Fairhurst\\_2017\\_letter\\_on\\_practice\\_areas.pdf](https://www.abajournal.com/files/Fairhurst_2017_letter_on_practice_areas.pdf)) written that April by Fairhurst to Crossland. Fairhurst wrote that a majority of the court "would like the LLLT board to explore other areas."

The board considered expansion into landlord/tenant, immigration and consumer debt law, among other practice areas.

This April, the LLLT board formally asked the court

([https://www.abajournal.com/files/LLLT\\_Board\\_April\\_2020\\_Report\\_to\\_Court.pdf](https://www.abajournal.com/files/LLLT_Board_April_2020_Report_to_Court.pdf)) to approve the new practice areas of Washington administrative law and eviction and debt assistance, noting that the COVID-19 pandemic was likely to increase the already substantial need among the public for legal assistance in those domains.

The LLLT board also asked the court to make rules revisions modifying some licensure requirements, including reducing the mandated 3,000 hours of paralegal practical experience. The panel said a business plan it developed that would result in the LLLT program generating enough revenue to cover the state bar's direct expenses for administering the initiative by 2022, and to cover all costs by 2029, was contingent on the court approving the practice area and licensure changes.



*Sarah Bove, a Redmond-based LLLT.*

Washington State Bar Treasurer Daniel D. Clark recommended the court deny approval of the new practice areas, given the LLLT program had yet to become self-sustaining in its first practice area.



*Debra L. Stephens, chief justice of the Washington Supreme Court.*

The supreme court voted 7-2 in early June to reject the proposed additional practice areas and rules revisions, with two new justices sworn in earlier this year backing the rejection. Debra L. Stephens, who became chief justice earlier this year, and Madsen dissented.

Justice Steven Gonzalez, who voted in favor of establishing the LLLT license eight years ago, tells the ABA Journal the LLLT board's proposed new practice areas through the years "seemed ill-conceived." He points to the example of immigration law, which would have required the approval of federal immigration authorities and is what he called a high-stakes, complicated area of law.

"There should have been better proposals about what those practice areas would be," Gonzalez says.

Christy Carpenter, a Tacoma-based LLLT and LLLT board member, counters that new practice areas could have generated greater interest in the technician license because many paralegals were not interested in handling family law matters. "There are paralegals in many other practice areas who are ready to jump on the opportunity to enter in the program if other practice areas are offered," Carpenter says.

By comparison, when Utah launched its Licensed Paralegal Practitioner program (<https://www.utahbar.org/licensed-paralegal-practitioner/>) in recent years, it permitted nonlawyer licensees to undertake limited legal tasks in three practice areas: family law, debt collection and landlord/tenant.

### **Eliminating nonlawyer board seats**

Like the state supreme court, the Washington State Bar's board had at times backed the LLLT initiative.

In September 2016, the board approved the resolution ([https://www.wsba.org/docs/default-source/about-wsba/governance/resolutions/resolution-in-support-of-limited-license-legal-technicians-09-29-16.pdf?sfvrsn=2eb73ef1\\_5](https://www.wsba.org/docs/default-source/about-wsba/governance/resolutions/resolution-in-support-of-limited-license-legal-technicians-09-29-16.pdf?sfvrsn=2eb73ef1_5)) indicating its strong support for the limited license rule and praising the "exemplary job" done by the LLLT board.

The bar's board also voted during that time period to make LLLTs members of the bar effective in 2017, and it approved a bylaw change calling for there to be a new member of the board who was either a LLLT or a limited practice officer, known as an LPO. An LPO is a nonlawyer "licensed to select, prepare and complete approved documents for use in closing a loan, extension of credit, sale, or other transfer of real or personal property," according to the bar's website (<https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-practice-officers>). (LPOs were made members of the bar at the same time as LLLTs, according to the bar).

William D. Pickett, who was elected to the bar's board in 2015 and served as its president from March 2018 to fall 2019, says the annual turnover on the board in recent years produced new members who called themselves "reformers" and were hostile to the LLLT program.

Pickett, who describes himself as a strong supporter of LLLTs, says the opposition stemmed from lawyers who feared "that their market share [would] be eroded" by nonlawyer technicians.

Along those lines, a bar critic's March 2018 email urging a vote for three reform candidates for the association's board warned that bar staff "are stepping up their efforts to admit non-lawyers to the practice of law, even while lawyers are suffering underemployment and massive student debt."

Meanwhile, an early example of the board's change in approach to the technician program was its handling of the LLLT/LPO board seat and two other new board seats designated for nonlawyer community members.

The Washington Supreme Court approved the bylaw changes ([https://www.abajournal.com/files/2018\\_bylaw\\_approval.pdf](https://www.abajournal.com/files/2018_bylaw_approval.pdf)) creating those seats in January 2018, noting that they appeared necessary "for the consideration of the viewpoints of all members and of the public."

But the bar's board never appointed anyone to the posts. Instead, the bar asked the supreme court earlier this year to approve bylaw changes that included eliminating those nonlawyer seats and switching the remaining three board-appointed seats to elected positions.

Bar President Rajeev Majumdar highlighted in a March 2020 letter ([https://www.abajournal.com/files/Rajeev\\_March\\_2020\\_bylaw\\_letter.pdf](https://www.abajournal.com/files/Rajeev_March_2020_bylaw_letter.pdf)) to the court that under the changes, a LLLT or LPO could seek to fill all bar board seats except the at-large young lawyer slot. "All members will be treated equally," he wrote.

The LLLT board opposed the bylaw changes, arguing that allowing LLLTs and LPOs to run for election was the "functional equivalent of excluding them" because they make up a tiny percentage of the bar's membership.

“LPOs and LLLTs are licensed legal professionals with diverse experiences and perspectives and should have actual representation in the governing body rather than being treated as passive recipients of decisions impacting them, their clients and communities,” Crossland wrote in a January 2020 letter

([https://www.abajournal.com/files/January\\_2020\\_Crossland\\_letter.pdf](https://www.abajournal.com/files/January_2020_Crossland_letter.pdf)) to the bar’s president, a document he shared with the supreme court.

Despite the opposition, the court adopted the bylaw changes

([https://www.abajournal.com/files/April\\_2020\\_bylaw\\_approval.pdf](https://www.abajournal.com/files/April_2020_bylaw_approval.pdf)) in April. Three judges dissented, and Madsen’s written dissent ([https://www.abajournal.com/files/April\\_2020\\_bylaw\\_dissent.pdf](https://www.abajournal.com/files/April_2020_bylaw_dissent.pdf)) criticized the elimination of public members of the bar’s board.



*Rajeev Majumdar, president of Washington State Bar Association. Photo from the Washington State Bar Association.*

“In my view, the WSBA’s mission of public protection is enhanced when members of the public are included in at-large positions on the WSBA’s board of governors,” she wrote, noting that other state bar boards include public members.

### **Financial roadblocks**

LLLT supporters say the program has been undermined by the bar’s board in a variety of other ways.

Several months ago, the LLLT board requested permission to use the state bar’s technology to provide family law education to roughly 20 LLLT candidates. It did so because the University of Washington would no longer be offering the practice area courses.

Allowing the LLLT program to utilize its technology would have generated thousands of dollars for the bar; the bar’s chief regulatory counsel tells the ABA Journal estimates were “it would net somewhere between \$5,700 and \$7,300 per quarter, or [three] times that amount per year” as the courses are offered over three quarters.

During a January 2020 bar board meeting, board member Peter “P.J.” Grabicki urged his colleagues to support the LLLT education proposal. “We shouldn’t be seen as trying to frustrate the program when they have made a proposal that is net benefit to us, not a net cost,” Grabicki said.

But soon thereafter and without explanation, board member Carla J. Higginson made a motion that the board take no action to provide LLLT courses “at this time.” The motion passed 11-1, with Grabicki in opposition.

Asked about the issue during a May meeting with the supreme court, the bar board's treasurer said, "There were concerns over the bar doing this for antitrust reasons."

Crossland says it was "contradictory" for the bar's board to complain that the LLLT program was not generating enough revenue and then block a proposal that, if adopted, would have produced thousands of dollars. He says it was part of the bar board's efforts "to get rid of the LLLT program or, by the power of the purse strings, strangle it."

Additionally, the LLLT board requested that the Washington State Bar Foundation (<https://www.wsba.org/about-wsba/washington-state-bar-foundation>), which has its own board, create a fund that would permit the limited license program to seek contributions from donors and grantors. The funds would assist the LLLT program with outreach and reduce the fiscal impact to the state bar of operating the program, Crossland wrote in a March 2020 letter ([https://www.abajournal.com/files/Crossland\\_March\\_2020\\_letter\\_to\\_Foundation.pdf](https://www.abajournal.com/files/Crossland_March_2020_letter_to_Foundation.pdf)).

In April, state bar foundation president Kristina Larry wrote Crossland that the foundation's board had voted against ([https://www.abajournal.com/files/April\\_2020\\_foundation\\_rejection\\_.pdf](https://www.abajournal.com/files/April_2020_foundation_rejection_.pdf)) the request after "a robust discussion."

"The funds and scholarships that the foundation currently administers are all for WSBA Sections, and the board did not feel that it was appropriate to deviate from that model at this time," wrote Larry, who told the ABA Journal she voted in favor of the LLLT fund.

### **State bar leaders defend their approach**

Some current state bar leaders deny that the association's board has not been supportive of the LLLT program in recent years.

Majumdar said in a written statement that the board has stood by its 2016 resolution applauding the LLLT rule "and has continued to approve every budget request the LLLT program has asked for to achieve its mission."

However, he acknowledged individual board members have raised cost concerns, such as how long it would take the LLLT program to become self-sufficient and not draw on fees paid by lawyers.

Clark highlighted such issues in recent written and verbal communications to the supreme court, including a May 2020 letter ([https://www.abajournal.com/files/Clark\\_May\\_2020\\_letter.pdf](https://www.abajournal.com/files/Clark_May_2020_letter.pdf)) that said the bar's direct and indirect costs for administering the LLLT license had exceeded revenues the program had generated by nearly \$1.4 million. That financial performance contrasts with the court expressing confidence in its 2012 order approving the program that a fee-based system would be developed so that the licensing and regulation of LLLTs would be cost neutral to the state bar and its members.

Clark also wrote there had been "limited historical growth and apparent interest of the public in becoming an LLLT member." Though the initial LLLTs were licensed in 2015, a late June search of the bar's legal directory revealed just 45 LLLTs, with 39 listed as

active.

“The financial numbers and historical performance of the limited license should not be blamed on the WSBA not being supportive of the program or efforts of the LLLT Board,” Clark wrote the court.

Crossland, the LLLT board chair, says he would have liked there to have been more licensees by now. But he points out that the LLLT program was created from scratch since it was the first in the nation, and this foundation-building took several years. Crossland also says critics’ cost concerns are overblown, given that the state bar’s annual spending on the LLLT program is less than 1% of its yearly budget, which is roughly \$25 million, according to the bar.

“I think it is indefensible for them to say we are a drain on the license fees lawyers pay when they could look at the other 99% of where they spend their money,” says Crossland, noting the bar’s spending on litigation and other issues arising from what an outside investigator concluded last year was the bar board’s creation of a hostile work environment (<https://www.abajournal.com/web/article/washington-state-bars-board-mishandled-employees-harassment-complaint-report-finds>).

But Clark, the bar board’s treasurer, recommended in a presentation during the May meeting with the court that it consider a possible sunset of the LLLT program as one option. Clark says his actions were authorized by the bar board’s Budget and Audit Committee, and that Majumdar and the bar’s president-elect “were fully aware of the presentation that would be made to the court.”

Meanwhile, Majumdar told the ABA Journal that Clark did not represent the bar or its board with “his opinion and analysis” shared at the May 12 meeting, though the president said the bar’s Budget and Audit Committee did authorize the treasurer to relay his individual concerns.

“The board of governors did not recommend a sunset to the program, nor did any committee vote on that topic,” Majumdar said in a statement.

Pickett, who is serving as the board’s immediate-past president, called the board’s attempt to downplay its opposition to the LLLT program cowardly.

“There has been an active group of lawyers that for some time has been determined to put up every conceivable roadblock in an effort to eliminate the program,” Pickett says.

### **Supreme Court deals program a fatal blow**

At the supreme court’s June 4 en banc administrative meeting, Justice Susan Owens, who authored the dissent to the approval of the LLLT program in 2012, made a motion to sunset the initiative. Gonzalez seconded the motion, which was approved 7-2, with Stephens and Madsen dissenting.



Justice Steven Gonzalez. Photo from the Washington Supreme Court.

The sunset permits LLLTs in good standing to remain licensed and keep providing services. But anyone not already in the LLLT pipeline is prohibited from pursuing the license, and those in the pipeline as of June 4 have until July 31, 2021 to complete the licensure requirements.

Gonzalez says he supported sunseting the initiative because “it never came anywhere close to sustaining itself.”

“My urging continued to be to them, ‘Think of yourself as a small business that is applying for a small business loan, and you have to convince the lender that you are a viable operation,’” Gonzalez says. “I never saw such a plan.”

Owens did not respond to an interview request made through the court’s communications office.

Madsen wrote a dissent letter ([https://www.abajournal.com/files/Madsen\\_dissent\\_6-5-20.pdf](https://www.abajournal.com/files/Madsen_dissent_6-5-20.pdf)) in which she criticized both the process leading to the majority’s vote and the merits of the decision, calling the cost concerns about the program “hollow.”

“I think the court is on the wrong side of history on this,” Madsen says in an interview. “I also think it is a disservice to the public.”

Stephens also says she did not feel the cost issues were fully explored or justified sunseting the program.

However, the chief justice says her bigger worry was the process, calling it “highly unusual” for the court to vote to sunset the program even though that issue was not on the agenda for its June en banc meeting.

“I was concerned we shouldn’t take that action without letting people know that was under consideration,” Stephens says. “I had urged that we put out a public notice and take it up in July.”

In recent weeks, the Washington Supreme Court has received requests to reconsider its sunset vote in whole or in part.

Stephens says one issue raised by several communiques has been that the timeline set for those in the LLLT pipeline to become licensed is too short.

The LLLT board told the court in a June letter

([https://www.abajournal.com/files/June\\_2020\\_LLLT\\_Board\\_letter.pdf](https://www.abajournal.com/files/June_2020_LLLT_Board_letter.pdf)) that there are at least 275 students in the pipeline, and it requested that the court extend the licensure deadline until at least

Aug. 1, 2023.

“Students are reeling from the court’s decision,” the board wrote. “These are people who can ill-afford to absorb the loss of money and time spent pursuing the LLLT license.”

On July 9, the supreme court voted to make two modifications to its sunset decision, according to a letter that Stephens sent ([https://www.abajournal.com/files/July\\_9\\_LLLT\\_letter.pdf](https://www.abajournal.com/files/July_9_LLLT_letter.pdf)) to the leaders of the state bar and LLLT board.

“First, the court authorized an immediate reduction in the experience hours required of candidates for LLLT licensure from 3,000 hours to 1,500 hours,” Stephens wrote. “Second, the court voted to allow LLLT candidates until July 31, 2022, to complete the experience hours requirement, so long as they have completed all other licensure requirements, including taking the LLLT examination by July 31, 2021.”

“The court, by majority, declined to take any other action on the LLLT board’s request for reconsideration,” Stephens added.

Meanwhile, the LLLT board and the program’s supporters are mulling options to maintain the program, including requesting that the legislature act.

“We are not done,” Crossland says. “We will find ways to make this work.”

### **See also:**

ABAJournal.com

([https://www.abajournal.com/news/article/despite\\_kinks\\_in\\_program\\_nonlawyers\\_are\\_successfully\\_providing\\_some\\_legal\\_s](https://www.abajournal.com/news/article/despite_kinks_in_program_nonlawyers_are_successfully_providing_some_legal_s)):

“Despite kinks in program, nonlawyers successfully providing some legal services in Washington state”

*Updated July 10 at 3:10 p.m. to include subsequent action from the supreme court concerning the future of the LLLT program, as well as to provide additional information about the role of the state bar treasurer.*

***Give us feedback, share a story tip or update, or report an error.***



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# PRESS RELEASE

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Public Information Director  
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(212) 428-2500**

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**Date: June 17, 2020**

## **Chief Judge DiFiore Names Commission to Develop Comprehensive Vision for the Court System of the Future**

**NEW YORK**—Chief Judge Janet DiFiore today announced the appointment of a new commission charged with examining the enhanced use of technology and online platforms, among other innovations, and making recommendations to improve the delivery and quality of justice services, facilitate access to justice and better equip the New York State court system to keep pace with society's rapidly evolving changes.

Comprising a distinguished group of judges, lawyers, academics and technology experts, the Commission to Reimagine the Future of New York's Courts will explore regulatory, structural, technological and other innovations, providing short-term recommendations as the courts resume in-person operations while developing a blueprint for the court system of tomorrow.

To this end, the Commission will obtain widespread input through public comment, targeted outreach and the views of experts, proposing practical reforms that may be implemented by the Court System or Legislature. Judge DiFiore has called upon Henry Greenberg, a partner at Greenberg Traurig LLP and immediate past president of the New York State Bar Association, to spearhead this effort. Mr. Greenberg will serve as Chair of the Commission.

“While a tragedy, the COVID-19 crisis has been an impetus for innovation, leading us to examine what we have learned from the pandemic and how to best move forward. The pandemic’s dramatic impact on court operations has paved the way for the embrace of new technologies and approaches, with a focus on fairness, efficiency and efficacy. I am eager to work with Hank Greenberg and the Commission members as we seek to remove barriers to justice and prepare the Court System to effectively meet the justice needs of New Yorkers in the years ahead,” said Chief Judge DiFiore.

“I thank Chief Judge DiFiore for the honor of chairing the Commission and working with such an extraordinary group of judges and lawyers. The COVID-19 pandemic offers a unique opportunity to reimagine how courts deliver services and consider innovative proposals for the justice system of the future. The Commission, therefore, will explore the enhanced use of technology and online platforms, and regulatory and structural innovations, to more effectively and efficiently adjudicate cases and improve the accessibility, affordability and quality of legal services for all New Yorkers,” said Henry Greenberg.

A roster of the Commission members follows.

*Chair*

Henry M. Greenberg

*Members*

Hon. Ariel E. Belen, Retired Associate Justice of the Appellate Division, Second Department, and Administrative Judge of the Supreme Court, Kings County

Mark A. Berman, partner, Ganfer Shore Leeds & Zauderer, LLP

T. Andrew Brown, managing partner, Brown Hutchinson LLP; Vice Chancellor, New York State Board of Regents; president-elect, New York State Bar Association

Hon. Anthony Cannataro, Administrative Judge, Civil Court of the City of New York

Mylan L. Denerstein, partner, Gibson Dunn LLP

Hon. Craig J. Doran, Administrative Judge for the Seventh Judicial District

Richard A. Edlin, Vice-Chairman, Greenberg Traurig, LLP

Robert J. Giuffra, Jr., partner, Sullivan & Cromwell LLP

Dennis E. Glazer, retired partner, Davis Polk & Wardwell

Hon. Timothy C. Idoni, County Clerk of Westchester

Hon. Edwina G. Mendelson, Deputy Chief Administrative Judge for Justice Initiatives

Seymour James, partner, Barkett Epstein Kearon Aldea & LoTurco

Brad S. Karp, chairman, Paul, Weiss

Roger Juan Maldonado, partner, Smith, Gambrell & Russell, LLP; immediate past President of the New York City Bar Association

Jack Newton, chief executive officer & co-founder, Clio

Sharon M. Porcellio, member, Bond Schoeneck & King; co-chair, Advisory Group to the New York State Federal Judicial Council

Paul C. Saunders, chair, New York State Judicial Institute on Professionalism in the Law

Arthur J. Semetis, president, Arthur J. Semetis, P.C.

Paul Shechtman, partner, Bracewell

Michael A. Simons, Dean, St. John's Law School

Madeline Singas, Nassau County District Attorney

Hon. Leslie E. Stein, Associate Judge, New York Court of Appeals

Ari Ezra Waldman, Professor of Law and Computer Science, Northeastern University School of Law and Khoury College of Computer Sciences (as of 7/1/20)

# # #

# **OPEN SESSION AGENDA ITEM**

## **703 JULY 2018**

**DATE:** July 19, 2018

**TO:** **Members, Board of Trustees**

**FROM:** Randall Difuntorum, Program Manager, Professional Competence

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

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### **EXECUTIVE SUMMARY**

This matter is before the Board of Trustees (“Board”) for discussion. After the January 2018, planning session, the Board added objective d to Goal 4 of the strategic plan, directing the study of online legal service delivery models to determine if regulatory changes are needed to support or regulate access through the use of technology. The Bar contracted with Professor William D. Henderson<sup>1</sup> to conduct a landscape analysis of the current state of the legal services market, including new technologies and business models used in the delivery of legal services, with a special focus on enhancing access to justice.

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### **BACKGROUND**

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

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

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

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

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

## **DISCUSSION**

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

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

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

## **FISCAL/PERSONNEL IMPACT**

None

## **RULE AMENDMENTS**

None

## **BOARD BOOK AMENDMENTS**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

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

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

## **RECOMMENDATION**

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

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

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

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

## **ATTACHMENT(S) LIST**

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



# Legal Market Landscape Report

Commissioned by the State  
Bar of California

July 2018

William D. Henderson





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

## Executive Summary

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

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

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

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

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

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

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

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

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

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

As show in Figure 1, the legal services sector has experienced significant growth over the last two decades. It is noteworthy, however, that the pace of growth appears to be slowing. Between 1997 and 2002, the sector grew 43.3 percent (\$127.1 to \$182.1B), followed by 31.5 percent growth between 2002 and 2007 (\$182.1 to \$239.4B). However, between 2007 and 2012, growth slowed to 9.3 percent (\$239.4 to \$261.7B). Further, total employment in the legal services sector has declined by approximately 55,000 jobs since the 2007 high-water mark. In fact, in terms of employment, the legal sector is smaller now than it was in 2002.<sup>4</sup>

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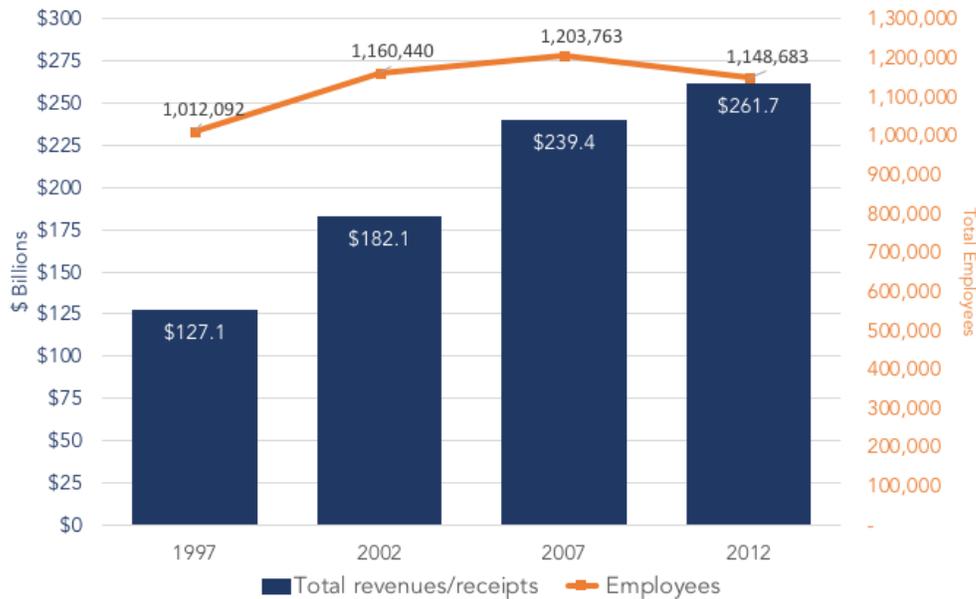
<sup>1</sup> See Business and Professions Code section 6001.1 State Bar— Protection of the Public as the Highest Priority (“Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions.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

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

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

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

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



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

An important caveat regarding the Figure 1 statistics, however, is that in the Economic Census data, law firm partners are owners rather than employees. Thus, partners are *not* part of the employment count. Data from the ABA suggests that the U.S. legal profession has gotten significantly older over the last half century, with the median age climbing from 39 in 1980 to 49 in 2005.<sup>5</sup> Therefore, it is quite possible that the diminution in legal services employment is occurring because law firms contain more partners who are, on balance, older and less leveraged in terms of associates, paralegals and staff.

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

<sup>5</sup> See Bill Henderson, *Is the Legal Profession Showing its Age?*, LEGAL WHITEBOARD, Oct. 13, 2013, [http://professorhenderson.com/downloads/Is\\_the\\_Legal\\_Profession\\_Showing\\_Its\\_Age.pdf](http://professorhenderson.com/downloads/Is_the_Legal_Profession_Showing_Its_Age.pdf) (last visited June 23, 2018).

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

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

Source: U.S. Census Bureau 2012 Economic Census

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

**Table 2. California Legal Services Market, 2012**

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

Source: U.S. Census Bureau 2012 Economic Census

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

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

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

## 1.2. In-House and Government Lawyers

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

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

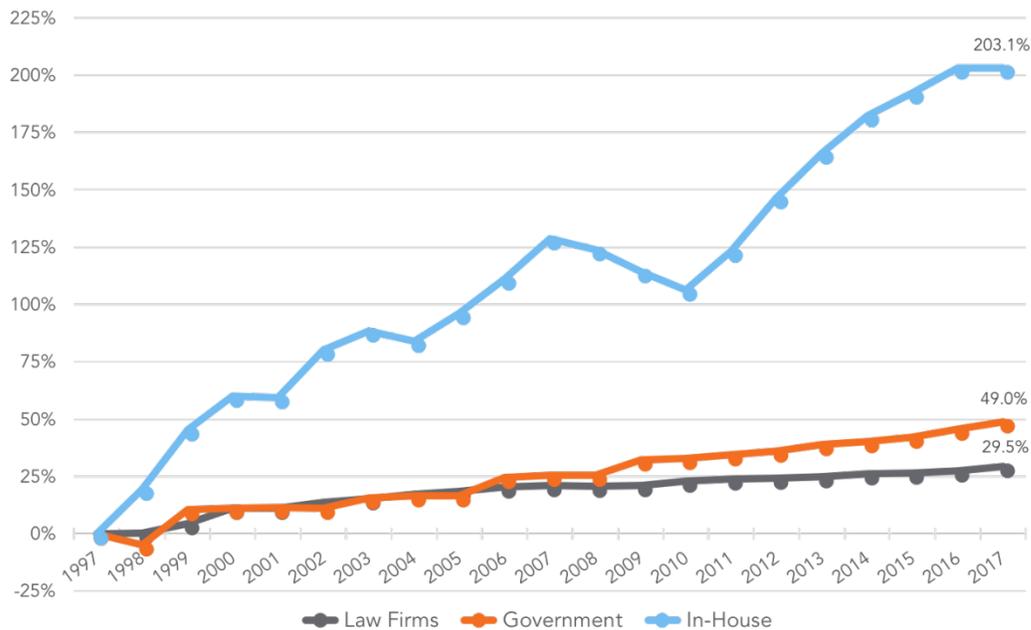
Figure 2 below shows the growth of lawyers by practice setting with 1997 as the baseline. The most striking feature is the rapid growth rate for in-house lawyers. Note also how employment rates for in-house lawyers tracked the economic downturn in 2008 to 2010. Yet it is also noteworthy that since the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

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<sup>6</sup> According to ABA statistics, in 2018 there are 1,338,678 active resident attorneys in the U.S. See [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/Total\\_National\\_Lawyer\\_Population\\_1878-2018.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf) (last visited July 11, 2018). Thus, it is reasonable to estimate that slightly more than half of lawyers are either law firm partners, shareholders, or solo practitioners. Unfortunately, the number and income of lawyers as business owners is not something tracked and published by the U.S. government. Data on employed lawyers, particularly over time, remain a useful barometer of the vitality of the overall legal economy.

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

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



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

### 1.3. Employed Lawyers Working in California

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

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

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

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

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

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

#### 1.4. Lawyers Working in the Gig Economy

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

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

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<sup>9</sup> See [www.cloc.org](http://www.cloc.org) (last visited July 11, 2018).

<sup>10</sup> See Sections 2.4 and 4.2, *infra*.

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

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

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

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

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

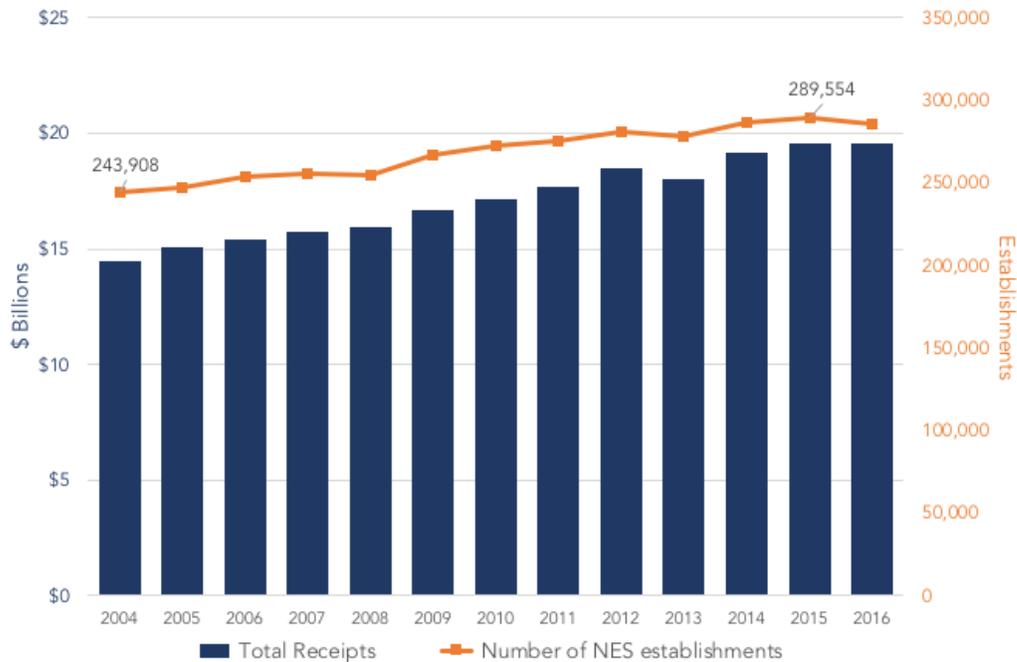
**Table 3. 2016 Nonemployer Statistics: Count, Receipts, Average Revenue**

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

Source: U.S. Census Bureau 2016 Nonemployer Statistics

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

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



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

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

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

As the gig economy grows and matures, it is also segmenting. One of the most established segments is the market for contract lawyers doing document review for major litigation and information requests from the FTC/DOJ related to antitrust review of proposed mergers. For nearly 20 years, this work has slowly moved out of law firms to contract attorneys provided by a large number of national and regional staffing agencies<sup>17</sup> or managed service firms.

One of the best windows on this market is the Posse List, which is a website founded in 2002 that maintains a large number of Listservs based on geography, subject matter expertise and foreign language proficiency. The staffing agencies and managed service firms post jobs; in turn, interested Posse List subscribers respond. According to a recent story in *Chicago Crain's Business*, the number of attorneys who subscribe to the Chicago portion of the Posse List increased from 1,520 in 2006 to over 5,000 in 2017.<sup>18</sup> The California market has robust coverage, with a statewide Listserv along with separate lists for the Los Angeles, San Francisco, San Diego and Sacramento markets.

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

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

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

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

<sup>18</sup> See Bushey, *supra* note 11.

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

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

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

The business model for lawyer marketplaces usually requires the entity running the marketplace to act as a transparent and trustworthy conduit for payment. In most cases, but not all,<sup>24</sup> payment is tied to the amount or volume of work. Although this raises nominal questions related to Rule 5.4 of the ABA Model Rules of Professional Conduct<sup>25</sup> concerning fee-splitting – a fact that all of these businesses took into account before launching – the tension is with the text of the existing rules rather than the underlying policy, which is to safeguard lawyer independence.<sup>26</sup> Thus, when evaluating the propriety of these marketplaces, legal regulators should fully weigh the benefits of these services to both clients and lawyers and require a clear factual basis to show that lawyer judgment is at risk of being compromised to the detriment of clients. The fact that these marketplaces are springing up in such numbers, often backed by professional investors, is a telling sign that buyers and sellers need better pathways to find each other.

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

<sup>21</sup> See Crunchbase, [https://www.crunchbase.com/organization/hire-an-esquire/funding\\_rounds/funding\\_rounds\\_list](https://www.crunchbase.com/organization/hire-an-esquire/funding_rounds/funding_rounds_list) (last visited June 26, 2018).

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

<sup>23</sup> *Id.*

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

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

<sup>26</sup> See Rule 5.4, Comment [1] (“The provisions of this Rule express traditional limitations on sharing fees. *These limitations are to protect the lawyer’s professional independence of judgment.*” (emphasis added)).

## 1.5. Alternative Legal Service Providers (ALSPs) and LegalTech

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

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

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

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

To help distinguish itself within a crowded marketplace, LawGeex recently launched a content marketing campaign<sup>30</sup> that included the creation of its LegalTech Buyer’s Guide. This remarkable document provides a detailed breakdown of venture capital funding (\$233 million in

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

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

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

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

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

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

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



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

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

<sup>31</sup> See Paul Lippe and Daniel Martin Katz, *10 Predictions about how IBM’s Watson will impact the legal profession*, ABA JOURNAL, Oct. 2, 2014 (Legal Rebels Series), at [http://www.abajournal.com/legalrebels/article/10\\_predictions\\_about\\_how\\_ibms\\_watson\\_will\\_impact/](http://www.abajournal.com/legalrebels/article/10_predictions_about_how_ibms_watson_will_impact/) (last visited June 28, 2018).

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

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

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

## **2. Individual versus Organizational Clients**

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

### **2.1. Chicago Lawyers I and II Studies**

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

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

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

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

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

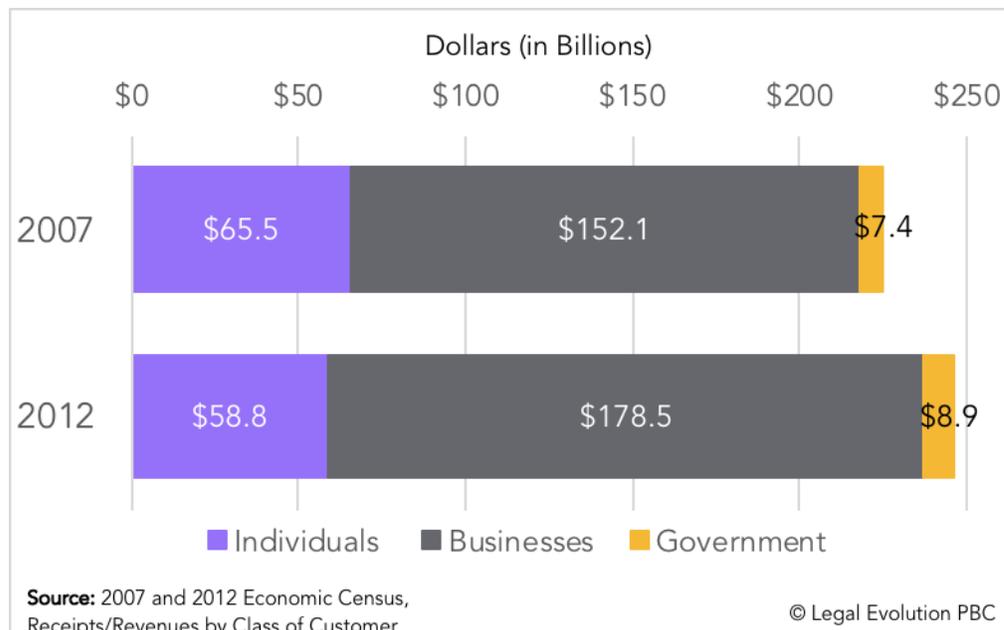
figure had dropped to \$55,000. Further, in 1995, 32 percent of these lawyers were working second jobs compared to 2 percent in 1975.

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

## 2.2. How Type of Client Shapes the Economics of Practice

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

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



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

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

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

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

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

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

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

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

### 2.3. The Economics of PeopleLaw

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

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

The average matter in the Clio system was worth approximately \$2,500.<sup>39</sup> Building a financially successful law practice out of low-stakes, high-volume cases requires capital for technology and marketing along with significant business acumen and managerial ability. Very few small firm

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

<sup>38</sup> *Id.* at 13.

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

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

#### 2.4. The Economics of Large Organizational Clients

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

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

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

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

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

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<sup>40</sup> See Rule 5.4.

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

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

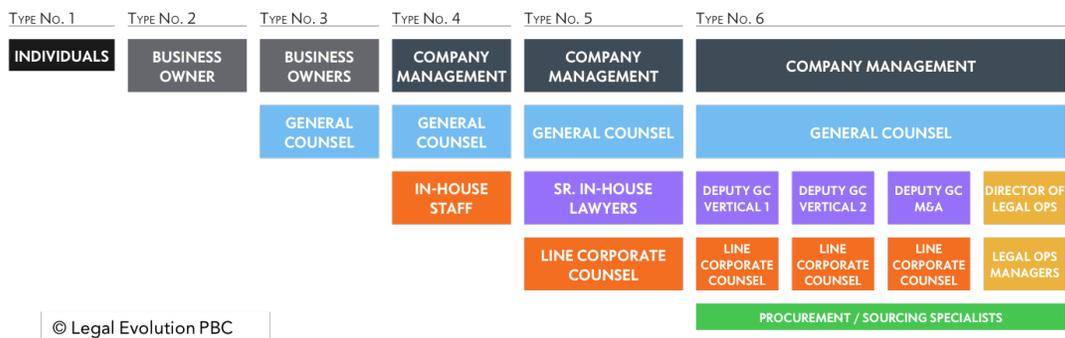
<sup>43</sup> See SUSSKIND, *supra* note 32, at 12 (discussing more-for-less imperative).

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

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

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

**Figure 6. Six Types of Clients**



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

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

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

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

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

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

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

### 3. The Problem of Lagging Legal Productivity

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

#### 3.1. Cost Disease

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

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

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

#### 3.2. Law Compared to Medical Care and Higher Education

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

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

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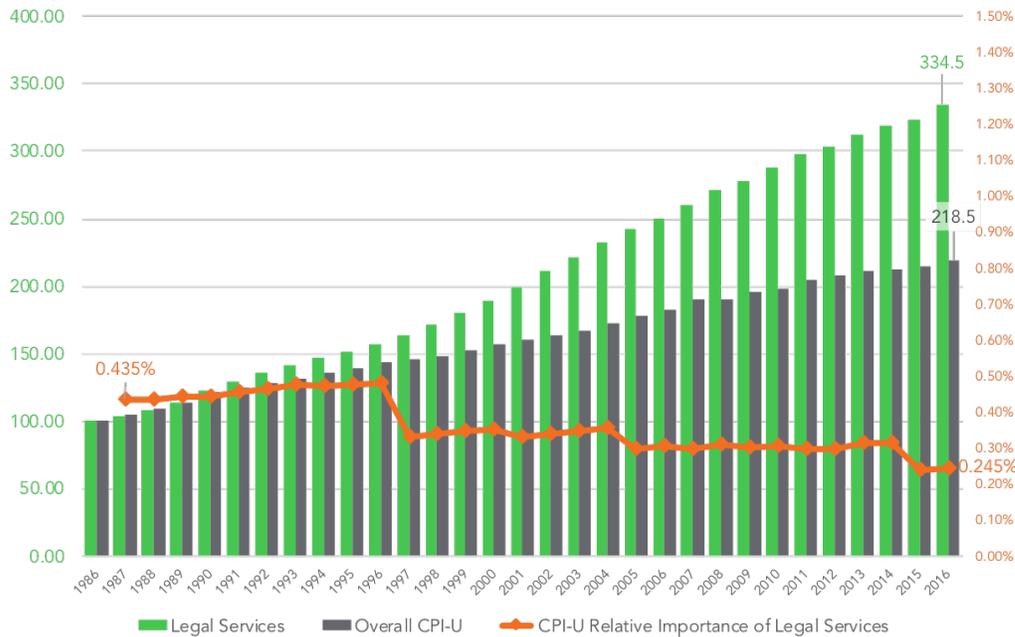
<sup>47</sup> See Barbara Rose, *Law, the Investment*, ABA JOURNAL (Sept. 2010) (quoting Nick Baughan of Marks Baughan & Co.).

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

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

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

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



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

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

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

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

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

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

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

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

### 3.3. Impact on the Practice of Law

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

- *Higher relative cost*: Even within the economically stressed PeopleLaw sector, the average hourly rate for a lawyer is \$260.<sup>52</sup> In the Organizational Client sector, profits of large firms have increased much faster than the nation's GDP and Consumer Price Index.<sup>53</sup>
- *Shrinking demand*: Between 2007 and 2011, the PeopleLaw sector shrank by nearly \$7 billion, or 10.2 percent.<sup>54</sup> This occurred on the heels of the deteriorating economics of lawyers serving individual clients.<sup>55</sup>
- *Substitution*: The PeopleLaw sector is increasingly served by legal publishers such as LegalZoom, Rocket Lawyer and many others that provide access to tech-enabled forms. In effect, this creates a consumer DIY culture where it is difficult to combine high-quality, low-cost forms with legal advice.<sup>56</sup> In the Organizational Client sector, in-house lawyers have become a substitute for law firms; in turn, ALSPs are a partial substitute for both.<sup>57</sup>

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

### 3.4. Courts and Access to Justice

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

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

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<sup>52</sup> See Section 2.3, *supra* at page 14.

<sup>53</sup> See Section 2.4, *supra* page 15.

<sup>54</sup> See Figure 5 and accompanying text.

<sup>55</sup> See Section 2.1, *supra* at page 12.

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

<sup>57</sup> See Section 2.4, *supra* at page 15.

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

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

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

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

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

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

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

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

<sup>60</sup> See LANDSCAPE STUDY, *supra* note 58, at 31.

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

<sup>62</sup> See SUSSKIND, *supra* note 32.

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

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

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

#### 4. Ethics Rules and Market Regulation

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

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

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

##### 4.1. The PeopleLaw Sector: LegalZoom and Avvo

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

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

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

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

<sup>68</sup> See [https://www.americanbar.org/groups/professional\\_responsibility/publications.html](https://www.americanbar.org/groups/professional_responsibility/publications.html) (last visited July 7, 2018).

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

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

Founded in 1999, LegalZoom specializes in tech-enabled legal documents that fit a wide array of individual and small-business needs. In 2012, LegalZoom filed an S-1 with the U.S. Securities & Exchange Commission (a requirement done in preparation for an initial public offering) but ultimately changed course and instead accepted more than \$200 million funding from a European private equity firm.<sup>70</sup> Although LegalZoom is not a law firm and therefore cannot engage in the practice of law, its brand recognition, which it largely built through conventional mainstream media advertising, enables it to direct advisory legal work to a network of practicing lawyers. It is able to partially monetize this influence by running prepaid legal service organizations in various U.S. states as permitted under Rule 7.3.<sup>71</sup> At present, LegalZoom offers prepaid legal services plans for both individuals and small businesses.<sup>72</sup>

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

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

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

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

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

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

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

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

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

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<sup>75</sup> See Sections 2.3 and 3.4, *supra*.

<sup>76</sup> See Appendix B.

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

<sup>78</sup> See *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) \_\_\_ U.S. \_\_\_ [135 S.Ct.] 1101.

<sup>79</sup> *Id.* at 1114.

<sup>80</sup> See Nathan Hale, Fla. Bar Says Case Law Shows TIKD Is Unlicensed Practice, Law360, June 5, 2018, at <https://www.law360.com/articles/1050404/fla-bar-says-case-law-shows-tikd-is-unlicensed-practice> (last visited July 9, 2018).

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

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

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

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

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

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

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

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

<sup>84</sup> *Id.* at 77.

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

#### 4.2. The Organizational Client Sector

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

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

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

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

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

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

<sup>86</sup> See Rule 5.4.

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

<sup>88</sup> See ABA Formal Opinion 08-451, *Lawyer Obligations When Outsourcing Legal and Nonlegal Support Services*, Aug. 8, 2008, online at [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/ethicsopinion08451.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/ethicsopinion08451.authcheckdam.pdf) (last visited July 8, 2018).

<sup>89</sup> See Section 2.2, *supra*.

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

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

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

#### 4.3. The U.K. and Australian Models

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

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

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

<sup>91</sup> See Section 1.3 and 2.4, *supra*.

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

<sup>93</sup> See Rule 5.4, Comment [1] (“The provisions of this Rule express traditional limitations on sharing fees. *These limitations are to protect the lawyer’s professional independence of judgment.*” (emphasis added)).

<sup>94</sup> See Section 1.5, *supra*.

<sup>95</sup> See McMorro, *supra* note 33, at 669.

<sup>96</sup> *Id.*

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

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

## 5. Conclusion

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

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

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

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

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

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

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

<sup>100</sup> Id.

<sup>101</sup> See generally McMorrow, *supra* note 33.

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

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

# Appendix A



## Appendix B

### Table of Ethics Opinions on Avvo\*

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

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

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

## About the Author



### **Professor William Henderson**

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

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

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