

COMMITTEE TO STUDY REGULATORY REFORM

Zoom Conference Call

June 4, 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. Introduction of Committee Members
- III. Review of Committee's Charge
- IV. Presentation (Mine and Oten) – Overview of Ongoing Regulatory Reform Efforts in the United States
- V. Introduction of Study Materials
- VI. Discussion: Methodology and Anticipated Progression Through Study
- VII. Goals for Next Quarter
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Task Force on the Delivery of Legal Services

October 4, 2019

Report and Recommendations

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EXECUTIVE SUMMARY

Creation and Charge of Task Force

On November 21, 2018, then Chief Justice Scott Bales issued Administrative Order No. 2018-111, which established the Task Force on Delivery of Legal Services. The administrative order outlined the purpose of the task force as follows:

- a) Restyle, update, and reorganize Rule 31(d) of the Arizona Rules of Supreme Court to simplify and clarify its provisions.
- b) Review the Legal Document Preparers program and related Arizona Code of Judicial Administration requirements and, if warranted, recommend revisions to the existing rules and code sections that would improve access to and quality of legal services and information provided by legal document preparers.
- c) Examine and recommend whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, and administrative hearings not otherwise allowed by Rule 31(d), and family court.
- d) Review Supreme Court Rule 42, ER 1.2 related to scope of representation and determine if changes to this and other rules would encourage broader use of limited scope representation by individuals needing legal services.
- e) Recommend whether Supreme Court rules should be modified to allow for co-ownership by lawyers and nonlawyers in entities providing legal services.
- f) In the Chair's discretion, consider and recommend other rule or code changes or pilot projects on the foregoing topics concerning the delivery of legal services.

The administrative order further directed the task force to submit a report and recommendations to the Arizona Judicial Council (AJC) by October 1, 2019. The report that follows consists of the task force's recommendations for the AJC's review and consideration.

The Task Force Process

Members of the task force represented a wide variety of perspectives on the delivery of legal services. From January through September 2019, the task force met monthly, discussing the issues outlined by Administrative Order 2018-111 and its charge. The task force received

presentations on various innovative approaches employed nationally and internationally to deliver legal services. The task force also heard from speakers about the changing legal marketplace and the impact of those changes on the cost of legal services and on the legal profession itself. Information about how local, national, and international community leaders are examining, exploring, and implementing innovative ways of delivering legal services was a regular part of information shared and discussed at monthly meetings.

Due to the number and complexity of topics the task force was charged with addressing and the limited time it had to explore those topics, task force members divided into two workgroups.¹ Workgroups met in breakout sessions during monthly task force meetings as well as in meetings held separately as needed. Workgroups invited subject matter experts, legal practitioners, and other stakeholders to give presentations and to testify on various topics. Each task force meeting included presentations by the workgroups, along with questions from and feedback by all task force members about workgroup efforts. Task force meetings were attended by the public and stakeholders who were encouraged to comment on the recommendations generated by the workgroups. This approach facilitated input from different perspectives, accounted for potential overlap among workgroups, ensured workgroups were not working in isolation, and recognized that members of the public and local stakeholders had a substantial interest in and knowledge about the topics being explored that would facilitate developing meaningful final recommendations.

¹ A workgroup co-led by Don Bivens and Stacy Butler addressed items (a) through (c) and a workgroup led by Judge Maria Elena Cruz addressed items (d) through (f) of the task force's charge.

Abbreviated Recommendations

1. Eliminate Arizona's Rules of Professional Conduct (ER) 5.4 and 5.7 and amend ERs 1.0 through 5.3 to remove the explicit barrier to lawyers and nonlawyers co-owning businesses that engage in the practice of law while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public. In anticipation of these rule changes, the Supreme Court should immediately convene a group to explore regulation of legal entities in which nonlawyers have a financial interest.
2. Modify ERs 7.1 through 7.5 (the "Advertising Rules") to incorporate many of the 2018 ABA Advertising Rule amendments and to align the rules with the recommendation to amend ERs 1.0 through 5.3 and eliminate ERs 5.4 and 5.7.
3. Promote education and information on what unbundled legal services are to the bench, bar, and public to encourage expanded understanding and utilization of unbundled legal services.
4. Revise Rule 38(d), Arizona Rules of Supreme Court, to clarify when a law student at an accredited law school or recent law school graduate may practice law under the supervision of a lawyer admitted to practice in Arizona, what legal services the law student or law graduate may provide, and the duties and obligations of the supervising lawyer.
5. Revise Rule 31(d), Arizona Rules of Supreme Court, by re-styling the rule into four separate rules, making the rule easier to navigate and understand.
6. Develop, via a future steering committee, a tier of nonlawyer legal service providers, qualified by education, training, and examination, to provide limited legal services to clients, including representation in court and at administrative proceedings.
7. Initiate, by administrative order, the Licensed Legal Advocate Pilot program developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College

of Law, to expand delivery of legal services to domestic violence survivors through the creation of a new tier of legal service provider.

8. Initiate, by administrative order, the DVLAP Document Preparer Pilot program as proposed by the Arizona Foundation for Legal Services and Education (the “Bar Foundation”) to create exceptions to the requirements of the Legal Document Preparer program and allow domestic violence lay advocates to prepare legal documents for victims of domestic violence receiving services through the Bar Foundation’s Domestic Violence Legal Assistance Program (DVLAP).
9. Make the following changes to improve access to and the quality of legal services provided by certified Legal Document Preparers:
 - a. Amend ACJA § 7-208 to allow LDPs to speak in court when addressed by a judge.
 - b. Amend ACJA § 7-208 to further define permissible and prohibited activities of LDPs.
 - c. The Arizona Supreme Court should pursue a campaign of educating the bench, members of the bar, and the public regarding what a legal document preparer is, what they can do, and what they are prohibited from doing.
 - d. Amend ACJA § 7-208 to remove the restrictions prohibiting legal document preparers from assisting clients who are represented by counsel.
 - e. Recommend increased access to LDP training, especially online, particularly for LDPs in rural areas.
 - f. Amend the ACJA and any other rules governing the investigation of and seeking of legal sanctions for engaging in unauthorized practice of law when the actions in

question involve a person acting in a manner that a legal document preparer would act if certified.

10. Advance and encourage local courts to establish positions and programs where nonlawyers located within the court are available to provide direct person-to-person legal information to self-represented litigants about court processes and available self-help services.

REPORT AND RECOMMENDATIONS

I. Background

The American Bar Association Commission on the Future of Legal Services found that “[d]espite sustained efforts to expand the public access to legal services, significant unmet needs persist” and that “[m]ost people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.”² In 2017, the Legal Services Corporation released a report, finding that 86% of civil legal matters reported by low-income Americans in the prior year received no or inadequate legal help.³ Relevant to the task force’s work, the Commission found that as of the last census, 63 million people met the financial qualifications for legal aid, but funding for the Legal Services Corporation is inadequate.”⁴ In fact, in some jurisdictions more than 80% of civil litigants are in poverty and unrepresented.⁵ Importantly, one study has shown that “well over 100 million Americans [are] living with civil justice problems many involving what the American Bar Association has termed ‘basic human needs,’” including

² Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States*, 11-14 (American Bar Association 2016), available at https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf

³ Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017), available at <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>; National Center for State Courts, *Nonlawyer Legal Assistant Roles Efficacy, Design, and Implementation*, 1 (2015) (Research on unmet civil legal needs suggest that around 80% of such need does not make it into a court. At the same time, legal aid organizations are able to satisfy less than half of those that request legal help.).

⁴ Commission on the Future of Legal Services, *supra* note 2, at p. 12.

⁵ *Id.*

matters such as housing (evictions and mortgage foreclosure), child custody proceedings, and debt collection.⁶

One reason for the current “justice gap” is that the costs of hiring lawyers has increased since the 1970s, and many individual litigants have been forced to forego using professional legal services and either represent themselves or ignore their legal problems.⁷ Professor William D. Henderson, Indiana University Maurer School of Law, has noted the alarming decline in legal representation for what he calls the “PeopleLaw sector,” observing that law firms have gradually shifted the core of their client base from individuals to entities. Indeed, while total receipts of United States law firms from 2007 to 2012 rose by \$21 billion, receipts from representing individuals declined by almost \$7 billion. Correspondingly, the percentage of revenue generated by representing individuals fell 4.8% during that time period.⁸ And according to a report issued by the National Center for State Courts, 76% of 900,000 civil cases examined from July 1, 2012 through June 30, 2013 involved at least one self-represented party.⁹

Small firm lawyers, who primarily serve the PeopleLaw sector, are struggling to earn a living, which curtails their abilities to represent people unable to pay adequate amounts for legal services.¹⁰ According to the 2017 Clio Legal Trends Report, the average small firm lawyer bills

⁶ *Id.* (quoting Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. Rev. 433, 466 (2016)).

⁷ William Henderson, *The Decline of the People Law Sector*, November 19, 2017, Post 037, available at <https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/>.

⁸ *Id.* at i.

⁹ National Center for State Courts, *The Landscape of Civil Litigation in State Courts*, 31-33 (2015), available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

¹⁰ See Henderson, *supra* note 7 at p. 14-15.

\$260 per hour, performs 2.3 hours billable work a day, bills 1.9 hours of that work, and collects 86% of invoiced fees.¹¹ As a result, the average small firm lawyer earns \$422 per day before paying overhead costs. These lawyers are spending roughly the same amount of time looking for legal work and running their business as they are performing legal work for clients.¹² Professor Henderson suggests that this lagging legal productivity may result in part from ethical rules that restrict ownership of law firms to lawyers because “ethics rules are the primary mechanism for regulating the market for legal services.”¹³ Also, a growing mismatch between the cost of litigation and amounts in controversy has made many cases unattractive to lawyers and clients alike.¹⁴

Courts across the nation strive to give litigants greater access to civil justice. Much of that focus, in the past decade, has been on providing clear information to self-represented litigants about court processes and procedures. But despite these efforts, the justice gap has grown between those who can afford to pay for legal services and those who cannot do so. Clearly, merely assisting litigants to navigate the justice system alone is insufficient to ensure that Arizonans have meaningful access to our courts to resolve legal issues. And although subsidized and free legal

¹¹ Clio, *2017 Legal Trends Report*, 17 (2017), <https://www.clio.com/resources/legal-trends/2017-report/>.

¹² *Id.*

¹³ Henderson, *supra* note 7, at p. 21 (citing Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structures*, 84 Va. L. Rev. 1707 (1998) (noting that “[e]thical rules are a form of professional self-regulation enforced by civil liability or professional discipline.”)).

¹⁴ National Center for State Courts, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, 25 (2015), available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

services, including low bono and pro bono legal services, are a key part to solving this access to justice gap, they are insufficient. “U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with civil legal needs.”¹⁵

Considering the large market for legal services left unserved by lawyers, technology-based and artificial intelligence platforms have stepped in to serve clients. Online entities assist customers to form businesses, register trademarks, and draft wills and other legal forms.

Arizona has long explored new ways of delivering legal services. Since 2003, the Arizona Supreme Court has authorized the certification of Legal Document Preparers (“LDPs”), and the State Bar of Arizona recently implemented a web-based “Find A Lawyer” program, connecting those with legal needs to lawyers willing to do the work pro bono or at an affordable cost.¹⁶ Arizona courts have also worked to expand and clarify ways in which court staff can provide legal information to self-represented parties.¹⁷ Arizona, like other states, has also recently turned to technology to help bridge the justice gap. Examples include implementing a virtual resource center through the award-winning webpage AZCourtHelp.org with legal information sheets and legal information videos, pilot online dispute resolution programs, and the design of an online program (AZPoint.org) to streamline drafting, filing, serving, and transmitting orders of protection.

¹⁵ Commission on the Future of Legal Services, *supra* note 2, at p. 14 (citing Gillian K. Hadfield, *Innovating Access: Changing the Way Courts Regulate Legal Markets*, Daedalus 5 (2014)).

¹⁶ <https://azbar.legalserviceslink.com/>

¹⁷ See, e.g., the Arizona Commission on Access to Justice’s Question and Response Handbook available in print for court employees and accessible online through AZCourtHelp.org available at <https://www.azcourthelp.org/faq>.

It is against this backdrop and Arizona's many years of efforts to advance access to justice that the task force was established and carried out its work. The task force developed 10 recommendations in relation to the six topics it was charged with analyzing. The following pages summarize those recommendations and the impetus and rationale behind them.

II. Recommendations.

Recommendation 1: Eliminate Arizona's ERs 5.4 and 5.7 and amend ERs 1.0 through 5.3 to remove the explicit barrier to lawyers and nonlawyers co-owning businesses that engage in the practice of law while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public.

A. Review of National Efforts and Recommendation Development.

Ethical rules have been called out as contributing to the justice gap as demonstrated by Professor Henderson's *Legal Marketplace Landscape Report*.¹⁸ Henderson's watershed report and the work of the Association of Professional Responsibility Lawyers (APRL) make clear that Arizona's ethical rules should be amended given that lawyers are increasingly providing services in a manner other than through traditional legal partnerships or professional corporations. E.R. 5.4, which generally prohibits lawyers from sharing fees with nonlawyers and prohibits nonlawyers from having any financial interest in law firms, has been identified as a barrier to innovation in the delivery of legal services.

Arizona is not alone in considering significant and innovative changes to the ethical rules that restrict ownership of any business that engages in the practice of law to lawyers alone. In June 2019 the Board of Trustees of the State Bar of California voted to seek public comment on broad concepts for changing California's ethical rules that would allow limited alternative business

¹⁸ Henderson, *supra* note 7, at p. 21; Oregon State Bar Futures Task Force, *Future: The Future of Legal Services in Oregon, Executive Summary*, 4 (2017), available at http://www.osbar.org/docs/resources/taskforces/futures/futurestf_summary.pdf (citing Commission on the Future of Legal Services, *supra* note 2, at p. 16).

structures.¹⁹ These concepts include loosening rules on passive investment and allowing nonlawyers to partner with lawyers in the formation of businesses that provide legal services. Utah is similarly considering a two-year pilot “sandbox” program that would allow the formation of alternative business structures and regulate those businesses through an independent regulatory body overseen by the Utah Supreme Court. In addition, Washington D.C. has allowed limited alternative business structures for several decades²⁰ and the American Bar Association (“ABA”) Commission on the Future of Legal Services has also considered proposals to eliminate model ethical rule 5.4.²¹

Task force members not only heard from Professor Henderson but spoke with representatives from the Washington D.C. Bar about the effect of D.C.’s 5.4 rule changes, heard from ethics experts locally, and attended a summit hosted by the Institute for the Advancement of the American Legal System (“IAALS”), that focused on regulatory changes related to the practice of law. The task force received information about past and present efforts of national organizations like the ABA and APRL to consider and propose rule changes that would allow for the creation of alternative legal business structures. To assist it, the workgroup assigned to examine whether to permit nonlawyer ownership of firms invited two Arizona ethics lawyers to join in forming proposals.²² A sentiment that resounded within the workgroup was that lawyers have the ethical

¹⁹ See State Bar of California Task Force on Access Through Innovation of Legal Services Report: *Request to Circulate Tentative Recommendations for Public Comment*, July 11, 2019, available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf>.

²⁰ Rule 5.4, D.C. Rules of Professional Conduct.

²¹ Commission on the Future of Legal Services, *supra* note 2, at p. 66.

²² Patricia A. Sallen, a legal ethics consultant and lawyer based in Phoenix, Arizona, whose work has included serving as Director of Special Services and Ethics with the Arizona State Bar,

obligation to assure legal services are available to the public, and that if the rules of professional conduct stand in the way of making those services available, then the rules should be changed, albeit in a way that continues to protect the public.

Before deciding to recommend eliminating ER 5.4, the task force considered and rejected two other proposals offered by the workgroup. First, similar to Washington D.C.'s approach, the task force considered amending Rule 5.4 to allow the formation of alternative business structures.²³ The goal of this proposal was to open business possibilities and allow passive investment in legal services businesses. Important aspects of this proposal included disclosing to the public and clients that the businesses involved nonlawyer partners or investors, registering with the State Bar, and reinforcing the ethical rules that address lawyer independence and conflicts of interest. Major hurdles faced by the workgroup in attempting to merely amend ER 5.4 and other ethical rules addressing the independence of lawyers and protection of the public included how to regulate nonlawyers, the impossibility of identifying all possible businesses arrangements that might be formed and considering the effect of such rule changes on multi-jurisdiction law practices.

Second, the task force explored recommending a pilot "sandbox" program in which ER 5.4 would be waived for entities that applied for and were granted permission to operate as multi-discipline legal service providers. This proposal was rooted in the idea that entrepreneurial lawyers and nonlawyers would pilot a range of different business forms, which would permit the Supreme

working as ethics counsel for the Arizona State Bar, membership on the Arizona Supreme Court Attorney Regulation Advisory Committee, and teaching and writing about ethics-related topics nationally. Lynda L. Shely, is a Scottsdale, Arizona, attorney who provides ethics advice and representation to lawyers and law firms in Arizona and the District of Columbia, presents nationally on ethics-related topics, served as Director of Ethics for the State Bar of Arizona, has been called as an ethics expert witness, is a member of the Association of Professional Responsibility Lawyers (APRL), and is active in ABA committees.

²³ Commission on the Future of Legal Services, *supra* note 2, at p. 42.

Court to determine how ER 5.4 should be amended and eliminate the guesswork involved in the first proposal. Hurdles to this proposal included identifying who would decide applications for waivers of the ethical rules and whether the limited duration of a pilot project would deter business formation because of the risk that the businesses would have to close if the pilot program did not result in permanent rule changes.

The task force ultimately concluded that no compelling reason exists for maintaining ER 5.4 because its twin goals of protecting a lawyer's independent professional judgment and protecting the public are reflected in other ethical rules which can be strengthened. The task force therefore voted to file a rule petition to eliminate ERs 5.4 and 5.7 and modify ERs 1.0 through 5.3 to ensure lawyer independence and public protection. Considering these changes, the task force also recommends eliminating ER 5.7.

After significant discussion, the task force relatedly recommends that the Supreme Court convene a group to explore entity regulation for firms in which nonlawyers have an ownership interest. Currently, Arizona's rules of professional responsibility apply only to lawyers. But entity regulation is not a unique concept. The United Kingdom regulates legal entities, and the Utah Work Group on Regulatory Reform recently made a proposal regarding the issue. Utah proposes developing a new regulatory body for legal services. As the Utah Supreme Court moves forward with revising the rules of practice, it will simultaneously pursue creation of a new regulator, operating under the supervision and direction of the Supreme Court, for the provision of legal services. Utah anticipates some form of an independent, non-profit regulator with delegated regulatory authority over some or all legal services.²⁴

²⁴ The Utah Work Group on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation*, 15, 21 (2019) available at <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>

Entity regulation should be explored as an additional tool to ensure lawyer independence, client confidentiality, and consumer protection. Given the limited time afforded the task force for its work, it did not explore in detail the advisability of legal entity regulation or what such regulation would entail. Task force members considered, however, whether entity regulation should, at least, (1) require a lawyer with a financial interest or managerial authority in a legal entity to be responsible for nonlawyer owners to the same extent as if the nonlawyers were lawyers, (2) require informed written consent from clients acknowledging both a nonlawyer's financial interest or managerial authority in the entity and the entity's commitment to the lawyer's independence of professional judgment, and (3) designate one person in the entity to be responsible for the nonlawyers' compliance with any regulations.

The proposed amendments are summarized below and are detailed in Appendix 1 accompanying this report.

B. Summary of Proposed Elimination of ERs 5.4 and 5.7 and Amendments to ERs 1.0 through 5.3.

The proposed amendments to Arizona's ERs 1.0 through 5.3 would remove the requirement restricting the ownership of any business that engages in the practice of law exclusively to lawyers. This recommendation is centered in the elimination of ER 5.4 and re-defining the term "firm" in ER 1.0(c). Proposed changes to the ethical rules also ensure that the concepts of a lawyer's independent professional judgment and protection of the public are emphasized in the remaining ethical rules. Several proposed amendments eliminate comments to the rules, incorporating any substantive comments into the rules themselves, deleting comments that are duplicative or unnecessary, and amending remaining comments to be more concise and instructive. All proposed rule changes are designed to ensure that the ethical rules governing conflicts, obligations to the client, professional independence of lawyers, and maintaining the

overarching goal of protecting the public that have traditionally been the core values of the rules of professional conduct remain, regardless whether services are provided by a business that involves a partnership between lawyers and nonlawyers, involve passive investment in a purely legal services business, or provides both legal and nonlegal services.

ER 5.4 Professional Independence of a Lawyer

ER 5.4, which prohibits sharing fees with nonlawyers and forming partnerships with nonlawyers if any part of the partnership's activities include the practice of law, is "directed mainly against entrepreneurial relationships with nonlawyers" and aimed at "protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers."²⁵ The ABA Model Rule 5.4 and its predecessor rules as far back as the 1928 Canons of Professional Ethics, "originated in legislation aimed at forbidding lawyers from being employed by corporations to provide services to members of the public."²⁶ The prohibition was not rooted in protecting the public but in economic protectionism. There was "no evidence that the corporations then supplying lawyers to clients were harming the public, and the transparent motivation behind the legislation was to protect lawyers' businesses."²⁷ In evaluating the need to continue ER 5.4, the task force considered whether the rule serves a modern purpose and concluded it no longer serves any purpose, and in fact may impede the legal profession's ability to innovate to fill the access-to-civil-justice gap.

ER 5.4's negative effect was evident during the great recession, when many lawyers expressed interest in partnering with nonlawyers to be a "one-stop shop" for consumers who

²⁵ ABA Formal Ethics Opinion 01-423 (2001).

²⁶ Bruce A. Green, *Lawyers Professional Independence: Overrated or Undervalued?* 46 Akron L. Rev. 599, 618 (2013).

²⁷ *Id.*

wanted to refinance home loans, stop foreclosures, or participate in short sales. Typically, lawyers endeavored to create partnerships with mortgage brokers and real estate agents to help consumers. But ER 5.4's bar to partnering with a nonlawyer to provide legal services prohibited lawyers from forming these relationships. And yet creating single entities to offer all those services may have served consumer-clients' best interests.

The legal profession cannot continue to pretend that lawyers operate in a vacuum, surrounded and aided only by other lawyers or that lawyers practice law in a hierarchy in which only lawyers should be owners. Nonlawyers are instrumental in helping lawyers deliver legal services, and they bring valuable skills to the table.

Eliminating ER 5.4 would allow, for example:

- A nonlawyer to have an ownership interest in a partnership in which a lawyer provides legal services to others outside the entity;
- A nonlawyer partner in a firm to provide nonlegal services to clients of the entity;
- A nonlawyer to serve as a firm's chief financial officer or chief technology officer; and
- A lawyer to pay nonlawyer personnel a percentage of fees earned by the law firm on a particular case.

Eliminating ER 5.4 will not remove protection afforded a lawyer's professional independence and the public. ER 1.8(f), for example, already directs that third-party payers such as insurance companies cannot interfere with a lawyer's independent professional judgment or the client-lawyer relationship.

ER 1.0 Terminology

The proposed amendments include a new definition of "firm" to account for ownership interests in legal businesses by nonlawyers. The amendments include broadening the definition of "screened" to clarify that reasonably adequate procedures to screen both lawyers and nonlawyers

with ownership interests must be undertaken, and the amended definition provides direction on what constitutes “reasonably adequate procedures.”

In addition, proposed amendments to ER 1.0 incorporate concepts from existing comments to the rule and other rules that the task force determined were important enough to be part of the rule’s text. Amendments also define previously undefined phrases in rules that are necessary to address the new concept of nonlawyers having an ownership interest in firms and those nonlawyers providing nonlegal services to firm clients.

ER 1.5 Fees

The proposed amendments to ER 1.5 are rooted in ensuring that the language of the rule reflects the change to the definition of “firm” in ER 1.0(c) and reflects the elimination of ER 5.4’s prohibition of a business providing legal services to be owned by lawyers and nonlawyers alike. The proposed rule also incorporates language from current comments to clearly provide that the rule applies to firms dividing a single billing to a client and firms jointly working on a matter. The rule further requires that division of responsibility must be reasonable.

ER 1.6 Confidentiality

The amendment to ER 1.6 requires that a lawyer make reasonable efforts to prevent inadvertent or unauthorized disclosure of confidential information about a client, even if the services the firm provides to the client are purely nonlegal. The task force recognized that by eliminating ER 5.4 and allowing lawyers and nonlawyers to partner together to form businesses that might provide both legal and nonlegal services, it remains imperative to protect clients and the confidentiality of representations. Therefore, the amendment to ER 1.6 preserves that protection and clarifies that regardless whether a client is receiving legal services from a lawyer or receiving nonlegal services from a nonlawyer, the traditional protections of the client’s information apply to all aspects of the business.

ER 1.7 Conflict of Interest: Current Clients

There are no proposed amendments to ER 1.7. However, the concept of personal-interest conflicts addressed in comment 10 to the rule were imported into the new definition in ER 1.0(o), and amendments to ERs 1.8, 1.10, and 5.3 address other conflict-related issues. This permits elimination of comment 10 while adding these essential concepts into the text of the ethical rules.

ER 1.8 Conflict of Interest: Current Clients: Specific Rules

An amendment to this rule adds subsection (m), which states that when lawyers refer clients for nonlegal services provided either by the lawyer or nonlawyers in the firm or refer clients to a separate entity in which the lawyer has a financial interest, they must comply with ERs 1.7 and 1.8(a). This addition takes content from comment 3 and moves it into the rule's text. In addition, comments 1, 2, and 3 are deleted because relevant parts of comments 1 and 3 are made part of a new definition of "business transaction" in ER 1.0(n) and comment 2 merely restates ER 1.8(a) and is therefore redundant. In addition, the personal-interest conflicts issue addressed in comments to ER 1.7 are included in a new provision to ER 1.8.

ER 1.10 Imputation of Conflicts of Interest: General Rule

ER 1.10(a) is amended to address nonlawyers. With the elimination of ER 5.4, nonlawyers will be able to play significant roles in firms, including having ownership interests. Therefore, the rules should explicitly address imputation of their conflicts. Amendments to the comments include deleting comments 1 through 4. Comment 1, which discusses a "firm," is no longer needed in light of the expanded definition of "firm" in ER 1.0(c). Comments 2 and 3 summarize the concepts of imputation, with one important exception that addresses conflicts if a lawyer owns all or part of an opposing party. That exception was expanded to include nonlawyers and was added to the rule's text as subsection (f), which provides that a conflict is imputed to the entire firm if a lawyer or nonlawyer owns all or part of an opposing party. Comment 4 contains important concepts the task

force determined should be part of the rule itself. New subsection (g) therefore allows disqualified nonlawyers to be screened from matters without imputing the conflict to the firm, unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm. Similarly, new subsection (h) allows lawyers to be screened if they are disqualified because of events or conduct that occurred before they became licensed lawyers, unless the lawyer is an owner, shareholder, partner, officer, or director of the firm.

ER 1.17 Sale of Law Practice or Firm

Current subsections (a) and (b) are removed considering the elimination of ER 5.4, which, in turn, rendered many comments to the rule unnecessary. Several new subsections were added to move important information from remaining comments into the rule's text. Subsection (a)(1) now requires the seller to disclose the purchaser's identity. Subsection (c) states that the purchaser cannot increase fees to clients to finance the sale, and the purchaser must honor existing arrangements between the seller and clients regarding fees and scope of work. New subsection (d) requires the seller to give notice to clients before allowing a purchaser to access detailed client information. New subsection (e) requires the seller to ensure that a purchaser is qualified and new subsection (f) advises that if courts must approve substitution, the matter cannot be included in the sale until obtaining that approval. Finally, new subsection (g) makes the rule inapplicable to transfers of legal representation unrelated to a sale of the firm. No comments are necessary for the proposed rule.

ER 5.1 Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors

Amendments to this rule were made in part because a lawyer may hold an ownership interest in a firm in a variety of ways. The rule is no longer limited to a "partner" and instead a broader reference to "ownership interests" was added to the title because of the change in the definition of "firm" in ER 1.0(c) and the elimination of ER 5.4. As with several other ERs

discussed here, the task force determined that comments to this rule addressed important concepts that should be part of the rule. The definition of “internal policies and procedures” was moved from the comment to subsection (b). Subsection (c) now states that whether a lawyer has supervisory duties over lawyers may vary depending on the circumstances. And, subsection (d) now provides guidance on what constitutes reasonable remedial action. No comments are necessary for the proposed rule.

ER 5.3 Responsibilities Regarding Nonlawyers

The task force determined that the rule should refer to both nonlawyers in the firm and nonlawyer assistants, who can be inside or outside the firm, and therefore a change to the title was made to identify the scope of the rule. As with ER 5.1(a), ER 5.3(a) now instructs that lawyers and firms must ensure lawyers and nonlawyers alike undertake reasonable measures to conform to the Rules of Professional Conduct. The remaining amendments move important information from the comments to the rule itself. A definition of “reasonable measures” was added to subsection (b), while direction on what constitutes a direct supervisor’s “reasonable efforts” was added in subsection (c)(1). New subsection (c)(3) requires that lawyers give directions appropriate under the circumstances to nonlawyers outside the firm and guidance on allocating responsibility for monitoring an external nonlawyer when the client directs that the lawyer select the particular nonlawyer was added to new subsection (c)(4). Finally, new subsection (d) requires that each firm designate one lawyer who is responsible for establishing policies and procedures in the firm to assure that all nonlawyers comply with the lawyers’ ethical obligations. The task force suggests that the State Bar may then require that the lawyer identify on the annual dues statement which lawyer in the firm is responsible under ER 5.3(d), similar to the requirement that each lawyer identify the lawyer responsible for the firm trust account procedures. This would provide a level

of entity accountability to assure that a specific attorney must establish appropriate nonlawyer ethics procedures.

ER 5.7 Responsibilities Regarding Law Related Services

In evaluating whether to recommend eliminating ER 5.4, the task force considered the need to maintain ER 5.7. Under the existing rule, and depending on the circumstances, a lawyer may be obligated to provide the recipient of law-related services the full panoply of protections enjoyed by the lawyer-client relationship.

Considering the recommendation to eliminate ER 5.4, and thus allow lawyers to partner with nonlawyers, ER 5.7 seems unnecessary and restrictive of innovation. The general conflict-of-interest and confidentiality rules, as well as the rules protecting the professional independence of lawyers, as amended, should suffice to protect clients.

Recommendation 2: Modify Arizona’s ERs 7.1 through 7.5 to incorporate many 2018 ABA Advertising Rule amendments and to align the rules with the recommendation to eliminate ERs 5.4 and 5.7 and amend ERs 1.0 through 5.3.

A. ABA Model Rule Changes and National Trends.

In 1977, the United States Supreme Court decided *Bates v. State Bar of Arizona*,²⁸ and in 1985 Arizona adopted the ABA Model Rules. Current ERs 7.1 through 7.5 (the “Advertising Rules”), which govern lawyer communications about legal services, have not substantively changed since their adoption in 1985, despite compelling reasons to make changes.²⁹ Technological advances in the delivery of legal services as well as cross-border marketing of legal services through the internet, television, radio, and even print advertising have changed the ways

²⁸ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

²⁹ Portions of this summary are derived from the Standing Committee on Ethics and Professional Responsibility’s 2018 Report and Resolution 101 for amendment of the ABA Model Rules on Professional Conduct on lawyer advertising.

consumers learn about available legal services. These changes, as well as the mobility of clients and lawyers, require more uniformity in the rules that regulate lawyer advertising among United States jurisdictions. Therefore, the task force recommends bringing the Advertising Rules into conformity with recent changes made by the ABA in 2018 and aligning the rules with current realities of lawyer advertising and law practice.

The task force's recommended amendments to the Advertising Rules accommodate three trends calling for simplicity and uniformity in the regulation of lawyer advertising. First, lawyers increasingly practice across state and international borders, and clients often need services in multiple jurisdictions. Second, technologies that were not prevalent in 1985 to search for professional services today are ubiquitous.³⁰ Third, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful.³¹

³⁰ See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 (“According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.”).

³¹ For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services. For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, *supra* note 30, at 7-18.

Empirical data from a survey sent to bar regulators by APRL regarding the enforcement of current advertising rules shows that complaints about lawyer advertising are rare; the vast majority of advertising complaints are filed by other lawyers and not consumers, and most complaints are handled informally, even when there is a provable advertising rule violation.³² APRL's survey data is consistent with charges received by the State Bar of Arizona regarding lawyer advertising. Based in part on this data, in August 2018 the ABA House of Delegates adopted model rule amendments while maintaining the primary regulatory standard for advertising – communications must be truthful and not misleading.³³ The State Bar of Arizona expressed support for these amendments through the vetting process. Many jurisdictions currently are considering adoption of the 2018 ABA Model Rule amendments – and some jurisdictions, such as Virginia, Washington, and Oregon already have updated their Rules with variations on the recommendations.

B. Summary of Proposed Amendments to ERs 7.1 through 7.5.

The proposed amendments to Arizona's ERs 7.1 through 7.5 incorporate many of the 2018 ABA Model Rule amendments and fulfill the task force's charge to identify issues and improvements in the delivery of legal services. As evidenced by Recommendation 1 above, the task force recommends eliminating or amending ethical rules that impede lawyers' abilities to provide cost-effective legal services.

The proposed amendments to the Advertising Rules would:

- retain the rules' primary regulatory mandate of refraining from making false and misleading communications;

³² ABA Report and Resolution 101 on Lawyer Advertising, August, 2018: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_dar_resolution_and_report_advertising_report_as_amended_by_rules_and_calendar_for_submission_004.pdf

³³ *Id.*

- set forth the requirements for who may identify themselves as a “certified specialist” in an area of law;
- maintain reasonable restrictions on direct solicitation of specific potential clients; and
- eliminate obsolete and anticompetitive provisions that unreasonably restrict the dissemination of truthful advertising.

The most significant proposed amendment, which goes beyond the 2018 ABA Model Rule amendments, would eliminate current ER 7.2(b)’s prohibition against giving *anyone* anything of “value” for recommending a lawyer or referring a potential client to a lawyer. Anecdotally, it has been observed that this provision is violated daily because, taken literally, this provision prohibits taking an existing client golfing to say thank you for a referral or giving a firm paralegal a gift card or sending flowers for referring a family member to the firm. Similarly, there are many ethics opinions issued both in Arizona³⁴ and around the United States that provide convoluted attempts to distinguish between what is permissible “group advertising” versus what is an impermissible “referral service.” Not only do these technical interpretations serve no productive regulatory purpose, but the unnecessary complexity in the regulations stifles lawyers’ abilities to embrace more efficient online marketing platforms for fear the website or service may be deemed a for-profit referral service.

Rule 7.2(b)’s prohibition against “giving anything of value” exists although there is no quantifiable data evidencing that *for-profit* referral services or even paying for referrals confuses or harms consumers. Consumers do not expect online marketing platforms to be nonprofit operations – which are the only referral services permissible under the current regulatory

³⁴ See State Bar of Ariz. Ops.05-08 (2005), 06-06 (2006); 10-01 (2010), and 11-02 (2011).

framework. Note that Florida, one of the most restrictive lawyer advertising jurisdictions in the country, already permits for-profit referral services.

The proposed changes to the Advertising Rules are set forth in Appendix 1. The following summarizes those changes.

ER 7.1 Communications Concerning a Lawyer's Services

The amended rule retains the existing prohibition against “false and misleading” communications about a lawyer’s services. Most bar regulators in the United States have expressed the view that this provision is the rule primarily relied on to regulate lawyer advertising. The current requirements for identifying a lawyer as a “certified specialist” were moved from current ER 7.4 into new ER 7.1(b) and the proposed amendment updates the language from restricting use of the term “specialist” to restricting only the use of the phrase “certified specialist,” consistent with the ABA Model Rule. This change avoids constitutional challenges to the overly restrictive prohibition in current ER 7.4, which limits use of the term “specialist.” The proposed changes would also bring Arizona’s rule in line with the ABA Model Rule language in noting that lawyers may not identify themselves as “*certified* specialists” unless they comply with the requirements set forth in Court rules. The reference in new ER 7.1(b) to new criteria for certified specialist will be contained in Supreme Court Rule 44, and this cross-reference will assist lawyers researching Arizona’s certified specialist advertising requirements. Explanatory comments from current ER 7.4 have been moved to the comments of ER 7.1 to reassure patent attorneys that their specialization is still recognized.

The amendments also move the requirement that all communications must contain the name of a lawyer or law firm and some “contact” information from ER 7.2(c) into new ER 7.1(c). Comments to 7.1 also now include explanatory comments regarding law firm names that were in current ER 7.5. This is consistent with the 2018 Amendments to the ABA Model Rules of

Professional Conduct and clarifies that disbarred lawyers' names and names of lawyers on disability inactive status cannot continue in a firm name.

ER 7.2 (RESERVED)

Current ER 7.2 sets forth specific rules concerning lawyer advertising. The task force recommends deleting that rule and moving the substance of current ER 7.2(c) to new ER 7.1(c). The consumer protection afforded by current ER 7.2 can be provided by less non-competitive provisions. For instance, the rules on conflicts of interest, including ERs 1.7, 1.8, and 1.10, protect clients/consumers because they restrict a lawyer's (and firm's) representation of a client if the lawyer's own interests could "materially limit" the lawyer's independent professional judgment in representing the client. Thus, a lawyer cannot be "forced" to represent a client simply because they were referred by someone who the lawyer pays as a referral source. The conflict of interest rules control who and how a lawyer may represent a client, and such representations must be free of any conflict that could materially limit the lawyer's objectivity. And disclosures revealing that a lawyer will pay referral fees sufficiently informs consumers about the referral system. Such disclosures may be required to comply with ER 7.1's "false and misleading" standard to assure that adequate information is conveyed to website visitors or referral sources about the fact that the site is not a nonprofit operation.

ER 7.3 Solicitation of Clients

Consistent with the 2018 Amendments to the ABA Model Rules, the title of this rule was modified, and a definition of "solicitation" was added. This rule governs direct marketing to individuals with specific needs for legal services, as opposed to general advertising on billboards, business cards, print advertisements, television commercials, websites, and the like. The proposed amendments are narrowly tailored to protect consumers who need legal services in particular matters from overreaching by lawyers. The amendments would preclude, for example, solicitation

letters sent to homeowners in a community where there are known construction defects, car accident victims, members of a neighborhood that has been affected by an environmental hazard, and individuals charged with crimes. Solicitation would *not* include sending a letter to everyone in a certain zip code simply to introduce a law firm to a general community that does not have a specific legal need (such as an estate planning firm sending letters to everyone in Paradise Valley or a family law attorney sending announcement postcards to all businesses in her business complex, announcing the opening of her office). Solicitation also would exempt class action court or rule-required notifications.

ER 7.3 retains the prohibition against in-person (face to face or door-to-door) and real-time electronic (such as telephone calls or Facetime) solicitation, unless the prospective client falls within certain categories of individuals not likely to be overwhelmed by a lawyer's advocacy/solicitation skills, such as other lawyers, a former client, or a family member or friend of the lawyer. And even for these categories of prospective clients, a lawyer cannot solicit them (or anyone) if they have made known that they do not want to be solicited or the communication involves coercion, harassment, or duress. At the same time, an amendment to ER 7.3 adds an exception to the prohibition against in-person solicitation for communications directly with business people who regularly hire lawyers for business legal services, consistent with the 2018 Amendments to the ABA Model Rules. The task force notes that this language was vetted extensively through ABA entities and Bar regulators to assure that the language could not be misinterpreted to mean, for instance, that a lawyer could call someone who regularly hires business lawyers to solicit business for criminal defense, bankruptcy, or family law matters. The language in the proposed amendment limits this category of prospective client to only those who regularly

retain counsel for business purposes and therefore are experienced at receiving calls, emails, and meetings with lawyers seeking to represent their companies.

The proposed amendments delete the current Rule’s “ADVERTISING MATERIAL” notation requirement for envelopes (and filing requirement), consistent with the 2018 Amendments to the ABA Model Rules. Several jurisdictions, including, for instance, the District of Columbia, Massachusetts, Maine, Pennsylvania, North Dakota, Oregon, and Washington either have never had a notation requirement or deleted the requirement years ago. None of these jurisdictions indicate any consumer confusion in receiving written communications from lawyers. Nor is there any empirical evidence to indicate that the notation serves a necessary purpose in alerting consumers to the contents of an envelope. Given the changes in technology and methods of direct marketing consumers receive on a regular basis, there is far less likelihood of a consumer being confused about the purpose of a direct mail solicitation letter or email today, than perhaps existed in 1985 when the notation requirement was adopted.

ER 7.4 (RESERVED)

Current ER 7.4 concerns a lawyers’ abilities to communicate their fields of practice. As noted previously, the requirements for identifying a lawyer as a “certified specialist” was moved to new ER 7.1(b). Comments to ER 7.4 regarding patent attorneys were moved to ER 7.1. The remainder of ER 7.4 has been deleted as duplicative of proposed ER 7.1.

ER 7.5 (RESERVED)

Current ER 7.5 concerns firm names and letterheads. The ABA deleted ER 7.5 as unnecessary, given that ER 7.5 simply described information in a firm name that might be false or misleading. The task force recommends deleting ER 7.5 because it is not needed to regulate law firm names. ER 7.1 is sufficient and the more commonly used regulation. As previously explained, the task force recommends moving ER 7.5’s comments to ER 7.1.

Recommendation 3: Promote education and information on what unbundled legal services are to the bench, bar, and public to encourage expanded understanding and utilization of unbundled legal services.

When lawyers provide limited scope representation also known as “unbundled” legal services, clients hire them to perform a specific task or represent them for only a limited process or issue of the legal matter instead of the entire matter. There is no standard unbundled process because lawyers perform many different tasks and clients have different needs. Arizona has allowed lawyers to engage in limited scope representation since 2003.³⁵ However, the practice appears to be used predominately by lawyers who work in family law. One explanation for the lack of lawyers engaging in limited scope representation is a concern that once the limited representation ends between the client and the lawyer, the court will continue to require the lawyer to represent the client beyond the limited scope agreement.

The task force reviewed articles and best practices concerning unbundled legal services. Unbundled legal services have existed in the American legal system for some time as many legal engagements can be broken into discrete tasks. However, it is imperative that courts explicitly support this model of providing legal services to ensure that the bench, bar, and public fully understand what this type of legal service entails and ensure that consumers do not go without representation rather than pay the high cost of a full-service legal engagement.

To remedy these concerns the task force recommends:

A. The Supreme Court should explicitly support the delivery of unbundled legal services through a campaign of education for the bench and court staff in Arizona.

The task force recommends that the Supreme Court incorporate information on what unbundled legal services are, how to recognize an entry of limited appearance and notice of termination of appearance, and how to honor those limited engagements in cases. This education

³⁵ ER 1.2(c), Ariz. R. Sup. Ct. 42.

campaign should include educating court clerk offices and staff on unbundled legal services so that staff can ensure once a notice of termination of limited appearance is entered, the attorney is no longer noticed or required to appear in court for matters unrelated to the limited scope of service for which they had appeared. The task force recommends that the Court include information on unbundled legal services in new judge orientation programs and in annual judicial conference and leadership conference programs.

B. The State Bar should explicitly promote and educate the bar about unbundled legal services.

The task force recommends that the State Bar of Arizona encourage listings and promotion of lawyers offering unbundled legal services. The State Bar recently launched a Find-A-Lawyer portal that aids consumers in connecting with lawyers offering needed legal assistance in particular areas of the law. This website also allows consumers to indicate their ability to pay for such services which opens a pathway for lawyers conducting pro bono work to connect to clients in need of services with limited financial means. The task force recommends the State Bar assess the Find-A-Lawyer program to determine ways to allow consumers to identify attorneys who offer unbundled legal services to encourage the public to obtain representation rather than go it alone for the entirety of their matter.

The task force also recommends that the State Bar offer educational opportunities through regular CLE programs, the annual bar conference, and articles in the Bar's e-news and print journals about what unbundled legal series are, best practices for initiating and terminating a limited scope representation, including drafting limited scope fee agreements, and how to assess a matter to determine if unbundled legal services are appropriate.

C. Provide information to the public on the different types of lawyer representation, including limited scope representation, on AZCourtHelp.org and AZCourts.gov.

The task force explored opportunities to educate the public on what unbundled legal services are and how they differ from other types of legal services, particularly full-service legal representation. The Bar Foundation in conjunction with the Supreme Court hosts the AZCourtHelp.org webpage which is a statewide virtual legal resource center. Cathleen Cole, Content Manager for AZCourtHelp.org, developed a draft webpage that describes each type of legal representation that an attorney might provide. Descriptions of the various types of legal services include a summary of what each type of legal representation is and descriptions of what each type of service entails. The page on unbundled legal services includes a Notice of Limited Scope Representation form, a Notice of Completion of Limited Scope Representation form, and an example of a limited scope representation contract.

At the time of this report, the Bar Foundation had launched this webpage. The task force recommends that the Supreme Court continue to collaborate with the State Bar and the Bar Foundation to ensure that relevant and meaningful content remains available on the type of legal services pages to ensure that the public has every opportunity to learn about the types of legal services they might secure to assist them with their legal needs.

In addition, the task force recommends that the Administrative Office of Courts develop similar content on AZCourts.gov. The Court Programs Unit of the AOC also developed webpages located under “Resources” in the Self-Help Center that explain the various types of legal representation. In addition, the AOC is working on developing legal information sheets – essentially pages that answer frequently asked questions – for inclusion on the types of representation page. The task force recommends that the Court continue to support the efforts of

the AOC to provide educational information to the public about the types of legal services, particularly unbundled legal services, through the Court's website.

D. Issue an administrative order drawing attention to limited scope representation and adopting uniform notices.

The task force recommends that the Supreme Court issue an administrative order that notifies the Judiciary that ER 1.2 explicitly allows limited scope representation (unbundled legal services) by attorneys in Arizona if the appearances are reasonable under the circumstances. Low-income individuals and increasing numbers of unrepresented litigants cannot afford the costs of full-service legal representation. Although self-represented litigants may be armed with online court forms and self-help materials, without advice and counsel from an attorney, many come to court uninformed, unprepared, or simply overwhelmed.

The task force also recommends that the Supreme Court, by administrative order, adopt two form notices for all practice areas:

- A form Notice of Limited Scope Representation that a lawyer would file upon appearing and which notifies the court that the filing attorney is entering the case for a specific scope of representation (by date, time period, activity, or subject matter).
- A Notice of Completion of Limited Scope Representation that notifies the court when the attorney's appearance terminates. Through education, judicial officers should learn that such a withdrawal or termination of appearance does not require leave of court (1) if the notice of limited appearance specifically states the scope of the appearance by date or time period; or (2) upon the attorney filing a Notice of Completion, which must be served on each of the parties, including the attorney's client.

Finally the task force urges the Supreme Court to inform the bench through the administrative order that (1) service on an attorney who has entered a limited appearance is

required only for matters within the scope of the representation as stated in the notice, (2) any such service must also be made on the party, and (3) service on the attorney for matters outside the scope of the limited appearance does not extend the scope of the attorney's representation. These efforts will ensure that the bench, opposing parties or counsel, and court staff are aware of when an attorney appearing for a limited purpose should be served with pleadings or noticed for court appearances.

A proposed administrative order and forms can be found in Appendix 2 to this report.

Recommendation 4: Revise Rule 38(d), Arizona Rules of Supreme Court, to clarify when a law student at an accredited law school or a recent law graduate may practice law under the supervision of a lawyer admitted to practice in Arizona, what legal services the law student or law graduate may provide, and the duties and obligations of the supervising lawyer.

This recommendation was brought to the task force by members of the legal community. In Arizona, law students can practice law under the supervision of a licensed attorney in accordance with Arizona Supreme Court Rule 38(d). This limited student law practice is restricted to students who are either supervised by an attorney in a public or private legal office or by a clinical law professor in conjunction with a law school clinical program. Although Rule 38(d) currently allows recent law graduates to engage in a limited practice of law until the first offering of the Arizona bar examination,³⁶ the rule was drafted in a way that downplayed or masked this opportunity for recent law graduates. Current Rule 38(d) is unduly complicated and unclear in large part and fails to include certain program essentials. Thus, the proposed amendments revise and reorganize the rule for clarity and substantive completeness. As revised, the proposed rule

³⁶ Certification of a certified limited practice student shall commence on the date indicated on a notice of certification and shall remain in effect . . . [until] the certified student fails to take or pass the first general bar examination for which the student is eligible. Ariz. R. S. Ct. 38(d)(5)(F)(iv).

sets out the program requirements and practice restrictions for both law students and recent law graduates in a clear, organized, consistent, and complete manner.

The proposed amendments clarify that recent law graduates may be certified to engage in the limited practice of law under the supervision of an attorney. The proposed amendments also more clearly state that limited practice does not need to be tied to a clinical law program. At least 16 states allow recent law graduates to engage in the limited practice of law post-graduation and pre-bar admission. These state programs share common features:

- All programs have specified durations. For example, some programs authorize practice only during the period in which the graduate has applied to take the first bar examination after his or her graduation and is awaiting the results. Other programs include similar restrictions and incorporate a tiered expiration date for the authorization to practice, such as no later than 12 or 18 months after the graduate graduated from law school.
- Most of these programs authorize graduates to practice law to the same extent law students are authorized to practice law under programs like existing Rule 38(d)(5). Thus, graduates are permitted to meet with clients, go to court, try cases, argue motions, and the like. Most of the states authorize graduates to handle civil and criminal cases, although some restrict the criminal cases to misdemeanors or less-serious felonies.
- Several programs authorize graduates to practice for certain type of employers, such as legal-aid clinics, public defenders, prosecutor's offices, or city, county, and state offices or agencies.
- Many programs impose supervisory requirements that are similar to the supervisory requirements imposed under existing Rule 38(d).

- A few programs require the dean of the graduate's law school, or the graduate's proposed supervising attorney, to certify the graduate's good character and competence to the state supreme court or another entity. Other programs simply require the employer to comply with the requirements of the program and do not require the employer to file any other documentation with any court or state agency.

Although these other state programs vary in operational details, they all provide a means by which law students and non-licensed law graduates may practice law, and effectively result in expanding the delivery of legal services, especially by public agencies or public service groups that provide legal services to individuals with limited resources. These programs do this by allowing recent law school graduates in the process of becoming licensed to gain experience by practicing law under the supervision of admitted lawyers for a limited duration. Because this limited exception to licensure is anticipated to benefit the public, the task force's proposed amendments to Rule 38(d) fall squarely within the mandate to consider and evaluate new models for delivering legal services.

Further, the amendments would eliminate, or at least lessen, many of the practical problems experienced by law school graduates given the workload of the individuals involved in the admission and character and fitness process. The amendments permit recent law graduates to practice under the supervision of a lawyer after graduation from an ABA accredited law school if the graduate takes the first Arizona uniform bar examination, or the first uniform bar examination offered in another state for which the graduate is eligible. Certification to practice terminates automatically if the graduate fails the bar examination, if the Committee on Character and Fitness does not recommend to the Supreme Court the graduate's admission to practice, if the graduate is denied admission to practice law by the Supreme Court, or on the expiration of 12 months from

the date of the graduate's graduation from law school unless the Supreme Court extends the 12-month period. If the graduate passes the bar examination, certification terminates 30 days after the graduate has been notified of approval for admission to practice and eligibility to take the oath of admission. Certification to practice for both graduates and law students also terminates on the occurrence of other events such as failure to meet the requirements for certification.

Proposed amended Rule 38(d) is set forth in Appendix 3.

Recommendation 5: Revise Rule 31(d), Arizona Rules of Supreme Court, by re-styling the rule into four separate rules, making the rule easier to navigate and understand.

The task force was charged with re-styling Rule 31(d), Arizona Rules of Supreme Court, which govern the practice of law. Over the years, Rule 31(d) has been expanded incrementally to include thirty-one exceptions, becoming cumbersome and difficult to navigate. Consistent with other restyling efforts, the task force separated current Rule 31 into four separate rules. Thus, proposed Rule 31 incorporates current Rule 31(a), proposed Rule 31.1 incorporates current Rule 31(b), proposed Rule 31.2 incorporates current Rule 31(c), and proposed Rule 31.3 incorporates current Rule 31(d). This restructuring is intended to make the rule easier to navigate and understand. Consistent with the Arizona Supreme Court's restyling conventions, the task force sought to state the rules using the active voice and eliminate ambiguous words (especially "shall") and archaic terms (e.g., herein, thereto, etc.). The rules were also restated in a positive—rather than prohibitory—manner (e.g., "a person may" rather than "a person may not,"; "a person or entity may" rather than "nothing in this rule prohibits").

The following is a summary of the changes recommended by the task force. The changes in restyled Rules 31 through 31.2 are mostly stylistic, with one major exception. Currently, the "authority to practice" in Rule 31(b) and the "unauthorized practice of law" in Rule 31(a)(2)(B) state that one is authorized to practice law only if he or she is an active member of the State Bar

of Arizona. One notable difference is restyled Rule 31.2(a), which specifically acknowledges that Rules 38 and 39 authorize non-Bar members (such as in-house counsel and out-of-state lawyers admitted *pro hac vice*) to practice law in Arizona.

The definition of “legal assistant/paralegal” was removed as that term is not used in current or restyled Rule 31. The definition of “mediator” was not included in the restyled rule. The definition of “unprofessional conduct” in current Rule 31(a)(2)(E) was not included in the restyled rule. The term “unprofessional conduct” is not used in Rule 31. In a rule petition seeking to restyle Rule 31, the task force also proposes an amendment to Supreme Court Rule 41 or 54 to include the definition of “unprofessional conduct” as those rules depend on that definition.

The most extensive changes occur to current Rule 31(d), which the proposed rule denominates as Rule 31.3. Rule 31(d) currently has thirty-one subsections with little reason to their order. To make the rule more useful, subsection (d) was reorganized into ten subsections in proposed Rule 31.3: (1) a “Generally” section; (2) Governmental Activities and Court Forms; (3) Corporations, Limited Liability Companies, Associations, and Other Entities; (4) Administrative Hearings and Agency Proceedings; (5) Tax-Related Activities and Proceedings; (6) Legal Document Preparers; (7) Mediators; (8) Legal Assistants and Out-of-State Attorneys; (9) Fiduciaries; and (10) Other.

The following matters merit specific mention. First, proposed restyled Rule 31.3(c)(i)(1) provides a definition of “legal entity.” Second, subsection (3) collapses the three current provisions regarding the representation of companies and associations in municipal or justice courts. Third, subsection (4) retains the provision authorizing a person to represent entities in superior court in general stream adjudications. Fourth, subsection (5) collapses seven current rules regarding the representation of various types of legal entities in administrative hearings or

administrative proceedings. Fifth, subsection (6) sets forth in a single location a general exception saying that a hearing officer or presiding officer can order an entity to be represented by counsel.

In addition, the task force considered rule petition R-18-0004, which the Supreme Court had continued pending the task force's recommendation. That petition seeks an amendment to the rule that would permit owners of closely held corporations and like entities, or their designees, to represent the entities in litigation. While the task force empathized with the plight of "mom and pop" entities that cannot afford counsel and yet are deprived of the ability to represent the entities in court, the task force does not recommend this proposal. Closely held corporations are not limited to one or two owners, and a myriad of unanticipated consequences could occur if entities are allowed to represent themselves. For example, nothing would prohibit a disbarred attorney from representing the entity. Also, task force members expressed concerns that unless every interest, particularly minority interests, agreed to the nonlawyer representation, the nonlawyer representative might not adequately represent the interests of the business, but rather may only represent majority interests. The task force's proposed restyling of Rule 31(d) addresses the organizational issues raised by the pending rule petition.

Finally, to the extent practicable, the task force endeavored to conform the rules to one another to avoid expressing identical requirements in different ways. With one possible exception, the task force does not recommend substantive changes to Rule 31. The task force clarified language in proposed 31.3(d), which addresses "Tax-Related Activities and Proceedings." Even assuming this clarification effects a substantive change, the task force believes the change is within its charge to simplify and clarify the Rule.

The restyled Rule 31 and a copy of existing Rule 31 are found in Appendix 4.

Recommendation 6: Develop, via a future steering committee, a tier of nonlawyer legal service providers, qualified by education, training, and examination, to provide limited legal services to clients, including representation in court and at administrative proceedings.

The task force recommends that Arizona develop a program to license nonlawyer “limited license legal practitioners,” (“LLLPs”) qualified by education, training, and examination, to provide legal advice and to advocate for clients within a limited scope of practice to be determined by future steering committees. The task force discussed at length the elements that would be required to establish an LLLP program, and we offer recommended next steps and component parts below. But the “in the weeds” details required for different areas of certification and regulation are many, and beyond the collective expertise of this task force. We therefore recommend that the Supreme Court appoint a steering committee (and perhaps subcommittees) to establish reasonable parameters for LLLPs, including (A) different areas and scopes of practice; (B) common ethical rules and discipline, (C) education, examination and licensing requirements, and (D) assessment and evaluation methods for proposed program. The task force highly recommends an early focus on family law as a subject area for LLLPs, as this is where the greatest need lies. However, the task force believes several other subject matter areas deserve serious consideration, including all limited jurisdiction civil practice matters, limited jurisdiction criminal matters that carry no prospect for incarceration, and many matters within administrative law.³⁷ Self-represented litigants encounter these practice areas every day in Arizona court with no access to legal assistance.

Members of a steering committee should include lawyers experienced in the subject area, judges who have presided over cases in the subject area, legal educators from law school and

³⁷ The task force also identified areas of the law where practice should specifically be excluded from the new tier due to their complexity and conflict with federal law. For example, federal law prohibits nonlawyers from giving legal advice in bankruptcy (*see* 11 U.S.C. § 110(e)(2)).

paralegal programs, court administrators, and public representatives. Litigants and potential litigants currently excluded from most legal services should play some role in the steering committee's process. Guiding principles should include access to justice, service to the public, economic sustainability, professional competence and accountability, and respect for our system of justice.

Arizona is not the first state to consider licensing nonlawyers to provide limited legal services. Washington and Utah have established programs to license nonlawyers to provide limited legal services, as has Ontario, Canada, all of which the task force heard from during its work. Other jurisdictions, including California, Colorado, Nevada, New Mexico, New York, and Oregon are also examining the potential for nonlawyers to provide limited legal services.

Evidence exists that licensing nonlawyers to provide limited legal services will not undermine the employment of lawyers. First, the legal needs targeted for LLLPs involve routine, relatively straight-forward, high-volume but low-paying work that lawyers rarely perform, if ever. Second, other recommendations in this report would allow lawyers to team with LLLPs to provide complementary services, thereby increasing business opportunities for lawyers. Moreover, to date no jurisdiction that allows certified nonlawyers to provide limited legal services has reported any diminution in lawyer employment. The task force acknowledges that some lawyers may prove instinctive skeptics on this issue, but the task force can find no empirical evidence that lawyers risk economic harm from certified LLLPs who provide limited legal services to clients with unmet legal needs.

The task force offers the following specific recommendations for consideration and refinement by a steering committee:

A. Areas of Practice and Scope of Practice

The steering committee should familiarize itself with the report and recommendation of the Delivery of Legal Services Task Force, consider the practice areas explored by the task force including hearing from members of the task force who were involved in the analysis of subject matter areas and educational needs, and address questions raised by the task force about areas of practice and scope of practice. Scope decisions include role definition, as well as identifying areas of law and particular tasks suitable for LLLPs to perform.

The task force recommends that the scope of the new tier — unlike the current role of LDPs — include the ability to provide legal advice and to make appearances in court on behalf of clients. The task force recommends that the steering committee consider whether LLLPs should be able to provide pre-litigation education about legal rights and responsibilities (for example, counseling tenants about how to avoid eviction and counseling debtors about avoiding debt collection litigation).

B. Oversight

The task force recommends that the steering committee develop ethical rules and regulation for LLLPs and create a disciplinary process for the unauthorized practice of law and ethical violations. In general, the task force recommends that such rules be approved by the Supreme Court in the same manner that the Court governs rules for attorneys. The task force further recommends that disciplinary matters for LLLPs be overseen by the State Bar of Arizona in the same manner that the State Bar governs attorney discipline.

Oversight is a critical aspect of the program. Making regulatory requirements that are too onerous will make the new tier unattractive and cost-prohibitive to both participants and users.³⁸

³⁸ The stifling effect of over-regulation on expansion of a new tier of service was one caution shared by the State of Washington.

At the same time, the market cannot be the only regulatory control. The steering committee should identify a balance between existing regulatory processes and the scope of practice LLLPs will be engaged in.

C. Education, Examination and Licensing

The steering committee should develop rules, regulations, and administration processes for application and examination to certify LLLPs. The task force recommends, based on requirements for lawyers and other legal paraprofessionals in Arizona, that the steering committee consider regulations in the following areas:

- application and licensing;
- examination; and
- development of curriculum to meet the requirements for obtaining a license.

Questions the task force did not have time or expertise to resolve include whether a minimum number of academic credits in legal ethics be required; whether only ABA-accredited legal training program be accepted; and whether equivalent credentials from other states or nations might satisfy the education requirements in whole or in part. The task force considered whether training should require an experiential learning component. If so, the task force recommends that any experiential learning requirement be integrated into a broader academic program, as opposed to a separate stand-alone endeavor. This recommendation comes after considering the barrier that high experiential learning requirements have posed to the existing Washington State Limited License Legal Technician program, and after considering what other states have shared with the task force about barriers that experiential learning requirements can pose for people in rural areas who apply for certification. Finally, the task force recommends that the steering committee might explore a separate path to certification for existing LDPs and paralegals, who may have had a head start on education and on-the-job experience.

D. Assessment and Evaluation of the Program

The task force recommends that the steering committee develop methods for measuring the appropriateness, effectiveness and sustainability of the LLLP program. Program goals should be to increase access to justice and to protect consumers of legal services. Appropriateness might require that the authorized tasks for LLLPs directly impact access to the courts and unmet legal needs. Appropriateness might also include whether the education requirements and regulations enable LLLPs to perform tasks competently.

Effectiveness might be measured by competence and usage. If self-represented litigants do not engage the services of LLLPs, of course the program fails. But other measures of effectiveness might include reduced burden on courts from self-represented litigants, improvements in procedural justice, improvements in litigant understanding, and improved litigant outcomes such as reduced costs for limited legal services and increased satisfaction ultimate legal outcomes.

Finally, the program should be assessed for sustainability, which would include economic viability for the public, for the court system, and for LLLPs.

Recommendation 7: Initiate, by administrative order, the Licensed Legal Advocate Pilot program developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law, to expand delivery of legal services to domestic violence survivors through the creation of a new tier of legal service provider.

In spring 2019, the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law (i4J) brought graduate students, undergraduate students and over 50 members of the community together in i4J's Innovating Legal Services course to explore a challenge framed as: "should Arizona create a new tier of civil legal professional, and what could that mean for survivors of domestic abuse?" That challenge was selected to provide a community-engaged "sandbox" that would supplement the task force's exploration of whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services. i4J partnered with

Emerge! Center Against Domestic Abuse and collaborated with community participants including judges, attorneys, lay legal advocates, social services providers, government representatives, domestic violence survivors, social scientists, interested community members, and other stakeholders.

The results of i4J's Innovating Legal Services course are presented in a report titled [*Report to the Arizona Supreme Court Task Force on Delivery of Legal Services: Designing a New Tier of Legal Professional for Survivors of Domestic Violence*](#) and a video summarizing that report.³⁹ Course co-instructors Stacy Butler and Jeffrey Willis shared the course's report and [video presentation](#) at a task force meeting.⁴⁰ The report demonstrates that domestic violence service providers like Emerge! serve thousands of domestic abuse survivors a year. Lay legal advocates employed by agencies like Emerge! provide information and explain processes within the legal system, but currently cannot provide legal advice.

The Innovating Legal Services course developed a proposal for a pilot program that would train lay legal advocates to become Licensed Legal Advocates (LLAs), able to provide legal advice to domestic violence survivors as they navigate Arizona's civil legal system. The proposed pilot removes the barrier imposed by unauthorized practice of law restrictions, giving the LLAs the ability to handle specifically-identified legal needs of participants at Emerge! and enhancing those participants' access to justice. The Innovating Legal Services course report identified above details the scope of service LLAs would be allowed to provide, as well as the training and education requirements LLAs would be required to complete to become an LLA. The report

³⁹ The full report and video are available under the "projects" tab of the i4J webpage, <https://law.arizona.edu/i4J>.

⁴⁰ Retired Pima County Superior Court Judge Karen Adam also served as a co-instructor in the course.

further details licensing and regulation requirements, bench, bar, and public education about LLAs, and an evaluation process for the pilot.

The task force recommends that the Supreme Court issue an administrative order establishing the Licensed Legal Advocate Pilot program, developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law, to expand delivery of legal services to domestic violence survivors through the creation of a new tier of legal services provider.

A draft administrative order can be found in Appendix 5 of this report.

Recommendation 8: Initiate, by administrative order, the DVLAP Legal Document Preparer Pilot program as proposed by the Arizona Bar Foundation.

The task force recommends that the proposal offered by the Bar Foundation on behalf of the Domestic Violence Legal Assistance Project (“DVLAP”) to create a DVLAP Legal Document Preparer Pilot program be adopted. The purpose of the Bar Foundation’s recommendation is to increase access to free assistance in the completion of civil legal forms for domestic violence victims. During the pilot program DVLAP Legal Document Preparers would provide this free assistance to domestic violence victims who are receiving services from DVLAP programs in Arizona. The Bar Foundation created this proposed pilot after service providers within DVLAP identified three issues: a need among domestic violence survivors for assistance with the completion of family law and other common court forms, capacity to leverage the role of lay legal advocates within the civil legal justice system, and challenges with applying the traditional process to become a certified legal document preparer to legal professionals working in a social service capacity.⁴¹ Because of the high demand for legal aid services, access to legal assistance from one

⁴¹ The Bar Foundation gave a presentation to the task force proposing this recommendation and reported that in conversations throughout 2014 and 2015, lay legal advocates and various stakeholders unanimously identified cost and time as the biggest barriers to lay legal advocates using the current process to become certified legal document preparers. Arizona Foundation for

of Arizona's three Legal Services Corporation funded legal aid organizations is often limited to basic advice on how to represent oneself, coupled with document preparation help. Lay legal advocates funded by DVLAP can provide legal information to survivors but cannot complete forms on their behalf. Using the existing LDP program and the infrastructure of the DVLAP program, this recommendation would create a pilot project allowing lay legal advocates employed by DVLAP-supported nonprofit domestic violence service and shelter programs to become DVLAP Legal Document Preparers. Under the proposed pilot, the minimum requirements for certification as an LDP under ACJA § 7-208 would be made less restrictive for DVLAP Legal Document Preparers (DVLAP LDPs") participating in the pilot as follows:

- While LDPs with a high school diploma or GED must have two years of law-related experience,⁴² a DVLAP lay legal advocate with a high school diploma or GED would be eligible to become a DVLAP LDP after one year of supervision by an attorney in a partnering DVLAP legal aid office.
- While LDPs with a four-year college degree must have one year of law-related experience, a DVLAP lay legal advocate with a four-year college degree would be eligible to become a DVLAP LDP after six months of supervision by an attorney in a partnering DVLAP legal aid office.
- DVLAP LDP would pay a lower certification fee.

Legal Services and Education, *Legal Advocate Preparer: Expanding the Role of Lay Legal Advocate*, p. 3 (August 2019), <https://www.azcourts.gov/Portals/74/LSTF/Meetings/08142019/4LegalAdvocatePreparerProposa1081419LSTF.pdf?ver=2019-08-12-091436-423>.

⁴² ACJA § 7-208(3)(b)(6) states that "law related experience" is one or a combination of the following: under the supervision of a licensed attorney, providing services in preparation of legal documents prior to July 1, 2003, under the supervision of a certified legal document preparer after July 1, 2003, or as a court employee.

- DVLAP LDP would be qualified through the LDP certification exam process and a separate exam measuring DVLAP LDP competency in substantive areas of law.

In exchange for this relaxed eligibility requirement, the scope of work in which a DVLAP LDP can engage is more limited than the scope of work authorized for LDPs pursuant to ACJA § 7-208. For example, an LDP can assist a self-represented litigant in identifying and completing legal documents at the litigant's direction, without the supervision of an attorney, for any form "for which the legal document preparer's level of competence will result in the preparation of an accurate document."⁴³ Conversely, an DVLAP LDP would only be authorized to assist a self-represented litigant in identifying and completing civil legal forms related to a domestic violence victim's family law needs (separation/divorce, legal decision making and/or parenting time, child support, guardianship, and modifications of post-decree matters), housing matters (landlord/tenant related to health, safety and eviction matters, foreclosure, and public housing issues), and areas of law related to stability, safety and rights (including obtaining/preserving protective orders, public benefits, victims' rights, and safety planning matters such as securing documents). Unlike LDPs, an DVLAP LDP in this pilot program would have a limited certification to provide document preparation services only for DVLAP clients and would not be allowed to charge for those services.

In another recommendation made elsewhere in this report, the task force has recommended that LDPs be allowed to respond if directly addressed by a judge. DVLAP LDP would similarly be able to attend court with DVLAP clients to the same extent that LDPs can attend court with their clients. Otherwise, DVLAP LDP would be subject to the same restrictions as LDPs, such as not giving legal advice or advocating on behalf of domestic violence victims.

⁴³ ACJA § 7-208(J)(4)(b).

All pilot project participants must be employed by nonprofit organizations approved by the Arizona Bar Foundation and DVLAP, and only domestic violence victims accessing services through DVLAP can receive assistance from DVLAP LDP. The Bar Foundation's report, shared with the task force, detailed the minimum requirements for becoming a DVLAP LDP and set forth a 24-month pilot project timeline.⁴⁴ The Bar Foundation would administer the pilot project and verify eligibility for each pilot project participant. All pilot project participants would be orientated to the purpose and goals of the pilot project and addendums to the current DVLAP funding agreements or Memorandums of Understanding would be executed with each party acknowledging the roles and responsibilities of each participant. Throughout the duration of the pilot project, each participant would be required to report quarterly on all activities related to the preparation of documents, number of domestic violence victims served, supervision and training processes, and participate in the evaluation of the pilot project, including implementation of client and stakeholder satisfaction surveys.

Recommendation 9: Make the following changes to improve access to and quality of the legal services provided by certified Legal Document Preparers.

The task force was charged with reviewing the LDP program and related Arizona Code of Judicial Administration ("ACJA") requirements and, if warranted, making recommendations for revisions to the existing rules and code sections that would improve access to and quality of legal services provided by legal document preparers. Since 2003, Arizona has certified LDPs to prepare legal documents for self-represented litigants. Rule 31, Arizona Rules of Supreme Court, defines

⁴⁴ *Legal Advocate Preparer: Expanding the Role of Lay Legal Advocate, Design of the Legal Advocate Preparer Pilot Project*, p. 8-11 (August 2019), available at <https://www.azcourts.gov/Portals/74/LSTF/Meetings/08142019/4LegalAdvocatePreparerProposa1081419LSTF.pdf?ver=2019-08-12-091436-423>.

the practice of law and provides an exception that defines the scope of legal practice allowed to LDPs.⁴⁵ Section 7-208(A) defines a “legal document preparer” as “an individual or business entity certified pursuant to [ACJA § 7-208] to prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public who is engaging in self representation in any legal matter”⁴⁶ LDPs spoke to the task force and testified before a workgroup relating their work experiences and sharing suggestions for improvement in the LDP program. In addition, members of the task force with experience in the LDP program shared their observations and suggestions.

After review, the task force makes the following recommendations:

A. Amend ACJA § 7-208 to allow LDPs to speak in court when addressed by a judge.

The task force learned that some judges will directly address an LDP in court, knowing that the LDP will be assisting the litigant in completing the necessary legal documents required by the court. LDPs of course want to be responsive to a judge, but they are also mindful of potential disciplinary action under current rules that prohibit an LDP from assisting consumers by speaking in court unless “ordered” by the court to do so. The task force recommends a single word change to ACJA § 7-208(J)(5)(b) to clarify that LDPs may assist a consumer in court when “authorized” (as opposed to “ordered”) by the court. This proposed amendment does not give an LDP the right to attend court on behalf of a client or to advocate for a client. But, allowing an LDP to interact with a judge who purposefully opens a dialogue with the LDP in the interests of justice should be permitted. The proposed amendment is as follows:

⁴⁵ ACJA § 7-208.

⁴⁶ ACJA § 7-208(A).

*A legal document preparer shall not attend court with a consumer for the purpose of assisting the consumer in the court proceeding, unless otherwise ~~ordered~~ authorized by the court.*⁴⁷

B. Amend ACJA § 7-208 to further define permissible and prohibited activities of LDPs.

Since 2003, LDPs have assisted self-represented litigants with the completion of legal forms and documents. However, there is some confusion as to the scope of documents LDPs can complete. The task force recognized that LDPs sometimes need to conduct basic legal research to do their jobs competently, such as prepare up-to-date documents that comply with new statutes or court rules. However, LDPs cannot give legal advice. The line between conducting legal research to assist a self-represented litigant in the form of completing a legal document and conducting research for purposes of giving legal advice can be blurred. A perceived lack of clarity in the current rules governing LDPs has led to some confusion, with some LDPs hesitant to conduct any legal research and other LDPs going so far as to draft substantive motions and briefs based on their legal research.

The task force recommends the ACJA § 7-208 be amended to provide clarity. First, § 7-208 should clarify that an LDP may conduct legal research so far as needed to understand general legal principles required to assist a client identify and complete a competent legal form or document. Second, the rule should also clarify that an LDP cannot perform legal research for providing legal options or legal advice to a client. LDP's are limited to completing forms and documents that conform to instructions and decisions communicated by clients. Similarly, an LDP cannot perform legal research for purposes of advocating a legal theory on behalf of a client. Specifically, LDPs cannot engage in legal analysis, i.e., conducting legal research and then

⁴⁷ ACJA § 7-208(J)(5)(b).

applying that research to the facts of the client’s case to advocate for an outcome. This means LDPs cannot draft substantive legal motions,⁴⁸ supporting memoranda, or appellate briefs to be filed in any court. These types of legal activities are beyond the certification and the limited scope of practice allowed to LDPs. However, LDPs can produce motions in family court cases using the “motions form.” The task force envisions that the recommended LLLP program might well file substantive motions and advocate on behalf of clients within the scope of the LLLPs particular certification(s).

The task force urges the Supreme Court to direct the Certified Legal Document Preparers Board and the Certification and Licensing Division to work together to draft a petition to amend ACJA § 7-208 in accordance with this recommendation. The task force also recommends that the amendment reference specific examples of court filings that LDPs can and cannot prepare.

C. The Arizona Supreme Court should pursue a campaign of educating the bench and members of the bar on what a legal document preparer is, what they can do, and what they are prohibited from doing.

The task force recommends that the Supreme Court produce information sheets (referred to as Legal Info Sheets) that can be available in paper and electronically for self-help centers in courts, and the court websites, AZCourtHelp.org, and Azcourts.gov, about LPD services. Presentations should be delivered at the annual judicial conference to educate the bench about LDPs. Moreover, the State Bar should educate its membership about LDPs through presentations at the annual bar convention, articles in e-news and the Arizona Attorney Magazine or other appropriate forums and publications.

⁴⁸ There was some debate within the task force regarding what constitutes a substantive legal motion. As stated below, the task force recommends that the Certified Legal Document Preparers Board and the Certification and Licensing Division develop a definition accompanied by a comment with examples for clarity.

D. Recommend ACJA § 7-208 be amended to remove the restrictions prohibiting legal document preparers from assisting clients who are represented by counsel.

The task force has recommended elsewhere in this report that ER 5.4 be eliminated, removing the barrier for attorneys to partner with nonlawyers, such as LDPs.⁴⁹ Moreover, the task force has recommended elsewhere in this report that the Supreme Court take steps to expand the utilization of limited scope representation. Anecdotally, limited scope representation occurs most often in family law matters, an area in which LDPs often assist clients too. An LDP might well assist in drafting most of the documents required for a divorce, but a lawyer may be needed to advise on discrete legal questions.

This recommendation would allow otherwise self-represented litigants to benefit from the services of both an LDP and an attorney. Amendment to § 7-208 as recommended is not intended to create a relationship between an LDP and attorney akin to that of a paralegal working under the supervision of an attorney. Rather, the amendment will allow both legal services providers to work with a client simultaneously (with transparency and disclosure) where the client continues to direct the work of the LDP consistent with existing rules.

E. Recommend that there be increased access to training, especially online, for LDPs, particularly for LDPs in rural areas.

Many rural communities rely on LDPs due to the small number of attorneys in their area as compared with the number of low-income residents in those communities. The task force recommends that the Supreme Court direct increased access to training and continuing education courses for LDPs concerning core skills and the LDP code of conduct. The task force further recommends that these training and education materials be developed in a way that would allow LDPs to participate online.

⁴⁹ See Recommendation 1 herein.

F. Amend the ACJA and any other rules governing the investigation of and seeking of legal sanctions for engaging in unauthorized practice of law when the actions in question involve a person acting in a manner that a legal document preparer would act if certified.

The task force learned through the course of its work that persons have wrongly held themselves out as certified LDPs to the detriment of self-represented litigants. It is difficult to pursue these persons for engaging in the unauthorized practice of law (“UPL”) in a swift and consistent manner. Typically, a superior court judge orders the persons to cease the UPL on threat of sanctions. The task force recommends that UPL matters be brought before the Presiding Disciplinary Judge (PDJ) rather than a superior court judge. This recommendation is supported by several considerations.

First, the sections of the ACJA governing LDPs and LDP sanctions already provides authority for cease and desist orders against persons not certified but otherwise acting in the manner of a certified LDP.⁵⁰ The current process brings UPL claims before superior court judges who may not be intimately familiar with the certified LDP program, its governing regulations, or the risks to consumers from uncertified persons pretending to be LDPs. Conversely the PDJ’s function centers on regulatory matters, specifically enforcement of ethical rules and regulations surrounding the practice of law by attorneys and the limited practice afforded to LDPs. The PDJ already presides over LDP Board disciplinary sanctions and is therefore familiar with ACJA 7-208 and Arizona Rule of Supreme Court, Rule 31. It would be consistent with Arizona’s existing process regulating the practice of law to have the PDJ preside over UPL matters related to persons who pretend to be, but are not, certified LDPs. The task force also recommends that the Supreme Court identify any rule or statutory changes necessary for assessment of a civil fine against those persons found to be engaging in the kind of UPL discussed here.

⁵⁰ ACJA § 7-201(E)(6).

The task force acknowledges that there are inherent difficulties in enforcing the limited sanctions available to address UPL cases. But, having these matters go through the PDJ would result in consistent application of the rules, sharing of these decisions on the PDJ's website and further increasing the confidence of the bench and bar in the LDP program.

Recommendation 10: Advance and encourage local courts to establish positions or programs where nonlawyers are located within the court to provide direct person-to-person legal information about court processes to self-represented litigants.

Arizona courts have initiated programs to make information about legal processes available to self-represented litigants. Some programs reach self-represented litigants statewide, such as self-help resources like legal information sheets and legal information videos available on AZCourts.gov and AZCourtHelp.org. Few Arizona courts, however, offer programs that provide direct “person to person” assistance to self-represented litigants. Two counties offer such services in Arizona, each different from the other, but both developed based on local resources and other practical considerations. For example, the Superior Court of Santa Cruz County employs a court coordinator who meets with self-represented litigants by appointment to assist them in identifying proper forms and giving them legal information about court processes. The court coordinator discloses to all litigants that she cannot give legal advice, that she may meet with an opposing litigant, and that litigant information is confidential. Conversely, the Maricopa County Superior Court Providing Access to Court Services (“PACS”)/AmeriCorps navigator program uses undergraduate students serving as AmeriCorps Navigators alongside staff in the Court's Law Library Resource Center (“LLRC”). Self-represented litigants can go to the LLRC to research law, obtain forms and receive assistance in completing them, file documents in the LLRC (versus the clerk's office), and get assistance with finding a courtroom or other court location. The LLRC also partners with the Arizona State University, Sandra Day O'Connor Legal Center to provide court customers with 15 minutes of free on-site legal advice from volunteer attorneys two days per

week. This program has an office in the Superior Court of Coconino County as well. The remaining Arizona courts do not have programs where a self-represented litigant can get direct person-to-person assistance.

Many Arizona residents live in rural communities, where significant distances separate home and the nearest courthouse. More importantly, rural residents have fewer opportunities to confer with lawyers or LDPs than urban and suburban residents.⁵¹ Arizona's rural areas, like rural areas across the nation, are experiencing population declines and aging attorney populations.⁵² Therefore, the attorney population in rural areas is diminishing while the average age of lawyers in rural areas is increasing, meaning rural residents are increasingly more likely to be self-represented.⁵³ In addition, rural courts are closing, increasing the justice gap in rural communities.⁵⁴

Urban and suburban areas face their own challenges meeting the needs of self-represented litigants. Burgeoning dockets can be slowed as judges attempt to accommodate the lack of legal knowledge possessed by self-represented litigants.

⁵¹ Conference of State Court Administrators *Courts Need to Enhance Access to Justice in Rural America*, p. 1-3 (2018), available at <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Policy-Paper-1-28-2019.ashx>.

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

⁵⁴ Example, in 2018 the Santa Cruz County Board of Supervisors voted to close the court in Sonoita, forcing residents to travel another 30 miles or more, no small distance to rural residents, to Nogales for court services.

The task force’s review of various court coordinator and court navigator programs here and elsewhere⁵⁵ demonstrates that well-trained and appropriately supervised nonlawyers can perform a wide array of tasks to help self-represented litigants understand and manage their cases.

Understanding the need for each jurisdiction to identify and adopt a program that is sustainable, the task force recommends that the Supreme Court pursue means to advance establishment of nonlawyer staff who are located within the court and who provide direct person-to-person court and civil process navigation assistance to self-represented litigants in local courts.

III. Conclusion

The task force undertook the Supreme Court’s assigned tasks with great enthusiasm and worked as diligently as possible within the limited time allotted to make significant recommendations to “move the ball forward” in closing the civil justice gap. Some in the bar and in the public may have grave concerns about some recommendations. Skepticism is healthy and welcomed in debating the merits of our recommendations. When all is said and done, we are hopeful that our system of justice in Arizona is remolded to accommodate the needs of all Arizonans needing legal assistance without sacrificing the high ethical and performance standards necessary to protect the public.

⁵⁵ See report from the Justice Lab at Georgetown Law Center, titled [Nonlawyer Navigators in State Courts: An Emerging Consensus](#).

OPPOSITION STATEMENT⁵⁶

Hon. Peter B. Swann
Chief Judge, Arizona Court of Appeals, Division I

I wholeheartedly embrace the basic mission of the Task Force to make access to legal services more affordable to all. And I concur with recommendation numbers 2-5, 7, 8, and 10 in its report. I write separately, however, because I view recommendation number 1 as posing a serious threat to the long-term health of the justice system, and I view recommendations number 6 and 9 as ineffective proposals that create more risk of public harm than opportunity for good.

The Report begins with a discussion of a problem whose existence cannot be disputed: legal services are too expensive, and most citizens are priced out of the ability to secure meaningful justice through the courts. The Report does not, however, examine the barriers to justice erected by the court system itself: understaffing, which contributes to delay and cost, and bloated, one-size-fits-all procedural rules that are designed for the most complex cases. The recommendations then take an odd turn: rather than examining the reasons that the system is so difficult and expensive to navigate, the Task Force's first recommendation is to cast aside ethical rules in an effort to make the practice of law more profitable. Such a proposal would make Arizona unique in the nation, and a leader in the race to the bottom of legal ethics.

I was honored to serve on the Civil Justice Reform Committee and the Restyling Task Forces for the Civil and Family Rules. In my opinion, the rules that came from those efforts are among the most cogent sets of procedural rules in effect in any jurisdiction. But the existing rules

⁵⁶ The task force discussed many of Judge Swann's concerns (some are newly raised in his opposition statement) and ultimately rejected them. The task force modestly supported having court-employed navigators but lacked sufficient time to formulate a recommendation. (See Recommendation 10.) Finally, because the minority position was received after the last task force meeting, the task force was unable to discuss it and address specific points.

should ensure the effective litigation of *all* cases, and in this regard they fail. Though the current rules do an excellent job of implementing the “Cadillac” system of trial by jury and cutting-edge discovery techniques, they are completely ineffective at offering a simple path to dispute resolution for self-represented litigants, and they offer no streamlined procedures for small cases.⁵⁷ The complexity of the system – indeed the very need for legal services in many cases – is a problem of our own making. I respectfully submit that the Task Force should have directed its attention to *systemic* reforms, and not to finding ways to direct even more resources to an already-too-resource-hungry system. If the court system is too complex for the average citizen, then we must create a simpler and more efficient system – not new industries that will continue to consume the public’s money.

Bad legal advice is never a bargain. And nothing in the Report suggests that allowing nonlawyers to own law firms or otherwise practice law will increase the *quality* of legal services. Yet the recommendations from which I dissent here are designed to enhance the role of nonlawyers in the delivery of legal services at every level. The argument seems to be that “something is better than nothing,” and because traditional legal representation is often unaffordable, a corps of new service providers is the answer. This argument ignores the underlying reality that our system is ill-designed to assist the very people it tries to help.

⁵⁷ For reasons addressed at length by the Civil Justice Reform Committee, Arizona’s system of compulsory arbitration has proven ineffective at ensuring access to justice. The Task Force nonetheless declined to devote time to alternative procedures that would better enable self-represented litigants to handle their own matters without the cost of a lawyer, LDP or LLLP.

Recommendation 1:

Recommendation number one is to eliminate the ethical rules prohibiting nonlawyer ownership of law practices. To be clear, this recommendation would allow anyone, including disbarred lawyers, large corporations, and venture capitalists to have full equity stakes in law firms while escaping any duties to the clients. No other state has adopted such a proposal.⁵⁸ And while I take pride in Arizona’s spirit of innovation, this proposal is neither innovative nor responsible. The proposal would surely open vistas of new sources of wealth for lawyers, but it would not benefit the public.

The Task Force’s discussions of this proposal often questioned why the current rules against nonlawyer equity, which have existed in every state for at least decades, exist at all. The Report proclaims “Ethical rules have been called out as contributing to the justice gap as demonstrated by [the Henderson Report].” Indeed, the Report relies exclusively on the Henderson Report for this proposition. The fact that a professor has “called out” ethical rules is, to my mind, no more persuasive than the fact that a substantial part of the population has “called out” lawyers as greedy crooks. Both beliefs are no doubt sincere – I submit that neither is correct.

There is no empirical proof that ethical rules have created the problems with the delivery of legal services. I find this perspective troubling, and therefore highlight a few of the reasons for the existing rule.

The relationship between attorney and client is the most sacred of fiduciary relationships. The duties of loyalty and confidentiality that are present in every representation are foundational to a functioning justice system. Proponents of the recommendation will point out that they are

⁵⁸ Washington, D.C. and Utah have made modest efforts at exploring alternate business structures, but the Task Force recommendation takes an absolutist approach, and expressly rejects the approaches of these jurisdictions.

proposing no changes to the rules governing loyalty and confidentiality. But this is at most theoretically half-correct. As a matter of law, practice, and human nature, the fiduciary duties owed to partners and other investors are quite real. And the interest of an investor may well be in conflict with that of a client.

Investors owe no duty of loyalty to the clients of the lawyers in whom they invest. The lawyers in such relationships would retain the full duty of undivided loyalty to the client, yet assume fiduciary duties to conduct the representations to maximize profit for the nonlawyer partner. It does not take great imagination to understand that undivided loyalty would be a practical impossibility in such a relationship.

Because the recommendation does not include a proposal for entity regulation (opting instead to leave the question for future study), a nonlawyer investor with interests directly adverse to the client would generally not impute that conflict to the lawyer. Under the proposed revisions to ER1.10, nonlawyer conflicts would be imputed only in the rare circumstance when the nonlawyer owns the opposing party. Lawyers would then be free to represent clients despite conflicts of interest that would rightly disqualify a law firm operating under the current rules. Though it might be comforting to suppose that no lawyer would take advantage of such a situation, it is not realistic.

Much of the need for legal services exists in Arizona's smaller communities. The recommendation contains no limits on the types of entities that could be formed, or on their size. Under the proposal, an entity could effectively buy up a majority of the practices in these communities, consuming brick-and-mortar law firms and leaving residents of those communities with no real choice but to be represented by a lawyer beholden to the entity. Under the proposal, both sides of a dispute could even be represented by lawyers beholden to the *same* entity.

The risks of such conflicts are not theoretical. Under the current rules, *all* individuals with an ownership stake in a law firm must be lawyers. All such individuals owe the *same* duty of loyalty to the client. The proposal would shatter that unified duty, and require that clients entrust their rights, their lives, and their secrets to a lawyer who has an affirmative duty (not merely a desire) to maximize profit – even at the expense of the client.

A glimpse of this phenomenon can be seen in the use of captive law firms by insurance companies. Insurance defense counsel already experience an evolved form of control over representation through aggressive cost restraints. And while few insurance defense counsel would candidly deny those restrictions sometimes interfere with their ability to provide the best service to their clients, they are nonetheless able to serve ethically when there is significant alignment of interests between the insurer and the insured. In these cases, the insurer bears the financial risk of any enforced lack of diligence. Imagine, however, that there was *no* alignment of interests between the insurer and insured, and the insurer did *not* bear the risk of shoddy legal work. What incentive would the insurer then have except to drive quality down?

The latter, nearly unimaginable, scenario is exactly what the recommendation entails. Any entity could substitute itself for the insurer in the above example, control local markets, drive costs (and quality) down, and control fees. But apart from the rare legal malpractice judgment, the nonlawyer would bear no practical risk if the results of its business practices were an increase in unjust or unfavorable results. And the risk of a malpractice judgment could neatly be reduced by requiring clients to sign retainer agreements with comprehensive arbitration clauses.

I fail to see how the public would be benefitted by a system that allows law firm owners to run the business aspect of the practice without regard to the interests of clients or serious conflicts,

and without meaningful economic risk or ethical regulation. The goal of the Supreme Court should be to promote access to justice, not merely access to for-profit services.

The Court should consider the harm that will befall the public perception of a justice system that strips away ethical constraints on lawyers in favor of corporate profits. Public confidence in lawyers is already low. Yet public confidence in the courts remains high, and that confidence is the basis of the legitimacy of the justice system itself. If the Arizona Supreme Court is perceived as placing a thumb on the scale in favor of lawyers and investors, it is difficult to see how that public confidence will be enhanced. “Trickle down economics” might be the subject of fair debate, but “trickle down justice” is not. There is simply no likelihood that nonlawyers will enhance the quality of justice in Arizona, and I urge the Court not to place Arizona on the track to be the first jurisdiction to be seduced by such an argument.

Recommendation 6:

Arizona ranks 51st in lawyers per capita in the United States, including the District of Columbia and Puerto Rico.⁵⁹ And with so few lawyers, Arizona is still home to one of the largest trial courts in the nation. This is important, because it undercuts the relevance of the national economic data underlying the speculations advanced in the “watershed” Henderson paper on which the Report places such heavy reliance. Because the relative supply and demand for legal services in Arizona is far out of line with much of the country, the relevance of Professor Henderson’s economic models is questionable. But if one thing is clear, it is that Arizonans are not clamoring for more lawyers. Nor is there a public thirst for practitioners who never attended law school and charge a “mere” \$100 per hour. What the public rightfully wants is a system of

⁵⁹ For raw lawyer-population data, see ABA National Lawyer Population Survey, 2019, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf

justice that is itself more scalable and responsive to its diverse needs – a system it can navigate for free.

A theme in the Task Force deliberations was a sense that because services like LegalZoom exist, the Court should embrace them and create a new industry of nonlawyers to offer similar services. By the same reasoning, the existence of WebMD should prompt the state to allow anyone to take a few courses, pass a test, and prescribe medication. Both arguments are fallacious, and any expansion of legal services provided by nonlawyers should instead be justified by a firm conviction that the services will benefit the public without significant risk. Recommendation number 6 does not satisfy that test.

Indeed, experienced practitioners understand that services such as LegalZoom actually create massive risk for clients. While basic forms can be useful tools, it is dangerous in the extreme to assume that they constitute adequate legal services. Rarely are an individual's legal needs so "standard" that a simple form will ensure the efficient or effective protection of legal rights. And the use of such devices without adequate advice concerning the implications of various courses of action can transform a simple problem into ruinous litigation. I fail to grasp how a corps of individuals with minimal legal training and experience can expect to protect their clients' interests.

The Task Force's response to my question, of course, is that many legal problems are fairly simple and do not require the full resources of a lawyer. To be sure, services are often effectively rendered today by a paralegal operating under the supervision of a lawyer. But that supervision is critical: in our complex justice system, every move entails great risk of unintended consequences and it is naive to assume that a nonlawyer will be effective in providing the advice needed to guard against such risks. A simple problem poorly managed can become a complex problem, and the Task Force's tacit assumption that "simple" matters can safely be left to forms is simply wrong.

My objections to recommendation number 6 is not simply a kneejerk defense of a guild. I recognize that nonlawyers can and do serve critical roles in assuring access to justice. To that end, I regret that the Task Force did not include in its recommendations my proposal to create a system of court navigators who could provide meaningful information to litigants at the courthouse. I regret that it did not propose the creation of alternative procedural tracks for self-represented litigants in smaller disputes. And yet I agree with its support for targeted *nonprofit* programs aimed at providing services in specific case types. Programs carefully developed by each of Arizona's two law schools and the Arizona Bar Foundation reflect the type of careful planning and targeted services that are likely to provide services to those in crisis who could not otherwise afford them. By contrast, the sweeping recommendations of the Task Force to create a new class of practitioner, the LLLP, have been the product of a few days of discussion, and the details are left to a future steering committee.

By acknowledging that a steering committee would be needed to do the real work of defining the LLLP tier, the Task Force highlights the extreme difficulty of turning a "new tier" into a successful program. The Task Force worked for nine months, yet its recommendation provides only the most skeletal description of the proposed LLLP program. Put simply, the concept is not fully baked. In view of the large number of issues (both known and unknown) that remain unaddressed, I suggest that the Court either reject the recommendation outright or request further detailed study before deciding to create such a tier. It would be unwise to decide to create the LLLP program until its precise contours can be described and debated.

Recommendation 9:

I agree with most of the components of Recommendation number 9. I disagree, however, with subpart (a), which would authorize LDPs to speak in court. Though the Task Force acknowledges that LDPs are engaged in the practice of law (a prerequisite to the Court's regulation of LDPs), it speaks with two inconsistent voices. On the one hand, it seeks to expand the role of LDPs by letting them address a court. On the other hand, it sets LDPs up for failure by prescribing unworkable limitations on their ability to do legal research. I find both proposals untenable.

Legal research is a First Amendment right. Any person is free to conduct legal research, and I cannot see how the Court can lawfully prohibit such research. But even if a prohibition were constitutionally possible, where is the public good in such a proposal? The Court has already created the LDP tier of practitioners, and any notion that they do not provide legal advice is folly. Legal advice is inherent in any aspect of the practice of law, and a LDP cannot properly fill out a form or prepare an original document without creating legal consequences.

It is essential, if we are to have such a tier in Arizona, that LDPs be empowered to provide the best service possible to clients. An uninformed LDP is an ineffective or even dangerous LDP, and I submit that LDPs should face no restrictions on research activities. If we cannot trust LDPs to conduct legal research, then we should not allow them to practice law in any form. But I have no reason to believe that LDPs would not be able to conduct legal research appropriately as long as the services they offer do not exceed the scope authorized by the code. I would therefore delete the restriction.

APPENDIX

APPENDIX 1: Proposed Amended ERs (Clean and Redline)⁶⁰

ER 1.0 Terminology (Clean)

(a) – (b) No Change.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in any affiliation, or any entity that provides legal services for which it employs lawyers. Whether two or more lawyers constitute a firm can depend on the specific facts.

(d) – (f) No Change.

(g) – (i) [Formerly (h) – (j)] No Change.

(j) "Screened" denotes the isolation of a lawyer or nonlawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or nonlawyer is obligated to protect under these Rules or other law.

(1) Reasonably adequate procedures include:

(i) Written notice to all affected firm personnel that a screen is in place and the screened lawyer or nonlawyer must avoid any communication with other firm personnel about the screened matter;

(ii) Adoption of mechanisms to deny access by the screened lawyer or nonlawyer to firm files or other information, including information in electronic form, relating to the screened matter;

(iii) Acknowledgment by the screened lawyer or nonlawyer of the obligation not to communicate with any other firm personnel with respect to the matter and to avoid any contact with any firm files or other information, including information in electronic form, relating to the matter;

(iv) Periodic reminders of the screen to all affected firm personnel.

(v) Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

⁶⁰ This Appendix presents all of the ERs covered by Recommendations 1 and 2. A clean version of each ER is followed immediately by a redline version of that ER.

(2) Screening measures must be implemented as soon as practical after a lawyer, nonlawyer or firm knows or reasonably should know that there is a need for screening.

(k) – (m) [Formerly (l) – (n)] No Change.

(n) “Business transaction,” when used in reference to conflicts of interests:

(1) includes but is not limited to

(i) The sale of goods or services related to the practice of law to existing clients of a firm’s legal practice;

(ii) A lawyer referring a client to nonlegal services performed by others within a firm or a separate entity in which the lawyer or the lawyer’s firm has a financial interest;

(iii) Transactions between a lawyer or a firm and a client in which a lawyer or firm accepts nonmonetary property or an interest in the client’s business as payment of all or part of a fee.

(2) does not include

(i) Ordinary fee arrangements between client and lawyer;

(ii) Standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others and over which the lawyer has no advantage with the client.

(o) “Personal interests,” when used in reference to conflicts of interests, include but are not limited to:

(1) The probity of a lawyer’s own conduct, or the conduct of a nonlawyer in the firm, in a transaction;

(2) Referring clients to a nonlawyer within a firm to provide nonlegal services; or

(3) Referring clients to an enterprise in which a firm lawyer or nonlawyer has an undisclosed or disclosed financial interest.

(p) “Authorized to practice law in this jurisdiction” denotes a firm that employs lawyers or nonlawyers who provide legal services as authorized by Rule 31.

(q) “Nonlawyer” denotes a person not licensed as a lawyer in this jurisdiction or who is licensed in another jurisdiction but is not authorized by these rules to practice Arizona law.

(r) “Nonlawyer assistant” denotes a person, whether an employee or independent contractor, who is not licensed to practice law in this jurisdiction, including but not limited to secretaries, investigators, law student interns, and paraprofessionals. Law enforcement personnel are not considered the nonlawyer assistants of government lawyers.

Comment [2019 amendments]
Confirmed in Writing

[1] No Change.

Firm

[2] Similar questions can also arise with respect to lawyers in legal aid, legal services organizations, and other entities that include nonlawyers and provide other services in addition to legal services. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules. For instance, an organization that provides legal, accounting, and financial planning services to clients is a “firm” for purposes of these Rules for which a lawyer is responsible for assuring that reasonable measures are in place to safeguard client confidences and avoid conflicts of interest by all employees, officers, directors, owners, shareholders, and members of the firm regardless of whether or not the nonlawyers participate in providing legal services. *See Rules 5.1, 5.2 and 5.3.*

Fraud

[3] – [5] No Change, except renumbered from comments [5] – [7].

ER 1.0 Terminology (Redline)

(a) – (b) No Change.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in ~~a law partnership, professional corporation sole proprietorship, or other association; or lawyers employed in a legal services organization or the legal department of a corporation or other organization~~ any affiliation, or any entity that provides legal services for which it employs lawyers. Whether ~~government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation~~ two or more lawyers constitute a firm can depend on the specific facts.

(d) – (f) No Change.

(g) ~~“Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.~~

~~(h)~~ g) No Change other than renumbered.

~~(i)~~ h) No Change other than renumbered.

~~(j)~~ i) “No Change other than renumbered.

~~(k)~~ j) “Screened” denotes the isolation of a lawyer or nonlawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably

adequate under the circumstances to protect information that the isolated lawyer or nonlawyer is obligated to protect under these Rules or other law.

(1) Reasonably adequate procedures include:

- (i) Written notice to all affected firm personnel that a screen is in place and the screened lawyer or nonlawyer must avoid any communication with other firm personnel about the screened matter;
- (ii) Adoption of mechanisms to deny access by the screened lawyer or nonlawyer to firm files or other information, including information in electronic form, relating to the screened matter;
- (iii) Acknowledgment by the screened lawyer or nonlawyer of the obligation not to communicate with any other firm personnel with respect to the matter and to avoid any contact with any firm files or other information, including information in electronic form, relating to the matter
- (iv) Periodic reminders of the screen to all affected firm personnel.
- (v) Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

(2) Screening measures must be implemented as soon as practical after a lawyer, nonlawyer or firm knows or reasonably should know that there is a need for screening.

(1 k) – (1 m) No Change, other than renumbered.

(n) “Business transaction,” when used in reference to conflicts of interests:

(1) includes but is not limited to

- (i) The sale of goods or services related to the practice of law to existing clients of a firm’s legal practice;
- (ii) A lawyer referring a client to nonlegal services performed by others within a firm or a separate entity in which the lawyer or the lawyer’s firm has a financial interest;
- (iii) Transactions between a lawyer or a firm and a client in which a lawyer or firm accepts nonmonetary property or an interest in the client’s business as payment of all or part of a fee.

(2) does not include

- (i) Ordinary fee arrangements between client and lawyer;
- (ii) Standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others and over which the lawyer has no advantage with the client.

(o) “Personal interests,” when used in reference to conflicts of interests, include but are not limited to:

(1) The probity of a lawyer's own conduct, or the conduct of a nonlawyer in the firm, in a transaction;

(2) Referring clients to a nonlawyer within a firm to provide nonlegal services; or

(3) Referring clients to an enterprise in which a firm lawyer or nonlawyer has an undisclosed or disclosed financial interest.

(p) "Authorized to practice law in this jurisdiction" denotes a firm that employs lawyers or nonlawyers who provide legal services as authorized by Rule 31.

(q) "Nonlawyer" denotes a person not licensed as a lawyer in this jurisdiction or who is licensed in another jurisdiction but is not authorized by these rules to practice Arizona law.

(r) "Nonlawyer assistant" denotes a person, whether an employee or independent contractor, who is not licensed to practice law in this jurisdiction, including but not limited to secretaries, investigators, law student interns, and paraprofessionals. Law enforcement personnel are not considered the nonlawyer assistants of government lawyers.

Comment [2003 2019 amendment]

Confirmed Writing

[1] No Change.

Firm

~~[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~

~~[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

[4-2] Similar questions can also arise with respect to lawyers in legal aid, and legal services organizations, and other entities that include nonlawyers and provide other services in

addition to legal services. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules. For instance, an organization that provides legal, accounting, and financial planning services to clients is a “firm” for purposes of these Rules for which a lawyer is responsible for assuring that reasonable measures are in place to safeguard client confidences and avoid conflicts of interest by all employees, officers, directors, owners, shareholders, and members of the firm regardless of whether or not the nonlawyers participate in providing legal services. See Rules 5.1, 5.2, and 5.3.

Fraud

[3 5] – [5 7] No Change, other than renumbered.

Screened

~~[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.~~

~~[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.~~

~~[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.~~

ER 1.5 Fees (Clean)

(a) – (d) No Change.

(e) Two or more firms jointly working on a matter may divide a fee resulting from a single billing to a client if:

(1) the basis for division of the fees and the firms among whom the fees are to be divided are disclosed in writing to the client;

(2) the client consents to the division of fees, in a writing signed by the client;

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

Comment [2019 amendment]**Reasonableness of Fee and Expenses**

[1] No Change.

Basis or Rate of Fee

[2] – [3] No Change.

Terms of Payment

[4] – [5] No Change.

Prohibited Contingent Fees

[6] No Change.

Disclosure of Refund Rights for Certain prepaid Fees

[7] No Change.

Disputes Over Fees

[8] No Change, except renumbered from comment [10].

ER 1.5 Fees (Redline)

(a) – (d) No Change.

~~(e) A division of a fee between lawyers who are not in the same firm may be made only~~
Two or more firms jointly working on a matter may divide a fee resulting from a single billing to a client if:

~~(1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the~~

representation; the basis for division of the fees and the firms among whom the fees are to be divided are disclosed in writing to the client;

(2) the client ~~agrees~~ consents to the division of fees, in a writing signed by the client; ~~to the participation of all the lawyers involved and the division of the fees and responsibilities between lawyers; and~~

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

Comment [2003 2019 amendment]

Reasonableness of Fee and Expenses

[1] No Change.

Basis or Rate of Fee

[2] – [3] No Change.

Term of Payment

[4] – [5] No Change.

Prohibited Contingent Fees

[6] No Change.

Disclosure of Refund Rights for Certain Prepaid Fees

[7] No Change.

Division of Fee

~~[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers, if the division is in proportion to the services performed by each lawyer or all lawyer assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be completely and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).~~

~~[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.~~

Dispute Over Fees

~~[10 8]~~ No Change, other than renumbered.

ER 1.6 Confidentiality (Clean)

(a) – (d) No change.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, even if the firm provides the client with only nonlegal services.

2003 Comment [amended 2019]

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client, including representation by the firm for only nonlegal services. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] - [4] No Change.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other, and nonlawyers in the firm, information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] No Change.

Disclosure Adverse to Client

[7] – [20] No Change

Withdrawal

[21] No Change.

Acting Competently to Preserve Confidentiality

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision including individuals who are providing nonlegal services through the firm. Lawyers shall establish reasonable safeguards within firms to assure that all information learned from or about a firm client shall remain confidential even if the only services provided to the client are nonlegal services. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made

reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]–[4].

[23] No Change.

Former Client

[24] No Change.

ER 1.6 Confidentiality (Redline)

(a) – (d) No change.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, even if the firm provides the client with only nonlegal services.

2003 Comment [~~amended 2009~~ 2019]

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client, including representation by the firm for only nonlegal services. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] - [4] No Change.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other, and nonlawyers in the firm,

information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] No Change.

Disclosure Adverse to Client

[7] – [20] No Change

Withdrawal

[21] No Change.

Acting Competently to Preserve Confidentiality

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision including individuals who are providing nonlegal services through the firm. Lawyers shall establish reasonable safeguards within firms to assure that all information learned from or about a firm client shall remain confidential even if the only services provided to the client are nonlegal services. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]–[4].

[23] No Change.

Former Client

[24] No Change.

ER 1.7 Conflict of Interest: Current Clients (Clean)

No change to the black letter rule.

Comment [2019 amendment]

[1] – [9] No Change.

[10] – [33] No change except renumbered from [11] – [34]

ER 1.7 Conflict of Interest: Current Clients (Redline)

No change to the black letter rule.

Comment [~~2003~~ 2019 amendment]

[1] – [9] No Change.

Personal Interest Conflicts

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

~~[11] [10]~~ – ~~[12] [11]~~ No Change other than renumbered.

~~[13] [12]~~ – ~~[34] [33]~~ No change other than renumbered.

ER 1.8 Conflict of Interest: Current Clients: Specific Rules (Clean)

(a) – (l) No Change.

(m) A lawyer or firm must comply with ER 1.7 if the client expects the lawyer or firm to represent the client in a business transaction or when the lawyer's or firm's financial interest otherwise poses a significant risk that the representation of the client will be materially limited by the lawyer's or firm's financial interest in the transaction.

Comment [2019 amendment]

[1] The risk to a client is greatest when the client expects the lawyers to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that that lawyer must comply, not only with requirements of paragraph (a), but also with requirements of ER 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyers dual role as both legal adviser and participant in the transaction, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyer in the form or refer clients through a separate entity in which the lawyer has a financial interest, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that ER 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[2] – [19] No Change, excepted renumbered from comments [4] to [21].

ER 1.8 Conflict of Interest: Current Clients: Specific Rules (Redline)

(a) – (l) No Change.

(m) A lawyer or firm must comply with ER 1.7 if the client expects the lawyer or firm to represent the client in a business transaction or when the lawyer's or firm's financial interest otherwise poses a significant risk that the representation of the client will be materially limited by the lawyer's or firm's financial interest in the transaction.

Comment [2003 2019 amendment]

Business Transactions Between Client and Lawyer

~~[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyers and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the~~

lawyer's legal practice. See ER 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by ER 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. IN such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the materials risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See ER 1.0(e) (definition of informed consent).

[3 1] The risk to a client is greatest when the client expects the lawyers to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with requirements of paragraph (a), but also with requirements of ER 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyers dual role as both legal adviser and participant in the transaction, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyer in the firm or refer clients through a separate entity in which the lawyer has a financial interest, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that ER 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4 2] – [24 19] No Change, other than renumbered.

ER 1.10 Imputation of Conflicts of Interest: General Rule (Clean)

(a) While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or nonlawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers and nonlawyers in the firm.

(b) – (e) [No change.]

(f) If a lawyer or nonlawyer in a firm owns all or part of an opposing party, the personal disqualification of the lawyer or nonlawyer is imputed to all others in the firm.

(g) If a nonlawyer is personally disqualified, the nonlawyer may be screened and the nonlawyer's personal disqualification is not imputed to the rest of the firm unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm.

(h) If a lawyer is personally disqualified from representing a client due to events or conduct in which the person engaged before the person became licensed as a lawyer, the lawyer may be screened, and the lawyer's personal disqualification is not imputed to the rest of the firm unless the lawyer is an owner, shareholder, partner, officer or director of the firm.

Comment [2019 amendment]

[1] – [7] No change, except renumbered from current [5] – [11].

ER 1.10 Imputation of Conflicts of Interest: General Rule (Redline)

(a) While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or nonlawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers and nonlawyers in the firm.

(b) – (e) No change.

(f) If a lawyer or nonlawyer in a firm owns all or part of an opposing party, the personal disqualification of the lawyer or nonlawyer is imputed to all others in the firm.

(g) If a nonlawyer is personally disqualified pursuant to paragraph (a), the nonlawyer may be screened and the nonlawyer's personal disqualification is not imputed to the rest of the firm unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm.

(h) If a lawyer is personally disqualified from representing a client due to events or conduct in which the person engaged before the person became licensed as a lawyer, the lawyer

may be screened, and the lawyer's personal disqualification is not imputed to the rest of the firm unless the lawyer is an owner, shareholder, partner, officer or director of the firm.

Comment [2003 and 2016 2019 amendment]

Definition of Firm

[1] For purposes of the Rules of Professional Conduct, the term 'firm' denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in a legal services organization of the legal department of a corporation or other organization. See ER 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See ER 1.0 Comments [2]—[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by ERs 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, for example, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm are reasonably likely to be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm. A disqualification arising under ER 1.8(l) from a family or cohabitating relationship is persona and ordinarily is not imputed to other lawyers with whom the lawyers are associated.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that a person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and firm have a legal duty to protect. See ERs 1.0(k) and 5.3.

[5 1] – [14 7] No change, other than renumbered.

ER 1.17 Sale of Law Practice or Firm (Clean)

(a) A firm may sell or purchase a law practice, or a practice area of a firm, including good will, if the seller gives written notice to each of the seller's clients regarding:

- (1) the proposed sale, including the identity of the purchaser;
- (2) the client's right to retain other counsel or to take possession of the file; and
- (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(b) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(c) A sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

(d) Before providing a purchaser access to detailed information relating to the representation, including client files, the seller must provide the written notice to a client as described above.

(e) Lawyers participating in the sale of a law practice or a practice area must exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently; avoid disqualifying conflicts, and secure the client's informed consent for those conflicts that can be agreed to and the obligation to protect information relating to the representation.

(f) If approval of the substitution of the purchasing lawyer for a selling firm is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(g) This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

[Note: All Comments to existing ER 1.17 were deleted.]

ER 1.17 Sale of Law Practice or Firm (Redline)

(a) A lawyer or a law firm may sell or purchase a law practice, or an area of law practice a practice area of a firm, including good will, if the following conditions are satisfied seller gives written notice to each of the seller's clients regarding:

~~(a) The seller ceases to engage the private practice of law, or in the area of practice that has been sold, in the geographic area(s) in which the practice has been conducted;~~

~~(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;~~

~~(c) The seller gives written notice to each of the seller's clients regarding;~~

(1) the proposed sale, including the identity of the purchaser;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(b) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

~~(d) The fees charged clients shall not be increased by reason of the sale.~~

(c) A sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

(d) Before providing a purchaser access to detailed information relating to the representation, including client files, the seller must provide the written notice to a client as described above.

(e) Lawyers participating in the sale of a law practice or a practice area must exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently; avoid disqualifying conflicts, and secure the client's informed consent for those conflicts that can be agreed to and the obligation to protect information relating to the representation.

(f) If approval of the substitution of the purchasing lawyer for a selling firm is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(g) This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Comment [2003 rule]

[All comments to ER 1.17 were deleted]

ER 5.1 Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors (Clean)

(a) A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these,

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

(b) A lawyer having supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the persons who is being supervised and the amount of work involved. Whether a lawyer has supervisory authority may vary given the circumstances.

(c) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

ER 5.1 Responsibilities of ~~Partners, Managers, and Supervisory Lawyers~~ Lawyers Who Have Ownership Interests or are Managers or Supervisors (Redline)

~~(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a firm, shall make reasonable efforts to ensure~~

~~that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.~~

(a) A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these,

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person who is being supervised and the amount of work supervised. Whether a lawyer has supervisory authority may vary given the circumstances.

(c) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner~~ has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

Comment [2003 amendment]

[Note: All Comments to existing ER 5.1 were deleted.]

ER 5.3. Responsibilities Regarding Nonlawyers (Clean)

(a) A lawyer who in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers, including those who have equity interests in the firm, is compatible with the professional obligations of the lawyer. Reasonable measures include but are not limited to adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and.

(2) to ensure that nonlawyers comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all firm client information.

(b) A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

(c) A lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has managerial authority in the firm and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) When a firm includes nonlawyers who have an equity interest or managerial authority in the form, any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.

[Note: All Comments to existing ER 5.3 were deleted.]

ER 5.3. Responsibilities Regarding Nonlawyers Assistants (Redline)

~~With respect to a nonlawyer employed or retained by or associated with a lawyer:~~

~~(a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's is compatible with the professional obligations of the lawyer;~~

~~(a) b) a lawyer having direct supervisory authority over the nonlawyer~~ A lawyer in a firm shall make reasonable efforts to ensure that the person's conduct firm has in effect measures giving reasonable assurance that the conduct of nonlawyers, including those who have equity interests in the firm, is compatible with the professional obligations of the lawyer; and Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and.

(2) to ensure that nonlawyers comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all firm client information.

(b) A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable

assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

(c) ~~a~~ A lawyer shall be responsible for conduct of ~~such a person~~ a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner or~~ has ~~comparable~~ managerial authority in the firm ~~in which the person is employed, or has direct supervisory authority over the person,~~ and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) When a firm includes nonlawyers who have an equity interest or managerial authority in the firm, any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.

Comment [2003 amendment]

[Note: All Comments to existing ER 5.3 were deleted.]

ER 5.4 Professional Independence of a Lawyer (Clean)

[Note: The entirety of this rule was deleted.]

~~ER 5.4 Professional Independence of a Lawyer (Redline)~~

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

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

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

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

~~(4) a lawyer may share court awarded legal fees or fees otherwise received and permissible under these rules with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.~~

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

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

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

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

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

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

~~Comment [2003 amendment]~~

~~[1] The provisions of this Rule express traditional limitations on the sharing of fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment~~

~~of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.~~

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

ER 5.7 Responsibilities Regarding Law-Related Service (Clean)

[Note: The entirety of this rule was deleted.]

~~ER 5.7. Responsibilities Regarding Law-Related Services (Redline)~~

~~(a) A lawyer may provide, to clients and to others, law-related services, as defined in paragraph (b), either:~~

~~(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or~~

~~(2) by a separate entity which is controlled by the lawyer individually or with others.~~

~~Where the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer shall be subject to the provisions of the Rules of Professional Conduct in the course of providing such services. In circumstances in which law-related services are provided by a separate entity controlled by the lawyer individually or with others, the lawyer shall not be subject to the Rules of Professional Conduct, in the course of providing such services, only if the lawyer takes reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not apply.~~

~~(b) The term law-related services denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.~~

~~Comment [2003 rule]~~

~~[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflict interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.~~

~~[2] ER 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that~~

~~apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., ER 8.4.~~

~~[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1).~~

~~[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.~~

~~[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with ER 1.8(a).~~

~~[6] In taking the reasonable measures referred to in paragraph (a) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.~~

~~[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.~~

~~[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a) of the Rule cannot be met. In such a case a~~

lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by ER 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law related services. Examples of law related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (ERs 1.7 through 1.11, especially ERs 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of ER 1.6 relating to disclosure of confidential information. The promotion of the law related services must also in all respects comply with ERs 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also ER 8.4.

[12] Variations in language of this Rule from ABA Model Rule 5.7 as adopted in 2002 are not intended to imply a difference in substance.

ER 7.1. Communications Concerning a Lawyer's Services (Clean)

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

(a) A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

(b) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the lawyer complies with Arizona Supreme Court Rule 44 requirements.

(c) Any communication made pursuant to this Rule shall include the name and contact information for at least one lawyer or law firm responsible for its content.

[1] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[2] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of a clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[3] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. ER 8.4(c). See also ER 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm Names

[4] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A firm name cannot include the name of a lawyer who is disbarred or on disability inactive status because to continue to use a disbarred lawyer's name is misleading. A lawyer or law firm may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name

or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[5] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction. Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading. It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[6] Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in this Rule to communications concerning a lawyer’s services.

Certified Specialists

[7] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[8] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a United States Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a United States Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[9] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ER 7.1 Communications Concerning a Lawyer's Services (Redline)

A lawyer shall not make ~~or knowingly permit to be made on the lawyer's behalf~~ a false or misleading communication about the lawyer or the lawyer's services.

(a) A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

(b) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the lawyer complies with Arizona Supreme Court Rule 44 requirements.

(c) Any communication made pursuant to this Rule shall include the name and contact information for at least one lawyer or law firm responsible for its content.

Comment [2003 Rule 2019 amendment]

~~[1] This Rule governs all communications about a lawyer's services, including advertising permitted by ER 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. A clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is false or misleading.~~

[2 1] ~~Misleading~~ Truthful statements ~~that are misleading~~ are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is ~~also~~ misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3 2] ~~Promising or guaranteeing a particular outcome or result is misleading.~~ A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of a clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4 3] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. ER 8.4(c). See also ER 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm Names

[4] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A firm name cannot include the name of a lawyer who is disbarred or on disability inactive status because to continue to use a disbarred lawyer's name is misleading. A lawyer or law firm may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[5] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction. Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading. It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. Whether a communication about a lawyer or legal services is false or misleading is based upon the perception of a reasonable person.

[6] Paragraph (b) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in this Rule to communications concerning a lawyer's services. See comment to ER 5.5(b)(2) regarding advertisements and communications by non-members. A non-member lawyer's failure to inform prospective clients that the lawyer is not licensed to practice law by the Supreme Court of Arizona or has limited his or her practice to federal or tribal legal matters may be misleading.

Certified Specialists

[7] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[8] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an

advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[9] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ER 7.2 [RESERVED] (Clean)

ER 7.2 [RESERVED] Advertising Communications Concerning a Lawyer's Services: Specific Rules (Redline)

(a) ~~Subject to the requirements of ERs 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~

(b) ~~A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:~~

~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(2) pay the usual charges of a legal service plan or a not for profit or qualified lawyer referral service, which may include, in addition to any membership fee, a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any such percentage fee shall not exceed ten percent, and shall be used only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of pro bono legal services. The fees paid by a client referred by such service shall not exceed the total charges that the client would have paid had no such service been involved. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and~~

~~(3) pay for a law practice in accordance with ER 1.17.~~

(c) ~~Any communication made pursuant to this Rule shall include the name and contact information for at least one lawyer or law firm responsible for its content.~~

(d) ~~Every advertisement (including advertisement by written solicitation) that contains information about the lawyer's fees shall be subject to the following requirements:~~

~~(1) advertisements and written solicitations indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (A) that the client will be liable for expenses regardless of outcome unless the repayment of such is contingent upon the outcome of the matter and (B) whether the percentage fee will be computed before expenses are deducted from the recovery;~~

~~(2) range of fees or hourly rates for services may be communicated provided that the client is informed in writing at the commencement of any client lawyer relationship that the total fee within the range which will be charged or the total hours to be devoted will vary depending upon that particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;~~

~~(3) fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, may be communicated provided that the client is informed~~

~~in writing at the commencement of any client-lawyer relationship that the quoted fee will be available only to clients whose matters fall within the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged;~~

~~(4) a lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee, or range of fees, for at least ninety (90) days unless the advertisement specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.~~

~~(e) Advertisements on the electronic media may contain the same information as permitted in advertisements in the print media. If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm.~~

~~(f) Communications required by paragraphs (c) and (d) shall be clear and conspicuous. To be "clear and conspicuous" a communication must be of such size, color, contrast, location, duration, cadence, and audibility that an ordinary person can readily notice, read, hear, and understand it.~~

Comment [2003 rule]

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This ER permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons~~

~~of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see ER 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor ER 7.3 prohibits communications authorized by law, such as notice to members of a class action litigation.~~

~~[5] Except as permitted under paragraphs (b)(1)–(b)(3), lawyers are not permitted to pay others for recommending the lawyer's services or channeling professional work in a manner that violates ER 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings, group advertisements, and online referral services that list lawyers by practice area do not constitute impermissible "recommendations."~~

~~[3] Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this ER, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator is consistent with ERs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with ER 7.1 (communications concerning a lawyer's services). To comply with ER 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. Giving or receiving a de minimis gift that is not a quid pro quo for referring a particular client is permissible. See also ER 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); ER 8.4 (duty to avoid violating the ERs through the actions of another).~~

~~[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. Published and electronic group advertising and directories are not lawyer referral services, but participation in such listings is governed by ERs 7.1 and 7.4. A lawyer referral service, on the other hand, is any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers or that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this ER only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that~~

is approved by an appropriate regulatory authority, such as the State Bar of Arizona, as affording adequate protections for the public.

~~[7] The reasonable operating expenses of a legal service plan or lawyer referral service include payment of the actual expenses of operating, conducting, promoting and developing the service, including expenditures for capital purposes for the service, as determined on a reasonable accounting basis and with provision for reasonable reserves. Public service activities of a legal service plan or lawyer referral service include the following: (a) furnishing or providing funding for legal services to persons and entities financially unable to pay for all or part of such services; (b) developing and implementing programs to educate members of the public with respect to the law, the judicial system, the legal profession, or the need, manner of obtaining, and availability of legal services; and (c) creating and administering programs to improve the administration of justice or aid in relations between the Bar and the public.~~

~~[8] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See ER 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these ERs. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in person, telephonic, or real-time contacts that would violate ER 7.3.~~

~~[9] Paragraph (f) requires communications under paragraphs (c) and (d) to be clear and conspicuous. In addition to the requirements of paragraph (f), a statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, in a manner that is readily noticeable, readable, and understandable, and it must not be obscured in any manner.~~

ER 7.3. Solicitation of Clients (Clean)

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or firm's pecuniary gain, unless the contact is with a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf even when not otherwise prohibited by paragraph (b), if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment; or

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, 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 live person-to-person 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.

Comment

[1] A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer seeking pecuniary gain solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of under influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. Those forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm the person's judgment.

[4] The contents of advertisements and communications permitted under ER 7.2 can be permanently recorded so that they cannot be disputed. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of ER 7.1. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of ER 7.1, that involves coercion, duress or harassment within the meaning of ER 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ER 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress ordinarily is not appropriate, including, for example, the elderly, disabled, or those whose first language is not English.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

ER 7.3 Solicitation of Clients (Clean)

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

~~(a b)~~ A lawyer shall not solicit professional employment by live person-to-person ~~in person, live telephone or real-time electronic contact~~ solicit professional employment from the person contacted or employ or compensate another to do so when a significant motive for the lawyer's doing so is the lawyer's or firm's pecuniary gain, unless the ~~person contacted~~ contact is with a:

(1) ~~is a lawyer; or~~

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

~~(b c)~~ A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf ~~from the person contacted by written, recorded or electronic communication or by in person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph ~~(ab)~~, if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment; or

~~(3) the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~(e) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known or believed likely to be in need of legal services for a particular matter shall include the words "Advertising Material" in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

~~(1) At the time of dissemination of such written communication, a written copy shall be forwarded to the State Bar of Arizona at its Phoenix office.~~

~~(2) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.~~

~~(3) If a contract for representation is mailed with the written communication, the contract shall be marked "sample" in red ink and shall contain the words "do not sign" on the client signature line.~~

~~(4) The lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose how the identity and specific legal need of the potential recipient were discovered.~~

(d e) Notwithstanding the prohibitions in ~~paragraph (a)~~ this Rule, 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 live person-to-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.

2003 Comment [2009 2019 amendment]

[1] ~~A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a~~ A ~~lawyer's communication typically does~~ is ~~not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet electronic searches. See ER 8.4 (duty to avoid violating the ERs through the actions of another).~~

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. There is a A ~~potential for abuse overreaching exists~~ when a lawyer seeking pecuniary gain solicits solicitation a person involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to be in need of legal services. This ~~These~~ These ~~forms of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.~~

[3] ~~The~~ This ~~potential for abuse overreaching inherent in direct in-person, live person-to-person contact telephone or real-time electronic solicitation justifies its prohibition, particularly since~~

lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not ~~involve real-time contact and do not~~ violate other laws ~~governing solicitations~~. Those forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in live person-to-person, telephone or real-time electronic~~ persuasion that may overwhelm the person's judgment.

[4] ~~The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under ER 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of ER 7.1. The contents of direct in-live person-to-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

[5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~ overreaching against a former client or a person with whom the lawyer has a close personal, or family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for ~~abuse~~ overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. ~~Consequently, the general prohibition in ER 7.3(a) and the requirements of ER 7.3(c) are not applicable in those situations. Also, p~~ Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[6] ~~But even permitted forms of solicitation can be abused. Thus, any A solicitation which that contains false or misleading information which is false or misleading within the meaning of ER 7.1, which that involves coercion, duress or harassment within the meaning of ER 7.3(b-c)(2), or which that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ER 7.3(b-c)(1) is prohibited. Moreover, if after sending a letter or other communication to a person as permitted by paragraph (c), the lawyer receives no response, any further effort to communicate with the person may violate the provisions of ER 7.3(b). Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress ordinarily is not appropriate, including, for example, the elderly, disabled, or those whose first language is not English.~~

[7] This ~~ER Rule~~ is does not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. ~~Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under ER 7.2.~~

[8] ~~The requirement in ER 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

[9] ~~Lawyers may comply with the requirement of paragraph (c)(1) by submitting (a) a copy of every written, recorded or electronic communication soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter, or (b) a single copy of any identical communication published or sent to more than one person and a list of the names and mailing or e-mail addresses or fax numbers of the intended recipients and the dates identical solicitations were published or sent. Lawyers may comply with the requirement of paragraph (c)(1) by submitting the required communications and information to the State Bar on a monthly basis.~~

[10] ~~The State Bar may dispose of the submissions received pursuant to paragraph (c)(1) after one year following receipt.~~

[11] ~~Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with ERs 7.1, 7.2 and 7.3(b). See ER 8.4(a).~~

ER 7.4 [RESERVED] (Clean)

ER 7.4. [RESERVED]— Communication of Fields of Practice (Redline)

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

~~(2) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and (3) a lawyer certified by the Arizona Board of Legal Specialization or by a national entity that has standards for certification substantially the same as those established by the board may state the area or areas of specialization in which the lawyer is certified. Prior to stating that the lawyer is a specialist certified by a national entity, the entity must be recognized by the board as having standards for certification substantially the same as those established by the board. If the national entity has not been recognized by the board, it may make application for recognition by completing an application form provided by the board.~~

~~(b) Communications to the Arizona Board of Legal Specialization and its Advisory Commissions relating to an applicant's qualifications for specialization certification shall be absolutely privileged, and no civil action predicated thereon may be instituted or maintained against any evaluator, staff or witness who communicates with or before the Board or its Advisory Commissions. Members of the Board of Legal Specialization, its Advisory Commission, and others involved in the specialization certification process shall be immune from suit for any conduct in the course of their official duties.~~

Comment

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" in a particular field is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.

[2] Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

ER 7.5 [RESERVED] (Clean)

ER 7.5. [RESERVED] Firm Names and Letterheads (Redline)

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates ER 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

COMMENT TO 2003 AND 2012 AMENDMENTS

~~[1] [2012 Amendment] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation that complies with ER 7.1.~~

~~[2] [2003 Amendment] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

~~[3] [2003 Amendment] "Of counsel" designation may be used to state or imply a relationship between lawyers only if the relationship is close, personal, continuous, and regular.~~

APPENDIX 2: Draft Administrative Order and Forms Re: Limited Scope Representation

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
LIMITED SCOPE REPRESENTATION)	Administrative Order
(DELIVERY OF UNBUNDLED LEGAL)	No. 2019 - _____
SERVICES))	
)	
_____)	

Low-income individuals and increasing numbers of unrepresented litigants cannot afford the costs of full-service legal representation. Limited scope representation, or unbundled legal services, describes a legal service delivery method whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end.

Although self-represented litigants may avail themselves of online court forms and self-help materials, without advice and counsel from an attorney, those litigants may come to court uninformed, unprepared, or simply overwhelmed. Others may be unable to afford the cost of legal representation for every aspect of their case. These situations impede access to justice. Limited scope representation provides unrepresented litigants an option for effective representation they may more easily afford.

Unbundling of legal services is authorized and does not violate the Arizona Rules of Professional Conduct as long as the attorney's representation is reasonable under the circumstances. (Arizona Ethics Rule 1.2 governs limited scope representation).

Approved limited scope representation forms are commonly used in civil and family law matters, (Rule 5.3 of the Rules of Civil Procedure and Rule 9 of the Family Law Rules of Procedure). The delivery of Legal Services Task Force recommended that a general notice of limited scope representation and notice of completion of limited scope representation be developed for any area of law that may not already offer a form. See Appendix A to this Order for Notice of Limited Scope Representation and Notice of Completion of Limited Scope Representation.

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

IT IS ORDERED, that to the extent not inconsistent with the Rules of this Court, an attorney may enter a limited appearance when representing a client.

IT IS ORDERED, that in accordance with Rule 1.2 of the Arizona Rules of Professional Conduct, an attorney may enter a limited appearance in a court proceeding including, but not limited to, discovery, motions practice, or hearings.

IT IS ORDERED, that an attorney's appearance may be limited by date, time period, activity, or subject matter, when specifically stated in a Notice of Limited Appearance filed and served prior to or simultaneous with the proceeding(s) for which the attorney appears.

IT IS ORDERED, that the attorney's limited appearance terminates when that attorney files a Notice of Completion of Limited Scope Representation, which must be served on each of the parties, including the limited appearance attorney's own client.

IT IS ORDERED, that (1) service on an attorney who has entered a limited appearance is required only for matters within the scope of the representation as stated in the notice; (2) any such service also must be made on the party; and (3) service on the attorney for matters outside the scope of the limited appearance does not extend the scope of the attorney's representation.

IT IS ORDERED, that this Administrative Order shall take effect on the date of this Order.

Dated this _____ day of _____, 2019.

ROBERT BRUTINEL
Chief Justice

FOR CLERK'S USE ONLY

ARIZONA SUPERIOR COURT
IN _____ COUNTY

IN THE MATTER OF:

CASE NO.: _____

(Plaintiff/Petitioner)

**NOTICE OF
LIMITED SCOPE
REPRESENTATION**

(Defendant/Respondent)

THE CLERK OF THE COURT will please note that I am entering an appearance limited to
(select one and specify):

☐ date:

_____.

☐ time period:

_____.

☐ activity:

_____.

☐ subject matter:

_____.

My appearance will terminate upon my filing a Notice of Completion.

My client and I agree that my appearance is limited and does not extend beyond what is specified above without mutual and informed consent and unless a new Notice of Limited Scope Representation is filed.

Notices and documents concerning my limited scope representation must be served on me and my client. All notices and documents regarding matters outside the scope of my representation

must be served only on my client and any other counsel who has entered an appearance on my client's behalf.

I hereby certify that the foregoing information is true and correct to the best of my knowledge and belief and that on the _____ day of _____, 20____, I served a copy of this Notice of Limited Scope Representation on all parties or their counsel and on my client by hand, first-class mail, or electronically by agreement of the parties, court rule or court order.

Signature

Street address

Print name and Bar number

City, state, zip code

Phone number

Email address

Date

FOR CLERK'S USE ONLY

ARIZONA SUPERIOR COURT
IN _____ COUNTY

IN THE MATTER OF:

CASE NO.: _____

(Plaintiff/Petitioner)

(Defendant/Respondent)

**NOTICE OF
COMPLETION OF
LIMITED SCOPE
REPRESENTATION**

THE CLERK OF THE COURT will please note that as of the ____ day of _____,
20____, I completed the (select one):

☐ date:

☐ time period:

☐ activity:

☐ subject matter:

specified in my Notice of Limited Scope Representation. The filing of this Notice of Completion terminates my appearance without necessity of leave of court. I informed my client that my appearance was temporary and will terminate upon the filing of this Notice of Completion.

Any subsequent notices or documents pertaining to this case must now be served on my client and any other counsel who has entered an appearance on my client's behalf.

I hereby certify that the foregoing information is true and correct to the best of my knowledge

and belief and that on the _____ day of _____, 20____, I served a copy of this Notice of Completion of Limited Scope Representation on all parties or their counsel and on my client by hand, first-class mail, or electronically by agreement of the parties, court rule or court order.

Signature

Street address

Print name and Bar number

City, state, zip code

Phone number

Email address

Date

APPENDIX 3: Rule 38(d), Arizona Rules of Supreme Court

Proposed Rule 38(d), Arizona Rules of Supreme Court (Clean)

(d) Clinical Law Professors, Law Students, and Law Graduates

1. *Purpose.* This purpose of this rule is to provide law students and recent law school graduates with supervised instruction and training in the practice of law for a limited time, and to facilitate volunteer opportunities for those individuals in pro bono contexts.

2. Definitions.

A. “Law school” means a law school either provisionally or fully accredited by the American Bar Association.

B. “Certified limited practice student” is a law student of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice student.

C. “Certified limited practice graduate” is a law graduate of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice graduate.

D. “Clinical Law Professor” is a faculty member teaching a clinical law program at a law school in Arizona either provisionally or fully accredited by the American Bar Association.

E. “Dean” means the dean, the academic associate dean, or the dean’s designee of the accredited law school where the law student is enrolled or the law graduate was enrolled on graduation.

F. “Period of supervision” means the dates for which the supervising attorney has declared, on the application for certification or recertification, that he or she will be responsible for any work performed by the certified limited practice student or the certified limited practice graduate under his or her supervision.

G. “Supervising attorney” is an active member of the State Bar of Arizona in good standing who has practiced law or taught law in an accredited law school as a full-time occupation for at least two years, and agrees in writing to supervise the certified limited practice student or certified limited practice graduate pursuant to these rules, and is identified as the supervising attorney in the application for certification or recertification. The supervising attorney may designate a deputy, assistant, or other staff attorney to supervise the certified limited practice student or certified limited practice graduate when permitted by these rules.

H. “Volunteer legal services program” means a volunteer legal services program managed by an approved legal services organization in cooperation with an accredited law school. Approved legal service organizations are defined in paragraph (e)(2)(C) of this rule.

3. General Provisions.

A. Limited Bar Membership. To the extent a professor, law student, or law graduate is engaged

in the practice of law under this rule, the professor, law student, or law graduate shall, for the limited purpose of performing professional services authorized by this rule, be deemed an active member of the state bar (but not required to pay fees). The provisions of this rule shall govern rather than the provisions of other rules relating to admission and discipline.

B. Nonapplicability of Attorney Discipline Rules to Terms of the Certification. The procedures otherwise provided by law or court rule governing the discipline of lawyers shall not be applicable to the termination of the certification of a clinical law professor, certified limited practice student, or certified limited practice graduate pursuant to these rules. Termination of certification shall be without prejudice to the privilege of the professor, law student, or law graduate to apply for admission to practice law if the professor, law student, or law graduate is in other respects qualified for such admission.

C. Effect of Certification on Application for Admission to Bar. The certification of a clinical law professor, law student, or law graduate shall not be considered as an advantage or a disadvantage to the professor, law student, or law graduate in an application for admission to the state bar.

D. Privileged Communications. The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by and among professors, supervising and designated attorneys, certified limited practice students, and certified limited practice graduates.

4. *Clinical Law Professors.*

A. Activities of Clinical Law Professors. A clinical law professor who is certified pursuant to this rule may appear as a lawyer solely in connection with supervision of students in a clinical law program in a law school in Arizona. A clinical law professor may appear in any court or before any administrative tribunal in this state in the matters enumerated in paragraph (d)(5)(C) of this rule on behalf of any person, if the person on whose behalf the appearance is being made has consented in writing to that appearance. Such written consent shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

B. Requirements and Limitations for Clinical Law School Professors. To appear as a lawyer pursuant to these rules, the clinical law professor must:

- i. be admitted by examination to the bar of any state or the District of Columbia;
- ii. neither ask for nor receive any compensation or remuneration of any kind for such services from the person on whose behalf the services are rendered;
- iii. certify in writing that the clinical law professor has read and is familiar with the Arizona Rules of Professional Conduct and the Rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of lawyers; and

iv. submit evidence that the clinical law professor has successfully completed the course on Arizona law described in [Rule 34\(j\)](#).

C. Certification of the Clinical Law Professor. The certification shall be signed by the clinical law professor and the dean of the law school on the form prescribed by the clerk of the Court and shall be filed with the clerk and the state bar. The certification shall remain in effect until withdrawn.

D. Duty to Ensure Adequate Supervision and Guidance of Certified Limited Practice Student. The clinical law professor must ensure that certified limited practice students receive adequate supervision and guidance while participating in the law school's clinical law program.

E. Termination of Certification.

i. The dean at any time, with or without cause or notice or hearing, may terminate a certification of a clinical law professor by filing a notice of the termination with the clerk of the Supreme Court. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

ii. The Court at any time, with or without cause or notice or hearing, may terminate a certification of a clinical law professor by filing notice of the termination with the clerk of this Court. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

5. Law Students

A. Law Student Eligibility for Limited Practice Certification. To be eligible to become a certified limited practice student, an applicant must

i. have successfully completed legal studies amounting to at least two semesters, or the equivalent academic hour credits if the law school or the student is on some basis other than a semester, at an accredited law school;

ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice student from the person on whose behalf the services are rendered; this requirement does not prevent a supervising lawyer, legal services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law student, or prevent any such lawyer or agency from requesting compensation or remuneration for legal services as otherwise authorized;

iii. certify in writing that the student has read and is familiar with the Arizona Rules of Professional Conduct, the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and

iv. be certified by the dean of the law school where the student is enrolled as being in good

academic standing, of good character, and as having either successfully completed or being currently enrolled in and attending academic courses in civil procedure, criminal law, evidence, and professional responsibility.

B. Application to become a Certified Limited Practice Student or Extend the Certification Period

i. All applications to become a certified limited practice student or to extend the period of certification must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated fee. The clerk of the Court shall send a copy of all approved student limited practice certifications to the admissions department of the state bar.

ii. The application for certification or extension must be signed by the applicant, the dean, of the law school in which the applicant is enrolled, and the supervising attorney.

iii. The applicant must attest that he or she meets all of the requirements of this rule; will immediately notify the clerk of the Court if he or she no longer meets the requirements of the rules; and has read and will abide by the Arizona Rules of Professional Conduct and these rules.

iv. The dean of the law school in which the applicant is enrolled must attest that the applicant meets the requirements of these rules, and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the Clerk of the Court if the certified limited practice student no longer meets the requirements of these rules.

v. The supervising attorney must specify the period during which he or she will be responsible for supervising the applicant and attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice Student; Presence of Supervising or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice student may appear in any court or before any administrative tribunal in this state on behalf of any person who has consented in writing to that appearance if the supervising attorney has provided written approval of that appearance. The written consent and approval shall be filed in the record of the case and shall be brought to the attention of the judge or presiding officer and the certified limited practice student must advise the court on the occasion of the student's initial appearance in the case of the certification to appear as a law student pursuant to these rules.

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice student in the following circumstances:

- a. In any civil case in justice, municipal, and magistrate court, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;
 - b. In any civil case in superior court or before any administrative tribunal.
 - c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;
 - d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;
 - e. In any misdemeanor criminal defense case, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and
 - f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.
 - g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.
- ii. Other Client Representation Activities. Under the supervision of the supervising attorney, but outside the supervisor's presence, a certified limited practice student may:
- a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice student is eligible to appear, but such pleadings or documents must be signed by the supervising attorney or designated attorney;
 - b. prepare briefs, motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney or designated attorney;
 - c. assist indigent inmates of correctional institutions or other persons who request such assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. If there is a lawyer of record in the matter, all assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney or designated attorney;
 - d. give legal advice and perform other appropriate legal services, but only with the consent of the supervising attorney or designated attorney.

iii. Other Non-Representation Activities. In connection with a volunteer legal services program and at the invitation or request of a court or tribunal, a certified limited practice student may appear as a law student volunteer to assist the proceeding in any civil matter, provided:

- a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;
- b. the student's supervising attorney is associated with the particular volunteer legal services program;
- c. the certified limited practice student has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title "Certified Limited Practice Student."

- i. A certified limited practice student may use the title "Certified Limited Practice Student" only in connection with activities performed pursuant to these rules.
- ii. When a certified limited practice student's name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the student is a certified limited practice student pursuant to these rules; state the name of the supervising attorney; be signed by the supervising attorney or designated attorney; and otherwise comply with these rules.
- iii. A certified limited practice student shall not hold himself or herself out as an active member of the state bar.
- iv. Nothing in these rules prohibits a certified limited practice student from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. Duties of the Supervising Attorney. The supervising attorney must:

- i. supervise and assume professional responsibility for any work performed by the certified limited practice student while under his or her supervision;
- ii. assist and counsel the certified limited practice student in the activities authorized by these rules and review such activities with the certified limited practice student, all to the extent required for the proper training of the certified limited practice student and the protection of the client;
- iii. read, approve, and sign any pleadings, briefs or other documents prepared by the certified

limited practice student before the filing thereof, and read and approve any document prepared by the certified limited practice student for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney shall still provide general supervision;

iv. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited practice student has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice student during the period of certification, the certified limited practice student must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice student. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

G. Duration and Termination of Certification. Certification of a certified limited practice student shall begin on the date specified in the certification and shall remain in effect for the period specified in the certification unless sooner terminated by the earliest of the following occurrences:

i. The certified limited practice student requests termination of the certification in writing or notifies the clerk of the Court that he or she no longer meets the requirements of these rules. In such event the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

ii. The supervising attorney notifies the clerk of the Court in writing that his or her supervision of the certified limited practice student will cease before the date specified in the notice of certification. In such event, the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar. The dean may issue a modified certification reflecting the substitution of a new supervising attorney.

iii. The dean at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

iv. The Court at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

v. One or more of the requirements for certification no longer exists or the certified limited practice student or supervising attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule, or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

6. Law Graduates

A. Law Graduate Eligibility for Limited Practice Certificate. To be eligible to become a certified limited practice graduate, an applicant must:

- i. have graduated from an accredited law school;
- ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice graduate from the person on whose behalf the services are rendered; this requirement does not prevent a supervising lawyer, legal services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law graduate, or prevent any such lawyer or agency from requesting compensation or remuneration for legal services as otherwise authorized;
- iii. certify in writing that the law graduate has read and is familiar with the Arizona Rules of Professional Conduct, the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and
- iv. be certified by the dean of the accredited law school where the law graduate was enrolled on graduation as having graduated in good academic standing and being of good character.

B. Application to Become a Certified Limited Practice Graduate

- i. All applications to become a certified limited practice graduate must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated fee. The clerk of the Court shall send a copy of all approved graduate limited practice certifications to the admissions department of the state bar.
- ii. The application for certification must be signed by the applicant, the dean of the law school where the applicant was enrolled on graduation, and the supervising attorney.
- iii. The applicant must attest that he or she meets all of the requirements of this rule, will immediately notify the clerk of the Court if he or she no longer meets the requirements of the rules, and has read and will abide by the Arizona Rules of Professional Conduct and these rules.
- iv. The dean of the law school where the applicant was enrolled on graduation must attest that the applicant meets the requirements of these rules, and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the clerk of the Court if the certified limited practice graduate no longer meets the requirements of these rules.
- v. The supervising attorney must specify the period during which he or she will be responsible for and will supervise the applicant and attest that he or she has read and will abide by, the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice Graduate; Presence of Supervising Attorney or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice graduate may appear in any court or before any administrative tribunal in this state on behalf of any person who has consented in writing to that appearance if the supervising attorney has also provided written approval of that appearance. In each case, the written consent and approval must be filed in the case and be brought to the attention of the judge or the presiding officer. In addition, the certified limited practice graduate must advise the court at the law graduate's first appearance in the case of the certification to appear as a law graduate pursuant to these rules.

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice graduate in the following circumstances:

a. In any civil case in justice, municipal, and magistrate court unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;

b. In any civil case in superior court or before any administrative tribunal;

c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;

d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;

e. In any misdemeanor criminal defense case unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and

f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.

g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.

ii. Other Client Representation Activities. Under the general supervision of the supervising attorney or designated attorney, but outside his or her presence, a certified limited practice graduate may:

a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice graduate is eligible to appear, but such pleadings or documents must be signed by the supervising attorney or designated attorney if filed in the superior court, Arizona Court of Appeals, Arizona Supreme Court, or with an administrative tribunal;

b. prepare briefs, motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney or designated attorney;

c. assist indigent inmates of correctional institutions or other persons who request assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. If there is a lawyer of record in the matter, all assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney or designated attorney;

d. give legal advice and perform other appropriate legal services, but only after consultation with and consent of the supervising attorney or designated attorney.

iii. Other Non-Representation Activities. In connection with a volunteer legal services program and at the invitation and request of a court or tribunal, a certified limited practice graduate may appear as a law graduate volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the certified limited practice graduate's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice graduate has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title "Certified Limited Practice Graduate."

i. A certified limited practice graduate may use the title "Certified Limited Practice Graduate" only in connection with activities performed pursuant to these rules.

ii. When a certified limited practice graduate's name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the law graduate is a certified limited practice graduate pursuant to these rules, state the name of the supervising attorney, be signed by the supervising attorney or designated attorney if required by these rules, and otherwise comply with these rules.

iii. A certified limited practice graduate shall not hold himself or herself out as an active member of the state bar.

iv. Nothing in these rules prohibits a certified limited practice graduate from describing his or

her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. Duties of the Supervising Attorney. The supervising attorney must:

- i. supervise and assume professional responsibility for any work performed by the certified limited practice graduate while under his or her supervision;
- ii. assist and counsel the certified limited practice graduate in the activities authorized by these rules and review such activities with the certified limited practice graduate, all to the extent required for the proper training of the certified limited practice graduate and the protection of the client;
- iii. read and approve all pleadings, briefs, or other documents prepared by the certified limited practice graduate as required by these rules; sign any pleading, brief, or other document if required by these rules, and read and approve any document prepared by the certified limited practice graduate for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney must still provide general supervision;
- iv. assume professional responsibility for all pleadings, briefs, or other documents filed in any court or with an administrative tribunal by the certified limited practice graduate under his or her supervision;
- v. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited graduate has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice graduate during the period of certification, the certified limited practice graduate must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice graduate. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

G. Duration and Termination of Certification. Certification of a certified limited practice graduate shall begin on the date specified in the certification and shall remain in effect for the period specified in the certification unless sooner terminated by the earliest of the following occurrences:

- i. The certified limited practice graduate requests termination of the certification in writing or notifies the Clerk of the Court that he or she no longer meets the requirements of these rules. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.
- ii. The supervising attorney notifies the clerk of the Court in writing that his or her supervision

of the certified limited practice graduate will cease before the date specified in the certification. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

iii. The dean at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

iv. The Court at any time, with or without cause or notice or hearing, files notice of the termination with the clerk of the Court.

v. One or more of the requirements for certification no longer exists or the certified limited practice graduate or supervising attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

vi. The law graduate fails to take the first Arizona uniform bar examination, or the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

vii. The law graduate fails to pass the first Arizona uniform bar examination for which the law graduate is eligible or fails to obtain a score equal to or greater than the acceptable score established by the Committee on Examinations on the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

viii. Thirty days after the Court notifies the law graduate that he or she has been approved for admission to practice law and is eligible to take the oath of admission.

ix. The Committee on Character and Fitness does not recommend to the Court that the law graduate be admitted to practice law.

x. The law graduate is denied admission to practice law by the Court.

xi. The law graduate is admitted to practice law.

xii. Expiration of 12 months from the date of the law graduate's graduation from law school unless, before expiration of the 12-month period and for good cause shown by the law graduate, the Court extends the 12-month period.

Rule 38, Arizona Rules of Supreme Court (Redline)

(a) – (c) No Change.

(d) Clinical Law Professors, ~~and Law Students, and Law Graduates~~

~~1. Purpose. This rule is adopted to encourage law schools to provide clinical instruction of varying kinds~~ The purpose of this rule is to provide law students and recent law school graduates with supervised instruction and training in the practice of law for a limited time, and to facilitate volunteer opportunities for those individuals in pro bono contexts.

2. Definitions.

~~A. “Accredited law school”~~ “Law school” means a law school either provisionally or fully ~~approved and~~ accredited by the American Bar Association.

B. “Certified limited practice student” is a law student ~~or a graduate~~ of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice student.

C. “Certified limited practice graduate” is a law graduate of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice graduate.

D. “Clinical Law Professor” is a faculty member teaching a clinical law program at a law school in Arizona either provisionally or fully accredited by the American Bar Association.

~~C.~~ E. “Dean” means the dean, the academic associate dean, or the dean’s designee of the accredited law school where the law student is enrolled or the law graduate was enrolled on graduation.

~~D. “Designated attorney” is, exclusively in the case of government, any deputy, assistant or other staff attorney authorized and selected by a supervising attorney to supervise the certified limited practice student where permitted by these rules.~~

~~E.~~ F. “Period of supervision” means the dates for which the supervising attorney has declared, on the application for certification or recertification, that he or she will be responsible for any work performed by the certified limited practice student or the certified limited practice graduate under his or her supervision.

~~F. “Personal presence” means the supervising attorney or designated attorney is in the physical presence of the certified limited practice student.~~

~~G. “Rules” means Rule 38, Rules of Supreme Court.~~

H. G. “Supervising attorney” is an attorney admitted to Arizona full or limited practice who active member of the State Bar of Arizona in good standing who has practiced law or taught

law in an accredited law school as a full-time occupation for at least two years, and agrees in writing to supervise the certified limited practice student or certified limited practice graduate pursuant to these rules, and is identified as the supervising attorney in and whose name appears on the application for certification or recertification. The supervising attorney may designate a deputy, assistant, or other staff attorney to supervise the certified limited practice student or certified limited practice graduate when permitted by these rules.

H. “Volunteer legal services program” means a volunteer legal services program managed by an approved legal services organization in cooperation with an accredited law school. Approved legal service organizations are defined in paragraph (e)(2)(C) of this rule.

3. General Provisions.

A. Limited Bar Membership. To the extent a professor, ~~or a law student, or law graduate~~ is engaged in the practice of law under this rule, the professor, ~~or law student, or law graduate~~ shall, for the limited purpose of performing professional services authorized by this rule, be deemed an active member of the state bar (but not required to pay fees). The provisions of this rule shall govern rather than the provisions of other rules relating to admission and discipline.

B. Nonapplicability of Attorney Discipline Rules to Terms of the Certification. The procedures otherwise provided by law or court rule governing the discipline of lawyers shall not be applicable to the termination of the certification of a clinical law professor, ~~or a certified limited practice student, or certified limited practice graduate~~ pursuant to ~~this rule~~ these rules. Termination of certification shall be without prejudice to the privilege of the professor, ~~or the law student, or law graduate~~ to ~~make application~~ apply for admission to practice law if the professor, ~~or the law student, or law graduate~~ is in other respects qualified for such admission.

C. Effect of Certification on Application for Admission to Bar. The certification of a clinical law professor, ~~or a limited practice law student, or law graduate~~ shall ~~in no way not~~ be considered as an advantage or a disadvantage to the professor, ~~or the law student, or law graduate~~ in an application for admission to the state bar.

D. Privileged Communications. The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by and among professors, supervising and designated attorneys (~~and designated attorneys~~), and certified limited ~~student~~ practice students, and certified limited practice graduates.

4. Clinical Law Professors.

A. Activities of Clinical Law Professors. A clinical law professor ~~not a member of the state bar but who is~~ certified pursuant to this rule may appear as a lawyer solely, in connection with supervision of students in a clinical law program ~~approved by the dean and faculty of in a law school in Arizona either provisionally or fully approved and accredited by the American Bar Association.~~ A clinical law professor may appear in any court or before any administrative tribunal in this state in the matters enumerated in paragraph (d)(5)(C) of this rule on behalf of any person, if the person on whose behalf the appearance is being made has consented in writing

to that appearance. Such written consent shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

B. Requirements and Limitations for Clinical Law School Professors. ~~In order to make an appearance~~ To appear as a lawyer pursuant to ~~this~~ these rules, the clinical law professor must:

~~i. be duly employed as a faculty member of a law school in Arizona either provisionally or fully approved or accredited by the American Bar Association for the purpose, *inter alia*, of instructing and supervising a clinical law program approved by the dean and faculty of such law school;~~

~~ii~~ i. be admitted by examination to the bar of ~~another~~ any state or the District of Columbia;

~~iii~~ ii. neither ask for nor receive any compensation or remuneration of any kind for such services from the person on whose behalf the services are rendered;

~~iv~~ iii. certify in writing that the clinical law professor has read and is familiar with the Arizona Rules of Professional Conduct and the Rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of lawyers; and

~~v~~ iv. submit evidence that the clinical law professor has successfully completed the course on Arizona law described in [Rule 34\(j\)](#).

C. Certification of the Clinical Law Professor. The certification shall be signed by the clinical law professor and the dean of the law school on the form prescribed by the clerk of ~~this~~ the Court and shall be filed with the clerk and the state bar. The certification shall remain in effect until withdrawn.

D. Duty to Ensure Adequate Supervision and Guidance of Certified Limited Practice Student. ~~It shall be the responsibility of t~~The clinical law professor must ~~to ensure that certified limited practice students receive adequate supervision and guidance while participating in the law school's clinical law program. In the case of a certified student who has graduated and participates in the program pending the taking of the bar examination, the clinical law professor shall, on a monthly basis, based on such reporting from the certified limited practice student and the supervising attorney as the law school shall require, confirm that the certified graduate has received and is receiving adequate attorney supervision and guidance.~~

E. ~~Withdrawal or~~ Termination of Certification.

i. The dean at any time, with or without cause or notice or hearing, may ~~withdraw~~ terminate a certification of a clinical law professor ~~at any time by filing a notice to that effect, with or without stating the cause for the withdrawal, of the termination with the clerk of this Court, who shall forthwith mail copies thereof to the clinical law professor and the State Bar of Arizona~~ the Supreme Court. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

ii. The Court ~~at any time, with or without cause or notice or hearing,~~ may terminate ~~the a~~ certification of a clinical law professor ~~at any time without cause and without notice or hearing~~ by filing notice of the termination with the clerk of this Court ~~and with the state bar~~. The clerk shall mail copies of the notice to the clinical law professor and the state bar.

5. *Practical Training of Law Students*

A. Law Student Eligibility for Limited Practice Certification. To be eligible to become a certified limited practice student, ~~a law student applicant~~ an applicant must

i. have successfully completed legal studies amounting to at least two semesters, or the equivalent academic hour credits if the law school or the student is on some basis other than a semester, at an accredited law school, ~~subject to the time limitation set forth in these rules;~~

ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice student from the person on whose behalf the services are rendered, ~~but this shall not;~~ this requirement does not prevent a supervising lawyer, legal aid bureau services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law student, nor shall it ~~or prevent any such lawyer or agency from making such charges for its services as it may otherwise properly require~~ requesting compensation or remuneration for legal services as otherwise authorized;

iii. certify in writing that the student has read and is familiar with the Arizona Rules of Professional Conduct, ~~and the rules of the Supreme Court of Arizona,~~ and the statutes of the State of Arizona relating to the conduct of attorneys; and

iv. be certified by the dean of the ~~accredited~~ law school where the student is enrolled ~~(or was enrolled on graduation), or by the dean's designee,~~ as being in good academic standing, of good character, and as having either successfully completed or being currently enrolled in and attending, academic courses in civil procedure, criminal law, evidence, and professional responsibility.

B. Application ~~for~~ to become a Certified Limited Practice Student or Extend the Certification Period

i. All applications ~~for student~~ to become a certified limited practice certification student or ~~requests to change or add a supervising attorney or to~~ extend the period of certification ~~pursuant to these rules~~ must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated ~~appropriate nonrefundable processing~~ fee. The clerk of the Court shall send a copy of all approved student limited practice certifications to the admissions department of the state bar.

ii. ~~The application for certification shall require the signature of the applicant, the dean, associate dean, or assistant dean of the accredited law school in which the applicant is enrolled,~~

~~and the signature of the supervising attorney. The application for certification or extension must be signed by the applicant, the dean, of the law school in which the applicant is enrolled, and the supervising attorney.~~

iii. The applicant ~~shall~~ must attest that he or she meets all of the requirements of ~~the~~ this rules; ~~agrees to and shall will~~ immediately notify the clerk of the Court ~~in the event if~~ he or she no longer meets the requirements of the rules; and ~~that he or she has read, is familiar with~~ and will abide by the Arizona Rules of Professional Conduct ~~of the State of Arizona~~ and these rules.

iv. The dean, ~~associate dean, or assistant dean~~ of the ~~aeereditd~~ law school in which the applicant is enrolled ~~shall~~ must attest that the applicant meets the requirements of these rules,; ~~that he or she shall immediately notify the clerk of the Court in the event that the certified limited practice student no longer meets the requirements of these rules; and that he or she has no knowledge of facts or information that would indicate that the applicant is not and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the Clerk of the Court if the certified limited practice student no longer meets the requirements of these rules.~~

v. The supervising attorney ~~shall~~ must specify the period during which he or she will be responsible for ~~and will supervise~~ supervising the applicant and attest that he or she has read, ~~is familiar with,~~ and will abide by the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice ~~Certification~~ Student;
~~Physical~~ Presence of Supervising or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice student may appear in any court or before any administrative tribunal in this state on behalf of any person ~~if that person on whose behalf the student is appearing who~~ has consented in writing to that appearance ~~and if the supervising attorney has also indicated in writing provided written approval of that appearance. IN each case, The written consent and approval shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal. In addition, and~~ the certified limited practice student ~~shall orally~~ must advise the court on the occasion of the student's initial appearance in the case of the certification to appear as a law student pursuant to these rules. ~~A certified limited practice student may appear in the following matters:~~

a. Civil Matters. ~~In civil cases in justice, municipal, and magistrate courts, the supervising lawyer (or designated lawyer) is not required to be personally present in court if the person on whose behalf an appearance is being made consents to the supervising lawyer's absence.~~

b. Criminal Matters on Behalf of the State. ~~In any criminal matter on behalf of the state or any political subdivision thereof with the written approval of the supervising attorney (or designated attorney), the supervising attorney (or designated attorney) must be present except when such appearance is in justice, municipal, or magistrate courts.~~

~~e. Felony Criminal Defense Matters. In any felony criminal defense matter in justice, municipal, and magistrate courts, and any criminal matter in superior court, the supervising attorney (or designated attorney) must be personally be present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.~~

~~d. Misdemeanor Criminal Defense Matters. In any misdemeanor criminal defense matter in justice, municipal, or magistrate courts, the supervising attorney (or designated attorney) is not required to be personally present in court, so long as the person on whose behalf an appearance is being made consents to the supervising attorney's absence; however, the supervising attorney shall be present during trial.~~

~~e. Appellate Oral Argument. A certified limited practice student may participate in oral arguments in the Arizona Supreme Court and Court of Appeals, but only in the presence of the supervising attorney (or designated attorney) and with the specific approval of the court for that case.~~

~~Notwithstanding anything hereinabove set forth, the court may at any time and in any proceeding require the supervising attorney (or designated attorney) to be personally present for such period and under such circumstances as the court may direct.~~

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice student in the following circumstances:

a. In any civil case in justice, municipal, and magistrate court, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;

b. In any civil case in superior court or before any administrative tribunal.

c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;

d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;

e. In any misdemeanor criminal defense case, unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and

f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.

g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.

ii. Other Client Representation Activities. Under the ~~general~~ supervision of the supervising attorney ~~(or designated attorney)~~, but outside ~~his or her personal~~ the supervisor's presence, a certified limited practice student may:

a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice student is eligible to appear, but such pleadings or documents must be signed by the supervising attorney ~~(or designated attorney)~~;

b. prepare briefs, ~~abstracts~~ motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney ~~(or designated attorney)~~;

c. ~~provide assistance to~~ assist indigent inmates of correctional institutions or other persons who request such assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. ~~(If there is a lawyer of record in the matter, all such assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney (or designated attorney))~~;

d. ~~render~~ give legal advice and perform other appropriate legal services, but only ~~after prior consultation with and upon the express~~ with the consent of the supervising attorney ~~(or designated attorney)~~.

iii. Other Non-Representation Activities. ~~A certified limited practice student may perform any advisory or non-representational activity which could be performed by a person who is not a member of the state bar, subject to the approval by the supervising attorney (or designated attorney).~~ In connection with a volunteer legal services program and at the invitation or request of a court or tribunal, a certified limited practice student may appear as a law student volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the student's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice student has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title "Certified Limited Practice Student."

i. ~~In connection with activities performed pursuant to these rules, a~~ A certified limited practice student may use the title “Certified Limited Practice Student” only ~~and may not use the title in connection with activities not performed pursuant to these rules.~~

ii. When a certified limited practice student’s name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the student is a certified limited practice student pursuant to these rules; state the name of the supervising attorney; be signed by the supervising attorney or designated attorney; and otherwise comply with these rules.

iii. A certified limited practice student ~~may not and shall not in any way~~ hold himself or herself out as ~~a regularly admitted or~~ an active member of the state bar.

iv. Nothing ~~contained~~ in these rules prohibits a certified limited practice student from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. ~~Requirements and~~ Duties of the Supervising Attorney. The supervising attorney ~~shall~~ must:

i. ~~be an active member of the state bar under these rules, and before supervising a certified limited practice student shall have practiced law or taught law in an accredited law school as a full-time occupation for at least two years;~~

ii. ~~supervise no more than five (5) certified limited practice students concurrently; provided, however, that a supervising attorney who is employed full time to supervise law students as part of an organized law school or government agency training program may supervise up to, but in no case more than fifty (50) certified students;~~

~~iii.~~ i. supervise and assume personal professional responsibility for any work performed by the certified limited practice student while under his or her supervision;

~~iv.~~ ii. assist and counsel the certified limited practice student in the activities authorized by these rules and review such activities with the certified limited practice student, all to the extent required for the proper training of the certified limited practice student and the protection of the client;

~~v.~~ iii. read, approve, and sign any pleadings, briefs or other documents prepared by the certified limited practice student before the filing thereof, and read and approve any document prepared by the certified limited practice student for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney shall still provide general supervision;

~~vi.~~ provide the level of supervision to the certified limited practice student required by these rules ~~(exclusively in the case of government agencies, a designated attorney may, in the place of the supervising attorney, perform the obligation set forth in this subparagraph, but the Supervising Attorney shall still provide supervision); and~~

~~vii. in the case of a certified student who is participating in a clinical program post-graduation pending the taking of the bar examination, report to the clinical law professor and the dean of the law school, as the law school shall require, on a monthly basis regarding the supervising attorney's supervision and guidance of the certified student.~~

~~vii.~~ iv. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited practice student has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice student during the period of certification, the certified limited practice student must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice student. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

~~F.~~ G. Duration and Termination of Certification. Certification of a certified limited practice student shall ~~commence~~ begin on the date ~~indicated on~~ specified in the certification and shall remain in effect for the period specified in the ~~notice of~~ certification unless sooner terminated ~~pursuant to~~ by the earliest of the following occurrences:

i. ~~Termination by the Student.~~ The certified limited practice student ~~may request~~ notifies termination of the certification in writing or ~~notify~~ notifies the clerk of the Court that he or she no longer meets the requirements of ~~this rule, and these rules.~~ In such event the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

ii. ~~Termination by the Supervising Attorney.~~ The supervising attorney ~~may notify~~ notifies the clerk of the Court in writing that his or her supervision of the certified limited practice student will cease before the date specified in the notice of certification. In such event, the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar, ~~and~~ ¶ The dean may issue a modified certification reflecting the substitution of a new supervising attorney, ~~as necessary.~~

iii. ~~Termination by the Dean.~~ A certification of student limited practice ~~may be terminated by~~ ¶ The dean at any time, with or without cause and without notice or hearing, by filing files notice of the termination with the clerk of the Court. ~~A certification of student limited practice shall be terminated if one or more of the requirements for the certification no longer exists or the certified limited practice student, supervising attorney or designated attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.~~

iv. ~~Failure to take or Pass the Bar Examination.~~ A certification of a student limited practice ~~shall be terminated if the certified student fails to take or pass the first general bar examination~~

for which the student is eligible. The Court at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

~~v. Termination by the Arizona Supreme Court. A certification of student limited practice may be terminated by the Arizona Supreme Court any time, without cause and without notice or hearing, by filing notice of the termination with the clerk of the Court. A certification of student limited practice shall be terminated if~~ One or more of the requirements for the certification no longer exists or the certified limited practice student, or supervising attorney or designated attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule, or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

6. Law Graduates

A. Law Graduate Eligibility for Limited Practice Certificate. To be eligible to become a certified limited practice graduate, an applicant must:

i. have graduated from an accredited law school;

ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice graduate from the person on whose behalf the services are rendered; this requirement does not prevent a supervising lawyer, legal services organization, law school, public defender agency, or the state or any political subdivision thereof from paying compensation to the eligible law graduate, or prevent any such lawyer or agency from requesting compensation or remuneration for legal services as otherwise authorized;

iii. certify in writing that the law graduate has read and is familiar with the Arizona Rules of Professional Conduct, the rules of the Supreme Court of Arizona, and the statutes of the State of Arizona relating to the conduct of attorneys; and

iv. be certified by the dean of the accredited law school where the law graduate was enrolled on graduation as having graduated in good academic standing and being of good character.

B. Application to Become a Certified Limited Practice Graduate

i. All applications to become a certified limited practice graduate must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated fee. The clerk of the Court shall send a copy of all approved graduate limited practice certifications to the admissions department of the state bar.

ii. The application for certification must be signed by the applicant, the dean of the law school where the applicant was enrolled on graduation, and the supervising attorney.

iii. The applicant must attest that he or she meets all of the requirements of this rule, will

immediately notify the clerk of the Court if he or she no longer meets the requirements of the rules, and has read and will abide by the Arizona Rules of Professional Conduct and these rules.

iv. The dean of the law school where the applicant was enrolled on graduation must attest that the applicant meets the requirements of these rules, and, to the best of the dean's knowledge, is qualified by ability, training, or character to participate in the activities permitted by these rules. The dean must immediately notify the clerk of the Court if the certified limited practice graduate no longer meets the requirements of these rules.

v. The supervising attorney must specify the period during which he or she will be responsible for and will supervise the applicant and attest that he or she has read and will abide by, the Arizona Rules of Professional Responsibility, these rules, and will assume responsibility under the requirements of these rules.

C. Permitted Activities and Requirements of a Certified Limited Practice Graduate; Presence of Supervising Attorney or Designated Attorney

i. Court and Administrative Tribunal Appearances. A certified limited practice graduate may appear in any court or before any administrative tribunal in this state on behalf of any person who has consented in writing to that appearance if the supervising attorney has also provided written approval of that appearance. In each case, the written consent and approval must be filed in the case and be brought to the attention of the judge or the presiding officer. In addition, the certified limited practice graduate must advise the court at the law graduate's first appearance in the case of the certification to appear as a law graduate pursuant to these rules.

ii. Presence of Supervising Attorney or Designated Attorney. The supervising attorney or designated attorney must appear with the certified limited practice graduate in the following circumstances:

a. In any civil case in justice, municipal, and magistrate court unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney;

b. In any civil case in superior court or before any administrative tribunal;

c. In any criminal case on behalf of the state or any political subdivision of the state if the case is in the superior court or any appellate court;

d. In any felony criminal defense case in justice, municipal, and magistrate court, and in any criminal case in superior court;

e. In any misdemeanor criminal defense case unless the person on whose behalf the appearance is being made consents to the absence of the supervising attorney or designated attorney; however, the supervising attorney or designated attorney must be present during trial; and

f. In oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only with the specific approval of the court for that case.

g. Notwithstanding anything in this section, the court may at any time and in any proceeding require the supervising attorney or designated attorney to be present.

ii. Other Client Representation Activities. Under the general supervision of the supervising attorney or designated attorney, but outside his or her presence, a certified limited practice graduate may:

a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice graduate is eligible to appear, but such pleadings or documents must be signed by the supervising attorney or designated attorney if filed in the superior court, Arizona Court of Appeals, Arizona Supreme Court, or with an administrative tribunal;

b. prepare briefs, motions, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney or designated attorney;

c. assist indigent inmates of correctional institutions or other persons who request assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court. If there is a lawyer of record in the matter, all assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney or designated attorney;

d. give legal advice and perform other appropriate legal services, but only after consultation with and consent of the supervising attorney or designated attorney.

iii. Other Non-Representation Activities. In connection with a volunteer legal services program and at the invitation and request of a court or tribunal, a certified limited practice graduate may appear as a law graduate volunteer to assist the proceeding in any civil matter, provided:

a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;

b. the certified limited practice graduate's supervising attorney is associated with the particular volunteer legal services program;

c. the certified limited practice graduate has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.

D. Use of the Title “Certified Limited Practice Graduate.”

- i. A certified limited practice graduate may use the title “Certified Limited Practice Graduate” only in connection with activities performed pursuant to these rules.
- ii. When a certified limited practice graduate’s name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the law graduate is a certified limited practice graduate pursuant to these rules, state the name of the supervising attorney, be signed by the supervising attorney or designated attorney if required by these rules, and otherwise comply with these rules.
- iii. A certified limited practice graduate shall not hold himself or herself out as an active member of the state bar.
- iv. Nothing in these rules prohibits a certified limited practice graduate from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive, or misleading.

E. Duties of the Supervising Attorney. The supervising attorney must:

- i. supervise and assume professional responsibility for any work performed by the certified limited practice graduate while under his or her supervision;
- ii. assist and counsel the certified limited practice graduate in the activities authorized by these rules and review such activities with the certified limited practice graduate, all to the extent required for the proper training of the certified limited practice graduate and the protection of the client;
- iii. read and approve all pleadings, briefs, or other documents prepared by the certified limited practice graduate as required by these rules; sign any pleading, brief, or other document if required by these rules, and read and approve any document prepared by the certified limited practice graduate for execution by any person. If a designated attorney performs this duty in place of the supervising attorney, the supervising attorney must still provide general supervision;
- iv. assume professional responsibility for all pleadings, briefs, or other documents filed in any court or with an administrative tribunal by the certified limited practice graduate under his or her supervision;
- v. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited graduate has or will cease before the date indicated on the certification.

F. Substitution of the Supervising Attorney. If the supervising attorney becomes unable to supervise the certified limited practice graduate during the period of certification, the certified limited practice graduate must designate a substitute supervising attorney by submitting a form provided by the clerk of the Court, to the clerk, together with any designated fee. The substitute

supervising attorney must sign the form and specify the period during which he or she will be responsible for supervising the certified limited practice graduate. The substitute supervising attorney must also attest that he or she has read and will abide by the Arizona Rules of Professional Responsibility and will comply with the requirements of these rules.

G. Duration and Termination of Certification. Certification of a certified limited practice graduate shall begin on the date specified in the certification and shall remain in effect for the period specified in the certification unless sooner terminated by the earliest of the following occurrences:

i. The certified limited practice graduate requests termination of the certification in writing or notifies the Clerk of the Court that he or she no longer meets the requirements of these rules. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

ii. The supervising attorney notifies the clerk of the Court in writing that his or her supervision of the certified limited practice graduate will cease before the date specified in the certification. In such event, the clerk shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

iii. The dean at any time, with or without cause and notice or hearing, files notice of the termination with the clerk of the Court.

iv. The Court at any time, with or without cause or notice or hearing, files notice of the termination with the clerk of the Court.

v. One or more of the requirements for certification no longer exists or the certified limited practice graduate or supervising attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the law graduate, the law graduate's supervising attorney, the dean, and the state bar.

vi. The law graduate fails to take the first Arizona uniform bar examination, or the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

vii. The law graduate fails to pass the first Arizona uniform bar examination for which the law graduate is eligible or fails to obtain a score equal to or greater than the acceptable score established by the Committee on Examinations on the first uniform bar examination offered in another jurisdiction for which the law graduate is eligible.

viii. Thirty days after the Court notifies the law graduate that he or she has been approved for admission to practice law and is eligible to take the oath of admission.

ix. The Committee on Character and Fitness does not recommend to the Court that the law graduate be admitted to practice law.

x. The law graduate is denied admission to practice law by the Court.

xi. The law graduate is admitted to practice law.

xii. Expiration of 12 months from the date of the law graduate's graduation from law school unless, before expiration of the 12-month period and for good cause shown by the law graduate, the Court extends the 12-month period.

APPENDIX 4: Rule 31, Arizona Rules of Supreme Court

Proposed Restyled Arizona Rule of Supreme Court 31 (Clean).

Rule 31. Supreme Court Jurisdiction

(a) Jurisdiction. The Arizona Supreme Court has jurisdiction over any person or entity engaged in the authorized or unauthorized “practice of law” in Arizona, as that phrase is defined in (b).

(b) Definition. “Practice of law” means providing legal advice or services to or for another by:

- (1) preparing or expressing legal opinions to or for another person or entity;
- (2) representing a person or entity in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation;
- (3) preparing a document, in any medium, on behalf of a specific person or entity for filing in any court, administrative agency, or tribunal;
- (4) negotiating legal rights or responsibilities on behalf of a specific person or entity; or
- (5) preparing a document, in any medium, intended to affect or secure a specific person’s or entity’s legal rights.

Rule 31.1. Authorized Practice of Law.

(a) Requirement. A person may engage in the practice of law in Arizona, or represent that he or she is authorized to engage in the practice of law in Arizona, only if:

- (1) the person is an active member in good standing of the State Bar of Arizona under Rule 32; or
- (2) the person is specifically authorized to do so under Rules 31.3, 38, or 39.

(b) Lack of Good Standing. A person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status, is not a member in good standing of the State Bar of Arizona under Rule 31.1(a)(1).

Rule 31.2. Unauthorized Practice of Law. Except as provided in Rule 31.3, a person or entity who is not authorized to practice law in Arizona under Rule 31.1(a) must not:

- (a)** engage in the practice of law in Arizona; or
- (b)** use the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “J.D.,” “Esq.,” or other equivalent words that are reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in Arizona.

Rule 31.3. Exceptions to Rule 31.2.

(a) Generally. Notwithstanding Rule 31.2, a person or entity may engage in the practice of law in a limited manner as authorized in Rule 31.3(b) through (e), but the person or entity who engages in such an activity is subject to the Arizona Supreme Court’s jurisdiction concerning that

activity. A person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status, may not engage any of the activities specified in this Rule 31.3 unless this rule authorizes a specific activity.

(b) Governmental Activities and Court Forms.

(1) ***In Furtherance of Official Duties.*** An elected official or employee of a governmental entity may perform the duties of his or her office and carry out the government entity's regular course of business.

(2) ***Forms.*** The Supreme Court, Court of Appeals, superior court, and limited jurisdiction courts may create and distribute forms for use in Arizona courts.

(c) Legal Entities.

(1) ***Definition.*** "Legal entity" means an organization that has legal standing under Arizona law to sue or be sued in its own right, including a corporation, a limited liability company, a partnership, an association as defined in A.R.S. §§ 33-1202 or 33-1802, or a trust.

(2) ***Documents.*** A legal entity may prepare documents incidental to its regular course of business or other regular activity if they are for the entity's use and are not made available to third parties.

(3) ***Justice and Municipal Courts.*** A person may represent a legal entity in a proceeding before a justice court or municipal court if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the proceeding;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

(4) ***General Stream Adjudication Proceeding.*** A person may represent a legal entity in superior court in a general stream adjudication proceeding conducted under A.R.S. §§ 45-251 et seq. (including a proceeding before a master appointed under A.R.S. § 45-255) if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the proceeding;

(C) such representation is not the person's primary duty to the entity but is secondary or incidental to other duties related to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the corporation or association (other than receiving reimbursement for costs).

(5) ***Administrative Hearings and Agency Proceedings.*** A person may represent a legal entity in a proceeding before the Office of Administrative Hearings, or before an Arizona administrative agency, ~~or~~ commission, or board, if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the particular proceeding;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

(6) **Exception.** Despite Rule 31.3(c)(3) through (c)(5), a court, the hearing officer, or the officer presiding at the agency or commission proceeding, may order the entity to appear only through counsel if the court or officer determines that the person representing the entity is interfering with the proceeding's orderly progress or imposing undue burdens on other parties.

(d) Tax-Related Activities and Proceedings.

(1) A person may prepare a tax return for an entity or another person.

(2) A certified public accountant or other federally authorized tax practitioner (as that term is defined in A.R.S. § 42-2069(D)(1)) may:

(A) render individual and corporate financial and tax advice to clients and prepare tax-related documents for filing with governmental agencies;

(B) represent a taxpayer in a dispute before the State Board of Tax Appeals if the amount at issue is less than \$25,000; and

(C) practice before the Internal Revenue Service or other federal agencies if authorized to do so.

(3) A property tax agent (as that term is defined in A.R.S. § 32-3651), who is registered with the Arizona State Board of Appraisal under A.R.S. § 32-3642, may practice as authorized under A.R.S. § 42-16001.

(4) A person may represent a party in a small claims proceeding in Arizona Tax Court conducted under A.R.S. §§ 12-161 et seq.

(5) In any tax-related proceeding before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Arizona Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, a person may represent a taxpayer if:

(A) the person is:

(i) a certified public accountant,

(ii) a federally authorized tax practitioner (as that term is defined in A.R.S. § 42-2069(D)(1)); or

(iii) in matters in which the amount in dispute, including tax, interest and penalties, is less than \$5,000, the taxpayer's duly appointed representative; or

(B) the taxpayer is a legal entity (including a governmental entity) and:

(i) the person is full-time officer partner, member, manager, or employee of the entity;

- (ii) the entity has specifically authorized the person to represent it in the proceeding;
- (iii) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and
- (v) the person is not receiving separate or additional compensation for such representation (other than receiving reimbursement for costs).

(e) Other.

(1) ***Children with Disabilities.*** In any administrative proceeding under 20 U.S.C. §§ 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a person may represent a party if:

(A) the hearing officer determines that the person has special knowledge or training with respect to the problems of children with disabilities; and

(B) the person is not charging a fee for representing the party (other than receiving reimbursement for costs).

Despite these provisions, the hearing officer may order the party to appear only through counsel or in some other manner if he or she determines that the person representing the party is interfering with the proceeding's orderly progress or imposing undue burdens on other parties.

(2) ***Department of Fire, Building and Life Safety.*** In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, a person may represent a party if:

(A) the party has specifically authorized the person to represent the party in the proceeding; and

(B) the person is not charging a fee for the representing the party (other than receiving reimbursement for costs).

(3) ***Fiduciaries.*** A person licensed as a fiduciary under A.R.S. § 14-5651 may perform services in compliance with Arizona Code of Judicial Administration § 7-202 without acting under the supervision of an attorney authorized under Rule 31.1(a) to engage in the practice of law in Arizona. Despite this provision, a court may suspend the fiduciary's authority to act without an attorney if it determines that lay representation is interfering with the proceeding's orderly progress or imposing undue burdens on other parties.

(4) ***Legal Document Preparers and Limited Licensed Legal Practitioners.*** Certified legal document preparers and limited licensed legal practitioners may perform services in compliance with the Arizona Code of Judicial Administration. This exception is not subject to the restriction in the second sentence of Rule 31.3(a) if a disbarred or suspended attorney has been certified as a legal document preparer or licensed as a limited license legal practitioner as provided in the Arizona Code of Judicial Administration.

(5) Mediators.

(A) A person who is not authorized under Rule 31.1(a) to engage in the practice of law in Arizona may prepare a written agreement settling a dispute or file such an agreement with the appropriate court if:

(i) the person is employed, appointed, or referred by a court or government entity and is serving as a mediator at the direction of the court or a governmental entity; or

(ii) the person is participating without compensation in a nonprofit mediation program, a community-based organization, or a professional association.

(B) Unless specifically authorized in Rule 31.3(e)(5)(A), a mediator who is not authorized under Rule 31.1(a) to engage in the practice of law in Arizona and who prepares or provides legal documents for the parties without attorney supervision must be certified as a legal document preparer in compliance with the Arizona Code of Judicial Administration § 7-208.

(6) *Nonlawyer Assistants and Out-of-State Attorneys.*

(A) A nonlawyer assistant may act under an attorney's supervision in compliance with ER 5.3 of the Arizona Rules of Professional Conduct. This exception is not subject to the restriction in Rule 31.3(a) concerning a person who is currently suspended or has been disbarred from the State Bar of Arizona, or is currently on disability inactive status.

(B) An attorney licensed in another jurisdiction may engage in conduct that is permitted under ER 5.5 of the Arizona Rules of Professional Conduct.

(7) *Personnel Boards.* An employee may designate a person as a representative who is not necessarily an attorney to represent the employee before any board hearing or any quasi-judicial hearing dealing with personnel matters, but no fee may be charged (other than for reimbursement of costs) for any services rendered in connection with such hearing by any such designated representative who is not authorized under Rule 31.1(a) to engage in the practice of law in Arizona.

(8) *State Bar Fee Arbitration.* A person may represent a legal entity in a fee arbitration proceeding conducted by the State Bar of Arizona Fee Arbitration Committee, if:

(A) the person is a full-time officer, partner, member, manager, or employee of the entity;

(B) the entity has specifically authorized the person to represent it in the particular proceeding;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

Current Rule 31, Arizona Rules of Supreme Court

Rule 31 Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law

1. *Jurisdiction.* Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

2. Definitions.

A. "Practice of law" means providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) preparing or expressing legal opinions;
- (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
- (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
- (5) negotiating legal rights or responsibilities for a specific person or entity.

B. "Unauthorized practice of law" includes but is not limited to:

- (1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a); or
- (2) using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

C. "Legal assistant/paralegal" means a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule.

D. "Mediator" means an impartial individual who is appointed by a court or government entity or engaged by disputants through written agreement to mediate a dispute. Serving as a mediator is not the practice of law.

E. "Unprofessional conduct" means substantial or repeated violations of the Oath of Admission

to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

(c) Restrictions on Disbarred Attorneys' and Members' Right to Practice. No member who is currently suspended or on disability inactive status and no former member who has been disbarred shall practice law in this state or represent in any way that he or she may practice law in this state.

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1. In any proceeding before the Department of Economic Security or Department of Child Safety, including a hearing officer, an Appeal Tribunal or the Appeals Board, an individual party (either claimant or opposing party) may be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

2. An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.

3. An officer of a corporation or a managing member of a limited liability company who is not an active member of the state bar may represent such entity before a justice court or police court provided that: the entity has specifically authorized such officer or managing member to represent it before such courts; such representation is not the officer's or managing member's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the entity was an original party to or a first assignee of a conditional sales contract, conveyance, transaction or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose.

4. A person who is not an active member of the state bar may represent a party in small claims procedures in the Arizona Tax Court, as provided in Title 12, Chapter 1, Article 4 of the Arizona Revised Statutes.

5. In any proceeding in matters under Title 23, Chapter 2, Article 10 of the Arizona Revised Statutes, before any administrative law judge of the Industrial Commission of Arizona or review board of the Arizona Division of Occupational Safety and Health or any successor agency, a corporate employer may be represented by an officer or other duly authorized agent of the corporation who is not charging a fee for the representation.

6. An ambulance service may be represented by a corporate officer or employee who has been specifically authorized by the ambulance service to represent it in an administrative hearing or rehearing before the Arizona Department of Health Services as provided in Title 36, Chapter 21.1, Article 2 of the Arizona Revised Statutes.

7. A person who is not an active member of the state bar may represent a corporation in small claims procedures, so long as such person is a full-time officer or authorized full-time employee of the corporation who is not charging a fee for the representation.

8. In any administrative appeal proceeding of the Department of Health Services, for behavioral health services, pursuant to A.R.S. § 36-3413 (effective July 1, 1995), a party may be represented by a duly authorized agent who is not charging a fee for the representation.

9. An officer or employee of a corporation or unincorporated association who is not an active member of the state bar may represent the corporation or association before the superior court (including proceedings before the master appointed according to A.R.S. § 45-255) in the general stream adjudication proceedings conducted under Arizona Revised Statutes Title 45, Chapter 1, Article 9, provided that: the corporation or association has specifically authorized such officer or employee to represent it in this adjudication; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation or association; and the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provision, the court may require the substitution of counsel whenever it determines that lay representation is interfering with the orderly progress of the litigation or imposing undue burdens on the other litigants. In addition, the court may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

10. An officer or full-time, permanent employee of a corporation who is not an active member of the state bar may represent the corporation before the Arizona Department of Environmental Quality in an administrative proceeding authorized under Arizona Revised Statutes. Title 49, provided that: the corporation has specifically authorized such officer or employee to represent it in the particular administrative hearing; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation; the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation; and the corporation has been provided with a timely and appropriate written general warning relating to the potential effects of the proceeding on the corporation's and its owners' legal rights.

11. Unless otherwise specifically provided for in this rule, in proceedings before the Office of Administrative Hearings, or in fee arbitration proceedings conducted under the auspices of the State Bar of Arizona Fee Arbitration Committee, a legal entity may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not

receiving separate or additional compensation (other than reimbursement for costs) for such representation.

12. In any administrative appeal proceeding relating to the Arizona Health Care Cost Containment System, an individual may be represented by a duly authorized agent who is not charging a fee for the representation.

13. In any administrative matter before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, a taxpayer may be represented by (1) a certified public accountant, (2) a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), or (3) in matters in which the dispute, including tax, interest and penalties, is less than \$5,000.00 (five thousand dollars), any duly appointed representative. A legal entity, including a governmental entity, may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

14. If the amount in any single dispute before the State Board of Tax Appeals is less than twenty-five thousand dollars, a taxpayer may be represented in that dispute before the board by a certified public accountant or by a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1).

15. In any administrative proceeding pursuant to 20 U.S.C. § 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a party may be represented by an individual with special knowledge or training with respect to the problems of children with disabilities as determined by the administrative law judge, and who is not charging the party a fee for the representation. The hearing officer shall have discretion to remove the individual, if continued representation impairs the administrative process or causes harm to the parties represented.

16. Nothing in these rules shall limit a certified public accountant or other federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), from practicing before the Internal Revenue Service or other federal agencies where so authorized.

17. Nothing in these rules shall prohibit the rendering of individual and corporate financial and tax advice to clients or the preparation of tax-related documents for filing with governmental agencies by a certified public accountant or other federally authorized tax practitioner as that term is defined in A.R.S. § 42-2069(D)(1).

18. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision

of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).

19. Nothing in these rules shall prohibit the supreme court, court of appeals, superior courts, or limited jurisdiction courts in this state from creating and distributing form documents for use in Arizona courts.

20. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

21. Nothing in these rules shall prohibit the preparation of tax returns.

22. Nothing in these rules shall affect the rights granted in the Arizona or United States Constitutions.

23. Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity.

24. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. This exemption is not subject to paragraph (c) of this rule, as long as the disbarred attorney or member has been certified as provided in § 7-208 of the Arizona Code of Judicial Administration.

25. Nothing in these rules shall prohibit a mediator as defined in these rules from preparing a written mediation agreement or filing such agreement with the appropriate court, provided that:

(A) the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or

(B) the mediator is participating without compensation in a nonprofit mediation program, a community-based organization, or a professional association.

In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of judicial Administration, Part 7, Chapter 2, Section 7-208.

26. Nothing in these rules shall prohibit a property tax agent, as that term is defined in A.R.S. § 32-3651, who is registered with the Arizona State Board of Appraisal pursuant to A.R.S. § 32-3642, from practicing as authorized pursuant to A.R.S. § 42-16001.

27. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

28. In matters before the Arizona Corporation Commission, a public service corporation, an interim operator appointed by the Commission, or a nonprofit organization may be represented by a corporate officer, employee, or a member who is not an active member of the state bar if

(A) the public service corporation, interim operator, or nonprofit organization has specifically authorized the officer, employee, or member to represent it in the particular matter,

(B) such representation is not the person's primary duty to the public service corporation, interim operator, or nonprofit organization, but is secondary or incidental to such person's duties relating to the management or operation of the public service corporation, interim operator, or nonprofit organization, and

(C) the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

Notwithstanding the foregoing provisions, the Commission or presiding officer may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented.

29. In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, an individual may be represented by a duly authorized agent who is not charging a fee for the representation, other than reimbursement for actual costs.

30. A person licensed as a fiduciary pursuant to A.R.S. § 14-5651 may perform services in compliance with Arizona code of judicial administration, Part 7, Chapter 2, Section 7-202. Notwithstanding the foregoing provision, the court may suspend the fiduciary's authority to act without an attorney whenever it determines that lay representation is interfering with the orderly progress of the proceedings or imposing undue burdens on other parties.

31. Nothing in these rules shall prohibit an active member or full-time employee of an association defined in A.R.S. §§ 33-1202 or 33-1802, or the officers and employees of a management company providing management services to the association, from appearing in a small claims action, so long as:

(A) the association's employee or management company is specifically authorized in writing by the association to appear on behalf of the association;

(B) the association is a party to the small claims action.

APPENDIX 5: Draft Administrative Order Implementing Licensed Legal Advocate Pilot Program

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
AUTHORIZING A LICENSED)	Administrative Order
LEGAL ADVOCATE PILOT PROGRAM)	No. 20__ - _____
)	
)	
)	

“Promoting Access to Justice” is Goal 1 of the Judiciary’s Strategic Agenda, *Justice for the Future: Planning for Excellence, 2019-2024*. The Task Force on the Delivery of Legal Services, established by Administrative Order 2018-111, was charged with reviewing the regulation of the delivery of legal services as well as examining and recommending whether nonlawyers, with specified qualifications, should be allowed to provide limited legal services.

At the same time the Task Force was pursuing its charge, the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law (i4J) brought graduate students, undergraduate students and over 50 members of the community together in i4J’s Innovating Legal Services course to explore a challenge framed as: “should Arizona create a new tier of civil legal professional, and what could that mean for survivors of domestic abuse?” The Innovating Legal Services course developed a proposal for a pilot program that would train lay legal advocates to become Licensed Legal Advocates (LLAs), able to legally advise DV survivors as they navigate Arizona’s civil legal system. The proposed pilot removes the barrier imposed by unauthorized practice of law restrictions, giving the LLAs the ability to handle specifically-identified legal needs of participants at Emerge! and enhancing those participants’ access to justice. The details of the pilot program are captured in a report titled *Report to the Arizona Supreme Court Task Force on Delivery of Legal Services: Designing a New Tier of Legal Professional for Survivors of Domestic Violence*, which was presented to the Task Force.

The Task Force found the pilot program was consistent with its charge. In October 2019, the Task Force recommended to the Arizona Judicial Council (AJC) that the Supreme Court establish the Licensed Legal Advocate Pilot Program. The AJC recommended adoption of the [report/recommendation].

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

IT IS ORDERED that:

1. The Licensed Legal Advocate Pilot Program shall run for a period of 24 months from the date of implementation.
2. Rule 31(d) of the Arizona Rules of Supreme Court is deemed modified as set forth in Appendix A for the duration of the Licensed Legal Advocates Pilot Program.
3. Licensed legal advocates may provide legal advice in the following areas:
 - a. Identifying urgent legal needs at intake and providing advice regarding next steps of action with respect to those needs;
 - b. Assisting self-represented DV survivors with the completion of DV and family law forms and providing legal advice necessary to adequately complete those forms;
 - c. Providing advice regarding preserving potential court evidence and preparing for court hearings and mediations; and
 - d. Assisting survivors at court hearings by being able to sit with the survivor and quietly advise them as requested by the survivor or the court.
4. Licensed Legal Advocates are subject to the Licensed Legal Advocates Rules of Professional Conduct, as set forth in Appendix B, adapted from the Arizona Rules of Professional Conduct for the duration of the Licensed Legal Advocates Pilot Program.
5. Qualifications of Licensed Legal Advocates are set forth in Appendix C.
6. A licensing exam for the Licensed Legal Advocates Pilot Program shall be developed and administered by the Certification and Licensing Division of the AOC, who shall oversee licensure of Licensed legal Advocates.
7. The Licensed Legal Advocate Pilot Program shall be administered by the Pilot Program Director in coordination with the AOC.

Dated this _____ day of _____, 20__.

ROBERT BRUTINEL
Chief Justice

Task Force on Delivery of Legal Services

Report and Recommendations

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October 4, 2019

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The State Bar *of California*

OPEN SESSION AGENDA ITEM 701 JULY 2019

DATE: July 11, 2019

TO: Members, Board of Trustees

FROM: Justice Lee Edmon, Chair, Task Force on Access Through Innovation of Legal Services
Randall Difuntorum, Program Manager, Office of Professional Competence

SUBJECT: State Bar Task Force on Access Through Innovation of Legal Services Report:
Request to Circulate Tentative Recommendations for Public Comment

EXECUTIVE SUMMARY

The Board of Trustees (Board) authorized the formation of a Task Force on Access Through Innovation of Legal Services (ATILS) to identify possible regulatory changes for enhancing the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. ATILS has prepared tentative recommendations presented as options under consideration by the Task Force. ATILS' further evaluation and refinement of these recommendations would benefit from public input. This item requests that the Board authorize a 60-day public comment period and a public hearing on the tentative recommendations under consideration by ATILS.

BACKGROUND

The ATILS project executes a specific item in the State Bar's strategic plan.¹ Goal 4, Objective d, of the strategic plan provides that:

¹ At its July 20, 2018, meeting, the Board of Trustees (Board) received a consultant's [Legal Market Landscape Report](#) and the consideration of this report led to the Board's decision to form a special Task Force. Professor William Henderson prepared the report that, in part, observed that: "ethics rules...and the unauthorized practice of law... are the primary determinants of how the current legal market is structured...."

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.

The following ATILS Task Force charter was prepared by staff and approved by the Board at its meeting on September 14, 2018:

The Task Force on Access Through Innovation of Legal Services (“ATILS”) is charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. A Task Force report setting forth recommendations will be submitted to the Board of Trustees no later than December 31, 2019. Each Task Force recommendation should include an explanatory rationale that reflects a balance of the dual goals of public protection and increased access to justice.

In carrying out this assignment, the Task Force should do the following:

1. Review the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public. In addition, assess the impact of the current definition of the practice of law on the use of artificial intelligence and other technology driven delivery systems, including online consumer self-help legal research and information services, matching services, document production and dispute resolution;
2. Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with nonlawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need; and
3. With a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.

ATILS is comprised of twenty-three members: eleven public members; ten lawyers; and two judges. Collectively, the expertise on ATILS includes but is not limited to knowledge and

experience in: legal services programs; artificial intelligence and “big data;” attorney professional responsibility and UPL; lawyer referral services; information technology and data security/privacy; online provision of legal information, document preparation and law-related services; paralegal and law office legal support services; and online dispute resolution. Two members of the Task Force are appointees nominated by the Legislature. Additionally, a liaison from the staff of the Supreme Court of California attends the ATILS meetings. State Bar assistance is provided by staff from the Office of Access & Inclusion, the Office of the Chief Trial Counsel, the Office of General Counsel, and the Office of Professional Competence.

Consistent with the charter’s three enumerated assignments, ATILS formed three subcommittees: an Unauthorized Practice of Law-Artificial Intelligence subcommittee (UPL/AI subcommittee); a Rules and Ethics Opinions subcommittee (Rules subcommittee); and, an Alternative Business Structures-Multidisciplinary Practice subcommittee (ABS/MDP subcommittee). ATILS has met five times and on each of these meeting dates both the entire Task Force and each subcommittee were scheduled to meet. In addition, in between these meetings, each subcommittee has held at least one additional meeting.

As part of its study, ATILS has received presentations² from persons knowledgeable in legal technology and access to justice (see table below).³

SPEAKER	BRIEF BIOGRAPHICAL INFORMATION	MEETING DATE⁴
IV Ashton	Founder and president of Houston AI	12/5/2018
William D. Henderson	Professor of law, editor of Legal Evolution, author of the Legal Market Landscape Report presented to the Board on July 20, 2018	12/5/2018
Kevin E. Mohr	Professor of law, former COPRAC Chair, former Rules Revision Commission consultant, member of ATILS	12/5/2018

² For the next ATILS meeting on August 9, 2019 in San Francisco, the following speakers are scheduled to make presentations: Colleen Cotter, Legal Aid Society of Cleveland, LSC grant recipient for technology in legal aid; Gillian Hadfield, Professor of Law and Professor of Strategic Management, University of Toronto; and Margaret Hagan, Director of the Legal Design Lab and a lecturer at Stanford University Institute of Design.

³ Written comments also were received from: Crispin Passmore (email dated February 26, 2019), a consultant with experience in the regulation of legal services in the United Kingdom; Cathy Sargent, (email dated March 26, 2019), Lawyers’ Mutual; Alex Guirguis (letter dated April 8, 2019), Off The Record, Inc.; Rilind Elezaj (email dated May 7, 2019), a search engine optimization specialist at Day Translations, Inc.; Jennifer McGlone (letter dated May 9, 2019), Director of Legal Affairs and Strategic Partnerships for Court Buddy, an online business offering unbundled legal services; and Genie Doi (email dated June 20, 2019), an immigration law practitioner. Copies of these comments are provided as Attachment B.

⁴ The ATILS meetings were webcast, including presentations of speakers, and the archived streams are available at [the State Bar website](#).

SPEAKER	BRIEF BIOGRAPHICAL INFORMATION	MEETING DATE⁴
Rebecca L.Sandefur	Faculty fellow and founder of the Access to Justice Initiative at the American Bar Foundation	4/8/2019
Alison Paul	Executive Director, Montana Legal Services Association	5/13/2019
Angie Wagenhals	Director of Pro Bono, Montana Legal Services Association	5/13/2019

At the ATILS meeting on June 28, 2019, the Task Force voted to submit its tentative recommendations to the Board with a request that public comment and a public hearing be authorized.⁵

DISCUSSION

TENTATIVE NATURE OF THE RECOMMENDATIONS

The ATILS tentative recommendations are intended to achieve the dual goals of public protection and increased access to justice. The recommendations are primarily concept or policy positions proposed for certain key regulatory issues. As concept recommendations, some of the proposals for changes in the law or regulatory structures will require details to be considered by a subsequent implementation body.⁶ Other recommendations, such as changes to the Rules of Professional Conduct, might not require consideration by an implementation body.

The tentative recommendations fall into three categories: general recommendations; recommendations for specific exceptions to the current restrictions on UPL; and Rules of Professional Conduct recommendations. The recommendations represent concepts and proposals that are under consideration by ATILS as a menu of options. This means that there are some recommendations that represent competing or alternate approaches to certain issues or policies (for example there are two inconsistent proposals for amending rule 5.4 (“Financial and Similar Arrangements with Nonlawyers”) of the Rules of Professional Conduct.

⁵ The complete list of tentative recommendations of the Task Force on Access Through Innovation of Legal Services are provided as Attachment A.

⁶ The method used for conducting an implementation study is itself a topic for consideration that should be pursued after any policy recommendations are determined. As one example of possible methods, see “Independent Regulator of Legal Services Policy Outline,” by Gillian Hadfield and Lucy Ricca, presented at IAALS Making History: Unlocking Legal Regulation Workshop, April 2019, posted online at: <https://worldjusticeproject.org/sites/default/files/documents/Independent%20Regulator%20of%20Legal%20Services%20Policy%20Outline.pdf> (last accessed: July 2, 2019). See also, Utah Supreme Court notice dated March 4, 2019 regarding a “regulatory sandbox” to test innovative legal service models and delivery systems, posted online at: <https://www.utahbar.org/wp-content/uploads/2019/03/A-Move-Toward-Equal-Access-3.pdf> (last accessed: July 2, 2019).

Having deliberated on the pros and cons of each recommendation, ATILS determined that each recommendation has sufficient merit for seeking public comment. Upon consideration of the public comment, ATILS will further consider and refine these recommendations. In the anticipated final report and recommendations, some of the tentative recommendations may be eliminated or consolidated; however, alternate proposals for certain issues or policies might remain included where, for example, a choice between those recommendations requires more information that can only be accomplished by a subsequent implementation study or regulatory design process.

REQUEST FOR PUBLIC COMMENT:

Although public comment circulation is not required because a change in the law is not presently requested, ATILS requests authorization to circulate the recommendation for a 60-day public comment period. ATILS believes that input from consumers, legal service providers, technology experts and lawyers is important for evaluating the tentative recommendations. The planned outreach efforts by ATILS include: contacting legal services providers; consumers groups; and using networks and social media.⁷ In addition to written public comment, ATILS requests authorization to hold a public hearing to receive oral testimony on the tentative recommendations. Preliminary plans have been made to facilitate the holding of a hearing on August 10, 2019 in San Francisco. This year the ABA Annual Meeting is being held in San Francisco from August 8 – 13 and attendees from across the country (including regulators and other stakeholders) would have a convenient opportunity to provide input on the ATILS recommendations by testifying at the hearing.

FORMAT OF THE RECOMMENDATIONS

Each of the ATILS recommendations include a statement of the recommendation itself, a brief statement of what the recommendation is intended to accomplish, and a summary of the pros and cons considered by ATILS. Depending on the specific recommendation, there may be introductory background or supporting documents that provide observations or analysis by the members of the Task Force or staff. For example, the recommendation concerning the issue of defining the “practice of law” in California is supported by a summary of relevant California laws.

LIST OF TENTATIVE RECOMMENDATIONS

General Recommendations

1.0 - The Task Force does not recommend defining the practice of law.

1.1 - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

⁷ For example, representatives of: the Access to Justice Lab programs at Harvard Law School, the Future of Lawyering Committee of the Association of Professional Responsibility Lawyers (APRL), and the California Lawyers Association have agreed to review the tentative recommendations during the public comment period.

- 1.2** - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.
- 1.3** - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Recommendations for Specific Exceptions to the Current Restrictions on the UPL

- 2.0** - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.
- 2.1** - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.
- 2.2** - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.
- 2.3** - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of “artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.
- 2.4** - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.
- 2.5** - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.
- 2.6** - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

Rules of Professional Conduct Recommendations

- 3.0** - Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- 3.1** - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1

amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

- 3.2** - Adoption of a proposed amended rule 5.4 [Alternative 2] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer's fee sharing arrangement with a nonlawyer.
- 3.3** - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.
- 3.4** - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.

GENERAL RECOMMENDATIONS – EXPLANATIONS AND PROS AND CONS:

1.0 - The Task Force does not recommend defining the practice of law.

Background: California Business and Professions Code section 6125 prohibits the UPL in California. The statutory scheme, however, does not define what constitutes the "practice of law." The common definition of the term can be originally found in *People v. Merchants Protective Corp.* (1922) 189 Cal. 531 as "the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure" and has been understood in practice to include legal advice and transactional legal services as well. *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128. This definition has been applied in an individualized fact specific manner, giving it sufficient agility to address the numerous, and oftentimes ever changing, factual circumstances where attempts to bypass the UPL rules have resulted in actual harm, or the substantial potential for harm, to members of the California public.

The Task Force, in reviewing the above, agrees that the current approach is sound and in the public interest. Thus, the Task Force's recommendations do not involve a change to existing rules or statutes as to the definition of UPL.

What will this recommendation do? – In connection with other recommendations that propose new exceptions to UPL permitting certain activities to constitute a safe harbor from UPL violations to promote innovation and new delivery systems, this recommendation clarifies that the existing definition of the practice of law will remain subject to Supreme Court interpretation notwithstanding anticipated regulatory changes to the rules and statutes that are the basis of current UPL violations.

Pros: This approach seeks to continue the current common law approach evidenced through a large body of case law going back almost a century, which demonstrate that protection of the public requires an agile definition to address numerous ways for actual and potential harm from UPL practitioners. Other attempts to codify the definition of the practice of law have not been successful. Attempting to codify the definition of the practice of law is not necessary to accomplish the Task Force's goals.

The safe harbor recommendation provides certainty for those meeting the criteria of the safe harbor.

Cons: The lack of a precise definition of either the practice of law or the unauthorized practice of law creates uncertainty for the public and potential providers.

Selected Resources: Attachment C – January 17, 2019 ATILS Task Force memorandum on UPL and the rules and statutes governing the practice of law; and a table of state case law for those states that have acknowledged the difficulty involved in attempting to define the practice of law.

1.1 - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

What will this recommendation do? – This policy will seek changes in the laws governing UPL to create a new exception permitting both for profit and not for profit entities to engage in specified activities in order to increase innovation and availability of legal services.

Pros: As found in Professor Henderson's [Legal Market Landscape Report](#), existing rules and regulations are a disincentive for nonlegal entrepreneurs to enter the legal market. (Legal Market Landscape Report, at page 21.) One likely disincentive is the existing California statutory law and case law which is the basis for the prohibition against a corporation (that is not a registered law corporation) operating a business in California to profit from the practice of law. Abrogating this restriction also would likely ameliorate the existing law disincentive. Notwithstanding this long- standing UPL prohibition, there is some limited precedence in regulating for-profit activities by entities. The rules governing professional law corporations

regulate for profit activities. Similarly, the rules governing certified lawyer referral services regulate for profit activities. To a lesser extent, in the multijurisdictional practice context, a for profit corporation may choose to hire an out-of-state corporate counsel who is not a full-fledged State Bar licensee. In addition, the Task Force believes that individuals in the middle class have access to justice concerns that could be addressed by the activities of a new form of for-profit provider. The success of online businesses, such as LegalZoom, provides anecdotal support for this proposition. Furthermore, to the extent for profit entities may already be engaging in these types of practices, providing regulatory parameters will improve public protection and the administration of justice.

Cons: This recommendation would mark a fundamental change in the ability of corporations to practice law in contrast to certain nonprofits that are currently authorized to practice law in California.

Nonprofit corporations may seek registration under the State Bar’s law corporation rules and other nonprofit activities are permitted under Supreme Court precedents but for profit business activity generally is limited to law corporations and limited liability partnerships registered with the State Bar. The ultimate strategic objective of the State Bar in conducting a study of regulatory reforms is to use technology to create access to justice for persons who presently cannot afford legal services under the current delivery systems (i.e., the traditional law firm model). Absent a thoughtful or directed regulatory framework, it is not clear that legal technology innovations developed in the for-profit sector would have a significant benefit to those impacted most by the justice gap.

Selected Resources: Attachment D – February 25, 2019 ATILS Task Force memorandum regarding expanding access to legal representation to consumers in civil matters involving critical human needs. Attachment E – Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access and Professionalism* (2016) Volume 29:1, The Georgetown Journal of Legal Ethics.

1.2 - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.

What will this recommendation do? – For those lawyers or law firms that might choose not to participate in reforms permitting fee sharing with nonlawyers or new UPL exceptions for regulated entities or individuals, this recommendation nevertheless encourages the use of technology to innovate and reduce costs in traditional law firm contexts that continue to offer consumers the option of obtaining legal and law-related services governed by the core principals of confidentiality, the attorney-client privilege, loyalty, competence, and independence of professional judgement.

Pros: The primacy of the judicial branch’s regulation over the practice of law and the administration of justice militate in favor of retaining the current regulatory paradigm of a lawyer as client representative and advocate, as an officer of the legal system and as a person having special responsibilities for the quality of justice. Lawyers, both as individuals and as members of law firms (defined in rule 1.0.1(c) to include an association authorized to practice law) are obligated to increase public access to legal services through innovation and technology (see Persky, *Home Grown* (June 2019) ABA Journal) in the same manner that lawyers and law firms are encouraged to increase access to justice, directly and in association with nonlawyers, through voluntary pro bono public services (see rule 1.0, Comment [5]), through projects for the appointment of legal counsel to represent low-income persons in identified areas of critical need (See Government Code § 68651) and through nonprofit public benefit and advocacy corporations (See Corporations Code § 13406(b) and *Frye v. Tenderloin Housing Clinic Inc.* (2006) 38 Cal.4th 23). This recommendation is intended to promote lawyers working in association with nonlawyers in the provision of cost-efficient legal and non-legal services either under a modified rule patterned after ABA Model Rule 5.7 or another regulatory model that fosters investment and development in technology-driven delivery systems, including but not limited to on-line legal services, Alternative Legal Service Providers (ALSPs) and an expanded role for paraprofessionals and nonlawyer specialists. (See rule 5.3.) This recommendation complements consideration of any potential reforms that might involve new regulatory models, such as an entity regulation model where a corporation or other organization, rather than an individual, is authorized to practice law under adequate public protection requirements, with the goal to increase access to justice.

Cons: Traditional lawyer regulation has not proven to foster innovation in the delivery of legal services, especially the types of innovative delivery models that might flow from enhanced competition. The slow evolution of the rules governing lawyers, including, but not limited to, lawyer advertising and solicitation, fee sharing/fee splitting, and UPL, are examples of regulatory reforms failing to keep pace with changes in the legal services market, including changes in the market driven by evolving innovation and technology and related consumer behavior and preferences.

Selected Resources: Attachment F – January 7, 2019 ATILS Task Force memorandum in part addressing the issue of “Why Lawyers are Regulated Under the Judicial Branch.”

1.3 - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Background: A framework for measuring the impact of the Task Force’s work is important and should be identified and articulated before implementation. The framework should allow benchmarks to be captured prior to making any changes to the system. See, for example, the

Drake Equation work that has been done at the Florida Justice Technology Center posted at: <https://floridajusticetechnologycenter.org/project/the-drake-equation/>.

What will this recommendation do? – In connection with the goal of the Task Force recommendations to increase access to justice, this recommendation will require a deliberate effort to identify and evaluate metrics that can assess the actual impact of any of the recommended reforms on access to legal services, including but not limited to the justice gap.

Pros: Absent a plan and methodology for capturing data and applying measures to evaluate the impact of regulatory changes, there would be no reliable way of knowing whether regulatory changes are having any positive effect on the access to justice crisis. Particularly where the providers to be regulated are developing technology-driven delivery systems, the regulator’s plan and methodology for capturing data and applying quantitative and qualitative metrics should be considered by the providers at the time that the technology itself is being developed. In addition, the details of the regulatory changes should be thoughtfully considered to determine whether rules should require certain data collection and reporting, as long as such requirements do not unduly burden user privacy or data security.

Cons: Development of strategic data collection and metrics likely will involve the cost of retaining expert consultants and vendors who possess the resources and skills to design reasonable and realistic benchmarks. Similar costs should be anticipated for the ongoing periodic analysis of the data. Lastly, a culture of evaluation and improvement assumes that changes will be made based on what is learned and this can be very challenging in a regulatory environment.

RECOMMENDATIONS FOR SPECIFIC EXCEPTIONS TO THE CURRENT RESTRICTIONS ON UPL – EXPLANATIONS AND PROS AND CONS

These recommendations would add exceptions to the existing restrictions on UPL to permit provision of specified services by regulated persons or entities. Recommendations 2.0 and 2.1 are not limited to activities by an entity or by technology-driven delivery systems. Recommendations 2.2–2.6 are limited to activities by an entity using a technology-driven delivery system. The Task Force is considering all of these options for regulatory reform with the goal of public protection and increasing access to legal services through innovation.

2.0 - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

Background: Unlike the entity regulation model contemplated by Recommendations 2.2–2.6, this recommendation describes a policy that would permit regulated nonlawyers to provide specified legal advice and services without a requirement that the delivery system be

technology-driven. For example, it would encompass nonlawyers practicing as limited licensed legal technicians⁸ similar to the nonlawyer provider program implemented in [Washington State](#).

Task Force Discussion Points on Options for Regulation: The Task Force engaged in an in-depth discussion about the ways in which individual nonlawyers who offer certain types of legal services might be regulated in order to ensure public protection. According to the research Professor Rebecca Sandefur presented to ATILS, members of society are faced with a growing number of legal problems, some with severe adverse legal consequences to their livelihood and well-being without even knowing they have a legal problem or that they may have legal recourse in the civil justice system. Her report shows that statistically middle income persons often turn to family members or to nonlawyers in their network of acquaintances for advice. They seldom involve lawyers or they do nothing and accept the consequences as bad luck or part of life. Lawyers are believed to be out of reach to many mainly because of cost. See:

http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf

In light of this, the Task Force reached a general consensus that allowing qualified nonlawyers to advise consumers on the existence of solutions for resolving legal problems in areas of critical need (e.g., housing, health and social services, domestic relations, domestic violence) could be justified as a limited exception to UPL. In light of this, the Task Force considered the following structural options for permitting nonlawyers to provide legal advice and services to consumers:

Option 1: Entity Regulation only

Under this option, if the Task Force (and ultimately the Court) were to implement an entity regulation model for the provision of legal services, quality control over nonlawyer individuals serving as employees of the regulated entities would be handled through the entity itself. The entity would be responsible for ensuring that its employees were complying with established standards for the provision of legal advice and services, and there would not be a parallel individual licensing scheme for nonlawyers. Under this option, nonlawyer individuals who seek to deliver limited legal services would have to establish an entity for this purpose.

⁸ Recommendation 2.0 is consistent with the conclusion reached in the Report of the State Bar of California Commission on Legal Technicians (July 1990) that, in part, states:

Issues of whether there is any role for those who are not attorneys to play in providing legal services directly to the public and, if so, the limits of that role, are obviously complex and susceptible to a variety of viewpoints. Public protection is, of course, paramount. At the same time, one may question whether the public is currently protected sufficiently under a system which results in some members seeking "unauthorized" assistance and encourages, or at least facilitates, unauthorized providers who operate outside the law.

Ultimately the Commission concluded that limited licensure of non-lawyers is a reasonable and worthwhile approach.

(Report of the State Bar of California Commission on Legal Technicians (July 1990), at p. 53. Copy is on file with the Office of Professional Competence.)

Option 2: Hybrid Entity/Individual Regulation

Under this option, a separate licensing scheme for nonlawyer individuals would be established, and nonlawyer individuals delivering the limited legal services under the regulatory scheme would be individually licensed under a separate licensing category from attorneys (like the nurse practitioner model). This could be administered by the State Bar, or another separate Board could be created to regulate these individuals. To the extent these new licensees also work for regulated entities, both the entity and the licensees would be separately regulated.

Option 3: Certification of Paraprofessionals/Exemption from UPL

Under this option, individuals who wish to serve as paraprofessionals could be certified upon a showing that they have met standards for training and qualification in the particular field. Once certified, these individuals would be permitted to provide limited legal advice and assistance as an exemption from the UPL statutes.

What will this recommendation do? – This recommendation recognizes that authorizing nonlawyers (such as limited license legal technicians) to provide specified legal advice and services is a category of UPL reform that merits exploration and should be considered as means for increasing access even if other recommendations would provide UPL exceptions for regulated entities or would allow fee sharing among lawyers and nonlawyers.

Pros: Expanding the number of individuals who may deliver certain legal services may increase access to those services by increasing supply, and also decreasing the price of those services. This recommendation would also balance that increased access with public protection by establishing a mechanism for regulating these nonlawyers that would ensure they are minimally competent to provide the services, and are accountable to consumers if they fall below established standards. Finally, clarifying the role nonlawyers may permissibly play will enable entities to more efficiently and with greater certainty deliver legal services to consumers.

Cons: This type of regulation requires a very delicate balance. Defining the permissible scope of practice for legal services delivered by nonlawyers may be challenging and could also lead to overregulation. Entities may be discouraged from employing nonlawyers to perform these tasks, or individuals may be hesitant to seek permission to deliver the limited services, if it is perceived that the qualifications are too onerous. On the other hand, if regulations are too lax, critical aspects of public protection, including the maintenance of client confidentiality and the avoidance of conflicts may be compromised.

2.1 - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

What will this recommendation do? – This policy will clarify the wide variety of regulated entities that would be permitted to provide specified legal, or law-related, advice and services, without a technology requirement (similar to Recommendation 2.0 that contemplates regulated individuals being permitted to render specified services), and that the particular regulations imposed would be tailored to the type of entity structure (e.g., lawyer and nonlawyer entity or 100 percent nonlawyer entity).⁹

Pros: In the legal industry, there is no existing definitive structure that has demonstrated an ability to spark technology-based innovation in delivering legal services to consumers. Experimentation with all options seems important for a thorough assessment, and regulatory reform methods, such as regulatory pilot programs, “sandbox” (<http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf>) or another controlled environment, may be considered. Different strategies for balancing public protection and innovation should be tailored to different structures. While a technology entity comprised of a majority of lawyer owners might be conducive to modest reforms that are similar to the regulation of a registered professional law corporation, that specific regulatory approach should not be considered as a “one-size fits all” paradigm for all possible structures and combinations.

Cons: A multiplicity of structures for different new providers that each have their own rules and regulations may result in consumer confusion and stifle consumer adoption of any one of those new market participants. Significant resources will be necessary to provide robust education and outreach to help consumers, as well as lawyers, understand the new regulatory structures and the public protection consequences of a consumer using, or a lawyer participating in, one or more of the new legal services providers. Multiplicity of practice structures may also challenge the regulator and the participants in determining which regulations apply to their practice structure. Even with the consumer interest being paramount, lawyers and judges should have a unique role in the delivery of legal services.

Selected Resources: Attachment G – June 18, 2019 Task Force memorandum of points discussed concerning various options for regulating entities or individuals permitted to render legal specified legal services.

⁹ By virtue of including this recommendation, ATILS is interpreting its charter as inclusive of recommendations for reform authorizing practice of law activities that do not inherently involve lawyer ownership or control. The charter’s inclusion of “ABS” and “MDP” structures led some ATILS members to wonder whether the charter implicitly limited the possible reforms to lawyer owned/controlled structures.

2.2 - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

What will this recommendation do? – This policy will change the laws governing UPL to create a new exception permitting specified legal advice and services to be provided by nonlawyer regulated entities that use technology to innovate and expand the delivery of legal services.

Pros: There are several pros to this approach: (1) members of the public have a way to identify providers that have been vetted by the regulating entity, removing their uncertainty in provider selection; (2) providing an exception to the UPL statute or rules will provide commercial certainty, thereby incentivizing innovation to increase and improve services to clients who fall within the access to justice gap; and (3) as proposed, this program will be self-funded and voluntary – thus, those who do not wish to participate and are comfortable operating under the existing definition of UPL without the safe harbor can continue to do so.

Cons: As with all technology, a new regulatory scheme will require development of new skill sets by the regulating entity that it may not currently possess, which will take time and money. The program will also require an initial set of seed funding in order to get the program up and running, so that the regulating entity is ready to go when the first wave of applicants submit their products. The regulatory scheme may stifle innovation.

2.3 - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of “artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

What will this recommendation do? – In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy provides that regulation will not be based on a definition of the term “artificial intelligence” because a definition is not needed and would likely be problematic given the evolving concept of artificial intelligence.

Pros: Artificial Intelligence “AI” is a rapidly evolving field without a specific definition or delineation. The term “AI” is often used as an umbrella/placeholder term in common usage further blurring its meaning. AI-driven systems may also incorporate human input or judgement. Defining AI for the recommendations could lead to unclear applicability as new technologies emerge and evolve. There is no logical reason to exclude technology solutions that may not be “AI driven.”

Cons: The limitation based on “legal technology” is vague, both in scope and in terms of the degree of technology/data required for qualification.

2.4 - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.

What will this recommendation do? – In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy will require those entities and their technology to abide by specified standards intended to balance public protection, for example, by requiring standards similar to the legal profession’s core values of confidentiality, loyalty, and independence of professional judgment.

Pros: This recommendation protects the public by requiring equivalent protections across all legal services, whether delivered by technology or human effort. These ethical standards should enable exploration of technologies in all areas of law, with case-by-case review by an expert panel. The Regulator will be required to provide information and guidance to technology providers. Ethical uniformity of the standards will also avoid favoritism of one type of provider over another.

Cons: Establishing ethical standards may limit technology architectures and design patterns available to technology providers. (For example, a service could receive data from two parties in a matter who are adverse to each other and merge that data to create a mediation settlement. However, that utility would likely be precluded by the duty of loyalty owed to each party.) Additionally, these standards may also impose significant regulatory costs. Overregulation may stifle innovation. While the public protection functions remain paramount, due care should be given for reasonably applying these ethical duties to technology providers.

Selected Resources: Attachment H – Task force discussion draft overview of “Standards and Certification Process for Legal Technology Providers;” and Task Force’s discussion draft of “Possible Rules for Technology Providers.”

2.5 - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.

What will this recommendation do? - In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy will require changes in the law to ensure that those entities and their technology preserve the client’s information through confidentiality and an

evidentiary privilege notwithstanding the fact that communications might be exclusively with nonlawyers.¹⁰

Pros: Imposing privilege will promote candor in legal communications with these programs thereby increasing the competency of the legal service provided. Creating privilege encourages the use of the technology. By building in these protections, the end-user cannot waive the privilege, except as specified by law, thereby protecting the user.

Cons: Extending protections like privilege to communications with technology providers engaging in practice of law activities may impose additional costs or restrict available technology architectures. Expanding protections like attorney-client privilege and a lawyer's ethical duty of confidentiality to technology providers may frustrate the administration of justice by shielding information from legal proceedings. It is also unclear if the extension of privilege protections to technology providers engaging in the practice of law activities will be respected at the federal level or outside of California. This may present significant risk and uncertainty to clients as to whether other jurisdictions can compel disclosure of their sensitive legal communications. Addressing and litigating these issues may create additional costs to technology providers. Lastly, the recommendation may be overly restrictive, depending upon the particular legal services delivery system, and whether there is or should be an expectation of confidentiality or privilege.

2.6 - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

What will this recommendation do? - In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy will require those entities to pay a registration or certification fee to fund the regulatory agency tasked with oversight, including the concept of fee scaling.

Pros: This approach would eliminate or reduce cost barriers for provision of low- or no-cost services to the public, and allow funding of the regulatory process on an equitable basis. Allowing scaled fees based upon how much the product addresses the access to justice gap incentivizes innovation that specifically addresses the need, and provides a potential alternative avenue for large revenue/profit companies that may balk at the scaled fee structure.

Cons: Disparity in the fee structure may seem unfair to those on the higher end of the fee spectrum. Such a fee structure may involve subjective judgment. Close qualitative distinctions on fee thresholds may be difficult to administer.

¹⁰ See the statutory privilege that protects a client's communications with a certified lawyer referral service, Evidence Code sections 965 – 968.

Each of the following recommendations involves changes to the rules. In some instances, rule language is provided. Any provided language is for illustration and discussion purposes only. The Task Force’s goal for these recommendations is to obtain input on the concept of the rule amendments and the policy changes underlying each proposal. The drafting of actual rule amendment language should follow the consideration of these policy issues.

RULES OF PROFESSIONAL CONDUCT RECOMMENDATIONS - EXPLANATIONS AND PROS AND CONS

3.0 - Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

What will this recommendation do? – To help lawyers be mindful of how technology can enhance the delivery of legal services, this amendment to existing rule 1.1 (Competence) would add a Comment to the rule stating that attorneys have a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

Pros:

1. Including a Comment to the competence rule, rule 1.1, that recognizes a lawyer’s duty to be familiar with and be competent in using relevant technology will alert lawyers to that duty and provide them with an incentive to adopt and incorporate useful technology in their practices. Such adoptions can have a beneficial effect on a practice’s efficiency, which can in turn lead to reduced costs that can be passed on to clients.
2. Although there are State Bar ethics opinions that have already embraced the substance of the proposed Comment, (see, e.g., State Bar Formal Opns. 2016-196; 2015-193; 2013-188; 2012-186; 2012-184; 2010-179), such opinions are merely persuasive. Further, those opinions, for the most part, rely on reasoning that depends on the interaction of various rules that can create confusion. A direct statement of the lawyer’s duty is preferable in providing the aforementioned incentives for lawyers to familiarize themselves with, and adopt available legal technology.
3. A Comment is preferable to black letter text. There are many different kinds of knowledge and skills that serve as the foundation for a lawyer’s competent delivery of legal services. For example, the [ABA MacCrate Report on Law Schools and the Profession \(1992\)](#) identified 10 separate skills and four values that every lawyer should possess. A black letter rule on competence should be more generally written, for example, it should identify the general components of competence, with comments included to flesh out the more generally-stated components. That is precisely what rule 1.1 does by defining “competence” in providing any legal service to mean that a lawyer applies “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Familiarity with the benefits and risks of using technology in providing legal

services is just one aspect of the knowledge and skills a lawyer must bring to bear in providing services to a client. The proposed Comment clarifies that.

4. Using a Comment to clarify the scope of a rule is preferable to the ABA Model Rule approach.¹¹ First, the Comment to ABA Model Rule 1.1 uses the word “should,” which is merely aspirational in nature. Such non-mandatory language is not appropriate in a disciplinary rule. Second, including a Comment similar to the Discussion section to former rule 3-110 is preferable to the Model Rule approach because such language could not be interpreted as adding to a lawyer’s duties, which is not a permitted use of a comment. Instead, using the syntax and general style of the former rule Discussion should be viewed as merely elucidating what the black letter of the rule encompasses. Explaining the scope of a rule’s application is an appropriate use of a comment. Moreover, that competence includes a familiarity with and appreciation of relevant technology is supported by several State Bar ethics opinions on this topic.
5. Importantly, a lawyer’s familiarity not only with the benefits of technology, but also its risks, (e.g., the risk of confidential client information being disclosed when using electronic means of communication) should also enhance client protection.
6. The addition of the Comment would bring California in line with a substantial majority of jurisdictions that have incorporated the ABA Model Rule Comment into their rules.

Cons:

1. Referring to the benefits and risks of technology use in the black letter text will more effectively educate lawyers on their duties when employing technology to provide legal services. Many lawyers will focus only on the black letter text and ignore the Comments.
2. It is possible that the Comment could have the opposite effect on lawyers and discourage them from adopting useful technology for fear of being held in breach of a duty if the technology is used incorrectly.

Selected Resources: Attachment I - Clean and redline versions of proposed new Comment [1] to rule 1.1 Competence.

¹¹ Model Rule 1.1, Cmt. [8], provides in relevant part: “To maintain the requisite knowledge and skill, a lawyer *should* keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” (Emphasis added)

The Task Force is proposing two alternate rule recommendation changes to rule 5.4, Recommendations 3.1 and 3.2. The Task Force proposes that both versions of the rule 5.4 revisions be circulated for public comment in an effort to gauge public input on the narrow approach of Alternative 1 (Rec. 3.1) and the broader approach of Alternative 2 (Rec. 3.2). The Task Force is open to both approaches and welcomes input on both versions to help inform further consideration and preparation of a final ATILS report and recommendations.

3.1 - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may share legal fees with a nonlawyer and may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

What will this recommendation do? – With the objective of removing some of the financial barriers to the collaboration of lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this amendment to rule 5.4 will expand the exception for fee sharing with a nonprofit organization and will permit a lawyer to practice in a firm in which a nonlawyer holds a financial interest so long as certain requirements are met.

Background: The proposed revisions to rule 5.4 Alternative 1 are intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology. Underlying the Task Force efforts is the understanding, from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services. The Task Force reasons that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services, this deterrent to the adoption of technology will be removed and the concomitant practice efficiency enhancements will increase access to legal services.

There are four proposed amendments. First, the Task Force recommends that current paragraph (b)(5), which permits a lawyer or law firm to share with or give court-awarded

fees to a nonprofit organization¹² be expanded to permit such sharing or giving of legal fees to a nonprofit organization regardless of whether the fees have been awarded by a tribunal. Second, the Task Force recommends the addition of a sixth exception to paragraph (a)'s fee sharing prohibition, new subparagraph (a)(6), which would permit fee sharing in a law firm in which nonlawyers hold a financial interest so long as the lawyer or law firm has complied with each of the requirements of paragraph (b). Paragraph (b), which replaces paragraph (b) of current rule 5.4, prohibits fee sharing in a law firm in which nonlawyers hold a financial interest unless each of the requirements set forth in subparagraphs (b)(1) through (b)(6) have been satisfied. Third, paragraph (d) is substantially revised to conform it to the changes made to paragraph (b). Fourth, new Comment [4] has been added, and current Comments [4] and [5] renumbered [5] and [6], respectively.

It is important to note that paragraph (b) is substantially more limiting than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to “assist” the firm’s lawyers in the firm’s sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature, e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.

Selected Resources: Attachment J – Clean and redline versions of proposed rule 5.4 [Alternative 1] and June 18, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 1] pros and cons.

3.2 - Adoption of an amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.

What will this recommendation do? – To promote broad flexibility in the financial arrangements among lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this expansive revision of rule 5.4 would permit fee sharing with a nonlawyer, including compensation paid to a nonlawyer for client referrals, so long as the client provides informed written consent.

¹² The Task Force welcomes public comment on the issue of whether “nonprofit organization” ought to be limited to a 501(c)(3) corporation.

Background: The proposed revisions to rule 5.4 Alternative 2 are meant to create a major shift in rule 5.4 around ownership and fee sharing with very limited regulation. Innovation requires changes in perception, new knowledge, and often unexpected occurrences. It requires collaboration, multi-disciplinary participation and funding/investment. Expecting new innovation in access to justice to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in access to justice. In fact, a recent survey has suggested that the access to justice gap has continued to increase, suggesting that a major shift in the legal field is necessary to disrupt the continuing access to justice crisis.

The Task Force's charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is nonlawyer ownership or investment - a specific area the current rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the Task Force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to "ensure that the recommendations of the Task Force are focused on protecting the interest of the public." Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of access to justice needs go unmet. The statistics evidencing the failure to meet the access to justice needs are immense and well documented.

The Alternative 2 proposed rule revision invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. In establishing ATILS, the State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for access to justice.

Pros:

1. The proposed Rule provides for highly skilled and trained individuals with unique skill sets not common to lawyers to be properly vested and incentivized by partnering with lawyers in a multitude of ways.
2. The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided to the public.
3. The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.
4. The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.

5. The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
6. The proposed Rule provides for the inclusion of oversight by a licensed legal professional.

Cons:

1. There is no mechanism for regulating nonlawyers under this proposal because it does not provide the incentives as in rule 5.1 and 5.3 for lawyers to supervise the conduct of nonlawyers.
2. Little or no concrete evidence that this proposal would increase access to justice.

Selected Resources: Attachment K – Clean and redline versions of proposed rule 5.4 [Alternative 2] and June 14, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 2] pros and cons.

3.3 - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

What will this recommendation do? – If a new rule is ultimately adopted, this recommendation could enhance access to justice in California by promoting the delivery of law related services by lawyers and law firms because the applicability of attorney professional responsibility standards to such services would be clarified by the new rule.

Background: The Task Force is not making a specific recommendation as to whether the Board should adopt a rule patterned on Model Rule 5.7. Rather, given that the State Bar’s recent comprehensive rule revision project considered Model Rule 5.7 but did it include a version of that rule in the rules adopted by the Board and submitted to the Supreme Court, the Task Force is interested in public comment on the specific issue of a possible variation of Model Rule 5.7 that could promote innovation, particularly in the area of lawyer and nonlawyer delivery of law-related services.

Pros: A version of Model Rule 5.7 has the potential to promote innovation because the rule would likely include a definition of “law-related” services and clarify the duties of lawyers when such services are provided separately from any provision of “legal” services. The rule could prevent client confusion regarding the protections a client can expect when a lawyer—whether through the lawyer’s law firm or a separate entity—provides ancillary law-related services. Such a rule could also require the lawyer to inform the client as to whether such law-related services would have any of the protections ordinarily present when legal services are being rendered, thus enhancing client protection.

Cons: California case law and advisory ethics opinions specifically address the duties of lawyers when providing law-related services and carefully account for differences in the facts and circumstances of particular matters. As a general proposition, this includes the longstanding policy that the authorities that govern attorney conduct in California apply to an attorney acting in a fiduciary relationship, regardless of whether the attorney is acting in his or her capacity as an attorney in a particular matter (see *Worth v. State Bar* (1976) 17 Cal.3d 337, 341). Any development of a new rule based on Model Rule 5.7 might present a challenge in codifying or changing the public protection presently found in California case law. In this area of attorney conduct, a one-size-fits-all rule might not afford adequate public protection.

Selected Resources: Attachment L – July 1, 2019 ATILS Task Force memorandum regarding background information in support of the ATILS recommendation to consider a new rule similar to ABA Model Rule 5.7. Attachment M – June 18, 2019 staff memorandum regarding ethics opinion related to ABA Model Rule 5.7 and currently circulating for public comment.

3.4 - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.

What would this recommendation do? – If rule changes are ultimately adopted, this recommendation could improve public awareness and understanding of the legal dimensions of various issues, such as common landlord-tenant problems, because the advertising and solicitation rules would be revised in ways that foster innovative online delivery of legal services and the online marketing of such services.

Background: The Task Force is not making a specific recommendation as to whether the Board should adopt amendments to rules 7.1–7.5 (re advertising and solicitation). Rather, given that the ABA revised the Model Rules on advertising and solicitation after the Rules Revision Commission completed its comprehensive rule revision project and the Supreme Court had approved its recommended revisions to those rules, the Task Force is interested in public comment on the specific issue of whether the latest versions of these Model Rules, and versions recently adopted in other jurisdictions, offer possible changes that would enhance the free flow of accurate information to consumers of legal services. Such a result would be particularly relevant in light of anticipated new and future innovations in the delivery of legal services. The Task Force is also interested in public comment on the versions of the analogous rules proposed in the 2015 and 2016 reports of the Association of Professional Responsibility Lawyers, which were the impetus for the ABA’s 2018 revisions to the Model Rules.

Pros: In part, the 2018 ABA revisions to the advertising rules: repeal rule 7.5 and move some of the content concerning firm names and letterhead to the Comments to rule 7.1; repeal rule 7.4

and move some of the content concerning fields of practice and specialization to rule 7.2 and the Comments to rule 7.2; and amend the concept of prohibited direct contact solicitations to focus on the concept of “live person-to-person contact” rather than the concept of “real-time electronic communication,” which had caused numerous application issues with respect to technological advances. Generally, these changes reduce and streamline the regulatory burden imposed on lawyer advertising. In particular, removing the restriction on real-time electronic communication could facilitate development of innovative online delivery systems that primarily utilize electronic communication for both the marketing and delivery of online legal services.

Cons: Considering changes to California’s attorney advertising rules at the present time would be premature. Up until November 1, 2018, the California advertising rules were not based on the ABA Model Rules. Because the change to rules based on the ABA Model Rules is new in California, implementation of further revisions could be disruptive of steps recently taken by lawyers and law firms to comply with the new California rules. Moreover, the California appellate courts and ethics opinion committees have not yet had an opportunity to interpret and apply the new rules. Interpretation of the new versions of the California rules by courts and ethics committees could be very informative of any further revisions.

Selected Resources: Attachment N – July 1, 2019 Task Force memorandum regarding background information in support of the ATILS recommendation to consider revised rules 7.1–7.5 similar to ABA Model Rules 7.1–7.3.

FISCAL/PERSONNEL IMPACT

There is no unbudgeted fiscal or personnel impact for authorizing the requested for public comment period. The cost of a public hearing will be absorbed by the Office of Professional Competence budget.

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 4. Support access to legal services for low-and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

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.

RECOMMENDATIONS

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees hereby authorizes a 60-day public comment period and a public hearing on the tentative recommendations of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed changes.

ATTACHMENT(S) LIST

- A. The complete list of tentative recommendations of the Task Force on Access Through Innovation of Legal Services.
- B. Full text of public comments received.
- C. January 17, 2019 ATILS Task Force memorandum on UPL and the rules and statutes governing the practice of law; and a table of state case law for those states that have acknowledged the difficulty involved in attempting to define the practice of law.
- D. February 25, 2019 ATILS Task Force memorandum regarding expanding access to legal representation to consumers in civil matters involving critical human needs.
- E. Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access and Professionalism* (2016) Volume 29:1, The Georgetown Journal of Legal Ethics.
- F. January 7, 2019 ATILS Task Force memorandum in part addressing the issue of "Why Lawyers are Regulated Under the Judicial Branch."

- G.** June 18, 2019 Task Force memorandum of points discussed concerning various options for regulating entities or individuals permitted to render legal specified legal services.
- H.** Task force discussion draft overview of “Standards and Certification Process for Legal Technology Providers;” and Task Force discussion draft of “Possible Rules for Technology Providers.”
- I.** Clean and redline versions of proposed new Comment [1] to rule 1.1 Competence.
- J.** Clean and redline versions of proposed rule 5.4 [Alternative 1] and June 18, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 1] pros and cons.
- K.** Clean and redline versions of proposed rule 5.4 [Alternative 2] and June 14, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 2] pros and cons.
- L.** July 1, 2019 ATILS Task Force memorandum regarding background information in support of the ATILS recommendation to consider a new rule similar to ABA Model Rule 5.7.
- M.** June 18, 2019 staff memorandum regarding ethics opinion related to ABA Model Rule 5.7 and currently circulating for public comment.
- N.** July 1, 2019 Task Force memorandum regarding background information in support of the ATILS recommendation to consider revised rules 7.1–7.5 similar to ABA Model Rules 7.1–7.3.



The State Bar of California

Task Force on Access Through Innovation of Legal Services

To: The Board of Trustees, State Bar of California
From: Task Force on Access Through Innovation of Legal Services
Date: July 2, 2019
Re: The Complete List of Tentative Recommendations

The Task Force on Access Through Innovation of Legal Services requests authorization to circulate for a 60-day public comment period the following tentative recommendations:

General Recommendations

- 1.0** - The task force does not recommend defining the practice of law.
- 1.1** - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.
- 1.2** - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.
- 1.3** - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Recommendations for Specific Exceptions to the Current Restrictions on the Unauthorized Practice of Law

- 2.0** - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.
- 2.1** - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.
- 2.2** - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.
- 2.3** - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of

“artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

- 2.4** - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.
- 2.5** - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.
- 2.6** - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

Rules of Professional Conduct Recommendations

- 3.0** - Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- 3.1** - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.
- 3.2** - Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.
- 3.3** - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

- 3.4** - Adoption of revised California Rules of Professional Conduct 7.1 - 7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1-7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.



The State Bar *of California*

Task Force on Access Through Innovation of Legal Services

To: Board of Trustees
From: Task Force on Access Through Innovation of Legal Services
Date: July 2, 2019
Re: Public Comments Received by the Task Force

The following are public comments received by the Task Force as of June 27, 2019:

Public Comment Letters Received

- Crispin Passmore, Passmore (February 26, 2019)
- Cathy Sargent, Lawyers' Mutual (March 26, 2019)
- Alex Guirguis, Off The Record, Inc. (April 8, 2019)
- Rilind Eleza, Day Translations, Inc. (May 7, 2019)
- Jennifer McGlone, Court Buddy (May 9, 2019)
- Genie Doi, immigrate.LA (June 20, 2019)

From: ATILS

Sent: Tuesday, February 26, 2019 2:34 PM

To: McCurdy, Lauren

Subject: ATILS: Email Comment on Model Rule 5.7 and Law Related Services

ATILS Task Force Members:

See email comment below from Crispin Passmore on the topic of Model Rule 5.7 and law related services, received and shared by Bridget Gramme.

--

Lauren McCurdy | Program Supervisor

Office of Professional Competence

[The State Bar of California](#) | 180 Howard St. | San Francisco, CA 94105

415.538.2107 | lauren.mccurdy@calbar.ca.gov

Working to protect the public in support of the mission of the State Bar of California.

Please consider the environment before printing this email.

From: Bridget Gramme [mailto:bgramme@sandiego.edu]

Sent: Tuesday, February 26, 2019 11:39 AM

To: McCurdy, Lauren

Subject: Re: ATIL task force - Model Rule 5.7

"If I were at the meeting as a member of the public and allowed to speak (I like that you do that) the point I'd be making is that the paper is very focused on lawyers.

It considers consumer protection only by saying that lawyers must in effect say to clients 'look, this service isn't ethical because I am not acting as a lawyer' but that isn't to my mind a real consideration of the consumer or public interest but one of dressing up protectionism as public interest/consumer protection; or suggesting that lawyers are the only ethical way to get law like service. It is almost designed to persuade clients not to go to a non lawyer service. To me a proper consideration of the consumer interest in this issue takes into account two different key points.

First is that too many individuals and small business don't get access to legal services. There is no point having perfect protection for those that make it if the unintended (or intended!) consequence is to keep the market small and exclude the majority of those that would benefit from advice and assistance. If a new rule encouraged as well as allowed firms to offer wider services then we might see new ways of reaching this currently excluded group. That is crucial to economic growth from small business as well as tackling poverty. There is great research in UK on small business legal need in particular. (see <https://research.legalservicesboard.org.uk/news/latest-research-18/> - The LSB commissioned research on small business legal need in 2013, then repeated in 2015 and 2017. This brings all of that together. The data is actually publicly available too but the reports are pretty comprehensive.)

Second is that it looks at MDPs only from the law firm end. Regulators and professions need to deal with whole market rather than just look at their narrow professional practice. So many businesses are in reality offering law like services in most of the

ATTACHMENT B

world. Accountancy firms, small business advisors and trade unions are just obvious examples: they find a way around the rules in most jurisdictions where there is money at stake. The effect of that is that innovation happens to benefit of big clients with money but is never available to poorer individuals and smallest business. One issue in the rule making is to think about how a non-law firm would be allowed to have solicitors added to their services - rather than just how are law like services added to regulated law firms."

Crispin Passmore
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Public Comment - Email Received from Cathy Sargent

From: Cathy Sargent [<mailto:sargentc@lawyersmutual.com>]

Sent: Tuesday, March 26, 2019 11:18 AM

To: Joanna Mendoza

Subject: Technology, the law, and access to justice

Dear Joanna,

I hope all is well with you and I wanted to pass along some information I gleaned while attending an Access to Justice Conference hosted primarily by incubators and access to justice professionals.

The 5th Annual Access to Justice Conference (AC2J2019) held in Utah this year, accentuated the *necessity of technology* and highlighted the many ways it can be used to make a practice more efficient, thus cost effective and available to the public who need low cost services. During the opening plenary session, **Supreme Court Justice Himonas** announced that Utah will be the first state to have “licensed” paralegals in 3 areas—family law, unlawful detainer and small claims—they have training at law schools, testing and licensing requirements. They are also first court to adopt “Pajama Court” as it has been affectionately named where it will be mandatory for small claims to be handled online 24/7 at anytime and anywhere. The parties are given 48 hours to resolve it and if not, an online facilitator is appointed to resolve it within 21 days. This project is in a 1- year trial and 43 other states are watching the outcome. If it is positive, they may adopt and are also looking to develop an interstate data base to share experience and knowledge with this program. *As far as technological innovation, they are borrowing from the FINTECH model and have a vision of asking tech companies to come to the Utah Bar/ Supreme Court, so they can evaluate and set parameters to protect the public and avoid the unauthorized practice of law (much like the current CA committee studying the same issues). The Utah Report on what this would look like is due June 2019.* Finally, they will have “Form Reform,” changing and simplifying all court forms to an 8th grade English standard level and putting them online for public use and access. A second Utah Supreme Court Justice Melissa Hart opened with “lawyers hate change” and believes that Incubators are the space that has and will continue to disrupt the practice of law in positive way. She believes that incubator law firms (who almost exclusively use technology) will be how future law firms operate. Her vision of disruption includes eliminating the billable hour, the Bar collecting hours of pro bono hours from lawyers at registration, and pricing transparency and predictability in the form of subscription fees.

Just and FYI as I know these issues are important to you and Utah may have some great ideas and thus eliminate the need to reinvent the wheel when it comes to how California may want to approach it.



Cathleen Sargent, Esq.

Vice President, Development & Outreach

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Seattle, WA 98104
Tel: 425-698-0778
<https://offtherecord.com>

Joanna Mendoza and Task Force Members
Task Force on Access Through Innovation of Legal Services
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Ms. Mendoza and Task Force Members,

Thank you for giving us the opportunity to share our thoughts on the current rules and, further, for lending an ear to what we believe would be valuable changes to those rules. While I am not a lawyer, having worked in the industry for the last five years, I believe the proposed changes to the California Rules of Professional Conduct described below would benefit all parties involved - lawyers would benefit from increased demand for their services; consumers would benefit through increased transparency, greater choices and more competitive pricing; and innovators would benefit by being confident the technology they are building will not be held back by outdated rules.

[Off The Record](#) (OTR) is a service that connects consumers looking to fight a traffic ticket with a local, qualified lawyer. Currently, less than 5% of the yearly 41 million tickets are contested. My co-founders and I started OTR back in 2015 after receiving unfair traffic tickets in Oregon. We did not initially set out to build such a service, but it soon became obvious that fighting these tickets was almost impossible. We searched for lawyers the traditional way, but the majority didn't bother returning our calls. Those who did, quoted us upwards of \$1,000 to fight a simple, common speeding ticket. It dawned on us that something was broken.

Here we are, four years later, and we've helped tens of thousands of drivers successfully fight their traffic tickets in 30 states. We have a 97% success rate across the country and we've earned a stellar reputation, as our [Google](#) and [Facebook](#) reviews make obvious (4.5+ out of 5 stars with 1000+ reviews). In fact, we have earned more and better reviews than our largest law firm competitors and solo practitioners alike, despite some of them having been around decades. Beyond that, our entry into a market actually drives down the cost to contest a ticket. This is something we are particularly proud of as it puts legal services within the reach of more consumers. It also provides more business for the participating attorneys. We see these as very promising signs.

Growth for OTR starts with the consumer. With two of our founders coming from the world's most customer-centric company, Amazon, we've worked extremely hard to create a quality consumer experience that earns and keeps consumer trust. And yet, our business would not exist without attorneys. Consequently, we've worked hard to ensure that lawyers feel comfortable participating on the platform. Despite our best efforts with lawyers and the legal

sector, one of the main impediments to our continued growth is the rules governing how lawyers can interact with non-lawyers.

Rethinking the RPCs

We write today to provide some suggested changes to the California Rules of Professional Conduct that would simplify our interactions with lawyers, allow us to grow the number of lawyers we work with, and, ultimately, help more people get access to the legal services they need.

As technology builders and innovators first, and RPCs experts only by necessity, we're most focused on the rules that pose the greatest immediate impediments to growing our business. Therefore, beyond the specific changes we propose below, we acknowledge that (a) there are other rules that either must be changed to make them consistent with the changes we propose here, and (b) there are probably rules that impact less integral parts of our business which we haven't yet realized need to be changed. As a result, we've included links to some articles that we believe reflect additional changes that you should explore but for which we haven't had the need or resources to draft specific proposed changes.

New Proposed Model Rule 5.4

Add new definition:

Definition of LMS (included in rule 5.4 if not included elsewhere in the rules): A Legal Matching Service or LMS is a lawyer matching service, a lawyer referral service, or other similar organization that refers, connects, or matches consumers to lawyers or facilitates the creation of attorney-client relationships between consumers and lawyers. An LMS may or may not be owned by lawyers or non-lawyers in whole or in part and does not engage in the practice of law.

New Proposed Rule:

- (a) A lawyer or law firm may share fees with an LMS provided:
 - (1) A lawyer or law firm enters into a written** agreement with LMS to share the legal fees and prior to the consumer engaging with the LMS the consumer has consented in writing** to the fact that a division of fees will be made.
 - (3) The total fee charged to the consumer is not increased solely by reason of the agreement between the lawyer and the LMS to divide fees.
 - (4) The lawyer does not permit the LMS to influence the lawyer's professional judgment in the delivery of legal services to the consumer.

**Such agreement may be executed by any generally accepted commercial means, including electronically.

Lawyer Referral Service Rules

Given that the proposed changes above explicitly incorporate the notion of a lawyer referral service, we further recommend that the lawyer referral rules be stricken entirely. As [this post](#) describes in detail, one main reason for the emergence of lawyer referral services was a way for bar associations to get around the legal profession's pre-*Bates* prohibition on advertising. Today, thanks to *Bates*, lawyers can advertise. And, thanks to the internet, consumers can tap conventional wisdom, the wisdom of crowds, and/or sophisticated AI-driven algorithms to recommend lawyers.

Eliminating the lawyer referral service rules would also allow consumers of legal services to leverage the same transparency they enjoy in other sectors. Whether in transportation (via driver ratings on Uber or Lyft), hospitality (via hotel and host ratings on Expedia or AirBnB), restaurants (via Yelp), or any other service provider and product (via Google and/or Amazon), it's not just that consumers aren't deceived (risk of deception in the referral being another reason that lawyer referral services emerged) they find these services incredibly valuable.

Ethics Opinions

We also recommend that the California Bar rethink the practice of issuing ethics opinions. More often than not, these opinions act as a chill on innovation and, frankly, lawyer commercial speech. Time and time again lawyers have quoted these opinions or offered their varying interpretations of these opinions to us as an excuse for not trying new marketing methods or engaging with new innovative services. Note further that many of these opinions, which emerge from different states and yet interpret the same issues, result in entirely different conclusions. This creates a confusing and contradictory landscape for lawyers in states where the issue hasn't been formally addressed or for lawyers in a multijurisdictional practice situation (an increasingly common situation these days), services like ours that work across borders, or jurisdictions that are late to addressing the question and want to see consistency in what's been done. Finally, because of concerns that lawyers will rely upon these opinions ethics committees almost always adopt the most conservative interpretation in drafting and issuing ethics opinions. Expanding access will require that lawyers take some risks. The regular drumbeat of "no" from conservative ethics opinions chills those efforts.

Other Rule Changes

As we stated earlier, there are likely other rules that need reconsideration. Here are a few links to some articles that provide suggestions about rules and regulation that we support at least in spirit:

- [3 Ways to Tweak the Lawyer Regulatory Rules Now](#)
 - Rule 1.15 and Rule 5.4
- [5 Wishes for Attorney Regulation Reform](#)
- [On "Lawyer Referral Services"](#)
 - On lawyer referral service rules
- [The Awful No Good, Rule 7.2](#)
 - Rule 7.2
- [What Should Attorney Advertising Regulation Look Like?](#)

- Rules 7.1, 7.2, 7.4, and 7.5.

We at OTR are just one of hundreds of such startups attempting to bridge the gap between the demand for legal services and lawyers willing to help. As such, we want to thank the Task Force again for this opportunity to share our thoughts about the evolution of legal regulation. With technology rapidly changing the face of the world we know, and the California Bar stepping into a brave new era with its recent changes, now is the time to reexamine how technology and regulation can go hand in hand to help lawyers build strong businesses, protect consumers, and expand access to the legal system. We at OTR are excited by these times and by the efforts of this Task Force. We stand at the ready to answer any questions about this letter or assist in any way that we can.

Thank You,

Alex Guirguis

Alex Guirguis
Chief Executive Officer
Off The Record, Inc.

Public Comment - Email Received from Rilind Eleza

From: Rilind Elezaj [<mailto:relezaj@daytranslations.com>]
Sent: Tuesday, May 7, 2019 8:04 AM
To: Mccurdy, Lauren
Subject: How Technology will Transform Legal Services

Dear Lauren,

Technology has touched every facet of life and work, from businesses and industries to services, such as legal services, healthcare, communication, education and more.

Lawyers and attorneys are able to serve their clients better and faster because they can optimize the processes and workflows at every stage of delivery or service. Digital transformation helps them to be more flexible and offer more value to their clients, improving their business impact and revenue.

I noticed your page on [how technology affects legal services](https://www.daytranslations.com/blog/2019/04/future-legal-services-technology-transforms-industry-13794/) and I wanted to suggest the following article of ours: <https://www.daytranslations.com/blog/2019/04/future-legal-services-technology-transforms-industry-13794/>

I think your readers would like to understand our key points and how technology will transform legal services.

Let me know if you could share this with your readers.

Best,
Rilind Elezaj

Rilind Elezaj
Human Powered Translations
Day Translations, Inc.
New York | Houston | Washington D.C. | Dubai



May 9, 2019

VIA EMAIL

Lori Gonzalez and Task Force Members
Task Force on Access Through Innovation of Legal Services
The State Bar of California
180 Howard Street
San Francisco, CA 94105
lori@raynacorp.com

Re: Court Buddy's Attorney And Client Insights For Task Force

Dear Lori,

Thank you for your time promoting the important work that the Task Force on Access Through Innovation of Legal Services (the "Task Force") is doing to address the access to justice gap that affects all Californians. We appreciate that the Task Force is considering what pilot programs might be adopted, and whether and how changes in the Rules of Professional Conduct and related guidelines, regulations, or opinions might foster innovation in, and expansion of, the delivery of legal services, especially to the vast majority of middle-class Californians who have legal needs that go unmet.

I. Court Buddy: Leveraging Technology To Effectively Address The Access To Justice Gap.

Court Buddy is a private, venture capital-backed company founded by attorneys for attorneys with the express intent of leveraging technology to address access to justice issues. We consider attorneys the "gold standard" and are on a mission to help as many people as possible find an attorney when they need one, regardless of their financial situation.

We understand that there are exponentially more California residents in need of legal services than there are California attorneys available to meet their legal needs, but we start by providing an automated online matching service for potential clients looking

for legal services. We have found that the automated matching of potential clients with attorneys practicing in their area of need is an invaluable first step.

Then, we utilize our platform, apps and tech features to help the attorneys and clients work together in a way that alleviates some of the biggest pain points for middle-class consumers of legal services. Our market research reveals that consumers are most concerned with: (1) finding attorneys available to help them, (2) overall cost and steep retainers, (3) the need for transparency and predictability when purchasing legal services, and (4) the need for targeted advice or services.

We also address many of the issues solo practitioners, small firm attorneys, and law school graduates in their first few years of practice face when they are looking to grow their practices. Year-over-year, solo practitioners and small firm attorneys identify their biggest issues as: (1) finding qualified, paying clients, (2) minimizing time spent on business development and administrative tasks such as fee-collecting, and (3) the need to free up more time to focus solely on the practice of law.

We launched Court Buddy in 2015 to build on the reforms being adopted as more and more state bars across the country recognized the importance of allowing their attorneys to unbundle legal services to better serve the needs of the chronically underserved middle-class. California's current Rules 1.2(b) and 1.5(e) of the Rules of Professional Conduct embody these reform efforts. Our attorney-members offer unbundled legal services at flat rates. For example, an attorney makes a single appearance in court on behalf of a party to a divorce or custody proceeding, drafts a motion or pleading to be filed in court, or writes a letter to challenge the withholding of a social security benefit for an agreed-upon, upfront flat fee.

Since our launch in 2015, we have helped tens of thousands of middle-class consumers and thousands of small firm and solo attorneys find each other and work together. The growth on our platform has been explosive, and we think that the Task Force understands why: the statistics show that there is a huge unmet need for legal services. To even begin to close the gap, attorneys must be allowed to leverage their time (which is a scarce resource) to reach as many everyday families, individuals, and small business owners as possible.

We're proud that our work in the access to justice space has been recognized. Court Buddy is the proud recipient of the ABA's 2017 Louis M. Brown Select Award for Legal Access. Court Buddy was also cited as a valuable legal technology tool available to consumers in Professor Rebecca L. Sandefur's Study which she presented to the Task Force at its April 8, 2019 meeting. (See "Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies," Rebecca L. Sandefur et al., 2019, Appendix B, at #43). We have been recognized by Above the Law as a "Top 3 Legal Tech Company in

America.” We have also won a Webby Award in the category of law, and an Envelope Award for entrepreneurship, which is sponsored by former President Barack Obama. Court Buddy has been cited in many articles and college textbooks and is frequently invited to guest lecture at colleges, universities, and law schools across the country on access to justice issues, diversity and entrepreneurship.

II. A Legal Technology Company’s Perspective On Bridging The Access To Justice Gap.

We’ve been asked what sets Court Buddy apart. We firmly believe that the major thing that differentiates us is that we listen to our customers and build our platform, apps and tech features around their needs. We meet both attorneys’ and middle-class consumers’ needs by investing unlimited amounts of time understanding them. We respect, and therefore do not interfere with, our attorney-members’ independent professional judgment and we let them determine whether they will work with any particular client, whether a limited scope representation is reasonable, and if so, what work needs to be done, and how to break the work down into discrete tasks for the clients to understand and agree to fund. In tech parlance, we have adopted a user-centric model.

We’ve also taken great care to build a business model that takes the ABA’s Model Rules of Professional Conduct and the corresponding state Rules of Professional Responsibility and ethics opinions into account. Additionally, Court Buddy actively works with the ABA, state and local bar associations to ensure that Court Buddy remains aware of any updates to applicable ethics rules. Court Buddy is proud to have been asked to partner with certain state and local bar associations because we provide more services to our attorney-members than the bar associations have the resources to provide through their call-in, next-in-line “referral hotlines.”

Court Buddy’s goal is to leverage the power of technology and innovation to achieve a greater social good. Court Buddy’s platform can reach all 170,044 active, licensed attorneys in California and all of the 29.87 million adult Californians who have access to either a smartphone or computer. While Court Buddy cannot single-handedly solve the access to justice problem in California, Court Buddy is certainly doing all that it can to address the problem.

III. Understanding The Access To Justice Gap In California.

A. Population Demographics Indicate That California Has One Of The Worst Access To Justice Problems In The Nation.

Statistically, one would expect California’s access to justice gap to be one of the worst in the nation. This is because California is the most populous state in the nation,

with 40.02 million residents, 29.87 million adults, and only 170,044 attorneys. (Appendix A). The population data shows that there is only one licensed, active California attorney for every 175 adult residents. (*Id.*).

Nationwide studies show that between 67%-80% of adults have a legal problem every 12 to 18 months. (“Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study,” Rebecca L. Sandefur, 2014, Executive Summary). Most everyday Americans do not formally consult with attorneys about those problems, either because they do not understand that they have a legal right, or because the barriers to finding and working with an attorney are too high. Time and again, middle-class Americans self-help. Currently, less than 15% of those with a legal problem even consult an attorney, let alone take their problem to court, with or without legal representation. (*Id.*)

Applying these nationwide statistics to our state would mean that every active, licensed California attorney has approximately 140 unserved, potential adult clients every 12-18 months. (Appendix A). If 67-80% of the 29.87 million adult California residents have a legal problem every 12-18 months, if only about 15% of those people take their issue to court, and if a smaller fraction of those litigants find an attorney, then that means that at least 17-20.3 million Californians will have an unmet legal need this year. To put that number into perspective, that number is greater than the entire population of New York, the fourth most populous state. (*Id.*).

California has the largest access to justice gap in the nation in terms of the size of its unserved client population (i.e., its unmet need). (Appendix A). In terms of the ratio of available attorneys to potential adult clients, it ranks eleventh out of all of the states. (Appendix B). As will be discussed further below, Court Buddy considers California’s access to justice problem to be among the most severe in the nation and tracks and treats it accordingly. Indeed, we moved our corporate headquarters to California in 2017 in part to be on the ground here.

As we’re certain the Task Force is aware, the California State Bar has commissioned a Justice Gap Study for the end of 2019. But there is little doubt that the problem is real and dire. The California Judicial Council for Public Affairs tracks and publishes the following statistics:

- More than 4.3 million Californians per year come to civil court unrepresented;
- 90% of family law cases have at least one party without an attorney;
- 90% of tenants in eviction cases represent themselves;
- More than 75% of civil cases have at least one party without an attorney; and

- More than 1.2 million Californians visit civil court self-help centers a year.

This has led the California Judiciary to conclude that “[f]or millions of Californians, self-help centers aren’t the last resort to get legal help—they’re the only resort.”

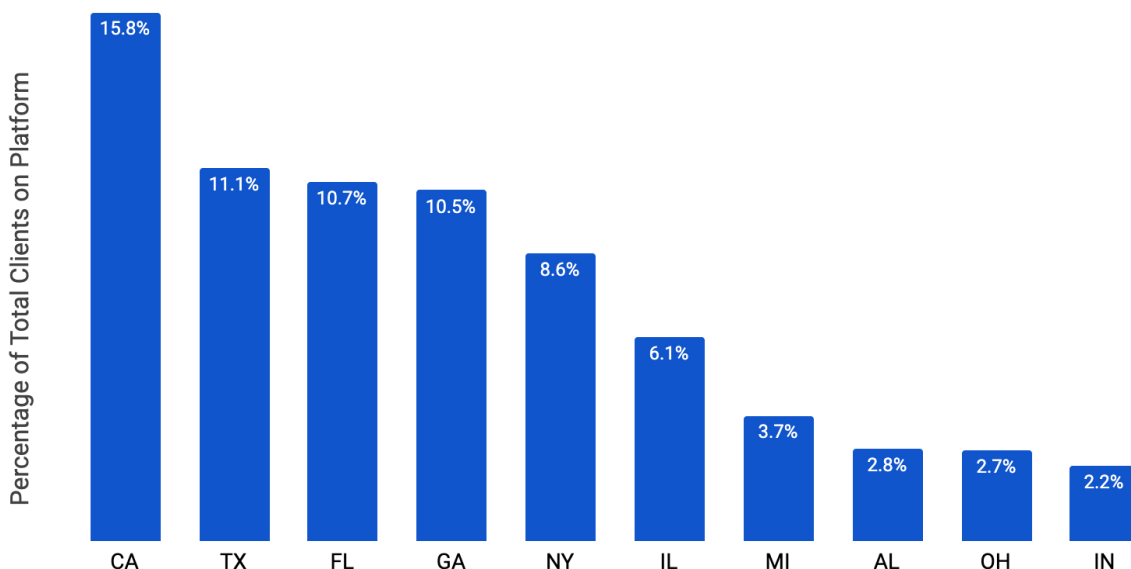
(California Courts, Judicial Council for Public Affairs, “Court Users Flock to Self-Help Centers,” April 19, 2017). Court Buddy improves the situation by matching middle-class California residents with licensed California attorneys, so that fewer people in need are left to self-help.

B. Court Buddy’s Data Substantiates The Severity Of The Problem And Its Impact On Middle-Class Families And Individuals.

Court Buddy’s internal data substantiates that there is a severe access to justice problem in California. California is one of our busiest states in terms of active potential clients on our platform, underscoring the magnitude of the middle-class demand for legal services in our state. Appendices C-D demonstrate the outsized demand for legal services from California residents. The following graph also shows the relative need of California residents to residents of other states with the largest access to justice gaps. The need of California residents clearly dwarfs that of residents of even the other most populous states.

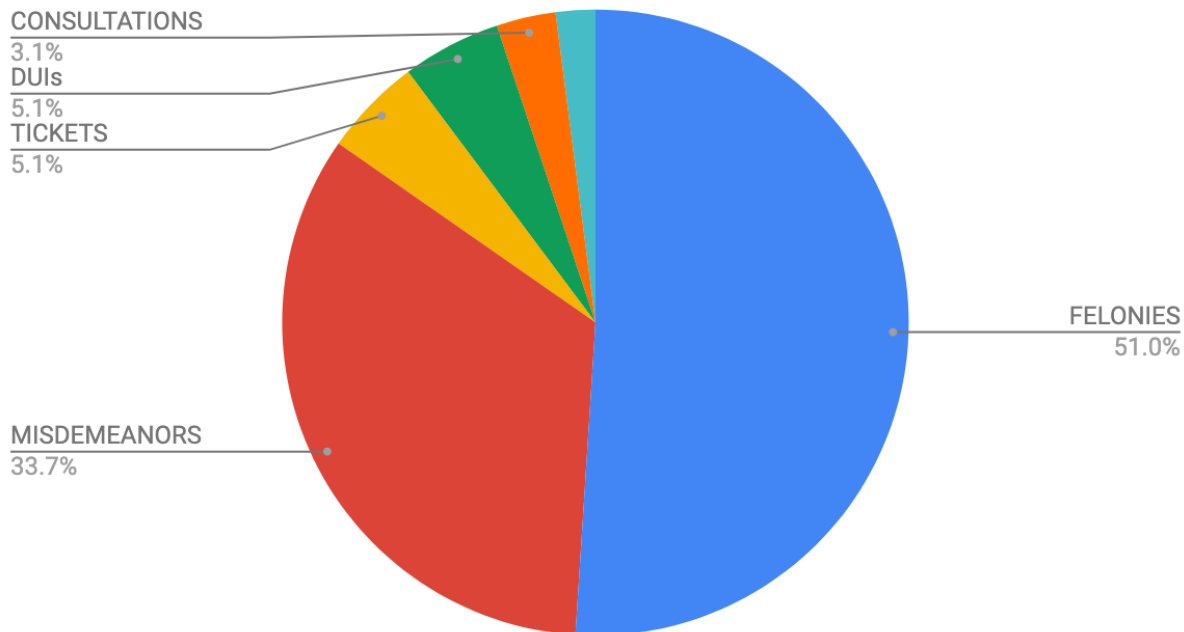
Our daily experience with assisting tens of thousands of people puts a real human face on the problem that cannot be reduced to mere percentages: every single day, middle-class Californians turn to Court Buddy to look for attorneys for help for themselves, for their families, and for their businesses.

Top Ten States With the Most Clients Seeking Attorneys
Court Buddy’s Platform

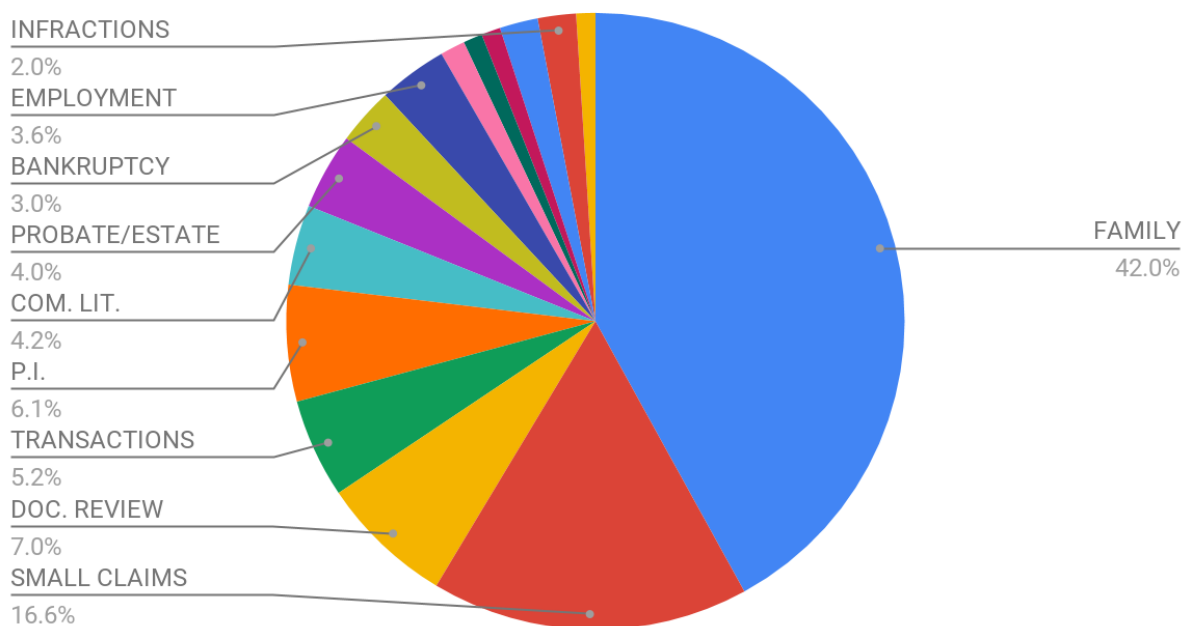


We are often asked about the types of legal services requested by potential clients. Currently, Californians use Court Buddy to request the following services:

Criminal Law Services Requested



Civil Law Services Requested



Attorneys who offer unbundled legal services in these areas make a real, measurable impact helping everyday Californians while growing their practices. There is a win-win value proposition here, where more California attorneys can find paying clients in the chronically underserved middle-class market and “do well by doing good.”

IV. The Data Shows That There Are Attorneys Looking To Grow Their Practices Who Are Available To Serve The Middle-Class Market.

While on paper, California’s 170,044 active, licensed attorneys should have more clients than they can handle from amongst their 40.02 million fellow Californians, in actuality, there are segments of the profession that are underemployed. Indeed, Court Buddy is often used by solo practitioners, small firm attorneys, and law school graduates in their first few years of practice who are looking to grow their practices and who have the most rate flexibility.

There is an underemployment problem among young lawyers nationwide. The ABA’s Section on Legal Education commissioned a post-Great Recession study and reported that, for respondents who graduated from law school during and after the time period between 2009 and 2017, only 44% indicated that they had a “good job” waiting for them when they graduated. Of the post-Great Recession law school graduates, 26% said that it took them more than one year to find a “good job.” (ABA Journal, “Less than Half of Recent Law Grads. Had Good Jobs after Graduation, Report Says,” Stephanie Francis Ward, Jan 16, 2018). According to the Summary Report prepared by the ABA, around 86% of recent law graduates were employed 10 months after graduation, but only 62% of U.S. law school graduates were employed in full-time, long-term positions that required a law degree. (*Id.*)

U.S. News & World Reports estimates that about half of California’s law school graduates overall secure full-time, long-term legal jobs 10 months after graduation. Those numbers fall well below the national average of 62%, and the two-thirds of graduates from law schools in New York and Pennsylvania who find law jobs according to the data. This can be partially explained by the fact that, despite California being the most populous state, it doesn’t have the same concentration of big law firms that are found in New York and Washington, D.C.

Court Buddy was founded by attorneys for attorneys. We are well aware of the challenges that attorneys face when they are just starting out and when they are at a point in their careers when they must focus on building their practices. We value our attorney-members and strive to serve their needs as well as those of the middle-class consumers. We are well aware that solo practitioners and small firm attorneys identify the same issues as their biggest challenges year-over-year: (1) acquiring new clients, (2) the amount of time spent on business development and administrative tasks such as

fee collecting, and (3) limited time to practice law. (2019 State of U.S. Small Law Firms Report, Thomson Reuters). More than 73% of the attorneys surveyed identified their biggest challenge as “acquiring new clients.” (*Id.*) Their persistent lament is that they spend only about half of their days (less than 60%) practicing law. (*Id.*) We are changing that.

Court Buddy offers solo and small firm attorneys, which may also consist of younger lawyers, the opportunity to create a profile identifying their areas of practice and to then, through Court Buddy’s automated matching algorithms, be matched with potential clients who can pay for those services. It affords the attorneys access to potential clients they wouldn’t otherwise have access to, which frees them up to spend more time doing what they most want to do: practice law.

V. What Can The Task Force Do To Help?

Our relatively unique perspective as an innovative, venture capital-backed technology company with an emphasis on tackling access to justice issues has given us insights into the size of the problem, how technology can be leveraged to help, and how certain ethics rules --- or at times, the perception of the rules by attorneys who do not realize the rules have been reformed --- can inhibit growth, investment, and innovation in the space. We respectfully submit these observations to the Task Force.

We speak to hundreds of attorneys every day, and our experience reveals that the ethics rules --- and even, attorneys’ perceptions of the rules --- can serve as an unnecessary barrier to entry. Attorneys remain concerned about whether they are even allowed to unbundle their services to meet the needs of middle-class consumers, or whether they are even allowed to use a wholly-automated online platform to be matched with potential clients. Our Attorney Success team fields daily inquiries from attorneys who want to grow their practices and sign up, but who are entirely unaware of the changes to the rules to allow reasonable, limited scope representations, or to allow the payment of reasonable advertising fees for truthful advertising. Although we are actively educating and informing our attorneys about how to best navigate the various ethics rules, the Task Force’s assistance would be welcomed.

The rules do matter: relaxing the regulatory environment and giving legal professionals more flexibility in how they deliver legal services absolutely increases their ability to work with middle-class consumers in a way that better serves the needs of those clients. Court Buddy would respectfully ask the Task Force to keep the following in mind when it undertakes its important work of considering revisions to the current ethics rules and related regulations: (1) strict regulations can inhibit growth, investment and innovation, and (2) good rules are not necessarily strict rules, rather, good rules are

rules that serve underlying policy objectives without undue unintended consequences for the consumer.

We appreciate the great care the California State Bar took in revising and adopting the Rules of Professional Responsibility that went into effect November 1, 2018; however, there is room for further positive change. Specifically, we ask the Task Force to consider whether: (1) it can promote attorney awareness of those rules that have already been reformed to afford attorneys greater flexibility in delivering legal services, and (2) whether certain of the remaining rules are even necessary and/or should be further revised or clarified.

From our perspective, the following reforms have been crucial to improving the situation on the ground and are already showing positive results; our wish is that California attorneys were better aware of them:

- **Unbundling:** Cal. Rules of Prof. Conduct, Rule 1.2(b) allows attorneys to “limit the scope of the representation if the limitation is reasonable under the circumstances” and provided the client “gives informed consent.” This reform to the rules is extremely important for facilitating the delivery of legal services to middle-class consumers, though in our experience attorneys remain unfamiliar with it. Promotion of the reform would be helpful.
- **Flat Fees for Legal Services:** Cal. Rules of Prof. Conduct, Rule 1.5(e) expressly allows attorneys to “make an agreement for, charge, or collect a flat fee for specified legal services,” which may be paid “in advance of the lawyer providing those services.” In our experience, this rule is extremely important because it encourages attorneys to work with middle-class consumers for flat rates while providing attorneys with a mechanism to ensure they will be paid for their efforts, and it should also be promoted.
- **Attorney Advertising and Solicitation Rules:** Cal. Rules of Professional Conduct, Rules 7.1-7.5 have been reformed to expressly permit attorneys to “advertise through any written, recorded or electronic means of communication, including public media,” and to “pay the reasonable costs of advertisements or communications permitted by this rule.” (Rule 7.2(a)-(b)(1)). Of course attorneys must take care that all communications about themselves, their firms and the legal services they offer are not false or misleading, but the rules clearly allow them to create truthful profiles, post them online and in “public media.” Our wish is that these rules were better understood, because electronic advertising is a primary way to reach middle-class consumers.

From our perspective, the following rules could be clarified, reformed or outright removed as indicated, to promote further innovation in the access to justice space:

- **Confidentiality:** Cal. Rules of Prof. Conduct, Rule 1.6 imposes the duty to protect client confidences, which the entire profession agrees serves crucial consumer protection objectives by encouraging clients to seek legal help and be forthcoming with their attorneys; however, Court Buddy would ask the Task Force to consider whether a formal Comment that attorneys' duties of confidentiality are not breached (and applicable privileges and protections are not waived) when they communicate with clients via the various secure, electronic methods so common today (i.e. email, secured online messaging platforms, or text messaging) would promote better attorney-client communication.
- **Safekeeping of Client Funds:** Cal. Rules of Prof. Conduct, Rule 1.15 provides that attorneys must safekeep client funds received by them either in their IOLTA accounts ("trust accounts") or operating accounts, as appropriate. Flat fees paid in advance may be deposited directly into attorneys' operating accounts, subject to certain conditions. Rule 1.15(b)(1)-(2). At Court Buddy, we provide an extra level of consumer protection by securely holding client funds until they agree to fund the tasks posted by their attorneys and authorize payment. The secured funds are then released by the consumer and placed directly into the attorney's account of choice, with the attorney receiving their entire legal fee. Even with these consumer protections in place, we find that attorneys are still hesitant to agree to unbundle their services and take upfront, flat fees. Clarification on this point or further promotion of the rules would be helpful.
- **Financial Arrangements with Non-Lawyers and UPL Concerns:** Cal. Rules of Prof. Conduct, Rule 5.4 prohibits an attorney from "shar[ing] legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law" pursuant to certain exceptions, including that attorneys may "pay a prescribed registration, referral or other fee to a lawyer referral service." While Court Buddy takes pains to make clear to all consumers that we do not provide legal services, are not a lawyer referral service, and do not fee-share with our attorney-members (as we are funded by membership fees and client-side administrative fees), we are left wondering, what purpose is served by the Rule, is it necessary, and is it reasonably tailored? Or, does attempting to regulate "lawyer referral services" unduly discourage attorneys from utilizing any service other than their nonprofit state bar "referral hotlines," which are chronically underfunded, and do not have the resources or capacities of for-profit wholly-automated matching platforms such as Court Buddy? As we understand it, the purpose of Rule 5.4 is the same as Rule 5.5 prohibiting the unauthorized

practice of law, but any innovation in the access to justice space will necessarily involve opening up the channels of delivering legal services to consumers. Especially when the attorneys themselves are the ones performing the legal services, these concerns seem misplaced and the rules an undue hindrance.

We would respectfully request that the Task Force consider whether the consumer protection purposes of the foregoing rules are being well-served, or rather, whether they are unduly inhibiting attorneys' ability to find and assist middle-class clients and therefore unwittingly and unintentionally contributing to the access to justice problem. Our position on the foregoing unauthorized practice of law rules is the latter.

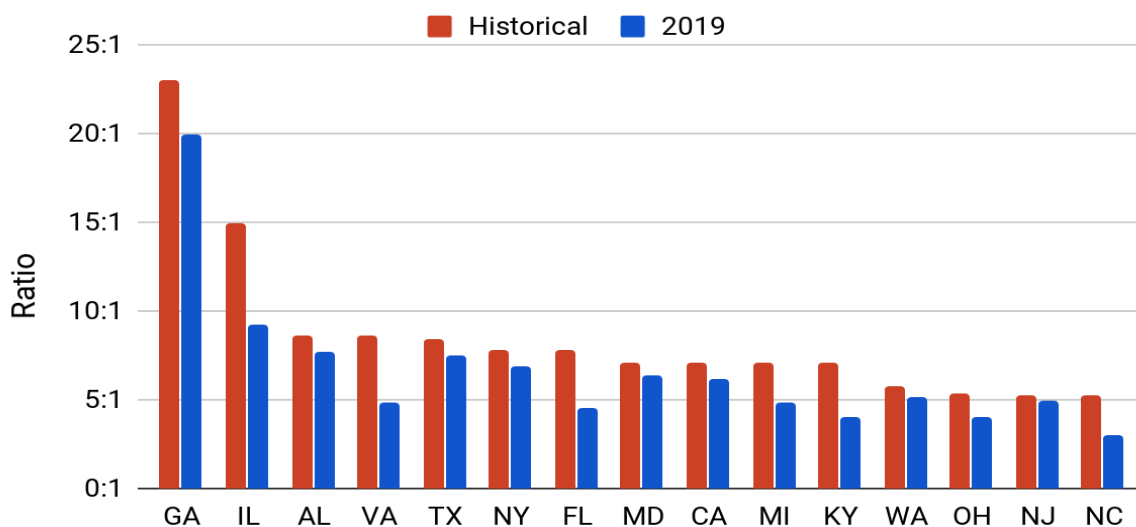
VI. Making An Impact: Improvement Within The Court Buddy Platform.

Court Buddy leverages our venture-capital backing, our team's time, energy, and expertise, and technology's ability to scale in an effort to consistently innovate and make a real impact. The encouraging thing that we can report to the Task Force is that our efforts are paying off. We are proud that the world with Court Buddy looks better than the world without Court Buddy.

The following graph shows the improvement in the ratio of new potential clients to available attorneys within the Court Buddy platform for the states with the biggest access to justice issues. (See Appendices E-F). A "lower" ratio is better, and the ratios are clearly trending that way within the Court Buddy platform over time. By way of example, while California still has the largest unmet client need in absolute terms, our efforts are improving the number of licensed California attorneys available to meet that need within the platform. The historic ratio was 7.1:1, or 7.1 potential clients for every available attorney. Currently (for the first quarter of 2019) it is 6.2:1., or 6.2 potential clients per attorney. There is across-the-board improvement:

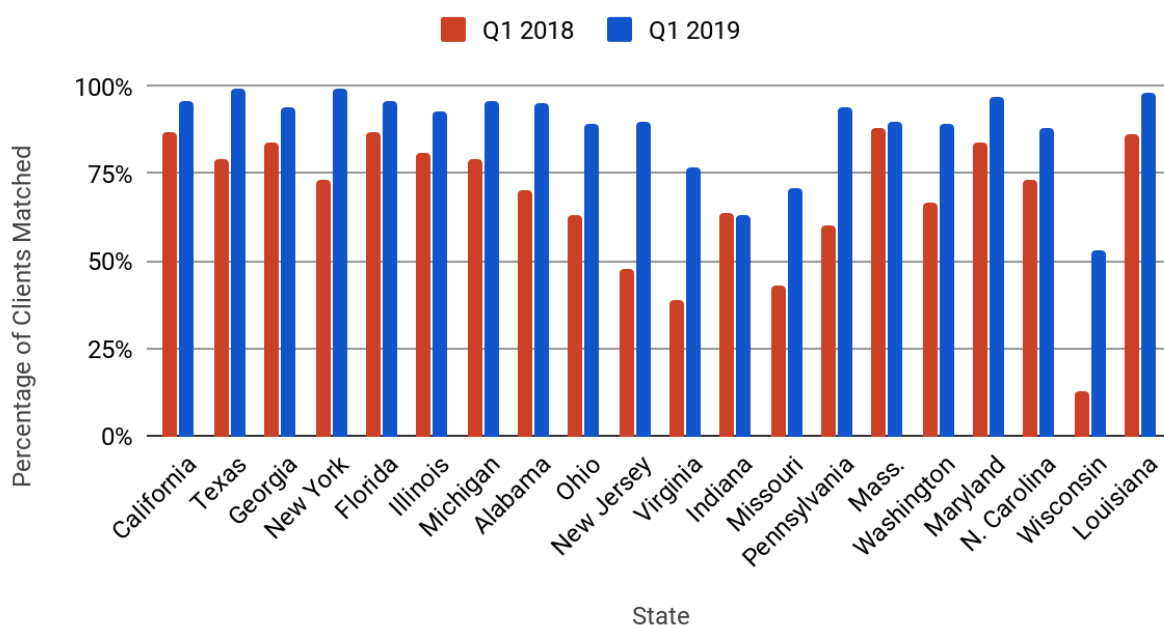
Ratio of Clients to Available Attorneys

Court Buddy's Platform



Similarly, the number of matches being made through the Court Buddy platform is improving over time. The following graph shows the improvement in the match rate for potential clients within the Court Buddy platform for the most problematic access to justice states. (See Appendices G-H). By way of example, California's match rate is currently at 96%, and has improved more than 10% from the first quarter of 2018 to the first quarter of 2019. (Appendix G). As the Task Force can see, there is across-the-board improvement in the number of matches being made between potential clients seeking help and available attorneys:

Improving Match Rates, Q1 2018 - Q1 2019

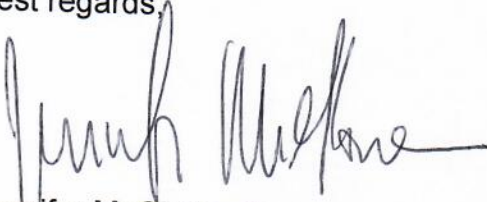


We are happy to report that the situation on the ground is improving nationwide. We have a long way to go, but investment and initiative, coupled with the ability to bring our value proposition to the various state bars and their attorney-members, has helped. We're encouraged, in California and elsewhere.

ATTACHMENT B

Again, Court Buddy thanks the Task Force's attention to these important matters. If we can be of any further help or a resource for the Task Force --- given our robust database and our on the ground perspective tackling access to justice issues in California and across the country --- please do not hesitate to let us know.

Best regards,

A handwritten signature in black ink, appearing to read "Jennifer McGlone". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jennifer McGlone, Esq.

Director of Legal Affairs and Strategic Partnerships, Court Buddy

Cc: Jojo Roque, Head of Business Marketing, Court Buddy (via email)

APPENDIX A

**States with Anticipated Severe Access to Justice Gaps,
Ranked from Most Populous State to Less Populous State**

Rank	State	Population (2019)	Adults (2019)	Attorneys (2018 ABA report)	Ratio of Attorneys to Population	Ratio of Attorneys to Adults	Ratio of Attorneys to Potential Clients, Per Year
1	California	40.02 M	29.87 M	170,044	1:235	1:175	1:140
2	Texas	29.1 M	20.2 M	90,485	1:321	1:223	1:178
3	Florida	21.64 M	16.17 M	78,244	1:276	1:206	1:164
4	New York	19.54 M	15.6 M	177,035	1:110	1:88	1:70
5	Penn.	12.84 M	10.1 M	50,112	1:256	1:201	1:160
6	Illinois	12.73 M	9.9 M	63,422	1:200	1:156	1:124
7	Ohio	11.73 M	8.98 M	37,873	1:309	1:237	1:189
8	Georgia	10.66 M	7.7 M	32,802	1:325	1:234	1:187
9	N. Carolina	10.5 M	7.76 M	24,087	1:435	1:322	1:257
10	Michigan	10.02 M	7.72 M	36,362	1:275	1:212	1:169
11	New Jersey	9.03 M	6.96 M	41,021	1:220	1:169	1:135
12	Virginia	8.58 M	6.5 M	24,208	1:354	1:268	1:214
13	Wash.	7.65 M	5.55 M	26,057	1:293	1:212	1:170
14	Arizona	7.23 M	5.19 M	18,500	1:390	1:280	1:224
15	Mass.	6.93 M	5.4 M	42,925	1:161	1:125	1:100

APPENDIX B

**States With Anticipated Severe Access to Justice Gaps,
Ranked by Ratio of Attorneys to Potential Adult Clients in Population**

Rank	State	Adult Population	Number of Attorneys	Ratio of Attorneys to Adults	Ratio of Attorneys to Potential Clients, Per Year
1	N. Carolina	7.76 Million	24,087	1:322	1:257
2	Arizona	5.19 Million	18,500	1:280	1:224
3	Virginia	6.5 Million	24,208	1:268	1:214
4	Ohio	8.98 Million	37,873	1:237	1:189
5	Georgia	7.7 Million	32,802	1:234	1:187
6	Texas	20.2 Million	90,485	1:223	1:178
7	Washington	5.55 Million	26,057	1:212	1:170
8	Michigan	7.72 Million	36,362	1:212	1:169
9	Florida	16.17 Million	78,244	1:206	1:164
10	Pennsylvania	10.1 Million	50,112	1:201	1:160
11	California	29.87 Million	170,044	1:175	1:140
12	New Jersey	6.96 Million	41,021	1:169	1:135
13	Illinois	9.9 Million	63,422	1:156	1:124
14	Mass.	5.4 Million	42,925	1:125	1:100
15	New York	15.6 Million	177,035	1:88	1:70

APPENDIX C

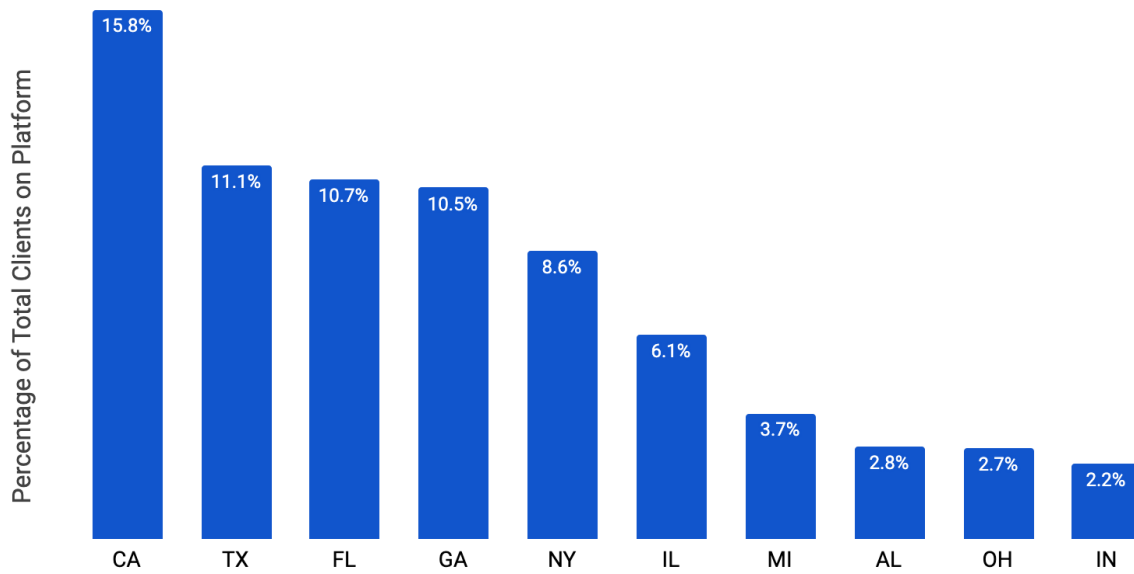
**States with Demonstrated, Severe Access to Justice Gaps,
Measured by Number of Active Clients with Legal Needs in Court Buddy Platform**

Rank	State	% of Active Clients in Court Buddy Platform
1	California	16.7%
2	Texas	12%
3	Florida	11.5%
4	Georgia	11%
5	New York	8.33%
6	Illinois	6.6 %
7	Michigan	3.7%
8	Alabama	2.55%
9	Ohio	2.5%
10	Massachusetts	2.2%
11	New Jersey	1.9%
12	Virginia	1.8%
13	Maryland	1.7%
14	Indiana	1.7%
15	Pennsylvania	1.6%
16	Washington	1.5%
17	Louisiana	1.45%
18	North Carolina	1.4%
19	Missouri	1.15%
20	Kentucky	1%

APPENDIX D

**Confronting the Most Severe Access to Justice Gaps,
Measured by Number of Active Clients with Legal Needs in Court Buddy Platform**

Top Ten States With the Most Clients Seeking Attorneys
Court Buddy's Platform



APPENDIX E

**Confronting the Most Severe Access to Justice Gaps,
By Ratio of Available Attorneys to New Clients in Court Buddy Platform**

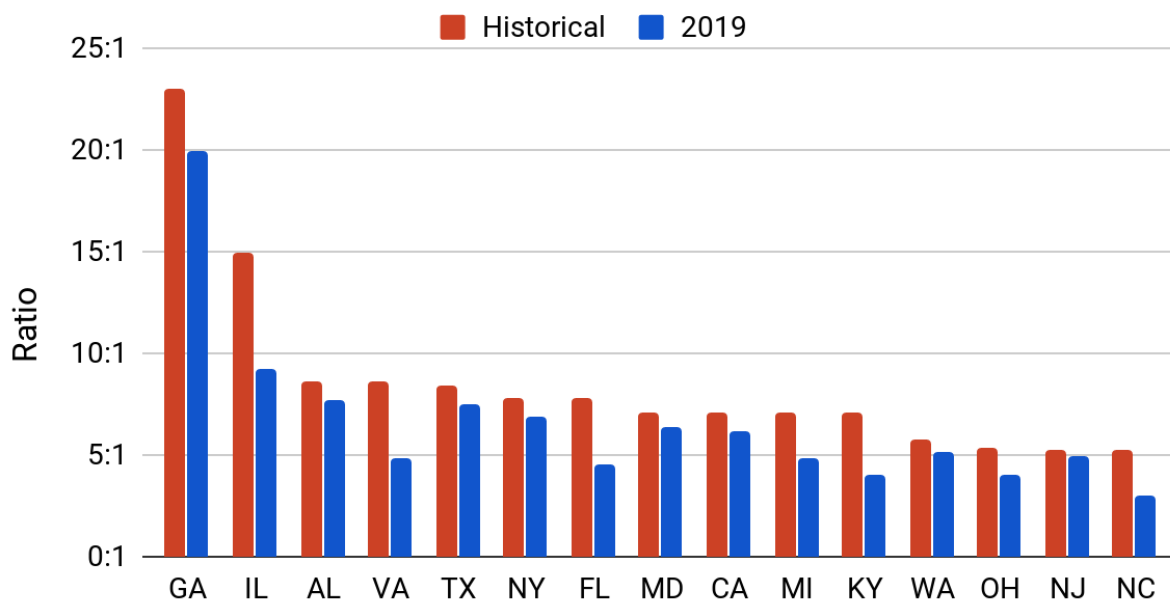
Rank	State	Ratio of Attorneys to Clients, Historically	Ratio of Attorneys to New Clients (Q1, 2019)
1	Georgia	1:23	1:20
2	Illinois	1:15	1:9.2
3	Alabama	1:8.6	1:7.7
4	Virginia	1:8.6	1:4.8
5	Texas	1:8.4	1:7.5
6	New York	1:7.8	1:6.9
7	Florida	1:7.8	1:4.5
8	Maryland	1:7.1	1:6.4
9	California	1:7.1	1:6.2
10	Michigan	1:7.1	1:4.8
11	Kentucky	1:7.1	1:4
12	Washington	1:5.8	1:5.2
13	Ohio	1:5.4	1:4
14	New Jersey	1:5.3	1:5
15	North Carolina	1:5.3	1:3

APPENDIX F

Addressing the Most Severe Access to Justice Gaps Within the Court Buddy Platform,
Improving the Ratio of New Clients to Available Attorneys Over Time

Ratio of Clients to Available Attorneys

Court Buddy's Platform



APPENDIX G

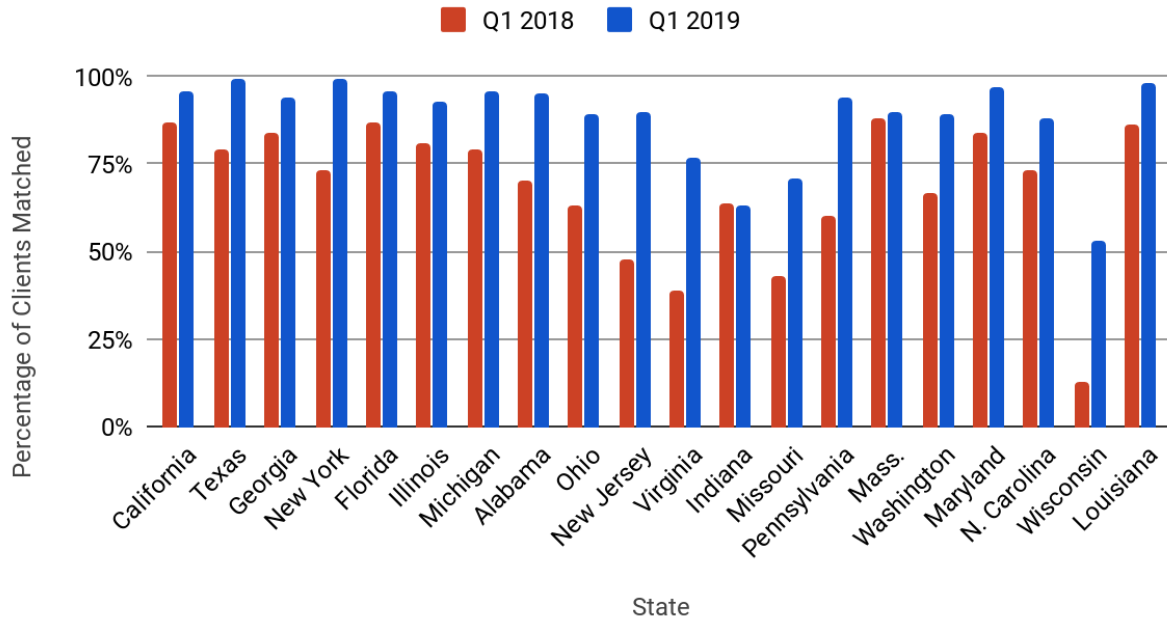
**Improving the Match Rate for Clients Within the Court Buddy Platform Over Time,
Ranked by States with the Largest Number of Active Clients with Legal Needs (See
Appendix C)**

Rank	State	% of Successful Attorney-Client Matches On Court Buddy Platform: Q1, 2018	% of Successful Attorney-Client Matches On Court Buddy Platform: Q1, 2019	Improvement of Attorney-Client Match Rate, Q1 2018 to Q1 2019
1	California	87%	96%	10%
2	Texas	79%	99%	24%
3	Florida	87%	96%	11%
4	Georgia	84%	94%	12%
5	New York	73%	99%	37%
6	Illinois	81%	93%	15%
7	Michigan	79%	96%	21%
8	Alabama	70%	95%	35%
9	Ohio	63%	89%	42%
10	Mass.	88%	90%	2%
11	New Jersey	48%	90%	89%
12	Virginia	39%	77%	96%
13	Maryland	84%	97%	15%
14	Indiana	64%	63%	0%
15	Pennsylvania	60%	94%	57%
16	Washington	67%	89%	33%
17	Louisiana	86%	98%	13%
18	N. Carolina	73%	88%	21%
19	Missouri	43%	71%	63%
20	Kentucky	38%	83%	122%

APPENDIX H

Improving the Match Rate for Clients Within the Court Buddy Platform Over Time, Considering States with the Largest Number of Active Clients with Legal Needs

Improving Match Rates, Q1 2018 - Q1 2019



Public Comment Letter From Ms. Doi

From: Genie Doi [<mailto:genie@immigrate.la>]

Sent: Thursday, June 20, 2019 10:04 AM

To: ATILS

Subject: Public Comment

Hello,

I would like to comment on the ATILS Rec. B. 2. - "Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/ approved entities to use technology-driven delivery systems to engage in authorized practice of law activities."

Disclaimer: I was unable to read the committee's reasoning for this recommendation because there is a problem with the PDF (see attached screenshot).

I love technology and leverage it where possible in my legal practice to create efficiency, lower costs, and thereby increase access to legal representation in my community. However, speaking on behalf of the immigration bar, allowing for-profit non-lawyers to provide immigration services would absolutely result in predatory consumer practices and life-altering outcomes for foreign nationals seeking to immigrate to the United States legally.

1. Tech entrepreneurs are by nature risk takers. They will encourage clients to take risks with the promise of high reward and low cost. Lawyers, by contrast, are trained to mitigate risk and will advise accordingly. In today's political environment, filing risky immigration applications can lead to life-altering consequences like deportation.
2. Tech entrepreneurs are primarily motivated by revenue generation. As non-lawyers, they owe no legal duty to the client. Lawyers, by contrast, are bound by law to act in the best interest of their client.
3. Legaltech startups may be here today, gone tomorrow—immigration applications sometimes take years to conclude. Lawyers, by contrast, are legally required to see a client through the end of each matter.
4. Immigrants are already a vulnerable community that is being preyed upon by bad actors engaged in the unauthorized practice of law.

Case in point: <https://www.passright.com/>

- for-profit non-lawyer engaged in lots of marketing and advertising that incorporates legal advice
- the business apparently partners with lawyers, but the marketing of this service violates attorney advertising rules
- not only that, the advertising makes [dubious claims](#) about obtaining green cards in 3 weeks
- consumers are clearly [confused](#) as to whether the founder is a lawyer or not

I used to consult for this company and had to end my ties due to their refusal to abide by ethical standards.

Thank you for your consideration.

ATTACHMENT B

Genie Doi
Attorney at Law
424.254.7972



[twitter](#) | [linkedin](#) | [facebook](#) | [instagram](#)



The file "5. Recommendation_Lawyers in traditional practice and law firms perform legal and law related services under the current regulatory framework with the intention of expanding access to justice through innovation with the use of technology (1).pdf" could not be opened because it is empty.

OK



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Artificial Intelligence and Unauthorized Practice of Law

To: Subcommittee on Artificial Intelligence and Unauthorized Practice of Law
 From: Judge Wendy Chang
 Date: January 7, 2019
 Re: Unauthorized Practice of Law

1. What constitutes the practice of law in California?

Section 6125 of the State Bar Act states:

No person shall practice law in California unless the person is an active member of the State Bar.

(Business & Professions Code §6125); Cal. Rule Prof. Conduct Rule 5.5(b). State Bar members are also prohibited from aiding or abetting any person or entity in the unauthorized practice of law. Cal. Rule Prof. Conduct Rule 5.5(b); *Geibel v. State Bar* (1938) 11 Cal.2d 412, 419-423.

The State Bar Act, however, does not define “practice of law.” In *Birbrower, Montalbano, Condon & Frank v. Sup. Ct.* (1998) 17 Cal.4th 119, the California Supreme Court reaffirmed the long standing definition of the practice of law as “the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.” *Id.* at 128 (quoting *People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535). The *Birbrower* court went on to note that the *Merchants* definition included “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation,” *Id.*, and then cited with approval *People v. Ring* (1937) 26 Cal. App. 2d Supp. 768, 771-772 (noting that the fact that the State Bar Act was adopted by the Legislature in 1927 using the term “practice of law” without defining it evidenced the “obvious and inescapable” conclusion that “in doing so, it accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court that it had a sufficiently definite meaning to need no further definition. The definition above quoted from *People v. Merchants Protective Corp.* has been approved and accepted in the subsequent California decisions [citations], and must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term ‘practice of law’”).

2a. What conduct is prohibited in California as the unauthorized practice of law?

The performance of the following acts by a person who was not an active member of the State Bar of California would be unauthorized practice of law in California:

- 1) Appearing in a court of justice
 - a. Physical appearances in court
 - b. Appearances on pleadings filed in court
 - c. Signing of pleadings filed in court
 - d. Depositions taken in pending litigation

- 2) Giving legal advice
- 3) Drafting legal instruments
- 4) Holding oneself out as an attorney
- 5) Negotiating and settling claims on behalf of another
- 6) Serving as a private arbitrator, mediator or other dispute resolution neutral

Merchants, supra, 189 Cal. At 535; Vapnek, Tuft, Peck and Wiener, *California Practice Guide, Professional Responsibility* (The Rutter Guide 2017) at 1:181 et seq. and citations contained therein.

Due to the language of §6125 being drafted in terms of a “person”, California law only permits a non-attorney natural person to represent themselves before a Court. *Roddis v. Strong* (1967) 250 Cal. App. 2d 304, 311. An entity, on the other hand, must be represented by a lawyer and may not represent itself (either directly or through a non-lawyer agent) in litigation, as such an act would be the unauthorized practice of law. See e.g. *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101 (corporation); *Albion River Watershed Protection Ass’n v. Department of Forestry & Fire Protection* (1993) 20 Cal. App. 4th 34, 37 (unincorporated association); *Aulisio v. Bancroft* (2014) 230 Cal. App. 4th 1518, 1519-20 (trustee for trust).

Out of state law firms must register with the State Bar of California to be eligible to practice law in California. Business and Professions Code sections 6174 and 6174.5 (limited liability partnerships); Business and Professions Code sections 6160 (law corporations).

2b. In addition, what are the penalties or consequences for unlawful practice in California?

For the UPL perpetrator, potential consequences for engaging in UPL can include:

- 1) Criminal penalties. Business & Professions Code §6126 (misdemeanor that could result in jail time).
- 2) Monetary awards connected with criminal prosecutions. Business & Professions Code §6126.6.
- 3) Contempt of Court. Business & Professions Code §6127.
- 4) Civil lawsuits. UPL can also result in civil lawsuits for equitable relief under the unfair competition law of Business & Professions Code §17200 and civil damages under tort theories, *Olson v. Cohen* (2003) 106 Cal. App. 4th 1209, including potential punitive damages.
- 5) The inability to recover fees. *Birbrower, supra*, 17 Cal.4th at 140.
- 6) Imposition of sanctions. *Albion River Watershed Protection Ass’n v. Department of Forestry & Fire Protection* (1993) 20 Cal. App. 4th 34, 37

For those affected by UPL, potential consequences can include:

- 1) Nullification of civil judgments obtained against a party represented by an unlicensed person. *Russell v. Dopp* (1995) 36 Cal. App. 4th 765, 775.

- 2) The overturning of criminal conviction of defendant represented by unlicensed person, as a deprivation of the defendant's constitutional right to counsel. *In re Johnson* (1992) 1Cal.4th 689, 700-701.
3. What practice of law conduct is permitted for persons who are not State Bar licensees?
 - a. Exceptions to §6125:

Notwithstanding the broad language of Business & Professions Code §6125, California law recognizes limited exceptions to §6125's prohibition, allowing unlicensed persons to practice law in California under "narrowly drawn"¹ circumstances:

- 1) By Consent of the Trial Judge. *In re McCue* (1930) 211 Cal. 57, 67.
- 2) Pro Hac Vice. Cal. Rules of Court, rule 9.40.
- 3) Appearance by military counsel. Cal. Rules of Court, rule 9.41.
- 4) Certified law students. Cal. Rules of Court, rule 9.42.
- 5) Out-of-State Attorney Arbitration counsel. Cal. Rules of Court, rule 9.43.
- 6) Registered Foreign Legal Consultant. Cal. Rules of Court, rule 9.44.
- 7) Registered Legal Services Attorneys. Cal. Rules of Court, rule 9.45.
- 8) Registered In-House Counsel. Cal. Rules of Court, rule 9.46.
- 9) Attorneys Practicing Temporarily in California as part of litigation. Cal. Rules of Court, rule 9.47.
- 10) Non-litigating attorneys temporarily in California to provide legal services. Cal. Rules of Court Rule. 9.48.

See also Comment to Cal. Rules Prof. Conduct Rule 5.5.

- b. Actions Not Considered the "Practice of Law" Under California Law

Certain other acts have been legally deemed to not constitute the "practice of law" in California:

- 1) "How to" books – so long as they are instructional and addressed to the public in general, as opposed to addressing any specific legal problem of a specific person. *People v. Landlords Professional Services* (1989) 215 Cal. App. 3d 1599, 1606.
- 2) Legal forms. *Id.* at 1605-06.
- 3) Filling in forms at the direction of clients. *Id.*; *Matter of Valinoti* (Rev. Dept. 2002) 4 Cal. State Bar Crt. Rptr. 498, 519.
 - a. Non-lawyer filling in form without direction of clients is UPL. *Brockey v. Moore* (2003) 107 Cal. App. 4th 86. 97. But compare:

¹ *Birbrower, supra*, 17 Cal.4th at 130.

- b. Non-lawyer selection form to be used by client for client may be UPL. *People v. Sipper* (1943) 61 Cal. App. 2d Supp. 844, 847 (disapproved on other grounds in *Murgia v. Mun. Ct.* (1975) 15 Cal.3d 286, 301).
- 4) Acting as mere scrivener. *Id.*
- 5) Acting as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator, or in any similar capacity for a court or any other governmental agency, so long as the individual does not give legal advice, examine the law or hold themselves out as being entitled to practice law. State Bar Rule 2.30(B), (C).
- 6) Non-lawyer operating a collection agency collecting a debt on its own behalf. *Le Doux v. Credit Research Corp.* (1975) 52 Cal. App. 3d 451, 454-55. (*disbarred or suspended attorneys excluded. Business & Professions Code §6130).
- 7) Preparation of simple tax returns. *Agran v. Shapiro* (1954) 127 Cal. App. 2d Supp. 807, 813.
- 8) Qualifying legal document assistants and unlawful detainer assistants registered under Business & Professions Code §6401.5 (*disbarred or suspended attorneys excluded. Business & Professions Code §6402).
- 9) Qualifying paralegals under the supervision of a State Bar member or an attorney practicing law in federal courts located in California by the attorney to him or her. Business & Professions Code §6450 et seq.)
- 10) Insurance company employing captive law firm(s) is not engaging in UPL. *Gafcon Inc. v Ponsor & Assoc.* (2002) 98 Cal. App. 4th 1388, 1405.
- 11) Immigration services. 8 CFR §§1.1, 292.1; Business & Professions Code §22440 et seq.; Government Code §8223.
- 12) Bankruptcy petition preparers who merely type bankruptcy forms. 11 USC §110(a); *In re Reynoso* (9th Cir. 2007) 477 F.3d 1117, 1123.

See Vapnek, Tuft, Peck and Wiener, California Practice Guide, Professional Responsibility (The Rutter Guide 2017) at 1:215 et seq. and citations contained therein.

4. What are the relevant California rules and laws restricting practice of law conduct?

Please see discussion above.

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
AR	Arkansas Bar Ass'n v. Block, 230 Ark 430; 323 SW2d 912 (1959)	Research of authorities by able counsel and by this court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law. Courts are not in agreement. We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law. Each case must be decided upon its own particular facts.—The practice of law is difficult to define. Perhaps it does not admit *435 of exact definition. <u>Rhode Island Bar Association v. Automobile Service Association, 1935, 55 R.I. 122, 179 A. 139, 100 A.L.R. 226.</u>	<p>Notes on why practice of law is not appropriate for A.I. "The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. A dual trust is imposed on attorneys at law. They must act with fidelity both to the courts and to their clients. They are bound by canons of ethics which are enforced by the courts. The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law."</p> <p>State Bar Association of Connecticut v. Connecticut Bank & Trust Company, 145 Conn. 222, 140 A.2d 863, 870</p>

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
CA	Birbrower, Montalbano, Condon & Frank v. Superior Court, (1998) 17 Cal.4th 119	<p>“Although the Act did not define the term “practice law,” case law explained it as “ ‘the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.’ ” (People ex rel. Lawyers' Institute of San Diego v. Merchants' Protective Corp. (1922) 189 Cal. 531, 535, 209 P. 363 (Merchants).) Merchants included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation. (Ibid.; see People v. Ring (1937) 70 P.2d 281, 26 Cal.App.2d. Supp. 768, 772–773 (Ring) [holding that single incident of practicing law in state without a license violates § 6125]; see also Mickel v. Murphy (1957) 147 Cal.App.2d 718, 721, 305 P.2d 993 [giving of legal advice on matter not pending before state court violates § 6125], disapproved on other grounds in Biakanja v. Irving (1958) 49 Cal.2d 647, 651, 320 P.2d 16.) Ring later determined that the Legislature “accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in Merchants'] that it had a sufficiently definite meaning to need no further definition. The definition ... must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term ‘practice law.’ ” (Ring, supra, 70 P.2d 281, 26 Cal.App.2d Supp. at p. 772.)</p> <p>In addition to not defining the term “practice law,” the Act also did not define the meaning of “in California.” In today's legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services, or restricts the Act's application ***309 to those out-of-state attorneys who are physically present in the state.”</p> <p>“Section 6125 has generated numerous opinions on the meaning of “practice law” but none on the meaning of “in California.” In our</p>	

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
		view, the practice of law “in California” entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law “in California.” The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.”	
FL	Florida v Sperry, 140 So 2d 587 (Fla, 1962) Judgment vacated and case remanded.	“Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues of this case... We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.”	This case was remanded. Additional excerpt. Sperry v Florida 373 U.S. 379. “The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by non-lawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give ‘the State's licensing board a virtual power of review over the federal determination’ that a person or agency is qualified and entitled to perform certain functions, ⁴ or which impose upon the performance of activity sanctioned by federal license additional

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
			conditions not contemplated by Congress. ⁵ 'No State law can hinder or obstruct the free use of a license granted under an act of Congress.' <i>Pennsylvania v. Wheeling & Belmont Bridge Co.</i> , 13 How. 518, 566, 14 L.Ed. 249."
HI	Fought & Co, Inc v Steel Engineering and Erection, Inc, 87 Hawaii 37; 951 P2d 487 (1998)	"First enacted in 1955, <u>HRS §§ 605–14</u> and <u>605–17</u> were intended to protect the public "against incompetence or improper activity." <i>See</i> Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal, at 661; Hse. Stand. Comm. Rep. No. 612, in 1955 House Journal, at 782. In drafting the statutes, the legislature expressly declined to adopt a formal definition of the term "practice of law," noting that "[a]ttempts to define the practice of law in terms of enumerating the specific types of services that come within the phrase are fruitless because new developments in society, whether legislative, social, or scientific in nature, continually create new concepts and new legal problems." Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal, at 661; Hse. Stand. Comm. Rep. No. 612, in 1955 House Journal at 783. The legislature recognized that the practice of law is not limited to appearing before the courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party <i>affecting the legal rights ... of such party</i> , where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy. ... Similarly, while it has explored the concept's dimensions, this court has never formally defined the term "practice of law." ... Our holdings in <i>Lau</i> and the other cases cited above are not incompatible with the proposition that the "practice of law" entails far more than merely appearing in court proceedings."	

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
IA	Iowa Supreme Court Comm on Unauthorized Practice of Law v Sturgeon, 635 NW2d 679 (Iowa, 2001)	<p>“Iowa Court Rule 118A.1 authorizes injunctions against the unauthorized practice of law. The commission notes that this court has the inherent authority to define and regulate the practice of law, citing <i>Baker</i>. In <i>Baker</i> we approved the nonexclusive definition of the practice of law found in Ethical Consideration 3–5:</p> <p>It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. However, the practice of law includes, but is not limited to, *682 representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional judgment is required.</p> <p>Iowa Code of Prof'l Responsibility EC 3–5; see also Baker, 492 N.W.2d at 701 (approving a similar version of this definition).”</p>	

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
ME	Bd of Overseers of the Bar v Mangan, 2001 ME 7; 763 A2d 1189 (Me. 2001)	<p>"The Maine Bar Rules do not explicitly state what constitutes the "practice of law," nor have we ever defined what constitutes the "practice of law."... The term "practice of law" is a " 'term of art connoting much more than merely working with legally-related matters.' " <i>Attorney Grievance Commission of Maryland v. Shaw</i>, 354 Md. 636, 732 A.2d 876, 882 (1999) (quoting <i>In re Application of Mark W.</i>, 303 Md. 1, 491 A.2d 576, 585 (1985)). "The focus of the inquiry is, in fact, 'whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent.' " <i>Id.</i> (quoting <i>In re Discipio</i>, 163 Ill.2d 515, 206 Ill.Dec. 654, 645 N.E.2d 906, 910 (1994)). Even where " 'trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law.'" <i>Shaw</i>, 732 A.2d at 883 (quoting <i>Lukas v. Bar Ass'n of Montgomery County</i>, 35 Md.App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977)))."</p>	
MN	Cardinal v Merrill Lynch Realty Burnet, Inc, 433 NW2d 864 (Minn, 1988)	<p>"We have quoted extensively from these earlier decisions to illustrate this court's abiding concern for the public interest in determining whether certain conduct constitutes the unauthorized practice of law and also the difficulty in defining with any precision that conduct which is unauthorized. The overriding consideration in the case before us, in keeping with our tradition in these matters, is the public welfare rather than the advantage that might accrue to lawyer or nonlawyer. We recognize today, as we did long ago, that the "interest of the public is not protected by the narrow specialization of an individual who lacks the perspective and the orientation which comes only from a thorough knowledge and understanding of basic legal concepts, of legal processes, and of the interrelation of law in all its branches." <i>Id.</i> at 480-81, 48 N.W.2d at 796."</p>	

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
NE	State of Nebraska v Childe, 147 Neb 527; 23 NW2d 720 (1946)	<p>“The power to define what constitutes the practice of law is lodged with this court. The sole power to punish any person assuming to practice law within this state without having been licensed to do so also rests with this court. It is the character of the act and not the place where the act is performed that constitutes the controlling factor. An all inclusive definition of what constitutes the practice of law is too difficult for simple statement. We shall not attempt it here, but will follow the practice established by the previous decisions of this court and examine the facts and circumstances of each case and determine whether the defendant purported to exercise the legal training, experience and skill of an attorney at law without a license to do so. Our former decisions supporting these views are collected and discussed in State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381.”</p>	
NH	Appeal of Campaign for Ratepayer’s Rights, 137 NH 720; 634 A2d 1345 (1993)	<p>“It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. “[T]here is [no] single factor to determine whether someone is engaged in the unauthorized practice of law and, consequently, may be prohibited from undertaking the legal representation of another. That determination must be made on a case-by-case basis.” Bilodeau v. Antal, 123 N.H. at 45, 455 A.2d at 1041. CRR’s position that it ought to be permitted to intervene without restriction in the adjudicatory aspects of a commission proceeding is, however, untenable. <i>See Selected Opinions of the Attorney General of New Hampshire 1987</i>, No. 87-46, at 144-45 (Equity 1989). There is no dispute that public participation can add considerable value to commission proceedings, and the commission should ensure that such participation is maximized. Where, however, the conduct under scrutiny is congruent with well accepted, exclusively lawyer functions, that conduct cannot lawfully be performed *716 by a non-lawyer, albeit with good character, who appears commonly.”</p>	

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
ND	State of North Dakota v Niska, 380 NW2d 646 (ND, 1986)	<p>"Although what constitutes the practice of law does not lend itself to an inclusive definition, it clearly includes Niska's drafting of legal instruments and pleadings and providing legal advice. <u>Cain v. Merchants Nat. Bank & Trust Co. of Fargo</u>, 66 N.D. 746, 268 N.W. 719 (1936); see also <u>Bluestein v. State Bar of California</u>, 13 Cal.3d 162, 118 Cal.Rptr. 175, 529 P.2d 599 (1974); <u>Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n</u>, 91 Wash.2d 48, 586 P.2d 870 (1978)."</p>	<p>Notes on why UPL for advertising does not violate right of freedom of speech.</p> <p>"The State's interest in regulating the practice of law is unrelated to the expression of ideas. Section 27-11-01 is not targeted at ideas which the state seeks to suppress. Compare, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (statute banning advertising price of prescription drugs); Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (ordinance describing permissible picketing in terms of its subject matter). Instead, § 27-11-01 is aimed at preventing the harm caused by unqualified persons performing legal services for others. Because providing legal services requires communication, any regulation of that activity necessarily limits speech. However, any resulting limitation on speech is merely incidental and is not directed at suppressing the expression of ideas. See Clark v. Community for Creative Nonviolence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (reasonable time, place and manner</p>

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

State	Case	Summary	Comments
			<p>restrictions valid even though they limit expression)."</p> <p>"There are numerous modes of communication not encompassing the practice of law available for Niska to express his views. We therefore conclude that § 27-11-01 as applied to Niska does not violate his right of free speech guaranteed by the North Dakota Constitution and the First and Fourteenth Amendments to the United States Constitution."</p>
RI	Rhode Island Bar Association v. Automobile Service Association, 1935, 55 R.I. 122, 179 A. 139, 100 A.L.R. 226	<p>"Whether or not it [practice of law] can be reduced to definition is not important to the decision of the matter before us at this time. "Definition, simple, positive, hard and fast as it is, never tells the whole truth about a conception," said the American philosopher, Josiah Royce, and we adopt that view in refraining from any attempt at definition here. That the practice of the law is a special field reserved to lawyers duly licensed by the court, no one denies."</p>	



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
 From: Mark Tuft
 Date: February 25, 2019
 Re: Expanding Access to Legal Representation to Consumers in Civil Matters
 Involving Critical Human Needs

As we pursue our charge of identifying possible regulatory changes to enhance access to legal services through the use of technology, including artificial intelligence and online legal services, our study should include nonprofit public benefit and advocacy organizations made up of lawyers and non-lawyers as a near-term model for enhancing the delivery of legal services to consumers in matters of critical need.

The law recognizes the right of a broad range of public interest and nonprofit advocacy organizations to provide legal services to individuals and groups in order to advance various social and political objectives (e.g., the ACLU, Natural Resources Defense Council; the Center for Biological Diversity, Disability Rights Advocates, Equal Rights Advocates). Members of these organizations and the governing boards are not limited to those licensed to practice law by the State Bar. Nor are they all required to be registered with the State Bar under the Nonprofit Public Benefit Corporation Law (Corporation Code §5110 et. seq.; §13406(b)). *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 28, 40. The constitutional limitations on the power of a state to exclude organizations that represent individuals and groups in litigation that involve matters of common interest or constitute a form of political expression is well established. *NAACP v. Button* (1963) 371 U.S. 415; *United Mine Workers of America v. Illinois State Bar* (1967) 389 U.S. 217, 222; ABA Formal Op. 93-374 (1993). These practice settings are not hampered by issues of the unauthorized practice of law or non-lawyer involvement in the provision of legal services. The State Bar responded to the Supreme Court's directive in *Frye* to study whether additional regulation of this form of practice was necessary. To date, further regulation has not been considered necessary for purposes of public protection.

In 2016, the Legislature established a pilot program aimed at expanding access to legal representation for low-income parties in specified civil matters "involving critical issues affecting basic human needs." Government Code §68651 (e.g., housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships; elder abuse; child custody proceedings). The pilot program is statutorily limited to "qualified legal projects" as defined under Business and Professions Code §6214 and is subject to funding restrictions which have rendered the program practically moribund. However, this legal services model could provide a framework for expanding the delivery of legal services in areas of critical need through artificial intelligence and on-line delivery systems that allow for greater efficiencies at an affordable cost to consumers. If viable, it could one of a series of recommendations that we provide to the Court.

ATTACHMENT D

Links:

- [State Bar of California Report re Nonprofit Entity Legal Practice \(*Frye Report*\) \(2008\)](#)
- [Corporation Code § 5110 et seq.](#)
- [Corporation Code § 13406\(b\)](#)

ARTICLES

When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism

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ABSTRACT

As legal aid budgets have stagnated or declined, deregulatory approaches to address the access gap in civil legal services have gained traction in the United States. One proposed deregulatory strategy, non-lawyer ownership of legal services, has become both particularly prominent and contested. Competition advocates claim that allowing non-lawyers to own legal services will bring in needed capital and expertise that will make legal services more affordable and reliable, while many members of the bar contend these outsiders will undercut professionalism. The existing academic literature has been almost entirely speculative and largely favored non-lawyer ownership on theoretical grounds.

Non-lawyer ownership though is not an abstraction. Two major jurisdictions, the United Kingdom and Australia, have adopted such ownership in recent years, and there are parallels to it within the United States in online legal services and social security disability representation. This Article draws on case studies and quantitative data from these three countries to argue for a more context-driven understanding of the impact of non-lawyer ownership. It finds that, for reasons under-explored in the literature, the access benefits of non-lawyer ownership are generally oversold, potentially diverting attention from more promising access strategies. This Article also identifies challenges to professionalism that non-lawyer ownership can create, including new types of conflicts of interest and the potential for regulatory capture by new actors who can profit from legal services.

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Despite its questionable access benefits, given current trends towards deregulation, non-lawyer ownership is likely to continue to spread. To address the potential dangers it can create, as well as maximize any access benefits it can bring, this Article recommends a process-based solution. Namely, that a diverse set of stakeholders, drawing on available empirical data, develop a tailored approach for when to allow for non-lawyer ownership and in what form.

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INTRODUCTION

In the face of stagnant or declining legal aid budgets¹ and perceived limitations of pro bono assistance,² deregulatory approaches to address the access gap in civil legal services have gained traction in the United States. These include proposals to liberalize restrictions around the unauthorized practice of law,³ as

1. Funding to the Legal Services Corporation, which helps fund civil legal aid programs in U.S. states, has declined by almost half in real terms between 1994 and 2013 to \$340 million. *Funding History*, LEGAL SERVICES CORPORATION, <http://www.lsc.gov/congress/funding/funding-history> [<http://perma.cc/E4CU-M27P>] (last visited Aug. 29, 2015); DEBORAH L. RHODE, ACCESS TO JUSTICE 186 (2004) (noting that most programs to assist the poor in both “civil and criminal matters are starved for resources”).

2. For an overview of some of these constraints, see Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 115–144 (2004) (detailing the history of the institutionalization of pro bono in the United States and noting the limitations of having free legal services provided by lawyers beholden to private commercial interests).

3. See, e.g., RHODE, *supra* note 1, at 87–91 (advocating for allowing other professionals, like accountants, to practice law in some areas and licensing and certifying others to perform other legal activities); Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STANFORD L. REV. 1689, 1709–11 (2008) (arguing that non-lawyer providers could

well as to create new categories of legal providers, like licensed paralegals, that require fewer qualifications.⁴ Perhaps the most prominent and controversial deregulatory approach is to allow for non-lawyer ownership of legal services. Liberalization advocates contend that the outside capital and expertise non-lawyers would bring would increase access to justice by making legal services more affordable and reliable. This argument has been taken up by civil society,⁵ numerous legal academics,⁶ and is a key claim in a legal challenge to restrictions on non-lawyer ownership brought by the law firm of Jacoby & Meyers in a New York federal court.⁷ On the other hand, opponents of non-lawyer ownership, including the American Bar Association (ABA), assert that opening up the profession to outside owners will undercut lawyers' independence and professionalism with adverse consequences to all clients, including those in under-served populations.⁸

adequately provide many legal services); CLIFFORD WINSTON, ROBERT W. GRANDALL, & VIKRAM MAHESHRI, *FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS* 83 (2011) (arguing for a certification regime instead of a licensing regime for most legal services in the United States).

4. Notably, in 2012 Washington State introduced licensed "legal technicians" in an effort to increase access to civil legal services. For an overview of this policy and the history leading up to it, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 77 (2013); *see also* RHODE, *supra* note 1, at 15 (noting that "almost all of the scholarly experts and commissions" that have studied the issue have recommended a larger role for non-lawyer specialists).

5. TESTIMONY TO THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL AID SERVICES ON ALLOWING INNOVATION TO MEET UNMET LEGAL NEEDS, RESPONSIVE L. (Sept. 27, 2013), http://responsivelaw.org/files/Responsive_Law_-_NY_Task_Force_2013.pdf [http://perma.cc/8LBP-G5V2] (arguing that non-lawyer ownership would increase access to legal services).

6. For an early example of the argument that non-lawyer ownership will increase access, albeit by two Canadians, see Robert G. Evans and Alan D. Wolfson, *Cui Bono-Who Benefits from Improved Access to Legal Services*, in *LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES* 3, 24–26 (Robert G. Evans & Michael J. Trebilcock eds., 1982). In the run-up to the consideration of multi-disciplinary practice by the American Bar Association several prominent academics wrote in support of non-lawyer ownership, although mostly on efficiency, not access grounds. *See, e.g.*, Larry Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1721–25 (1998); Edward Adams & John Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998). More recently, a number of articles have appeared arguing for non-lawyer ownership on access grounds. *See, e.g.*, Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L. J. 1 (2012) (arguing for non-lawyer ownership on first amendment and access grounds); Gillian Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2013) (arguing that abandoning restrictions on the corporate practice of law in the U.S. can significantly increase access to justice); Cassandra Burke Robertson, *Private Ordering in the Market for Legal Services*, 94 BOSTON UNIV. L. REV. 179–180 (2014) (arguing that restrictions on non-lawyer ownership reduce access and should be struck down as unconstitutional).

7. *See infra* note 203.

8. *See infra* II.C.; The New York State Bar Association (NYSBA) has considered and rejected non-lawyer ownership twice. *See* N.Y. ST. BAR ASS'N SPECIAL COMM. ON THE L. GOVERNING FIRM STRUCTURE OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, Ch. 12, § 5 (2000) (describing how outside investment could undercut lawyers' independence); N.Y. ST. BAR ASS'N, REPORT OF THE TASKFORCE ON NONLAWYER OWNERSHIP 73–76 (2012) [hereinafter *NYSBA REPORT*] (citing amongst other concerns that non-lawyer ownership might undercut professionalism).

Although the debate between these two competing sides has often been fierce, it has also been almost entirely theoretical with the New York State Bar Association Taskforce on Non-Lawyer Ownership recently noting, “there simply is a lack of meaningful empirical data about non-lawyer ownership . . .” (partly because of this dearth of data, the Taskforce recommended not allowing outside owners).⁹ Non-lawyer ownership though is not an abstraction. It has been allowed in most Australian states since the early 2000s¹⁰ and in England and Wales in the United Kingdom since 2011.¹¹ Since making these regulatory changes, these two countries have seen new types of actors provide legal services, including law firms that are listed on stock exchanges,¹² law firms owned by major insurance companies,¹³ and legal services offered by brands better known for their grocery stores.¹⁴ Under pressure from Australian and British law firms, Singapore recently allowed for minority non-lawyer ownership¹⁵ and the United Kingdom’s membership in the European Union may eventually force other European countries to also open up their legal markets.¹⁶

9. *Id.* at 17. The report continued, “. . . we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force’s ability to study the issue as it was difficult to assess past experience.” *Id.* at 72.

10. Starting with New South Wales different states in Australia allowed for non-lawyer ownership beginning in 2001. See Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*, U. MELBOURNE LEGAL STUD. RES. PAPER No. 339, at 5-6 (2008).

11. *Alternative Business Structures*, L. SOC’Y (Jul. 22, 2013), <http://www.lawsociety.org.uk/advice/practice-notes/alternative-business-structures/> [<http://perma.cc/FN2C-G8JG>] (noting that alternative business structures, or “ABSS,” began to be approved in 2011) [hereinafter *Alternative Business Structures*].

12. In 2007, the Australian law firm Slater & Gordon made headlines by becoming the first publicly traded law firm in history. Peter Lattman, *Slater & Gordon: The World’s First Publicly Traded Law Firm*, WALL STREET J. L. BLOG (May 22, 2007), <http://blogs.wsj.com/law/2007/05/22/slater-gordon-the-worlds-first-publicly-traded-law-firm/> [<http://perma.cc/3Q2L-X8CR>].

13. See *infra* II.A.1.

14. See *infra* II.A.2. for a description of Co-operative Legal Services, which is part of the Co-operative Group that runs a popular grocery store chain in the UK.

15. John Hyde, *Singapore Embraces ABSS to ‘Keep Pace’ With Rivals*, L. SOC’Y GAZETTE (Jan. 28, 2014), http://www.lawgazette.co.uk/5039611.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ280114 [<http://perma.cc/D52M-YMVQ>]; COMMITTEE TO REVIEW THE REGULATORY FRAMEWORK OF THE SINGAPORE LEGAL SERVICES SECTOR, FINAL REPORT 6, 38 (2014), <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20Report%20of%20the%20Committee%20to%20Review%20the%20Reg%20Framework%20of%20the%20Spore%20Legal%20Sector.pdf> [<https://perma.cc/3DWM-GDK8>] (finding that the new ABS models in Australia and the UK had caused ‘pressure’ on Singapore’s regulatory structure, with firms from those jurisdictions seeking to register in a similar form to their head offices).

16. Jacob Weberstaedt, *English Alternative Business Structures and the European Single Market*, 21 INT’L J. LEGAL PROF. 103, 109 (2014) (arguing that UK membership in the European Union will lead the entire union to adopt similar rules relating to non-lawyer ownership); Spain, Italy, and Denmark already allow for minority non-lawyer ownership. PANTEIA, EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS: FINAL REPORT 205-06 (2012), http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf [<http://perma.cc/23MY-4TQH>] (listing European countries that allow for partial non-lawyer ownership).

Meanwhile, regulatory bodies not just in the United States,¹⁷ but also Canada¹⁸ and Hong Kong¹⁹ are actively considering whether to allow for non-lawyer ownership in legal services.

This Article helps fill the current knowledge gap facing regulators by undertaking the most extensive empirical investigation of the impact of non-lawyer ownership to date. It focuses in particular on non-lawyer ownership's effect on civil legal services for poor and moderate-income populations. To do this, it draws on qualitative case studies and other available empirical data from the United Kingdom and Australia, as well as the United States, where non-lawyer ownership is generally barred, but close parallels are present in online legal services and social security disability representation.

Part I begins by briefly describing how non-lawyer ownership functions in the United Kingdom and Australia. It then lays out the most common justifications of those who claim non-lawyer ownership of legal services will either increase access or undercut professionalism. It then argues that those on both sides of this debate have mischaracterized its probable impact in at least three ways. First, their claims are frequently overly abstract. Not only do they not ground their claims empirically, but they generally ignore how the impact of non-lawyer ownership will likely be affected by contextual factors, specifically the type of non-lawyer owners, the legal sector at issue, and regulatory and economic variations between jurisdictions. Second, although non-lawyer ownership has spurred new business models as predicted by its advocates, it is unlikely these innovations will significantly increase access in most legal sectors for reasons that are underexplored in the literature. Finally, while non-lawyer ownership probably will not lead to the nightmare scenarios that some suggest,²⁰ in some contexts it can create new conflicts of interest and undermine lawyers' public

17. NYSBA REPORT, *supra* note 8, at 2 (recommending that New York not adopt non-lawyer ownership absent compelling need, pressure to change, or empirical data); James Podgers, *ABA Ethics Opinion Sparks Renewed Debate Over Nonlawyer Ownership of Law Firms*, ABA JOURNAL (Dec. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/aba_ethics_opinion_sparks_renewed_debate_over_nonlawyer_ownership_of_law_fi/ [<http://perma.cc/4ZFN-WZEB>] (describing debate created when the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that would permit a law firm to split fees with a law firm from another jurisdiction that is non-lawyer owned); Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest in Law Firms*, FORBES (Mar. 11, 2011 8:22 AM), <http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/> [<http://perma.cc/3REW-3Y6J>] (describing legislation introduced in North Carolina that would have allowed non-lawyers to buy up to forty-nine percent of a law firm).

18. CBA LEGAL FUTURES INITIATIVE, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA 68 (2014), cbafutures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf [<http://perma.cc/4M4R-WBX9>] (recommending the Canadian Bar Association allow for Alternative Business Structures).

19. Kathleen Hall, *Hong Kong Ponders ABS Model*, L. SOC'Y GAZETTE (Sept. 13, 2013), <http://www.lawgazette.co.uk/practice/hong-kong-ponders-abs-model/5037620.article> [<http://perma.cc/J5PU-RR5W>].

20. The idea of non-lawyer ownership has inspired actual nightmares for some.

Along the way to this presentation I also had nightmares. It was five years from now, the ABA was in steep decline . . . after an exhaustive search [of the ABA meeting] no programs on pro bono were to be

spiritedness and professional standards, often in ways even critics have failed to appreciate.

Part II illustrates these arguments through available data and case studies of non-lawyer ownership in the United Kingdom, Australia, and the United States. Part III uses these country studies to support and expand the arguments about non-lawyer ownership's likely impact laid out in Part I. Part IV ends by exploring some of the access and regulatory implications of the Article. Given the questionable impact of non-lawyer ownership on access, it argues that deregulatory approaches like non-lawyer ownership can become a distraction and that other strategies to increase access should instead be prioritized, particularly strengthening and broadening legal aid. Even though non-lawyer ownership may not bring significant access benefits, given current liberalization trends, such ownership is likely to continue to spread. To address concerns about professionalism non-lawyer ownership can create as well as to maximize any access benefits it can bring, the Article recommends a multi-stake holder process to tailor when and how to allow non-lawyer ownership, weighing its costs and benefits in different contexts.

While the regulation of the legal profession has often benefited lawyers more than the public,²¹ there is a danger that a new regulatory regime that embraces an ideology of deregulation or competition too strongly will gloss over new hazards or unduly dismiss old values worth supporting. Reforms like non-lawyer ownership raise the possibility for new conflicts between the interests of clients and the potentially diverse and distinct interests of non-lawyer owned commercial enterprises. With new groups profiting from legal services, regulation may become less susceptible to capture by interests inside the legal profession, but more susceptible to capture by actors outside of it. More generally, by becoming more like other services in the market the profession risks losing the public spiritedness that draws socially committed individuals into its ranks and supports its ability to promote public-spirited ideals within the legal system and more broadly.²² These concerns should not lead to a dismissal of non-lawyer

found, the crisis in death penalty representation went unnoticed . . . and no one was worrying about the independence of the judiciary . . .

LAWRENCE FOX, WRITTEN REMARKS OF LAWRENCE J. FOX TO THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE (Feb. 1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/fox1.html [http://perma.cc/6M4L-ECUJ].

21. For perhaps the most extensive critique of lawyer self-regulation in the United States, see RICHARD ABEL, *AM. LAW* (1991).

22. See Robert Gordon, *The Independence of Lawyers*, 68 B. U. L. REV. 1, 9, 32 (1988) (arguing that many are attracted to the profession for its independent, collegial, and intellectually stimulating environment or its publicly minded goals); David Wilkins, *Partner Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1273–77 (2007) (detailing the “paradox of professional distinctiveness,” which is that as law firms attempt to model themselves more on other types of businesses to increase efficiency that they lose their professional uniqueness which both justified the profession’s self-regulation and attracted talented practitioners to firms in the first place).

ownership out of hand, but instead a continuing analysis of available evidence to assess arguments over the merits of different types of non-lawyer ownership in different contexts.

I. NON-LAWYER OWNERSHIP OF LEGAL SERVICES

A. UNBUNDLING OWNERSHIP OF LEGAL SERVICES

Like any enterprise, the ownership of a legal services entity can be viewed as a bundle of rights and duties. These rights and duties may be unbundled and apportioned to different owners. For example, one party may claim profits produced by a business enterprise, while the right to manage that enterprise may be claimed by another. In practice, if one has significant profit rights in a business one will generally desire a stake in how it is controlled, but the two types of rights can be unbundled, such as in the case of non-voting stock in a public company.²³

A commercial enterprise delivering legal services has an added element of complexity surrounding its ownership. Only lawyers are allowed to practice law, so an enterprise offering legal services must do so through lawyers. Lawyers, though, do not have an unlimited right in the legal services they sell.²⁴ Instead, like other licensed occupations, they have a conditional use right given by the state, usually through one or more regulators. These regulators not only determine the conditions required to become a lawyer, but also can withdraw a lawyer's right to practice if they violate certain professional rules, such as lying to a court or misappropriating a client's funds.²⁵

Significantly, regulators of legal services have traditionally limited the ability of lawyers to be part of a commercial enterprise in which non-lawyers share profits in or manage the business entity.²⁶ These restrictions have largely been justified on the premise that non-lawyers may inappropriately influence how legal services are offered either to increase profits or out of a lack of appreciation of the duties imposed on one offering legal services.²⁷

The recent reforms in the United Kingdom²⁸ and Australia²⁹ have relaxed or ended these restrictions on lawyers' commercial relationships with non-lawyers and so open up new potential ownership structures for legal services. For

23. HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 12 (2000) (noting that if those with control rights have no rights to residual earnings they will have little incentive to make a profit).

24. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT (2009) [hereinafter MODEL RULES] (listing rules that lawyers must follow in order not to be disciplined or disbarred).

25. *See, e.g.*, MODEL RULES R. 8.5 (2009) (empowering disciplinary authorities to sanction lawyers).

26. *See, e.g.*, MODEL RULES R. 5.4 (2009) (declaring that a lawyer shall not share legal fees with a non-lawyer or practice law in an organization where a non-lawyer owns or is the director of or can control the professional judgment of a lawyer).

27. *See infra*, I.B.

28. *See* Legal Services Act 2007, c. 29 (U.K.); *Alternative Business Structures*, *supra* note 11.

29. *See* Parker, *supra* note 10.

example, in both countries non-lawyers can now join law firms as partners, law firms may become publicly owned, or legal services may be offered alongside other non-legal services or products offered by a larger commercial enterprise.³⁰ While lawyers could previously only sell their law firm to other lawyers, who would then themselves have to become part of the firm, lawyers in this more liberalized environment can sell their firm, or part of it, to lawyers or non-lawyers whether they are active managers or passive investors.³¹

TABLE 1:
POTENTIAL RIGHTS AND DUTIES OF DIFFERENT TYPES OF OWNERS AND
EMPLOYEES IN AN ENTITY SELLING LEGAL SERVICES.

	Sharing Profits	Control of Business	Transfer Rights	General Liability	Control of Legal Services	Professional Liability
Lawyer Owners	X	X	X	X	X	X
Non-Lawyer Owners	X	X	X	X		
Lawyer Employees					X	X

Governments and regulators in jurisdictions where they have allowed non-lawyer ownership have been clear that control over the right to actually practice law has to remain with licensed legal professionals, even if the profit rights of the business can be shared more broadly. To accomplish this, jurisdictions adopting non-lawyer ownership have required that a lawyer be responsible for ensuring professional rules of conduct are abided by in legal service enterprises owned by non-lawyers. England and Wales have mandated compliance officers for legal practice,³² while in jurisdictions like New South Wales in Australia a legal practitioner director performs a similar role.³³ If the business enterprise, or those in it, violate rules of professional conduct these compliance lawyers have a duty to correct the misbehavior, and the business entity may be disciplined or barred from offering legal services in the future if it is not corrected.³⁴ In Queensland,

30. See *infra* II.A–B.

31. *Id.*

32. SOLICITORS REGULATION AUTHORITY, SRA AUTHORISATION RULES FOR LEGAL SERVICES BODIES AND LICENSABLE BODIES 2011, Rule 8.5 [hereinafter SRA AUTHORISATION RULES].

33. Legal Services Commission, OBLIGATIONS OF LPDs (Nov. 2013), <http://www.lsc.qld.gov.au/compliance/incorporated-legal-practices/obligations-of-legal-practitioner-directors> [perma.cc/G87J-FBX5].

34. See SRA AUTHORISATION RULES, *supra* note 32, at R. 8.5 (finding compliance officers must take all reasonable steps to ensure compliance and report any failures); *Legal Profession Act 2004* (NSW) s 141(2)

the legal practitioner director also manages the entity's legal services,³⁵ while in England and Wales one of the managers of the enterprise offering legal services must be a lawyer.³⁶ Further, all lawyers working in any entity must abide by professional rules of conduct and may be open to professional discipline if they do not.³⁷ Whether it is through mandated compliance officers, lawyers' involvement in the management of legal services, or continued individual professional liability, it is licensed legal professionals that bare primary responsibility for ensuring that legal service enterprises that may be owned by non-lawyers are not in violation of professional rules.³⁸

While non-lawyer ownership allows lawyers and non-lawyers to share profit rights, debates over whether or not to adopt such ownership have frequently been polarizing. Advocates have claimed non-lawyer ownership will transform legal services, increasing access to justice in the process, as opponents have maintained that this transformation will undercut professionalism. The next two sections briefly detail the most common arguments of those who advocate each of these positions.

B. NON-LAWYER OWNERSHIP AND THE TRADITIONAL ARGUMENT FOR ACCESS

Access to legal services is a long-standing challenge in Australia, the United Kingdom, and the United States. Studies done in each of these countries indicate that there are likely a significant number of people who could benefit from the help of a lawyer, but do not hire one because they either cannot afford a lawyer or are unaware of how one could assist them.³⁹ One 2009 Legal Services

(Austl.) (stating that a legal practitioner director must take all reasonable action to correct the misbehavior of a legal practitioner employed by the practice); *id.* § 153 (listing conduct of legal practitioner director as grounds the Supreme Court can disqualify an Incorporated Legal Practice).

35. *Legal Profession Act 2004* (NSW) s 140 (Austl.).

36. *Alternative Business Structures*, *supra* note 11, § 5.1 (noting that all ABS's must have one manager who is a recognized legal professional in England and Wales or in Europe).

37. *Legal Profession Act 2004* (NSW) s 143(1)(a) (Austl.).

38. As John Flood has noted reforms like the Legal Services Act 2007 in the United Kingdom may outwardly seem to liberalize the profession, but they also re-regulate it, furthering the interests of some actors, like large law firms, within the legal profession. John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation*, 59 *CURRENT SOC.* 507 (2011); *see also* Legal Services Act 2007, c. 29 (U.K.).

39. BDRC CONT'L, LEGAL SERVICES BENCHMARKING REPORT 15 (2012), <https://research.legalservicesboard.org.uk/wp-content/media/2012-Individual-consumers-legal-needs-report.pdf> [perma.cc/H79R-ESVF] (finding in the UK that the working class and the unemployed were more likely to take no action when faced with a legal problem) [hereinafter BDRC CONT'L]; CHRISTINE COUMARELOS ET AL., LEGAL AUSTRALIA-WIDE SURVEY LEGAL NEED IN AUSTRALIA 142 (2012), [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf) [perma.cc/AKA7-NFT4] (finding that in Australia 30 percent of those who began to address a legal problem ended up not pursuing it further, perhaps because of lack of money); *see also* AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUST.: A SURVEY OF AMERICANS MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 28 (1994), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf> [perma.cc/H9EJ-DHSY] [hereinafter ABA LEGAL NEEDS] (noting that

Corporation survey in the United States found that for every client their funded programs served for a civil legal problem another potential client was turned away due to insufficient resources.⁴⁰

Prominent legal scholars like Gillian Hadfield in the United States and regulators in countries like the United Kingdom contend that non-lawyer ownership will help overcome this problem by increasing access to legal services.⁴¹ They support this claim primarily by arguing that outside capital will create new economies of scale, spur innovation, and generate new economies of scope and brands that will all benefit those in need of legal services.

Law firms that provide legal services for individuals have generally been small, consisting of solo practitioners or partnerships of a few lawyers.⁴² Critics claim this form of service delivery is inefficient, as each lawyer or small legal practice invests independently in office space, administrative systems, advertising, and finding solutions to routine legal problems.⁴³ They argue outside capital allows legal services enterprises to achieve larger economies of scale allowing them to invest more in technology, administrative systems, and research into more efficient ways to deliver legal services.⁴⁴ This larger size also allows lawyers within the firm to specialize more in different areas of law.⁴⁵

Non-lawyer ownership is seen as a way not only to address perceived under-capitalization in law firms, but also to recruit and retain high-value employees. Law schools generally do not train lawyers in management, technology, marketing, or other fields that are critical for running many legal

“fear of the cost” was one of the principal reasons given by low income respondents for not using the civil justice system). For an overview of twenty-six large-scale legal needs surveys undertaken across two decades in 15 separate countries, see PASCOE PLEASANCE & NIGEL J. BALMER, *HOW PEOPLE RESOLVE ‘LEGAL’ PROBLEMS* 4 (2014) (amongst other findings, cost is a primary barrier to accessing lawyers).

40. LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS 1 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [<http://perma.cc/WC94-KGFG>] (last visited Oct. 31, 2015).

41. Gillian Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 DAEDALUS 1, 83 (2014) (finding that perhaps the largest barrier to access in the U.S. is an overly restrictive approach to regulating legal markets, including barring non-lawyer ownership); MKT. INTELLIGENCE UNIT DEPT. OF CONSTITUTIONAL AFFAIRS, GOVERNMENT CONCLUSIONS: COMPETITION AND REGULATION IN THE LEGAL SERVICES MARKET, Jul. 2003, at ¶ 47 (UK), <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/oftreptconc.htm#part5> [<http://perma.cc/7MX5-T74D>] [hereinafter MARKET INTELLIGENCE UNIT] (advocating for non-lawyer ownership on competition and efficiency grounds in the UK).

42. For a classic description of the two hemispheres of the bar in America—those who service large organizations, like corporations, and those who service the majority of individual consumers, see JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

43. Hadfield, *supra* note 6, at 49–50.

44. *See id.*; SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES 115, 139 (2004) [hereinafter CLEMENTI REPORT].

45. Hadfield, *supra* note 6, at 52; Traditional law firms can, and do, expand through bank loans or saved profits. However, loans frequently come with high interest rates that must be repaid by the firm and many partners may not want to forgo profit disbursements in order to expand.

service enterprises. Non-lawyer ownership allows firms to provide equity (instead of just salaried compensation) to non-lawyers with skills not as readily available in the legal profession, potentially leading to more innovative or efficient legal services.⁴⁶ Investor ownership may also improve leadership transitions in some situations, as removing poorly performing management will generally be easier if management is also not significant co-owners of the firm as are managing partners in most law firms.

An enterprise offering multiple types of services, including legal services, may also create new efficiencies.⁴⁷ For example, it might be more convenient for a customer to be able to access banking and legal services through one company and a company offering these multiple services may be able to save on shared overhead costs.

Finally, outside investment may allow legal service providers to scale and their brands to become better recognized so that consumers can more efficiently navigate the legal services market. If an already well-known brand offering other services begins to offer legal services a consumer can use their perception of the quality of the larger brand as a proxy for the quality of the legal services they provide.⁴⁸ Concerns about protecting the reputation of their larger brand may also create an added incentive for legal service enterprises to provide a quality product.

C. NON-LAWYER OWNERSHIP AND THE TRADITIONAL ARGUMENT FOR PROFESSIONALISM

Criticism of non-lawyer ownership is perhaps most developed in the United States where such ownership has been considered and repeatedly rejected by regulators.⁴⁹ Prominent critics have included decision makers at the American Bar Association, the New York Bar Association's Taskforce on Non-lawyer

46. See Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 531 (2009) (noting that a publicly listed firm can be more efficiently organized and that employees remuneration can be better linked to the success of the firm); Ribstein, *supra* note 6, at 1723 (commenting that law firms may use the tournament of lawyers model because of the lack of options to reward employees with anything else, but the promise of management and financial rights combined with tenure); Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L. J. 953, 1010 (2012) (arguing non-lawyer ownership will allow these firms to attract other talented professionals).

47. See Interview 10, in Cambridge, Mass. (Feb. 4, 2014) [hereinafter Interview 10]. This interview, as well as the other interviews cited in this Article, was conducted with the understanding of confidentiality, and therefore no names are included. Instead the interviews are coded by number. Each number corresponds with an individual interview subject. Journal staff reviewed the notes from each interview to ensure the accuracy of the representations. The notes from the interviews are on file with the author. Interview 10 (Feb. 4, 2014).

48. Hadfield, *supra* note 6, at 49–50. For example, if Walmart started offering legal services, consumers could use their experience with the Walmart brand as a proxy for the quality of legal services they might receive.

49. See *infra* III.C.

Ownership, and vocal members of the profession such as Lawrence Fox.⁵⁰ Notably, few academics have publicly opposed non-lawyer ownership outright, although some have expressed notes of caution.⁵¹ Critics of non-lawyer ownership claim that its access benefits are unproven⁵² and that it will undermine professionalism,⁵³ imposing unreasonably high costs on clients, including low-income ones, as well as society as a whole. Non-lawyer ownership is seen to undercut professionalism by promoting commoditization, creating more conflicts of interest, and by increasing the likelihood that non-lawyers will be in a position to undercut professional standards.

Opponents of non-lawyer ownership argue that lawyers, and their firms, are acculturated towards a different set of goals than those owned by non-lawyers. Like Anthony Kronman's "Lawyer Statesman," legal professionals in this vision work to earn a living from their trade, but also to promote ideals that encourage public-spirited devotion to the law.⁵⁴ These critics contend that non-lawyer owners, in particular investor-owners, seek only to maximize the return on their investment because, unlike lawyers working in a firm, they are not personally invested in the labor of the enterprise.⁵⁵ Investor owned firms might focus exclusively on enhancing profits with little regard for the public good, which not only could harm the community, but also undercut one of the historical sources for the profession's legitimacy.⁵⁶ Non-lawyer owners may also be less likely to act as an independent check on state or corporate power.⁵⁷ While these critics generally acknowledge that law has become more like a business in recent years, with lawyers themselves more and more motivated by profit alone, they want to protect what remains of the profession's value system from further decline.⁵⁸

Non-lawyer ownership brings the potential for lawyers to be caught in a conflict between their duties to investors and their duties to their clients or the

50. See generally NYSBA REPORT, *supra* note 8, at 3; ABA COMMISSION ON MULTI-DISCIPLINARY PRAC., REP., ABA (1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpreport.html [<http://perma.cc/UQZ5-RPSG>] [hereinafter ABA COMMISSION]; Fox, *supra* note 20.

51. Robertson, *supra* note 6, at 180–81 (claiming that "few onlookers have attempted to defend the corporate practice doctrine" and citing to a handful of partial defenses. Although such a broad claim is likely too strong, as there have been many members of the bar who have argued against non-lawyer ownership, it is accurate to portray the academic literature as overwhelmingly supportive of non-lawyer ownership.).

52. See NYSBA REPORT, *supra* note 8, at 72 (noting lack of empirical data on the impact of non-lawyer ownership).

53. See *id.* at 73–74 (expressing concern that non-lawyer ownership will undermine professionalism).

54. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1995).

55. See Benedict Sheehy, *From Law Firm to Stock Exchange Listed Law Practice: An Examination of Institutional and Regulatory Reform*, 20 INT'L J. LEGAL PROF., 3, 7 (2013).

56. See *id.* (noting that the one of the major concerns of non-lawyer ownership was that these businesses would "focus excessively on enhancing members' economic benefit without regard for the public good").

57. See Fox, *supra* note 20 (noting that lawyers working for non-lawyer owned companies would be less likely to work on death penalty or other high profile and controversial pro bono matters).

58. See Adams & Matheson, *supra* note 6, at 23.

justice system.⁵⁹ For example, Shine Lawyers, a publicly owned law firm in Australia, makes clear in its prospectus to potential investors that their first duty is to the courts, then clients, and then shareholders.⁶⁰ These duties, in this order, are also laid out in Australian law.⁶¹ This example signals there is a potential regulatory solution to this conflict, but it also suggests that non-lawyer ownership creates conflicts different than those previously faced by the profession. Before non-lawyer ownership, it may have been in lawyers' self-interest to take actions that would further the financial interests of the firm, but a sense of professional duty or the firm's culture may have tempered such actions if they conflicted with a client's interests. In a world of non-lawyer ownership, investors may try to create new demands on a firm, and the lawyers within it, to prioritize commercial interests.

While many criticisms of non-lawyer ownership are directed at non-lawyer owners, others are directed more specifically at the dangers of having multiple kinds of employees, often offering multiple services, in the same firm. Some argue that non-lawyer managers and other employees may be more likely to violate legal ethics, not because lawyers have superior morality, but because lawyers are trained and duty-bound to look for conflicts, prize confidentiality, and uphold other professional rules.⁶² As legal and non-legal work becomes more integrated, and entangled, within the firm employees may also be more likely to engage in the unauthorized practice of law or share confidential client information across different departments of the company.⁶³

D. TOWARDS A NEW UNDERSTANDING OF NON-LAWYER OWNERSHIP

Participants in the debate over non-lawyer ownership have argued for two dueling, if not necessarily conflicting, claims: (1) that non-lawyer ownership will significantly increase access to legal services; and (2) that such ownership will negatively impact professionalism. While both sides to the debate bring insight, the actual effect of non-lawyer ownership is likely to be quite different than either

59. Arthur J. Ciampi, *Non-Lawyer Investment in Law Firms: Evolution or Revolution?* 247 N.Y. L. J. 3 (2012) (arguing that non-lawyer ownership places lawyers in a conflict between the best interests of their clients and having to answer to their non-lawyer partners).

60. SHINE LAWYERS, PROSPECTUS 40 (2013), https://www.shine.com.au/wp-content/uploads/2013/10/shine_corporate_limited_prospectus.pdf [<https://perma.cc/XWG8-YX8K>] ("Shine has a paramount duty to the court, first, and then to its clients. Those duties prevail over Shine's duty to Shareholders.") [hereinafter SHINE PROSPECTUS].

61. *Legal Profession Act 2004* (NSW) ss 161–163 (Austl.) (noting that the legislation is given precedence over the company's Constitution and allows the regulations associated with the Legal Profession Acts to displace the operation of the Corporations Act).

62. ABA COMMISSION, *supra* note 50 ("The Commission is particularly mindful that the principal arguments . . . for retaining such prohibitions relate to concerns about the profession's core values, specifically professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest.").

63. Adams & Matheson, *supra* note 6, at 21.

of these traditional accounts suggest in at least three ways that are briefly laid out in this section, before being returned to again in more detail in Part III where they are supported by the country studies presented in Part II.

First, arguments over non-lawyer ownership tend to be too abstract. Non-lawyer ownership should not be thought of as having the same impact in every context—it matters who the non-lawyer owners are and what legal sector or jurisdiction is at issue. A legal services firm owned by consumer owners or worker owners is likely to respond to a different set of incentives and have a different set of potential conflicts of interest than a firm owned by outside investors or owners that also offer other services in the market. Some sectors of legal services may attract more non-lawyer investors than other sectors because they are perceived to be more lucrative or easier to standardize or scale. Countries with larger capital and legal services' markets could see greater amounts and types of non-lawyer ownership. Meanwhile, non-lawyer ownership may be more or less likely depending on the specifics of the regulation allowing it, while a jurisdiction's other professional rules may also influence whether and how it develops. Accounting for these variables can help predict the effect non-lawyer ownership will have in different situations. For example, non-lawyer ownership may have little impact in the immigration sector in a relatively small jurisdiction where such ownership is highly regulated, but it may have a transformative impact that requires regulatory attention in the personal injury sector in a large jurisdiction where major commercial conglomerates enter the market.

Second, even though non-lawyer ownership may lead to more innovation in legal services, greater competition, and larger economies of scale there is reason to doubt that these changes will lead to significantly more access to legal services for poor and moderate income populations. Non-lawyer owners are likely to be attracted to legal sectors, like personal injury, that are relatively easy to commoditize and where expected returns are high. However, these lucrative sectors are less likely to have an access need because of long-standing practices like conditional or contingency fees. More generally, many areas of legal work may be difficult to scale or commoditize, such as aspects of family or immigration law that require significant tailoring to the specific situation of the client, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits. Even where commoditization is possible, persons with civil legal needs frequently have few resources and complicated legal problems. In this context, non-lawyer ownership is unlikely to provide these persons with significant new legal options, as they will still be unable to afford legal services. Finally, cultural or psychological barriers may cause some persons to resist purchasing some types of legal services. In other words, there may not be as much price elasticity in the market for some legal services as advocates of deregulation suggest.

Finally, those who oppose non-lawyer ownership on the grounds that it will undercut professionalism tend to make arguments that are both too wide and too

narrow. Many non-lawyer owned firms are likely to operate in ways quite similar to lawyer owned firms or at least in ways unlikely to create any serious new professionalism concerns. This though does not mean that no new professionalism concerns arise with non-lawyer ownership. The interests of clients and non-lawyer owners are likely to sometimes conflict, placing new pressures on lawyers. These conflicts seem most likely where non-lawyer owners have other well-defined commercial interests, such as in the case of a large corporation that offers multiple other services in the market.⁶⁴ In some situations, non-lawyer ownership may also undermine the public-spirited ideals of the profession, making it less likely lawyers in these firms will engage in pro bono or take on riskier cases that may have a broader social benefit. Lastly, while some have claimed that non-lawyer ownership will lead to an increase in quality of legal services, it is not obvious this will be the result and in some instances pressure by investors could undercut standards in the profession.

II. COUNTRY STUDIES

To illustrate the arguments laid out at the end of Part I, the three country studies in this Part explore the impact of non-lawyer ownership on access and professionalism for civil legal services for poor and moderate-income populations.⁶⁵ While non-lawyer ownership may have access benefits for other groups as well, it is poor and moderate-income individuals that are often excluded from legal services altogether and have justifiably been the primary focus of access advocates.⁶⁶

In the three countries studied, the available quantitative data on legal services is limited. None of the jurisdictions has reliable or systematic data on the price of civil legal services, although England and Wales are beginning to collect some of this information.⁶⁷ Given these restrictions, in each country examined this Article first attempts to determine where there has been significant investment in legal services by non-lawyers. If there is no significant non-lawyer ownership in a sector it is unlikely that such ownership is having a large impact on access or professionalism. In sectors where there has been significant non-lawyer ownership it undertakes qualitative case studies of particularly prominent instances of non-lawyer ownership in enterprises that provide services that are aimed, at least

64. Perhaps the most obvious example of such a conflict, albeit in the criminal context, would be a company that offers criminal defense services and also runs prisons. *See, e.g.*, MODEL RULES R. 1.8(a) (“A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client . . .”).

65. This Article examines how non-lawyer ownership may increase access for this population by increasing awareness of relevant legal options, reducing their price, or increasing their quality at the same or a lower price.

66. *See, e.g.*, RHODE, *supra* note 1, at 187 (for an overview of efforts to increase access to civil legal services in the United States and a proposed agenda).

67. Pricing data has been collected for conveyancing, divorce, and probate services in the United Kingdom for 2012. *See* BDRC CONTINENTAL, *supra* note 39.

in part, at low or moderate income populations. These case studies focus on examining new models of delivering legal services seemingly spurred by non-lawyer ownership, as it posits this type of innovation is most likely to lead to significant gains in access or to raise new professionalism concerns.⁶⁸ Data was collected from public sources, including through special requests to regulators and government agencies, as well as through institutional review board (IRB) approved interviews with key participants.⁶⁹

Given the limitations of the available data, and the complexity of the functioning of legal markets, this study should be treated as an initial attempt to demonstrate non-lawyer ownership's impact on access and professionalism, to be supplemented with further research. Nevertheless, drawing from available evidence does allow one to make, plausible arguments about non-lawyer ownership's most likely influence. Focusing on concrete examples also forces all sides in the debate to more carefully develop, and limit, their claims, while reexamining their normative commitments in the light of potentially contradictory evidence.⁷⁰

A. UNITED KINGDOM

Some background is helpful to appreciate the momentous regulatory changes in the legal services market in the United Kingdom, and specifically England and Wales, over the last several years. While in some jurisdictions there is only one type of legal professional—i.e. lawyers—in England and Wales there are eight types of licensed legal professionals: barristers, solicitors, notaries, conveyancers, legal executives (a type of para-legal), patent attorneys, trademark attorneys, and costs lawyers (who can settle the legal costs of a court case).⁷¹ While the division between barristers, solicitors, and notaries is old, the other types of licensed legal professionals are of more recent origin and were created in part to provide more affordable services by allowing individuals to specialize in areas of

68. See CLAYTON M. CHRISTENSON, *THE INNOVATOR'S DILEMMA* (2011) (describing how disruptive technology can lead to large new efficiency gains, undercutting earlier models of doing business).

69. To capture a more complete view—which included minority and contradictory perspectives—the author interviewed executives at non-lawyer owned legal service providers, competitors, regulators, representatives of the bar, academics, and those in non-profit organizations offering services to under-served populations. The author chose initial interview subjects through publicly available information on non-lawyer ownership and then followed a snowball interview method of selection.

70. Case studies in particular can be used to present us “with unfamiliar situations that inspire tentative moral judgments, which may destabilize the web of normative conviction we bring to them when we examine the connections among its elements.” David Thacher, *The Normative Case Study*, 111 AM. J. SOC. 1631, 1669 (2006).

71. See Approved Regulators, LEGAL SERV. BD., http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm [<https://perma.cc/NF5M-MGUP>] (last visited Oct. 31, 2015) (these eight types of licensed legal professionals each have their own regulator. Two accountant associations are also authorized to license accountants for special probate activities, but currently do not do so).

legal practice without as much training as a solicitor or barrister.⁷²

Since at least Margaret Thatcher's government there has been a strong deregulatory push in legal services in the UK.⁷³ In 2004, a report by Sir David Clementi, which built on a previous study by the UK's competition agency,⁷⁴ recommended a series of regulatory changes to the legal profession.⁷⁵ These proposals culminated in Parliament passing the Legal Services Act (the Act) in 2007.

The Act implemented two primary changes. The first concerned regulatory agencies. The Act separated the advocacy and disciplining functions of the bar by creating an independent Legal Ombudsman to address consumer grievances.⁷⁶ It also separated the advocacy and regulatory functions of the bar by, for example, creating the Solicitor Regulatory Authority (SRA) as the independent regulatory arm of the Law Society.⁷⁷ To oversee the eight independent frontline regulators of each type of legal professional in England and Wales the Act created the Legal Services Board (LSB), which acts as a "meta-regulator."⁷⁸ Second, the Legal Services Act allowed for Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs).⁷⁹ LDPs, the first of which were licensed in 2009, permit different types of legal professionals to own and manage law firms together (for example, solicitors and barristers can practice together in a LDP, while previously they had to practice in separate firms).⁸⁰ ABSs began to be licensed in 2011 and can be fully owned by non-lawyers as well as offer non-legal services alongside legal services.⁸¹

These reforms were brought about to increase competition, make the market more consumer friendly, and increase access to legal services for those without

72. Some of these other professions also formalized the role non-licensed individuals were already performing. For a short history of the origins of these licensed legal professionals, see LEGAL SERV. INST., *THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE* (Aug. 2010), <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf> [https://perma.cc/D5AB-YZE2?type=source].

73. For an excellent history of the reforms that were instituted in the English legal profession in the 1980s and 1990s, see RICHARD ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003).

74. In a 2001 report the Office of Fair Trading pointed to uncompetitive practices in the legal profession that it argued needed to be reformed. See OFFICE OF FAIR TRADING, *COMPETITION IN PROFESSIONS* (2001), http://www.oft.gov.uk/shared_oftr/reports/professional_bodies/oft328.pdf [https://perma.cc/F33B-3DTL].

75. See CLEMENTI REPORT, *supra* note 44.

76. See Legal Services Act 2007, c. 29, § 115 (UK).

77. See *How We Work*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/sra/how-we-work.page> [https://perma.cc/7KDS-GWZ2] (last visited Oct. 31, 2015).

78. See Approved Regulators, LEGAL SERV. BD., http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm [https://perma.cc/NF5M-MGUP] (last visited Oct. 31, 2015).

79. See Legal Services Act 2007, c. 29, § 5 (UK) (setting out the legal basis for ABSs); see also *Legal Disciplinary Practice*, L. SOC'Y (Apr. 6, 2011), <http://www.lawsociety.org.uk/advice/practice-notes/legal-disciplinary-practice/#ldp2> [perma.cc/GV65-8LHG] (describing the legal basis for LDPs) [hereinafter *Legal Disciplinary Practice*].

80. See *Legal Disciplinary Practice*, *supra* note 79.

81. See generally *Alternative Business Structures*, *supra* note 11 (describing how ABSs operate).

them.⁸² Although most ABSs licensed so far are traditional law firms simply adopting a new form, many are new actors in the legal services with new business models.⁸³ The reforms have also caught the attention of foreign investors. The publicly listed Australian law firm, Slater & Gordon, became an ABS in 2012 and subsequently bought several personal injury and general service law firms across the country to become a major market player.⁸⁴ LegalZoom, a U.S. online legal service provider, has also received an ABS license and announced a partnership with a major UK law firm network.⁸⁵

Deciphering the impact of non-lawyer ownership of legal services in England and Wales can be challenging. Not only did ABSs begin to be licensed only in late 2011,⁸⁶ but shortly after the Legal Services Act was passed the 2008 financial crisis undercut the demand for legal services, especially in certain sectors such as real estate.⁸⁷ Due to increased pressure on the budget and longstanding belt-tightening trends, the government implemented major cuts to the legal aid system in April 2013 (the UK has traditionally spent more per capita on legal aid than most other countries).⁸⁸ These cuts reduced fees paid to lawyers for legal aid and eliminated legal aid for many family law, housing, employment, welfare, debt, and immigration matters, as well as created a residency test and a more stringent means cutoff for beneficiaries.⁸⁹ Since legal aid has traditionally been through government contracting with private lawyers these cuts have created downward pressure on salaries in the overall legal services market.⁹⁰

82. See MARKET INTELLIGENCE UNIT, *supra* note 41; see also CLEMENTI REPORT, *supra* note 44, at 105.

83. As of 2014, about a third of licensed ABS firms were new entrants, while the others were law firms that had already been in existence and converted to ABSs. SOLIC. REG. AUTHORITY, RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES: FINDINGS WITH SURVEYS OF ABSs AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS 10 (2014) [hereinafter SOLICITORS REGULATORY AUTHORITY].

84. As of 2014, Slater & Gordon had more than 1200 staff in eighteen offices. See Neil Rose, *Slater & Gordon Completes Panonne Acquisition and Hints at Yet More to Come*, LEGALFUTURES (Feb. 17, 2014), <http://www.legalfutures.co.uk/latest-news/slater-gordon-completes-pannone-acquisition-hints-yet-come> [https://perma.cc/8JFN-QZP2] [hereinafter Rose, *Slater & Gordon Completes Panonne Acquisition*].

85. See John Hyde, *LegalZoom Enters Market with ABS License*, L. SOC'Y GAZETTE (Jan. 7, 2015), <http://www.lawgazette.co.uk/practice/legalzoom-enters-market-with-abs-licence/5045879.fullarticle> [https://perma.cc/8WQC-3RDS].

86. Neil Rose, *Future of Law: Big Brands and Alternative Business Structures*, GUARDIAN (Oct. 12, 2012), <http://www.theguardian.com/law/2012/oct/12/brands-alternative-business-structures> [http://perma.cc/MF38-32G3] [hereinafter Rose, *Future of Law*].

87. See PASCOE PLEASENCE, NIGEL J. BALMER & RICHARD MOORHEAD, A TIME OF CHANGE: SOLICITORS' FIRMS IN ENGLAND AND WALES 2–3 (2011), <https://research.legalservicesboard.org.uk/wp-content/media/time-of-change-report.pdf> [https://perma.cc/K2KZ-WLV3] (detailing a general fall in the demand for legal services after the financial crisis, particularly around real estate transactions and probate).

88. See John Flood & Avis Whyte, *What's Wrong with Legal Aid? Lessons from Outside the UK*, 25 CIV. JUST. Q. 80, 84 (2006). On cuts to the legal aid system, see Owen Bowcott, *Labour Peer Condemns Legal Aid Cuts*, GUARDIAN (May 2, 2012), <http://www.theguardian.com/law/2012/may/02/labour-peer-legal-aid-cuts> [https://perma.cc/9YLB-5SXU] [hereinafter *Labour Peer*].

89. See *Labour Peer*, *supra* note 88.

90. For the first time in their history barristers in the country went on strike in January of 2014 to protest these changes, indicating both the perceived severity of the cuts to the legal system and the profession. Owen Bowcott,

Despite this turmoil, the available data does allow us to see where Alternative Business Structures have and have not entered the market. As of August 2014, there were over 360 ABSs, most of which had been licensed by the Solicitor Regulatory Authority (SRA).⁹¹ The ABS firms licensed by the SRA are

TABLE 2:
ABS MARKET PRESENCE IN DIFFERENT LEGAL SECTORS REGULATED BY SOLICITOR REGULATORY AUTHORITY BETWEEN OCTOBER 2012 AND SEPTEMBER 2013.⁹³

	ABS market share (%) of Sector	Number of ABSs in Sector	Number of ABSs > 50% of Business in Sector
Children	3.47%	33	0
Consumer	19.77%	6	0
Criminal	2.87%	34	7
Debt Collection	3.73%	46	3
Employment	6.07%	94	5
Family/Matrimonial	5.27%	76	5
Intellectual Property	2.46%	16	1
Landlord/Tenant	3.45%	57	2
Litigation (Other)	4.26%	112	18
Mental Health	23.49%	6	1
Non Litigation Other ⁹²	16.80%	64	5
Personal Injury	33.53%	102	53
Probate Estate Administration	4.78%	67	0
Property Commercial	3.19%	73	0
Property Residential	3.03%	78	2
Social Welfare	11.96%	5	0
Wills Trusts Tax Planning	3.35%	89	7

Barristers and Solicitors Walk out Over Cuts to Legal Aid Fees, GUARDIAN (Jan. 5, 2014), <http://www.theguardian.com/law/2014/jan/05/barristers-solicitors-walkout-legal-aid-cuts> [<http://perma.cc/Q7V6-CRST>].

91. Nick Hilborne, *SRA Now Licensing More Than 300 ABSs*, LEGALFUTURES (Aug. 6, 2014), <http://www.legalfutures.co.uk/latest-news/sra-now-licensing-more-than-300-abss> [<http://perma.cc/GSR7-8F3R>].

92. “Non Litigation Other” is a catchall category that includes work that does not fit neatly into other categories when they self-report. It is unclear what types of work firms might be including in this category. Email from CBT to author (June 13, 2014) (on file with author).

93. SOLICITORS REGULATORY AUTHORITY, *supra* note 83, at 12, supplemented with data provided in email correspondence with SRA (June 13, 2014).

disproportionately concentrated in certain sectors, particularly personal injury, where in 2012–2013 ABS firms accounted for 33.5 percent of the market share.

Following personal injury, ABSs have had the biggest share of revenue in consumer, social welfare, and mental health law, although each of these sectors had a relatively small number of actual ABSs.⁹⁴ Consumer law includes product liability cases, mental health law contains mental health malpractice, and social welfare law includes disability benefits, so these legal services may be being offered by larger personal injury firms.⁹⁵ Corporate law, financial advice, civil liberties and immigration are left out of the above table because in these categories less than two percent of market share were with ABSs.⁹⁶

The next two sub-sections examine in more detail the initial impact of ABSs in the UK in two legal sectors: personal injury and family law. These examples highlight both how ABS firms are transforming these sectors, but also that these transformations do not necessarily bring improvements in access and can raise some professionalism concerns.

1. PERSONAL INJURY AND THE INSURANCE INDUSTRY

The rush of ABS licensed firms into the personal injury market has created new innovations, brought in new types of investors, and generated larger economies of scale.⁹⁷ However, the access benefits so far have been questionable and some of these ABSs have also created the possibility for new types of conflict of interest and helped actors bypass professional regulations.

The rapid growth of non-lawyer ownership in personal injury is not particularly surprising. The personal injury market is both historically large and, at least in recent years, disproportionately profitable, making it a clear target for outside investors.⁹⁸ Personal injury firms also require capital-intensive upfront costs, both to solicit claims through advertising and then to screen those claims.⁹⁹

94. This work constituted over fifty percent of business for only one ABS. *Id.*

95. *Id.*; Nick Hilborne, *ABSs Capture a Third of Personal Injury Market*, *SRA Research Reveals*, LEGALFUTURES (June 12, 2014), <http://www.legalfutures.co.uk/latest-news/abss-capture-third-personal-injury-market-sra-research-reveals> [http://perma.cc/LP6G-8F6J].

96. Email from SRA to author (June 13, 2014) (on file with author).

97. Quindell, discussed in this section, is an example of a firm with a new business model, outside investors, and a larger economy of scale. *Infra* note 117.

98. Previous research found firms that were more productive were most likely to operate in the injury market segment. LEGAL SERV. BOARD, EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS 6 (Oct. 2013), [https://research.legalservicesboard.org.uk/w\(on file with author\)u 2015\)ls,glr mentions](https://research.legalservicesboard.org.uk/w(on file with author)u 2015)ls,glr mentions). Is this what the author intended to cite back to?r that it comes from the same sop-content/media/Changes-in-competition-in-market-segments-REPORT.pdf [https://perma.cc/Q56V-37YL] [hereinafter LSB 2013]. The sector accounted for £1.8 billion in 2011 or about 12 percent of all legal turnover for solicitors in the United Kingdom. *Id.* at 4.

99. The need for larger investment in advertisement led to the growth of claims management firms in the United Kingdom before the 2013 ban on referral fees. LONDON ECON., ACCESS TO JUSTICE: LEARNING FROM LONG TERM EXPERIENCES IN THE PERSONAL INJURY LEGAL SERVICES MARKET 17 (2014), <https://research.>

There are regulatory reasons unique to the UK that likely helped spur non-lawyer investment as well. The government banned referral fees in April 2013 after a report recommending their prohibition by Justice Rupert Jackson to the Ministry of Justice.¹⁰⁰ This ban, and its anticipation, arguably sped the entry of ABSs into the personal injury market. Large insurance companies had previously made money off of the referral of their customers to personal injury lawyers after they had been in auto accidents.¹⁰¹ Instead of losing this lucrative source of revenue, insurance companies have instead invested in their own law firms to which they can refer cases without charging a fee, but still benefit from the subsequent profits.¹⁰² Meanwhile, large personal injury law firms, like Slater & Gordon, have bought law firms with well recognized brands and invested in advertising to ensure a steady supply of clients in the wake of the referral fee ban.¹⁰³

Many lawyers have criticized insurance companies for bypassing restrictions on referral fees by setting up their own legal practices. As one prominent UK personal injury lawyer noted,

The referral fee ban was ostensibly at least a principled one, i.e. distaste in selling the right to act for an injured person. It seems a strange solution to that problem, to allow those referrers now to own [a solicitor's practice] rather than simply be paid by a solicitor's practice a referral fee, and to somehow conclude this is better.¹⁰⁴

Indeed, beyond a general “distaste” for referral fees, the Jackson report criticized the referral system for not helping consumers find the best quality lawyer for their claim, but rather guiding them towards the lawyer who would pay the referrer the highest price.¹⁰⁵ Consumers who are directed to an ABS

legalservicesboard.org.uk/wp-content/media/Access-to-Justice-Learning-from-PI.pdf [http://perma.cc/Q56V-37YL] [hereinafter *LEARNING FROM LONG TERM EXPERIENCES*].

100. RUPERT JACKSON, *REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 203-206* (Dec. 2009), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> [https://perma.cc/JE44-6XRQ]; *Claims Management Company Regulations, Guidance and Legislation*, MINISTRY OF JUSTICE (Jan. 23, 2015), <http://www.justice.gov.uk/claims-regulation/information-for-businesses/referral-fees-ban-in-personal-injury-cases> [https://perma.cc/A4JP-4UPW?type=source] (detailing April 2013 ban created by Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) [hereinafter *MINISTRY OF JUSTICE*].

101. Before the referral fee ban over fifteen percent of personal injury solicitor firms received over fifty percent of their business through referrals. LSB 2013, *supra* note 98, at 53.

102. See Neil Rose, *ABS-Owners Sign up to Code on Handling Legal Work for Policy Holders*, LEGALFUTURES (Feb. 14, 2014), <http://www.legalfutures.co.uk/latest-news/abs-owning-insurers-sign-code-handling-legal-work-policyholders> [https://perma.cc/TL5Q-4CEL?type=source] [hereinafter *Rose, ABS-Owners Sign up to Code on Handling Legal Work for Policy Holders*].

103. See Interview 1, in London, Eng. (Jan. 9, 2014) [hereinafter *Interview 1*].

104. Email 21 (Apr. 7, 2014) (on file with the author and with Geo. J. Legal Ethics).

105. JACKSON, *supra* note 100, at 203–206. Importantly, the report also criticized referral fees for increasing the price of the overall personal injury litigation process by adding more players and costs. *Id.*

because their insurance company owns it similarly seem to be referred simply because of the monetary benefit to the insurance company and not because the referral is necessarily in the consumer's best interest.

One ABS, Quindell, which is listed on the Alternative Investment Market (AIM) on the London Stock Exchange, has bypassed the referral ban even though it is not owned by an insurance company.¹⁰⁶ Instead, Quindell sells claims management services.¹⁰⁷ Its agents staff telephone hotlines that are the first point of contact for customers when they call insurance companies after an auto accident.¹⁰⁸ The agent then alerts the insurance company to the claim, but also offers a package of other services to the customer including roadside assistance, vehicle repair, car rental, rehabilitation medical support, and legal services.¹⁰⁹ Since Quindell agents are the first point of contact with customers, recommending them to their legal services arm is not technically a banned referral.¹¹⁰ This strategy has been profitable, increasing Quindell's reported revenue from £163 million (with £52 million in profit) in 2012 to £380 million (and £137 million in profit) in 2013.¹¹¹ Some though have questioned whether the company is subverting the referral fee ban¹¹² or whether having medical evidence for a personal injury client provided by the same company that provides legal representation for the client creates a conflict of interest.¹¹³ One particularly critical report of Quindell's business strategy (written by a firm short selling its stock) led Quindell's shares to lose almost half their value, or about £1 billion, in one day in April 2014.¹¹⁴

106. Rory Gallivan, *Quindell Mulls U.S. Listing After Move to London Premium List Blocked*, WALL STREET J. (June 11, 2014), <http://online.wsj.com/articles/quindell-mulls-u-s-listing-after-move-to-london-premium-list-blocked-1402498223> [http://perma.cc/5UJ3-QY2G].

107. QUINDELL, QUINDELL PORTFOLIO PLC INVESTOR TEACH-IN & TRADING UPDATE 21 (2013) (describing how Quindell pays to be first notice of loss contact point). Quindell also receives a significant portion of its clients through direct customer outreach and other intermediaries.

108. *Id.*

109. *Id.*

110. *Id.*; see also Neil Rose, *Quindell Targets Huge Staff Growth and Higher Value Cases*, LEGALFUTURES (June 19, 2014), <http://www.legalfutures.co.uk/latest-news/quindell-targets-huge-staff-growth-higher-value-cases> [https://perma.cc/Y2GN-SQ3S?type=source] [hereinafter Rose, *Quindell Targets Huge Staff Growth*].

111. Stephen Joseph, *Investor Relations*, QUINDELL (Sept. 14, 2015), <http://www.quindell.com/investors/> [https://perma.cc/5NRP-BYLL].

112. Richard Moorhead, Lawyer Watch, *After Referral Fees—Ethical Personal Injury Practice?* LAWYER-WATCH (Mar. 21, 2014), <http://lawyerwatch.wordpress.com/2014/03/21/after-referral-fees-ethical-personal-injury-practice/> [https://perma.cc/BJD8-QKMN?type=source] (noting how First Notification of Loss Services (like Quindell) have the effect of bypassing the referral fee ban).

113. Interview 18, in London, Eng. (July 7, 2014).

114. Although this report seems to have been produced by an American trading firm shorting Quindell's stock, the market's reaction may indicate a larger unease about their business model. Neil Rose, *Quindell Launches Legal Action Over 'Shorting Attack'*, LEGALFUTURES (April 25, 2014), <http://www.legalfutures.co.uk/latest-news/quindell-launches-legal-action-shorting-attack> [https://perma.cc/8J6U-GYND?type=source] [hereinafter Rose, *Quindell Launches Legal Action*].

While it is in the short-term interest of insurance companies, or companies they contract with like Quindell, to have those they insure succeed in claims against third party insurance companies, it is in the interest of the insurance industry overall to keep the cost of claims down. This raises questions about whether there is an inherent conflict in having personal injury firms owned by insurers even if they do not bring cases against the insurers that own them.¹¹⁵ Before the ban on referral fees, some personal injury firms had bulk contracts with insurance companies to provide the firm with cases and this perhaps meant these law firms were careful not to be too aggressive against the insurance industry.¹¹⁶ However, such an arrangement still created some distance between insurance companies and personal injury law firms.

In February 2014, many of the major insurance companies with ABSs signed a voluntary code of conduct.¹¹⁷ Amongst other provisions, in the code they agreed that they and any party they might refer customers to would whenever possible settle their customers' claims through a government and stakeholder sanctioned claims portal and in a manner that does not unreasonably increase legal costs for the at-fault insurer.¹¹⁸ Such codes of conduct raise concerns that the insurance industry is actively trying to shape its ABSs' legal practice to keep insurance companies costs as low as possible, which may, or may not be, in the best interests of those who have been injured.

More generally, insurance companies have traditionally lobbied for regulation to limit the amount of compensation paid in personal injury cases, while personal injury lawyers have lobbied for regulation that would allow for greater compensation.¹¹⁹ Having insurance companies capture a large part of the

115. There is no outright prohibition on an insurance company owned ABS bringing an injury case against the insurance company that owns them. However, the Solicitors Regulation Authority Handbook provides a set of principles that all solicitors must follow. Principle 3 states, "[y]ou must not allow your independence to be compromised," and Principle 4 states, "[y]ou must act in the best interests of each client." Both of these principles would seem to bar solicitors from acting against the company that owns their firm on behalf of their client. SOLIC. REG. AUTH., *SRA Principles 2011* (2011), <http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page> [<http://perma.cc/66J7-VREV>].

116. Interview 17, in London, Eng. (July 3, 2014).

117. ASS'N OF BRITISH INSURERS, SUPPORT FOR CUSTOMERS WITH ROAD TRAFFIC INJURIES: THE ABI CODE (July 1, 2015), <https://www.abi.org.uk/media/Files/Documents/Publications/Public/2014/personal%20injury/Customers%20with%20Road%20Traffic%20Injuries%20The%20ABI%20Code.ashx> [<https://perma.cc/B7P7-YYCQ>]; Rose, *ABS-Owning Insurers*, *supra* note 102.

118. ASS'N OF BRITISH INSURERS, *supra* note 117, at § 22(i); Rose, *ABS-Owning Insurers*, *supra* note 102. In the code of conduct signatories also agreed to alert customers they were referring of their relationship with their ABS and also not to pressure customers into making claims or refer clients to third parties who might. ASS'N OF BRITISH INSURERS, *supra*, note 117, at §§ 15–16.

119. The Association of Personal Injury Lawyers undertakes multiple lobbying efforts on behalf of UK personal injury lawyers. See *Parliamentary Room*, ASS'N OF PERS. INJ. L., <http://www.apil.org.uk/parliamentary-room> [<http://perma.cc/P5QT-D82Y>] (last visited Oct. 9, 2015). The Association of British Insurers undertakes lobbying efforts for the UK insurance industry. See *About Us*, ASS'N OF BRITISH INSURERS, <https://www.abi.org.uk/About> [<http://perma.cc/9MWW-DQ6H>] (last visited Oct. 31, 2015).

personal injury sector upsets this political balance and could lead to regulation more favourable to insurance companies in the future.

While ABSs owned by insurance companies raise a number of potentially serious conflicts of interest, the access benefits of ABSs in the personal injury market have yet to be demonstrated.¹²⁰ In fact, there has been a decline in personal injury claims made in the United Kingdom from 2011–2012 to 2014–2015.¹²¹ This recent drop has been led by motor claims, which account for about three-quarters of all personal injury claims and reduced about 8 percent from 828,489 claims in 2011–2012 to 761,878 claims in 2014–2015.¹²² It is important to note that between 2011–2012 and 2014–2015 there has been a 35 percent jump in clinical negligence claims (which numbered 18,258 in 2014–2015) and an 18 percent jump in claims against employers (which numbered 103,401 in 2014–2015).¹²³ While this data indicates that the entry of ABSs into the market have failed to halt a decline in the overall number of injury claims, and motor accident claims in particular, without further information it is not possible to speculate about ABSs impact. The decline in motor vehicle claims and the recent rise of claims in clinical negligence and against employers could be caused by the emergence of ABSs, but also the recent referral fee ban, broader reforms in the personal injury sector, a change in the number of motor accidents,¹²⁴ a recent rise in hearing loss claims in the country,¹²⁵ or other factors.

Yet, there are other reasons to believe that ABSs may not be having a significant direct impact on access in personal injury matters. In 2010–2011, before ABSs were licensed, ninety-seven percent of those who brought a personal injury matter in England and Wales reported they did not pay for their solicitor because the solicitor was compensated by their insurance company, was contracted under a no win no fee arrangement, or was provided through legal aid,

120. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 38 (“It is clear that ABSs have already had a big impact on the personal injury market. However, it is not yet possible to assess whether this had led to an increase in access to justice.”).

121. All parties in the UK who receive a claim against them for a personal injury matter must register with the government’s Compensation Recovery Unit, which recovers social security and National Health Service costs in certain compensation and personal injury cases. *Collection*, COMP. RECOVERY UNIT, <https://www.gov.uk/government/collections/cru> [<https://perma.cc/E2QU-UPCE>] (last updated June 8, 2015) [hereinafter COMP. RECOVERY UNIT DATA]; data on the number of personal injury claims taken from excel file available at the Compensation Recovery Unit’s website.

122. *Id.*

123. *Id.* For a fuller discussion of what might be causing the trends in different categories of personal injury, see LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 25–28.

124. Road injuries and deaths have been steadily declining in the United Kingdom in recent years (on average down 4.7 percent each year since 2006, including 2012 and 2013). See *Reported Accidents, Vehicles & Casualties*, DEPT. FOR TRANSPORT, <https://www.gov.uk/government/statistical-data-sets/ras40-reported-accidents-vehicles-and-casualties> [<https://perma.cc/YY6G-YFRZ>] (last updated Sept. 24, 2015) (click on link for Table RAS40001).

125. Mark Sands, *25% of UK Workforce at Risk of Noise Induced Hearing Loss*, POST, May 27, 2014 (noting a forty percent increase in hearing loss claims since the introduction of the Jackson Committee reforms in 2013).

a trade union, or some other source.¹²⁶ Given the nature of this market, it would seem that large shifts in the number of people who can make personal injury claims are more likely to be driven by changes in the structure of conditional fee arrangements or calculations within the insurance industry on when they should fund claims, rather than by the emergence of ABSs.

2. FAMILY LAW AND CO-OPERATIVE LEGAL SERVICES

Co-operative Legal Services is part of the Co-operative Group, which was founded in 1863, is owned by its almost eight million members, and has 3,500 retail outlets throughout the country.¹²⁷ The Co-operative is known in particular for its grocery stores, pharmacies, banks, and services in funeral care and farming. In 2006 the Co-operative began offering legal services to its members and in 2012 they were granted an ABS license to provide these services to the general public.¹²⁸ Co-operative Legal Services is one of the most prominent examples of an ABS offering a broad range of civil legal services to a diverse customer base. Many observers, including those inside the Co-operative,¹²⁹ see Co-operative Legal Services as a way to increase access through economies of scale and scope. However, it is unclear how much the Co-operative has been able to actually increase access and its larger business model is still unproven.

In 2014, Co-operative Legal Services had a staff of 342 and a £23 million annual turnover.¹³⁰ Its major areas of work were probate, personal injury, and family law.¹³¹ Co-operative's funeral, financial, and other arms are able to refer clients to its legal services, and Co-operative Legal Services advertises heavily in the Co-operative Group's chain of grocery stores.¹³² Co-operative Legal Services primary offices are in London, Manchester, and Bristol, but they service many of their customers via phone.¹³³ They claim that by investing in infrastructure and quality control systems they can provide a better service at a more affordable price.¹³⁴

The Co-operative is unique in being member owned and committed to a larger social mission. The Co-operative claims it does not aim to make a profit from its

126. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 31–32.

127. *About Us*, THE CO-OPERATIVE. GRP., <http://www.co-operative.coop/corporate/aboutus/> [<http://perma.cc/72KU-AT6D>] (last visited Oct. 9, 2015); *Who We Are*, THE CO-OPERATIVE. GRP., <http://www.co-operative.coop/corporate/aboutus/an-introduction/> [<http://perma.cc/Z3S8-J2YL>] (last visited Oct. 9, 2015).

128. See *Supermarket Sweep: The cold wind of competition sweeps the legal services market*, ECONOMIST, Apr. 27, 2013, at 54.

129. See Interview 10, *supra* note 47.

130. *Id.*; THE CO-OPERATIVE. GRP., ANNUAL REPORT 19 (2014), <http://www.co-operative.coop/Corporate/PDFs/Annual-Report/2014/Co-operative-Group-Annual-Report-2014.pdf> [<http://perma.cc/NGZ9-5NHH>] [hereinafter THE CO-OPERATIVE GRP.].

131. THE CO-OPERATIVE. GRP., *supra* note 130, at 19.

132. Interview 10, *supra* note 47; THE CO-OPERATIVE. GRP., *supra* note 130, at 16–17.

133. THE CO-OPERATIVE. GRP., *supra* note 130, at 19.

134. Interview 10, *supra* note 47.

legal services as they are interested in offering a “social good” both to their members and the community at large.¹³⁵ Several of the senior lawyers who helped build Co-operative Legal Services joined from the social welfare sector of the legal profession when steep cuts in legal aid were announced in the early 2010s.¹³⁶ They came in part because they saw the Co-operative as a viable platform to provide low cost legal services through a trusted brand to not only the middle class, but also to low income populations who no longer had access to legal aid.¹³⁷

This sense of social mission is particularly true in regard to family law. While legal aid had previously been available to those who were income eligible in most private family law matters, including divorce and custody battles, after the cuts in April 2013 legal aid was only available in private family law disputes involving domestic abuse, forced marriage, or child abduction.¹³⁸ Within this reduced ambit, Co-operative Legal Services was the largest provider of family legal aid in the UK in 2014, having won seventy-eight government contracts across the country.¹³⁹ They serviced these contracts with peripatetic teams of lawyers that share office space in twenty-three of the Co-operative’s bank branches.¹⁴⁰ They also have one of three national telephone contracts for family legal aid.¹⁴¹ Beyond these government contracts, the Co-operative provides family legal services to the public at fixed rates. Some have expressed hope that the Co-operative will be able to provide these services at low enough prices so as to meaningfully mitigate access needs created by legal aid cuts.¹⁴²

However, although the Co-operative is one of the largest providers of family law services, it has not been able to halt a massive increase in the number of unrepresented litigants in UK family courts as a result of legal aid cuts that took effect in 2013. Between 2011 and the first half of 2014 the percent of private family law disputes where neither party was represented by a lawyer more than doubled, and the percent of cases where both parties were represented by a lawyer dropped from forty-nine percent to 25.8 percent.

135. *Id.*; *Co-Operative Group Values and Principles*, CO-OPERATIVE. GRP., <http://www.co-operative.coop/corporate/aboutus/The-Co-operative-Group-Values-and-Principles/> [<http://perma.cc/J3LJ-PRNF>] (last visited Oct. 9, 2015) (noting “social responsibility” and “concern for the community” as core values and principles).

136. *See* Interview 10, *supra* note 47.

137. *Id.*

138. *Q&A: Legal Aid Changes*, BBC News (March 20, 2013), <http://www.bbc.com/news/uk-21668005> [<http://perma.cc/4JQ2-77AP>].

139. Interview 10, *supra* note 47.

140. *Id.*

141. *Co-operative Launches ‘Massive Expansion’ of Family Legal Aid Service*, SOLIC. J., (April 23, 2013), <http://www.solicitorsjournal.com/news/management/business-development/co-op-launches-%E2%80%99massive-expansion%E2%80%99family-legal-aid-service> [<http://perma.cc/RPS3-5RWZ>].

142. Interview 10, *supra* note 47.

TABLE 3:
PERCENT OF PARTIES WITH LEGAL REPRESENTATION IN PRIVATE FAMILY LAW
DISPUTES IN THE UK.¹⁴³

	Both Parties	Applicant Only	Respondent Only	Neither Party
2011	49.0	29.9	10.0	11.1
2012	46.1	31.4	10.3	12.2
2013	35.0	37.4	9.3	18.3
2014 (1 st half)	25.8	37.4	9.7	27.1

Just because new ABSs like Co-operative Legal Services have not been able to fill the gap created by reductions in legal aid, does not mean they have not helped mitigate the impact of these cuts or that they will not play a larger role in the future.¹⁴⁴ However, in recent years, by far the predominant driver of changes in access to representation in family law disputes in the United Kingdom is not the rise of ABSs like Co-operative Legal Services, but cuts in legal aid. Much like in personal injury, the emergence of ABSs in family law representation seems at best a sideshow with unclear effects in the larger access story.

B. AUSTRALIA

Like in the United Kingdom, Australia’s competition authority (which enforces anti-competition law in the country) played a key role in advocating for the adoption of non-lawyer ownership in the country.¹⁴⁵ Under this pressure, and with little input from regulators or the bar, in the early 2000’s the New South

143. This data is taken from U.K. MINISTRY JUST. COURT STATISTICS (QUARTERLY): APRIL TO JUNE MAIN TABLES, tbl 2.4 (2014), <https://www.gov.uk/government/statistics/court-statistics-quarterly-april-to-june-2014> [<https://perma.cc/3KMD-S8W5>]. The number of private law family disputes also began to decline in 2014 (down fourteen percent from 2013), perhaps indicating that a lack of representation is deterring people from still seeking remedies in court. *Id.*

144. The number of respondents who reported that the family law services they received in the past two years represented value for money increased from fifty-seven percent to sixty-three percent between 2011 and 2014. There was also an increase of fixed fees in the family legal services market from twelve percent to forty-five percent. LEGAL SERVICES CONSUMER PANEL, TRACKER SURVEY 3 (2014) (U.K.), http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2014%20Tracker%20Briefing%201_Changing%20market.pdf [<http://perma.cc/TE6H-GU7C>].

The entry of ABSs into the market may have helped spur these changes. However, these changes may have also been caused by an increasingly competitive market in the run up to legal aid cuts. ABSs, including Co-operative, are reported to have only about five percent of the family legal services market so, while it is possible that they have spurred some of these changes, it seems unlikely that they are solely responsible. *Supra* tbl. 2.

145. See Georgina Cowdroy & Steven Mark, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT’L L. REV. 671, 673–75 (2004).

Wales government adopted a set of reforms that allowed for Incorporated Legal Practices (ILPs) and Multi-Disciplinary Partnerships (MDPs).¹⁴⁶ ILPs and MDPs are corporations and partnerships respectively that can offer legal services, along with almost any other non-legal service,¹⁴⁷ and are allowed unlimited non-lawyer investment.¹⁴⁸ Other Australian states undertook similar reforms around the same time.¹⁴⁹

Each ILP or MDP has a designated legal practitioner director or partner, who manages the firm's legal services and ensures compliance with professional obligations.¹⁵⁰ The firms must also create and implement their own "appropriate management systems" to ensure compliance with professional rules.¹⁵¹ However, unlike ABSs in England and Wales, ILPs and MDPs in Australia do not have to be licensed by a legal regulator.¹⁵² The Supreme Court may disqualify them though for violating certain conduct rules.¹⁵³ In other words, it is a registration, not a licensing, process.

While the United Kingdom has seen significant outside investment since allowing for non-lawyer ownership, the impact of similar reforms on the relatively small Australian legal services market has been more subdued. ILPs, and to a lesser extent MDPs, have become quite common in the Australian legal scene, but actual outside ownership outside a small handful of prominent examples is still rare. Instead these forms are largely adopted because of perceived tax and succession benefits.¹⁵⁴ Indeed, the large majority of ILPs are solo practitioners and most other ILPs are organized along the lines of traditional law firms.¹⁵⁵

146. *Id.*; *Legal Profession Amendment Act 2000* (NSW) (Austl.); *id.* at pt. 2.6. For a short history of when states allowed for incorporation of legal practices, see Parker, *supra* note 10, at 5–6.

147. *Legal Profession Act 2004* (NSW) s 135(1) (Austl.). An ILP may not conduct a managed investment scheme. *Id.* at s 135(2).

148. *Practice Structures*, THE LAW SOCIETY OF NEW SOUTH WALES, <http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/practicestructures/index.htm> [<http://perma.cc/84PM-D84B?type=live>] (last visited Oct. 7, 2015) (stating that any corporation may become an ILP, including therefore those owned by non-lawyers).

149. Only the state of South Australia still bars non-lawyer ownership in legal services. *Alternative Business Structures: Lessons From Other Jurisdictions*, GAZETTE 5 (Fall 2012), <http://lawsocietygazette.ca/wp-content/uploads/2013/01/gazette-2012-03-fall.pdf> [<https://perma.cc/6Q2Q-XF87?type=source>].

150. *Legal Profession Act 2004* (NSW) ss 140, 169 (Austl.).

151. *Id.* at § 140; Sheehy, *supra* note 55, at 16–18.

152. Sheehy, *supra* note 55, at 16.

153. *Legal Profession Act 2004* (NSW) s 153 (Austl.).

154. Parker, *supra* note 10, at 12 (ILPs are taxed at the corporate tax rate and it is arguably easier to transfer shares of an ILP to younger colleagues than in a traditional partnership).

155. *See, e.g.*, VICTORIA LEGAL SERV. BOARD & COMMISSIONER ANN. REP. 58 (2013), http://lsbc.vic.gov.au/documents/Report-Legal_Services_Board_and_Commissioner_annual_report-2013.pdf [<https://perma.cc/YK96-A8UL?type=source>] (In the state of Victoria there were 921 ILPs in 2013 of which 715 were solo practitioners). In New South Wales, as of 2014, there were just eighty-five ILPs with ten or more lawyers. Email 20 (Mar. 25, 2014) (on file with the author). From the websites of these firms none were offering fundamentally

1. PERSONAL INJURY AND CLASS ACTION: THE STORY OF THREE LAW FIRMS

Although there has not been a rush of non-lawyer owners into the legal services market in Australia, three law firms, including two personal injury firms, have now listed on the Australian Securities Exchange.¹⁵⁶ The two listed personal injury firms—Slater & Gordon and Shine Lawyers—are two of the three largest personal injury law firms in the country.¹⁵⁷ The other large personal injury law firm, Maurice Blackburn, has not gone public and continues to be lawyer owned. A comparison of these three personal injury law firms suggests that while publicly listing in the Australian context may not create readily apparent new conflicts of interest, it could more subtly undermine the public-spirited ideals of these firms. Such a comparison also casts doubt on whether outside ownership is necessary to achieve large economies of scale or whether such size in the end improves access to legal services.

In 2013, the personal injury market in Australia was estimated at somewhere between \$550 and \$700 million (AUD).¹⁵⁸ Contingency fees are not allowed in Australia,¹⁵⁹ but states have varied types of conditional fee arrangements. For example, Victoria and Queensland allow for a twenty-five percent increase to a winning solicitor's hourly fees, but New South Wales does not allow for a similar "uplift" upon winning.¹⁶⁰ Firms with deep pockets are better placed to offer conditional no win no fee arrangements, while tort reform in the early 2000s that included restrictions on the type of advertising allowed in personal injury has tended to favor established brands.¹⁶¹ This environment has helped lead to consolidation in the personal injury market, and as of 2013 the three largest players were Slater & Gordon (with twenty to twenty-five percent of the market), Maurice Blackburn (with just over ten percent), and Shine Lawyers (with almost

different services than traditional law firms although two, Slater & Gordon and Shine Lawyers, were publicly owned companies.

156. Slater & Gordon Limited (SGH) (listed May 21, 2007), ASX, <http://www.asx.com.au/asx/research/company.do#!/SGH> [perma.cc/Q73K-GDNK] (last visited Dec. 23, 2015); ILH Group Limited (ILH) (listed Aug. 17, 2007), ASX, <http://www.asx.com.au/asx/research/company.do#!/ILH> [perma.cc/FH83-FQKZ] (last visited Dec. 23, 2015); Shine Corporate Ltd (SHJ) (listed May 15, 2013), ASX, <http://www.asx.com.au/asx/research/company.do#!/SHJ> [perma.cc/PVS8-QFJQ] (last visited Dec. 23, 2015).

157. SLATER & GORDON ANNUAL REPORT 2014, SLATER & GORDON 9 (2014), <https://media.slatergordon.com.au/annual-report-2014.pdf> [https://perma.cc/WP3J-R37T] [hereinafter SLATER ANNUAL REPORT].

158. *Id.*

159. MAURICE BLACKBURN LAWYERS, RESPONSE TO THE ACCESS TO JUST. ARRANGEMENTS ISSUE PAPER 3, 4 (Aug. 7, 2013), http://www.pc.gov.au/__data/assets/pdf_file/0007/129337/sub059-access-justice.pdf [http://perma.cc/NE8F-GZZ4].

160. *Id.* at 4. The lack of allowed "uplift" has led firms to complain that in New South Wales they cannot offer legal services for cases they would be able to represent in other states.

161. SHINE PROSPECTUS, *supra* note 60, at 10 ("Tort reform also presents opportunities, particularly in the acquisition of smaller practices which do not have the systems in place to deal with complex regulatory changes.").

ten percent).¹⁶²

Slater & Gordon, founded in Melbourne in 1935, was already a well-known personal injury law firm when it was the first law firm to list on a stock exchange in Australia in 2007.¹⁶³ At that time it had 400 staff in fifteen offices,¹⁶⁴ revenues of \$55 million a year,¹⁶⁵ and an estimated ten percent of the personal injury market.¹⁶⁶ However, partly through a series of acquisitions,¹⁶⁷ by 2014 it had expanded to have revenue of \$234 million in Australia and employed 1,200 people in seventy locations across the country, in addition to having extensive operations in the UK.¹⁶⁸ It spends heavily on advertising and in 2014 had about seventy-five percent brand awareness across Australia.¹⁶⁹ Slater & Gordon is now also the largest provider of family law services, with plans to expand to become a general all-purpose consumer law firm.¹⁷⁰

While Slater & Gordon has been able to grow rapidly since it went public, it was already expanding before it listed.¹⁷¹ Similarly, Shine Lawyers already had offices across the country and had grown markedly before it went public in 2013.¹⁷² Maurice Blackburn, the second largest personal injury firm in the country, is not publicly owned. From 2005 to 2013 it expanded at a similar rate to Slater to twenty-seven offices and 800 staff.¹⁷³ However, most of this growth was internal and it may be that publicly owned firms are at an advantage in acquiring other law firms since they can often offer generous equity packages to incoming partners.

162. SHINE PROSPECTUS, *supra* note 60, at 10 (estimating Shine had no more than 10 percent of the personal injury market); SLATER ANNUAL REPORT, *supra* note 157, at 9 (estimating Slater had twenty-five percent of the personal injury market); Telephone Interview 16 (June 11, 2014) (noting Maurice Blackburn has a slightly larger share of the personal injury market than Shine) [hereinafter Interview 16].

163. SLATER & GORDON, PROSPECTUS 10 (2007), <https://media.slatergordon.com.au/prospectus.pdf> [<http://perma.cc/B7JE-4HR5>] [hereinafter SLATER PROSPECTUS].

164. *Id.*

165. *Id.*, at 10. According to its management team, Slater pursued a public listing rather than private equity because it provided more money, was easier for mergers, and allowed for better management systems. Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535, 536–537 (2009).

166. SLATER PROSPECTUS, *supra* note 163, at 23.

167. For an overview of these acquisitions, see Our History, Slater & Gordon, [perma.cc/E4JR-LQC6] (last visited Dec. 19, 2015).

168. SLATER & GORDON, ANNUAL REPORT 2 (2014).

169. *Id.* at 11. In 2004 (before Slater went public) a survey found that the firm had sixty percent national brand awareness. SLATER PROSPECTUS, *supra* note 163, at 24.

170. Chris Merit, *Slater & Gordon's Three-Part Plan Comes Together*, THE AUSTRALIAN (Nov. 1, 2013), <http://www.theaustralian.com.au/business/legal-affairs/slater-gordons-three-part-plan-comes-together/story-e6frg97x-1226750779555?nk=cfce80ad96b8b743ccae5984fd1d6c42> [<http://perma.cc/E35K-T8WN>].

171. SLATER PROSPECTUS, *supra* note 163, at 10.

172. Interview 16, *supra* note 162; SHINE PROSPECTUS, *supra* note 60, at 8–9, 14–15.

173. MAURICE BLACKBURN LAWYERS, RESPONSE TO ACCESS TO JUSTICE ARRANGEMENTS ISSUES PAPER 1 (Nov. 2013), <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub059-access-justice.pdf> [<http://perma.cc/V7LG-L6R4>] [hereinafter MAURICE BLACKBURN RESPONSE].

Some scholars have claimed that access to investor capital allows firms like Slater & Gordon to achieve a large enough size so that it can engage in more pro bono work and fund riskier class actions that may further the public interest.¹⁷⁴ It is unclear though whether investor capital is necessary for either of these aims and it may even undermine them. Both Shine Lawyers, which only listed recently, and Maurice Blackburn, which is not publicly listed, are better known for their pro bono work than Slater & Gordon.¹⁷⁵ Meanwhile, Maurice Blackburn and Slater & Gordon are by far the two largest law firms for plaintiff class action work in the country with Maurice Blackburn claiming to be the largest.¹⁷⁶ Third party litigation funders (who are able to charge contingency fees in Australia, unlike solicitors) finance a large percent of the class actions of both these firms.¹⁷⁷ These third party litigation funders favor securities class actions and are less likely to fund consumer and product liability class actions, which must instead be funded directly by the law firms themselves.¹⁷⁸ Slater & Gordon may actually be less likely than Maurice Blackburn to directly take on the costs of these class actions because it must answer to the market, instead of the firm's partners.¹⁷⁹ For example, when Slater & Gordon lost a major consumer drug class action in 2012, it led to a 10.5 percent profit loss for the firm that year.¹⁸⁰ This very public defeat led its chairman to reassure the market that most of the rest of its class action portfolio was funded by third-party litigation funders.¹⁸¹

174. Sheehy, *supra* note 55, at 24 (“With its increased financial power supplemented by the litigation funders, Slater has been able to prosecute actions against large MNCs more effectively.”).

175. Interview 15, in Cambridge, Mass. (Apr. 18, 2014); Interview 16, *supra* note 162 (Independent observers of the Australian market both noting that Maurice Blackburn and Shine Lawyers had stronger reputations for pro bono work than Slater & Gordon).

176. MAURICE BLACKBURN RESPONSE, *supra* note 173, at 17; VINCE MORABITO, AN EMPIRICAL STUDY OF AUST.’S CLASS ACTION REGIMES FIRST REP. 28 (2009), http://globalclassactions.stanford.edu/sites/default/files/documents/Australia_Empirical_Morabito_2009_Dec.pdf [<http://perma.cc/D3BR-TPMG>] (finding that Slater & Gordon (forty-nine proceedings) and Maurice Blackburn (thirty-three proceedings) were involved in the most class action proceedings between 1993 and 2009).

177. For an overview of the reasons behind the development of litigation funders in Australia, see generally Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014).

178. Interview 16, *supra* note 162 (academic expert on class actions noting that third party litigation funders are more likely to fund corporate class actions); see also Samuel Issacharoff & Thad Eagles, *The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions*, 38 U.N.S.W. L. J. 179, 180 (“The system of third party funders is simply ill-suited to consumer class actions, given the vast number of people who have been harmed and with whom funders would need to contract, and to bringing meritorious claims with thinner profit margins than third party funders find acceptable.”).

179. Interview 16, *supra* note 162 (arguing that since Slater is a public company it is less likely to take on riskier cases).

180. Stephanie Quine, *Failed Vioxx Action Hits Slaters’ Profit*, LAW. WKLY (Aug. 28, 2012), <http://www.lawyersweekly.com.au/news/failed-vioxx-action-hits-slater-profit> [<http://perma.cc/8GCQ-LNCH>].

181. *Id.* (Slater & Gordon’s managing director Andrew Grech reportedly stated that though it was “very disappointing, I think the important thing to emphasize is it’s very much a once-off situation and certainly not indicative of what’s in the portfolio of cases we have in the future, most of which, in the class action area, are funded by third party litigation funders now.”).

Indeed, critics of non-lawyer ownership in Australia argue that publicly listing orients the culture of a firm towards investors' expectations. The chairman of Maurice Blackburn has announced his firm's intention to stay privately owned, claiming that it does not "... want to compromise the quality of [its] work If you are a publicly listed company, then you will have to grow according to market forecast[s]."¹⁸² To meet these projections, some maintain that publicly listed firms do not take on riskier cases (such as large consumer class actions), shun pro bono (particularly controversial cases), and may even pressure their lawyers to settle cases to meet fiscal targets (although such claims have not been proven).¹⁸³

Even though the listing of law firms in Australia has not created the same types of clear conflicts of interest as other types of non-lawyer ownership in the UK, such as insurance companies owning personal injury firms,¹⁸⁴ the Australian experience does suggest that listing publicly could undermine some of the public-spiritedness of these firms. This could reduce access for certain groups that would benefit from pro bono or certain kinds of class actions. The rapid growth of Maurice Blackburn and Shine Lawyers (before it went public) should also lead one to question whether non-lawyer ownership is necessary to achieve large economies of scale, even if it may give these firms a competitive advantage in acquiring other firms. Finally, some have expressed concern that non-lawyer ownership has led to an unhealthy consolidation of the Australian personal injury market leading to a decrease in choice for consumers without necessarily improving the quality of services or making them less expensive.¹⁸⁵

C. UNITED STATES

Non-lawyer ownership of legal services is banned in all fifty U.S. states, although Washington D.C. allows for minority non-lawyer ownership, mostly to accommodate law firms with partners who are non-lawyer lobbyists.¹⁸⁶ In the face of perceived competition from accounting firms, the American Bar Association (ABA) seriously considered allowing for multi-disciplinary practice, which included non-lawyer ownership, in the late 1990s, but this was rejected amidst deep resistance from the bar whose suspicions about its dangers were

182. Jessica Seah, *Slater & Gordon Goes Global*, ASIAN LAW. (May 27, 2013), <http://practicesource.com/asian-lawyer-website-publishes-feature-slater-gordon/> [<http://perma.cc/3RD5-DUUC>] (quoting Maurice Blackburn chairman Steve Walsh).

183. Interview 27 (Aug. 17, 2014).

184. See COMP. RECOVERY UNIT DATA, *supra* note 121.

185. Cristin Schmitz, *PI Bar Warns of Fallout if ABS Comes*, THE LAW. WKLY, Aug. 29, 2014 (quoting Charles Gluckstein commenting on how he thinks Australia has become a "monopoly [personal injury] market").

186. Catherine Ho, *Can Someone Who is Not a Lawyer Own Part of a Law Firm? In D.C., Yes*, WASH. POST (Apr. 8, 2012), http://www.washingtonpost.com/business/capitalbusiness/can-someone-who-is-not-a-lawyer-own-part-of-a-law-firm-in-dc-yes/2012/04/06/gIQAnrvd4S_story.html [<http://perma.cc/2SVD-4ZER>].

heightened in the wake of the Enron scandal.¹⁸⁷ In 2012, the ABA's Commission on Ethics declined to develop a proposal that would have allowed for limited non-lawyer ownership¹⁸⁸ and the same year a task force of the New York State Bar considered and rejected recommending non-lawyer ownership.¹⁸⁹

Unlike its counterparts in the United Kingdom and Australia, the U.S.'s competition body, the Federal Trade Commission (FTC), has not been active in pushing for non-lawyer ownership, in part because of barriers created by U.S. federalism.¹⁹⁰ Jacoby & Meyers, a large branded personal injury and consumer law firm,¹⁹¹ has brought litigation in federal court in New York claiming that the ban on non-lawyer ownership is unconstitutional and limits access to the civil legal system.¹⁹² The firm argues that it does not have access to capital like its non-lawyer owned competitors, such as LegalZoom, that are able to invest heavily in technology and advertising.¹⁹³ Jacoby & Meyers asserts that the lawsuit is "to free itself of the shackles that currently encumber its ability to raise outside funding and to ensure American law firms are able to compete on a global

187. The proposal for multi-disciplinary practice in the United States considered in the late 1990s and early 2000s would have allowed for non-lawyer partners, but not passive investment. Laurel S. Terry, *The Work of the ABA Commission on Multi-Disciplinary Practice*, in *MULTI-DISCIPLINARY PRACTICES & PARTNERSHIPS: LAW., CONSULTANTS & CLIENTS* 2-1, 2-19 (Stephen J. McGarry ed., 2002), <http://www.personal.psu.edu/faculty/l/s/1st3/McGarry%20Multidisciplinary%20Ch2.PDF> [<http://perma.cc/JNU2-VFVC>] (describing process and debates surrounding the ABA's consideration of multi-disciplinary practice). For further reading, see generally Commission on Multi-Disciplinary Practice, ABA, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html [<http://perma.cc/QK2N-XL7N>] (providing links to ABA reports, debates, and resolutions on multi-disciplinary practice).

188. James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, ABA J. (June 1, 2012), http://www.abajournal.com/magazine/article/summer_job_ethics_20_20_commission_shelves_nonlawyer_ownership/ [<http://perma.cc/2QX7-PTW4>].

189. NYSBA REPORT, *supra* note 8, at 6, 69–79.

190. The Supreme Court has held that the Sherman Act does not apply to "state action." *Parker v. Brown*, 317 U.S. 341, 350–52 (1943). This theoretically allows private business actors to pressure state actors to restrict competition, i.e. by influencing a state to implement market restraints that the state "clearly articulates and affirmatively expresses" and "actively supervises." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1978) (citing *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (plurality opinion)).

191. Jacoby & Meyers was well known as one of the major "franchise law firms" that some thought would transform the U.S. legal services in the 1980s and 1990s because of their national brand and economies of scale. See, e.g., Carroll Seron, *Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 63, 68 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992); JERRY VAN HOY, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* 4–5 (1997).

192. Complaint for Declaratory and Injunctive Relief, Jacoby & Meyers L. Offices vs. Presiding Justices of the First, Second, Third, and Fourth Departments, Appellate Division of the S. Ct. of the State of N.Y., 2, 4 (S.D.N.Y. May 18, 2011), <http://online.wsj.com/public/resources/documents/JacobyMeyerssuit.pdf> [<http://perma.cc/44LY-2AEY>]. A New York district judge initially dismissed the suit, but a circuit court later reinstated it in district court in 2013. David Glovin & Don Jeffrey, *Jacoby & Meyers Wins Round in Nonlawyer Investor Dispute*, BLOOMBERG (Jan. 9, 2013), <http://www.bloomberg.com/news/2013-01-09/jacoby-meyers-wins-round-in-nonlawyer-investor-dispute.html> [<http://perma.cc/2XKQ-2HPT>].

193. Interview 11, in Cambridge, Mass. (Feb. 7, 2014).

stage.”¹⁹⁴

While non-lawyer ownership of legal services per se is barred, this section examines two examples of sectors in the U.S. that provide close parallels: online legal services (in particular legal services provided by the company LegalZoom) and social security disability representation (in particular services provided by the company Binder & Binder).

1. ONLINE LEGAL SERVICES AND LEGALZOOM

LegalZoom is an online legal services company that provides an example of a non-lawyer owned company that has innovated in the legal services market, invested heavily in technology and advertising, and achieved large economies of scale.¹⁹⁵ However, it is unclear how much it, and other companies like it, has increased access to legal services for poor and moderate-income populations. It has also been able to achieve its growth in a regulatory environment that bars non-lawyer ownership, while similar online legal service companies have not developed in either the UK or Australia, although LegalZoom could potentially offer a superior service if the ban on non-lawyer ownership was lifted.

LegalZoom was founded in 2001 by a small group of law graduates based in California.¹⁹⁶ In 2011, LegalZoom's customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using their online legal platform.¹⁹⁷ As of 2014, LegalZoom had over 800 staff, more than \$200 million in revenue, and offered legal plans in forty-two U.S. states.¹⁹⁸ Today its management team is made up mostly of non-lawyers and the company has a number of private equity investors.¹⁹⁹

LegalZoom provides legal services mainly to small businesses and individuals. They offer flat fee rates for self-guided legal documentation services such as registering a company or creating a will. They also provide legal plans for their customers at set rates. For example, in 2014 they charged fifteen dollars a month for an individual to speak with an attorney regarding “estate planning, contracts

194. Glovin & Jeffrey, *supra* note 192.

195. For example, in 2011, LegalZoom had about \$150 million in operating expenses of which sales and marketing was \$42 million and technology development \$8.1 million. LegalZoom.com, Inc. (Form S-1) (May 10, 2012), <http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm> [http://perma.cc/7EVY-QRQJ] [hereinafter LegalZoom SEC filing]. It provides equity-based compensation to its management team as well as key employees in marketing and technology development. *Id.* at 39.

196. Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011), <http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html> [http://perma.cc/LXY2-56W9].

197. LegalZoom SEC filing, *supra* note 195, at 36.

198. Telephone Interview 14 (Apr. 15, 2014) [hereinafter Interview 14].

199. In 2014 the European based private equity firm Permira invested \$200 million in LegalZoom, giving Permira the ability to appoint a majority of the board. *Permira Funds Complete Acquisition of More than \$200 Million of LegalZoom Equity*, LEGALZOOM (Feb. 14, 2014), <https://www.legalzoom.com/press/press-releases/permira-funds-complete-acquisition-of-more-than-200-million-of-legalzoom-equity> [http://perma.cc/9G6X-DE9X].

and other new legal matters.”²⁰⁰ While LegalZoom has its own lawyers on staff that develop the guided forms that their customers use to create customized legal documents, the company contracts with third party panel law firms to service their legal plan customers.²⁰¹ These panel law firms have dedicated lawyers that work with LegalZoom customers over the phone and online. The lawyers in these firms, not LegalZoom, are liable for their advice and the partner of the contracted firm is responsible for selecting, training, and supervising the attorney that services LegalZoom customers.²⁰² After each customer interaction, LegalZoom surveys customers on their experience with their lawyer.²⁰³ Since customers are not necessarily well positioned to determine the quality of the legal advice they receive, LegalZoom also hires a third party law firm to “secret shop,” or pretend to be customers, by calling LegalZoom affiliated lawyers with mock legal problems.²⁰⁴ Based on input from these sources, LegalZoom then analyzes a lawyer’s work and discusses their performance with contracted law firms.²⁰⁵

LegalZoom has confronted legal challenges to its business model. Litigants have claimed since non-lawyers own equity stakes in the company it is legally barred from offering legal services and so its services amount to the unauthorized practice of law. At the bottom of its homepage LegalZoom has a disclaimer that reads in part:

LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.²⁰⁶

In its terms of use listed elsewhere on the website it makes clear that “claims arising out of or relating to any aspect of the relationship between us” will be resolved through binding arbitration.²⁰⁷ It also details that “Any arbitration under these Terms will take place on an individual basis; class arbitrations and class actions are not permitted.”²⁰⁸

200. *Last Will and Testament Pricing*, LEGAL ZOOM, <http://www.legalzoom.com/legal-wills/wills-pricing.html> [<http://perma.cc/8KZH-Q22P>] (last visited Oct. 17, 2015).

201. Interview 14, *supra* note 198.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. LEGALZOOM, <http://legalzoom.com> [<http://perma.cc/7332-SA3N>] (last visited Sept. 11, 2015).

207. *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> [<http://perma.cc/8S95-VB25>] (last visited Sept. 11, 2015).

208. *Id.*

LegalZoom has so far either won or settled legal challenges that claimed their services amount to the unauthorized practice of law.²⁰⁹ Importantly, relying on recent U.S. Supreme Court jurisprudence, the Arkansas Supreme Court in *LegalZoom.com v. Jonathan McIllwain*²¹⁰ found that LegalZoom's arbitration clause, including its bar on class actions, was enforceable.²¹¹ Without the economic incentives of a class action at the disposal of plaintiffs (and their lawyers), fewer litigants will likely bring claims against LegalZoom in the future and even where they do, if they are successful, their victories will be more limited.²¹² As LegalZoom, and companies like it, continue to expand, and more customers rely on them, it will also become increasingly impractical for a court—or perhaps even a legislature—to bar their business model.

If the ban on non-lawyer ownership were lifted LegalZoom would not only face fewer litigation challenges, but it would not have to rely on partnerships with outside lawyers and could hire lawyers to directly provide services to its customers. This would increase the company's control over the lawyers that service its customers, potentially allowing the company to provide a better service at a lower price.

Still, the impact of LegalZoom and companies like it so far on access to legal services is not well documented. Anecdotally, they have put pressure on prices and so likely increased access.²¹³ Yet, a company like LegalZoom is aimed primarily at small businesses and the upper middle class.²¹⁴ In other words, people with the capacity to know they have a legal problem and the resources and savviness to be able to seek out its answer on the Internet and pay for it.

Will-writing provides an example of both how difficult it is to assess the access impact of companies like LegalZoom and a reason to believe it might be limited. Many people, even with minimal assets, could benefit from having a will (or at

209. Interview 14, *supra* note 198; Terry Carter, *LegalZoom Business Model OK'ed by South Carolina Supreme Court*, ABA JOURNAL (Apr. 25, 2014), http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court/ [<http://perma.cc/9R7Z-FCQX>].

210. *LegalZoom.com v. Jonathan McIllwain*, 429 S.W.3d 261, 261 (Ark. 2013).

211. The Arkansas Court relied heavily on the US Supreme Court's decisions in *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006) and *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). In *Cardegna* the U.S. Supreme Court held that under the Federal Arbitration Act (FAA) the legality of an arbitration clause could only be decided by an arbitrator unless the clause itself was challenged (such as if the contract had been entered into through fraud). In *AT&T*, the U.S. Supreme Court found that the FAA preempted state laws that banned contracts that prohibited class-wide arbitration. The Arkansas Supreme Court held that this line of U.S. Supreme Court jurisprudence barred the state's courts from hearing the plaintiff's challenge, but did refer the case to its Committee on the Unauthorized Practice of Law. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court continued this line of precedent further, finding in a five to three decision that under the FAA a court is not permitted to invalidate a contractual waiver of class arbitration on the reasoning that the cost of an individual plaintiff of arbitrating a federal statutory claim exceeds the potential recovery.

212. *But see* Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, ABA JOURNAL (May 19, 2014), http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina [<http://perma.cc/T782-N75C>] (last visited Oct. 17, 2015) (noting a North Carolina judge extending the life of a case by North Carolina bar claiming LegalZoom's services amount to the unauthorized practice of law).

213. Interview 14, *supra* note 198.

214. *Id.*

least their family or heirs would). One might hypothesize that the proliferation of websites that offer will-writing services like LegalZoom would increase the number of people with wills both through driving down prices and raising awareness of the need for a will through advertising.²¹⁵ However, a periodic Harris Interactive survey has found that the number of Americans with wills has remained relatively unchanged in the past decade.²¹⁶ According to the survey, it was forty-two percent in 2004, forty-five percent in 2007, thirty-five percent in 2009, and forty-three percent in 2011.²¹⁷ Data from probate courts in at least one state seems to back up this conclusion. In 2002 about thirty-two percent of cases filed in Massachusetts’ probate court involved deceased who had no will.²¹⁸ Slightly over ten years later in 2011 this rate was essentially unchanged at thirty-one percent.²¹⁹

While the survey and Massachusetts probate court data indicate there has been little movement in the number of people without wills this does not mean that

215. Others prominent online legal service companies that offer will-writing services for the U.S. market include rocketlawyer.com and nolo.com.

216. *Lawyers.com Survey Reveals Drop in Estate Planning*, LAWYERS.COM (Feb. 25, 2010), <http://press-room.lawyers.com/2010-will-survey-press-release.html> [<http://perma.cc/YT67-JUAH>] [hereinafter *Lawyers.com Survey Reveals Drop*] (last visited Oct. 17, 2015); Jenny Greenhough, *57% of Americans Don’t Have a Will—Are You One of Them? Estate Planning Results Announced*, EVERYDAY LAW BLOG, (Mar. 31, 2011), <http://blog.rocketlawyer.com/2011-wills-estate-planning-survey-95235> [<http://perma.cc/Q5ZX-BW8K>].

217. *Lawyers.com Survey Reveals Drop*, *supra* note 216.

218. Importantly, while the survey data does not tell us what number of Americans should have a will, the probate court data is more suggestive. Since the deceased’s heirs went to probate court these were instances where the deceased did have some property, that they had not undertaken other forms of estate planning (or these were insufficient), and so they may have benefitted from having a will. As the below table shows, in Massachusetts there has been little change in the number of cases filed in probate court where the deceased had no will between June 30, 2002 and June 30, 2011. (Note: data for 2008 and 2010 was not available. After 2011 Massachusetts no longer tracked whether there was a will in a probate filing). Interview 14, *supra* note 198.

TABLE 4:
NUMBER OF PROBATE FILINGS INCLUDING WILLS.

	2002	2003	2004	2005	2006	2007	2009	2011
No. of Probate Filings	19552	21420	22152	21979	21384	21244	20322	20645
Filings with Will	13279	14488	14800	14756	14264	14345	13758	14226
Filings without Will	6273	6932	7352	7223	7120	6899	6564	6419
% of Filings without Will	32.1	32.4	33.2	32.9	33.3	32.5	32.3	31.1

219. *Id.*

companies like LegalZoom have had no positive access benefits. Perhaps without LegalZoom and companies like it the number of people with wills in Massachusetts or elsewhere would have decreased significantly and instead the number has remained relatively steady.²²⁰ However, the presence of such companies has not been able to significantly increase the number of people with wills, nor is the quality of LegalZoom's wills compared to wills drafted by more traditional law firms well documented.²²¹ Overall, it is unclear what impact a company like LegalZoom has on access to legal services, and how dependent their strategy is to jurisdictions adopting non-lawyer ownership in the first place.

2. SOCIAL SECURITY DISABILITY REPRESENTATION AND BINDER & BINDER

In 2014, about 8.4 million Americans received Social Security Disability assistance.²²² When applying for this assistance, claimants can represent themselves or be represented by an attorney or a registered non-attorney representative. Disability representatives, whether they are attorneys or non-attorneys, frequently act on a contingency fee basis and are paid by the Social Security Administration (SSA) twenty-five percent of any back award owed to the claimant, up to \$6,000.²²³ In 2013, the SSA paid out about \$1.2 billion to these disability representatives.²²⁴ Several disability representation services are non-lawyer owned. Non-lawyer owned representation services often rely on non-attorney representatives while law firms often rely on lawyers in representing claimants. Therefore, it is difficult to disentangle whether it is non-lawyer ownership or non-lawyer representation that is driving differences between firms. Still, the experiences of this sector provide another example of how non-lawyer ownership may allow some companies to scale, but not necessarily significantly increase access. Non-lawyer ownership in this sector may also amplify and formalize behavior that may undermine standards of professional practice.

220. For instance, perhaps the rates of lawyers increased during this period and companies like LegalZoom were able to partially fill the resulting access gap. Alternatively, perhaps companies like LegalZoom have only been a replacement good for other affordable will-writing resources already available, like books on how to write your own will.

221. The available data also does not tell us about the quality of the wills LegalZoom helps its customers create. A survey of will-writing in the U.K. found that online self-completion wills were significantly more likely to be judged not to be legally valid or to fail to fulfill the client's wishes. IFF Research, *Understanding the Consumer Experience of Will-Writing Services* 56 (2011), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lwb_will_writing_report_final.pdf [<http://perma.cc/5MR3-EXZ2>].

222. SOCIAL SECURITY ADMINISTRATION, MONTHLY STATISTICAL SNAPSHOT JUNE 2014 (July 2014), http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ [<http://perma.cc/H7WR-KRVE>].

223. *GN 03940.003 Fee Agreement Evaluation*, SOCIAL SECURITY ADMINISTRATION, <https://secure.ssa.gov/poms.nsf/lnx/0203940003#a3> [<http://perma.cc/5TY9-M5MW>] (last visited Sept. 11, 2015).

224. *Statistics to Title II Direct Payments to Claimant Representatives*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/representation/statistics.htm#2013> [<http://perma.cc/37KV-UJU3>] (last visited Sept. 11, 2015).

Binder & Binder is one of the largest providers of social security disability representation in the United States.²²⁵ Binder started as a law firm in 1975, but incorporated in 2005.²²⁶ It is not public knowledge whether Binder started receiving non-lawyer investment in 2005, but in 2010 the venture capital firm H.I.G. reportedly bought a major stake in the company.²²⁷ Binder's share of SSA payments to representatives increased from about 3.25 percent of the total in 2005 to six percent in 2010 (or approximately eighty-eight million dollars).²²⁸

Binder has been successful at expanding their customer base through investment in advertising and marketing, but the prevalence of contingency fees in disability representation means that most clients with strong claims probably could already find free representation even before Binder's growth. In expanding its volume of customers Binder may arguably reach more individuals with riskier, but valid, claims. On the other hand, Binder may provide lower quality representation, causing more lost claims than otherwise would occur, but because of their high turnover still win enough cases so that their business model is profitable. Indeed, some disability lawyers complain that Binder's streamlined emphasis on the bottom line has led to a deterioration of standards in the field that has "infected law firms" normalizing and nationalizing harmful practices, such as representatives not meeting clients until the day of their hearing.²²⁹ Binder has also been subject to complaints accusing them of ethical violations, such as not sharing damaging evidence against their clients with the SSA as required by law.²³⁰

Despite these allegations, Binder likely engaged in some of its more controversial business practices before they had non-lawyer investors. Further, lawyer owned firms representing disability claimants have also been criticized for their questionable tactics.²³¹ In the end, non-lawyer ownership may have allowed a firm like Binder to more effectively spread their business model, but likely did not create the tactics that some claim have helped undercut professional norms in the sector.

225. Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in Social Security Disability System*, WALL ST. J. (Dec. 22, 2011), <http://online.wsj.com/news/articles/SB10001424052970203518404577096632862007046> [<http://perma.cc/HMP7-5V9E>].

226. *Binder & Binder—The National Social Security Disability Advocates (NY)*, N.Y. DEP'T OF ST. DIVISION OF INCORPORATIONS (Aug. 2014), https://appext20.dos.ny.gov/corp_public/ [<http://perma.cc/FHB4-E67M>].

227. Paletta & Searcey, *supra* note 225.

228. *Id.*

229. Telephone Interview 22 (Aug. 8, 2014) (practitioner noting that "Non-lawyers brought a different ethos that infected law firms . . . It used to be unthinkable 20 years ago that you would go to a hearing and have never met the client before, but now it's not just Binder & Binder that does it but many lawyers").

230. *Id.*

231. See Paletta & Searcey, *supra* note 225; U.S. SENATE COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, *HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY'S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM* (2013), http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36 [<http://perma.cc/4J2R-D3GP>].

III. TOWARDS A FRESH UNDERSTANDING OF NON-LAWYER OWNERSHIP

Changes in ownership rules do not directly challenge lawyers' monopoly in providing legal services. However, they do help determine what type of commercial ecosystem lawyers are a part of and the degree to which the profession is integrated, or separated, from the rest of the market. Those who advocate for more integration by allowing non-lawyer ownership frequently argue this will lower prices and increase access and quality. Those who oppose greater integration worry it will undercut ethical and professional distinctiveness and create new conflicts. The country and case studies in this Article show that while both sets of claims have some merit, they also miss critical components of non-lawyer ownership's likely impact.

A. CONTEXT MATTERS: A TAXONOMY OF VARIABLES

The actual scale and form non-lawyer ownership takes is affected by variables that are often overlooked, or under-emphasized, in the non-lawyer ownership debate. These variables include the type of non-lawyer owner, the sector of legal services at issue, the regulatory environment surrounding non-lawyer ownership and the broader profession, and the nature of the legal services and capital markets in a jurisdiction. More fully taking into account these variables can help regulators better predict the likely impact of non-lawyer ownership in different contexts so they can better craft appropriate regulation.

1. OWNERSHIP VARIATION

Not all types of non-lawyer owners of legal services are the same. Legal service enterprises may be publicly listed, owned by private outside investors, worker owned, consumer owned, government owned, or owned by a company that also provides other goods or services. Each type of ownership creates different kinds of pressures on an enterprise offering legal services.²³² For example, a publicly listed firm like Slater & Gordon may be more likely to make decisions to satisfy the broader public investor, whether this means focusing on meeting projected targets or avoiding negative publicity.²³³ Consumer owned firms, like the Co-Operative Legal Services in the United Kingdom, or non-profit owned firms may be better able to follow a social mission.²³⁴ A company that also offers other services may be more likely to offer legal services geared towards increasing the bottom line of the core business of that company, potentially

232. HANSMANN, *supra* note 23 (describing why different industries may be more amenable to certain types of owners in different country contexts).

233. *See supra* II.C.1.

234. *See supra* II.A.2; Salvos Legal in Australia is an example of a law firm owned by a non-profit, the Salvation Army, the profits of which then fund a legal aid firm. *See About Us*, SALVOS LEGAL, http://www.salvoslegal.com.au/about_us [http://perma.cc/J3A7-DRNU] (last visited Sept. 11, 2015).

creating more conflicts of interest.²³⁵ Private equity investment may be particularly drawn to companies like LegalZoom that hold out the promise of technological or other innovations in legal services that could lead to large profits in the short to mid-term.²³⁶ Recently in England and Wales municipal governments have started their own law firms to provide legal services to both themselves and other local governments and non-profits for a fee.²³⁷ These new government owned enterprises could further the public interest by generating profits for the government exchequer or being able to better serve public clients, but they also may present the opportunity for new conflicts of interest and the introduction of an unwelcome commercial orientation into government lawyering. Which types of ownership of legal services come to predominate in the future will have an important impact on what types of conflicts of interest may develop, the public-spirited orientation of the profession, and non-lawyer ownership's ultimate impact on access.

2. LEGAL SECTOR VARIATION

Vitality, and under-appreciated in the non-lawyer ownership debate, certain sectors of legal services are more likely to witness much more non-lawyer ownership than others. In particular, non-lawyer investors seem more probable in areas of the law that are amenable to economies of scale and where other non-lawyer costs may be high (such as advertising, administration, or technology). In this way, the impact of non-lawyer ownership should be viewed differently depending on the sector of legal services at issue, with some sectors likely to be transformed—with potential access benefits and professionalism concerns—and others being only marginally affected.

Notably, in the United Kingdom and Australia the personal injury sector has seen a disproportionate amount of non-lawyer investment.²³⁸ This investment may be because personal injury has historically had high advertising costs, large profits, and a relatively routine and high volume of cases that often result in settlement.²³⁹ Meanwhile, areas like criminal law or immigration have seen

235. For example, insurance companies entering the legal services market may be more likely to view legal services as a spin off from its core insurance business whose interests should remain paramount. *See supra* II.A.1 for such a possible instance in the United Kingdom.

236. Online legal service platforms like LegalZoom have witnessed private investment. *See supra* II.C.1; Binder & Binder has also seen private equity investment although it relies less on technology. *See supra* II.C.2.

237. John Hyde, *SRA Approves First Council ABS*, L. SOC.'Y GAZETTE (Aug. 6, 2014), <http://www.lawgazette.co.uk/law/sra-approves-first-council-abs/5042566.article> [<http://perma.cc/444P-43R2>] (last visited Oct. 11, 2015).

238. *See supra* II.A.1, II.B.1.

239. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 810 (2011) (describing how in the U.S. settlement mills use a disproportionate number of non-lawyers to settle routine personal injury matters).

much less non-lawyer ownership,²⁴⁰ perhaps because clients seek more individualized attention and the relative skills of a particular lawyer may matter more to the outcome of a case.

3. VARIATION IN THE REGULATION OF THE LEGAL PROFESSION

The broader regulatory environment of legal services in a jurisdiction also shapes how non-lawyer ownership develops. In the UK, a new ban on referral fees, which insurance companies once counted as an important source of revenue, led them to buy their own affiliated personal injury law firms.²⁴¹ A ban on contingency fees in Australia, and conditional fees that vary by state, has arguably favored larger personal injury firms that are better able to navigate this more complex regulatory system and spread their risk across larger portfolios.²⁴²

How non-lawyer ownership itself is regulated also helps determine its prevalence. In Australia, non-lawyer owned legal enterprises simply need to register with the appropriate regulator, while in England and Wales they must be licensed.²⁴³ The more burdensome licensing requirement in England and Wales likely reduces the amount of non-lawyer ownership that might otherwise occur.²⁴⁴ On the other hand, in Australia a lawyer must manage non-lawyer owned enterprises, while in England and Wales a lawyer only has to be part of the management team.²⁴⁵ This more stringent requirement may discourage some non-lawyer investors from entering the legal market.

4. VARIATION IN CAPITAL AND LEGAL SERVICES MARKETS

Finally, the size of a country's capital and legal services markets help determine the amount and type of non-lawyer ownership one can expect in a jurisdiction. Countries like Australia, without as well developed private equity markets and a relatively small legal services market, have seen far less ownership by non-lawyers than in the United Kingdom, where the population is almost three times larger and there is a broader and deeper range of potential investors.²⁴⁶

240. See *supra* II.A.

241. See *supra* II.A.1.

242. See *supra* II.B.2.

243. See *supra* II.B.

244. Compare VICTORIA LEGAL SERVICES BOARD *supra* note 155 (in the state of Victoria there were 921 ILPs in 2013, which allow for non-lawyer ownership even if there was relatively little of this type of ownership), with Hilborne, *supra* note 91 (in August of 2014 there were about 360 ABSs in all of England and Wales).

245. *Legal Profession Act 2004* (NSW)(Austl.), *supra* note 34; *Alternative Business Structures*, *supra* note 11.

246. Interview 14, *supra* note 198. In 2009-2012, according to the World Bank, the market capitalization of listed companies was about \$1.3 trillion in Australia and \$3 trillion in the UK. *Market Capitalization of Listed Companies* (Current US\$), THE WORLD BANK, <http://data.worldbank.org/indicator/CM.MKT.LCAP.CD> [<http://perma.cc/HST4-LGBN>] (last visited Oct. 5, 2015). The legal services market in Australia was estimated to have revenues of about \$19.9 billion in 2011. *Research and Markets: Legal Services Industry in Australia Expected*

Despite a regulatory environment that generally bars non-lawyer ownership, the United States has seen greater investment in and the rise of more online legal service companies than either the UK or Australia, likely in part because the U.S. capital markets are more robust and the legal services market is substantially larger, creating a more suitable environment to scale online legal services.²⁴⁷

If more jurisdictions allow for non-lawyer ownership, in full or in part, one would expect to see an increased number of multi-national legal service companies like Slater & Gordon.²⁴⁸ Their presence may reduce some of the inter-country differences that have marked the early days of non-lawyer ownership, as these multi-national companies would have access to both legal service and capital markets in different countries allowing them to scale their services more uniformly across jurisdictions. However, in a field like law, models developed in one jurisdiction often cannot be directly adopted by another jurisdiction given significant national and sub-national differences in law and the regulation of legal services. This means the size of relative markets, and the available capital within them, will likely continue to be meaningful constraints on the scale and diversity of non-lawyer owned enterprises delivering legal services in each jurisdiction.

B. NEW BUSINESS MODELS, BUT QUESTIONABLE ACCESS BENEFITS

The country studies provide support to the argument that non-lawyer ownership can, and in some circumstances does, lead to new innovation in legal services, larger economies of scale and scope, and new compensation structures.²⁴⁹ Yet, perhaps counter-intuitively, there is little evidence indicating that these changes have substantially improved access to civil legal services for poor to moderate-income populations. These findings may be partly the result of limited data, but there are at least four reasons why such ownership will likely not lead to as significant access gains as some proponents suggest.

First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where

to Increase to a Value of \$26.4 Billion by the End Of 2016, BUSINESS WIRE (Dec. 12, 2012), <http://www.businesswire.com/news/home/20121212006378/en/Research-Markets-Legal-Services-Industry-Australia-Expected#.U9twagzgXw> [<http://perma.cc/DHR4-FTH4>] (dollar amounts converted from pounds, £, to U.S. dollars, \$). The solicitors market (not counting barristers, conveyancers, or other parts of the legal market) in the UK had revenues of about \$31.4 billion in 2012. *Evaluation: Changes in Competition in Different Legal Markets*, LEGAL SERV. BD. 4 (Oct. 2013), <https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf> [<https://perma.cc/NTN9-R3FE>].

247. U.S. market capitalization averaged \$18.7 trillion from 2009-2012. World Bank, *supra* note 246; The U.S. legal services market contributed about \$225 billion to GDP in 2012. *Value Added by Industry*, BUREAU OF ECON. ANALYSIS (Jan. 23, 2014), http://www.bea.gov/industry/gdpbyind_data.htm [<http://perma.cc/9CYK-5FGY>].

248. See Rose, *Slater & Gordon Completes Panonne Acquisition*, *supra* note 84.

249. See *supra* II.

non-lawyer ownership is allowed.²⁵⁰ For example, a bankrupt tenant facing an eviction is likely provided few new options by non-lawyer ownership as they simply have no money to pay for legal services. After cuts in legal aid in the UK, both parties had representation in only about twenty-five percent of private family law disputes did both parties have representation.²⁵¹ This indicates that the legal market, even a deregulated one, is unlikely to address the legal needs of poor and middle income persons, who either cannot or will not spend the money to purchase the legal services they require.

Second, several of the legal sectors, like personal injury and social security disability representation, which have seen the greatest investment by non-lawyers, will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies.²⁵² Instead, competition amongst personal injury or social security disability representation providers is more focused on reaching persons with credible claims in the first place.

Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy to standardize or scale. Much legal work is complicated and requires the individualized attention of an experienced practitioner who often charges high rates. Even though many legal problems may have relatively uniform remedies, an experienced practitioner is needed to determine, case by case, the legal problem confronting the client before tailoring an appropriate solution.²⁵³ Non-lawyer ownership may not be able to overcome this challenge in a significantly more efficient way than a traditional worker owned partnership model. Indeed, where the attention of a lawyer is the primary input into a service, and other capital costs are low, a worker owned model could provide advantages over investor ownership.²⁵⁴

250. See PLEASANCE & BALMER, *supra* note 39, at 100–101 (noting that respondents to a legal needs survey in England and Wales were more likely to contact lawyers for severe problems and that there were clear links between social disadvantage and legal capability).

251. See MINISTRY OF JUSTICE, *supra* note 100.

252. For an overview of the regulatory framework for conditional fee arrangements in England and Wales, see, LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 14–16; Australia also largely allows for conditional fee arrangements. See, LAW COUNCIL OF AUSTRALIA, REGULATION OF THIRD PARTY LITIGATION FUNDING IN AUSTRALIA 10 n. 25 (2011), <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Regulationofthirdparty litigation funding in Australia.pdf> [PERMA.CC/M8FD-YRTA].

253. In this way legal services may be an example of Baumol's cost disease, or the proposition that salaries in occupations with little or no increase in labor productivity will still rise at corresponding rates to occupations where there has been increases in productivity. This makes goods or services produced by those occupations inflicted with Baumol's cost disease, such as health care or education, relatively more expensive. See William J. Baumol, *Health Care, Education and the Cost Disease: A Looming Crisis for Public Choice*, 77 PUB. CHOICE 17 (1993).

254. For example, Hansmann argues worker owned enterprises may be able to better overcome monitoring challenges than some investor owned enterprises. See Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L. J. 1749, 1761–62 (1989–1990).

Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have the ability to do so, either because they do not believe they need a legal service or because of cultural or psychological barriers.²⁵⁵ For example, even if the price of preparing a will decreases, many persons still may not purchase one because they do not like to contemplate their own death or do not perceive a will as a need.²⁵⁶ In other words, for some civil legal services there may not be as much price elasticity in the market as proponents of deregulation suggest.

C. DISTINCT CHALLENGES TO PROFESSIONALISM

While the claims behind the argument that non-lawyer ownership will significantly increase access are largely unsubstantiated by the available evidence, those who oppose non-lawyer ownership on the grounds it will undercut professionalism often make assertions that are too sweeping. Take concerns about commoditization and public spiritedness. Although certainly non-lawyer ownership can place new pressures to increase profits on legal service enterprises, lawyers at many firms were arguably already predominantly driven by this desire. Further, some forms of non-lawyer ownership, such as consumer owned firms, might actually be more likely to pursue a public-spirited mission than a lawyer owned firm.²⁵⁷ Still, while critics of non-lawyer ownership can over-generalize or over-estimate its impact, non-lawyer ownership in some contexts can change how legal services are offered in a way that is detrimental to consumers, the public, or the legal system more broadly.

1. CONFLICTS OF INTEREST

The interests of traditional law firms do not always align with their clients, but enterprises that offer legal services that also have other commercial interests are more likely to have conflicting and potentially adversarial interests to their

But see, Andrew von Nordenflycht, *Does the Emergence of Publicly Traded Professional Service Firms Undermine the Theory of the Professional Partnership? A Cross-Industry Historical Analysis*, 1 J. PROF. & ORG. 1 (2014) (arguing that the proposed benefits of partnerships versus public ownership are largely illusory).

255. *See* Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE 244 (Trebilcock, Duggan, & Sossin eds. 2012) (noting that while the cost of lawyers is one factor that explains why justice problems are not taken to lawyers, other factors, like what people perceive as a legal problem, are also significant).

256. *See supra* II.C.2. (observing little change in the number of persons with wills in the United States and Massachusetts).

257. *See, e.g.*, Co-Operative Legal Services in the UK, *supra* II.A.1. Similarly, labor unions in the U.K. have begun to invest in their own law firms, although this may mostly be to recapture referral fees lost when the referral fee ban was introduced. *Leeds Firm Breaks New Ground with Trade Union ABS*, LEGALFUTURES (Dec. 23, 2013), <http://www.legalfutures.co.uk/latest-news/leeds-firm-breaks-new-ground-trade-union-abs> [http://perma.cc/H3B8-FRNU].

clients.²⁵⁸ For instance, since insurance companies in the UK have an interest in reducing the amount they compensate claimants, there is a concern that they may have a conflict in acquiring plaintiff personal injury firms.²⁵⁹ These “captured” law firms may act to either shape outcomes of specific cases or the overall regulatory environment in a way that is beneficial to the insurance industry, but not necessarily their clients.

Where the government outsources functions related to the legal system—like prison or probation services—there is a greater possibility for conflicts of interest to arise. These conflicts can cast doubt on the integrity of the legal system, undermining the public’s trust in very real, though sometimes hard to measure, ways. Capita, a large business process outsourcer with multiple contracts with the UK government, has recently entered the legal services market by buying a law firm.²⁶⁰ Before buying this law firm, Capita already helped run the UK’s migrant removal process²⁶¹ and, separately, one of the government’s telephone hotlines to assess litigants’ entitlement to legal aid.²⁶² While perhaps not a direct conflict of interest, those active in legal aid have expressed concern that immigrants who were worried about the legality of their immigration status would not call the legal aid hotline out of fear that Capita might then try to deport them.²⁶³ This conflict existed before Capita had started its ABS, but similar conflicts could arise in the future with its affiliated law firm, particularly if it began providing legal aid.

Employees of companies that deliver outsourced public services often do not have the same duties as government employees to not further their own (or their company’s) financial interests.²⁶⁴ In this context, non-lawyer ownership creates new possibilities for self-dealing. For instance, attorneys contracted to provide legal aid assistance may refer clients to other services offered by their company, whether or not it was in the client’s best interest. Alternatively, a company contracted by a government agency, like the Social Security Administration in the United States, could attempt to use its insider knowledge to benefit those it

258. As Susan Shapiro notes, one of the primary sources of conflicts of interest for a fiduciary is the diversification and growth of their organization. SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE* 5 (2002).

259. See *supra* II.A.1.

260. Michael Cross, *Capita Enters Legal Services Market with Optima Acquisition*, L. SOC.’Y GAZETTE (Sept. 16, 2013), <http://www.lawgazette.co.uk/practice/capita-enters-legal-services-market-with-optima-acquisition/5037679.article> [<http://perma.cc/X68S-893G>].

261. *Capita Gets Contract to Find 174,000 Illegal Immigrants*, BBC NEWS (Sept. 18, 2012), <http://www.bbc.com/news/uk-politics-19637409> [<http://perma.cc/9EMZ-3P5R>].

262. *Capita Acquires FirstAssist*, CAPITA (Sept. 30, 2010), <http://www.capita.co.uk/news-and-opinion/news/2010/september/capita-acquires-firstassist-services-holdings-ltd.aspx> [<http://perma.cc/F2NS-7JCL>].

263. Interview 3, in London, Eng. (Jan. 10, 2014).

264. See generally Kathleen Clark, *Ethics for an Outsourced Government* (Washington University in St. Louis Legal Studies Research Paper No. 11-05-03, 2011), <http://ssrn.com/abstract=1840629> [<http://perma.cc/5U4A-NVEZ>] (describing in the U.S. context how outsourced employees do not face the same ethics standards as government employees).

represents before that agency.²⁶⁵

Some potential conflicts that may undercut public trust or potentially have long-term detrimental impact to the legal system can be so nebulous that they are difficult to regulate. Walmart is one of the largest employers in the United States and is frequently criticized for its employment practices.²⁶⁶ If Walmart started offering legal services in the United States, including employment law, some may question if they have a conflict of interest even if lawyers in their stores never directly represented their clients against Walmart. One could argue that Walmart has an interest in shaping employment law in the United States in a direction beneficial to the company and so it is troubling if they start representing a large number of workers for employment claims. At the very least, it may lead some to have less faith in the integrity or fairness of the justice system. However, the amorphous nature of such a potential conflict makes it difficult for a regulator to justify specifically barring Walmart, and not other retailers, from entering the legal services market in employment law.

Finally, non-lawyer ownership not only can create new conflicts of interest, but also can be used to bypass professional regulation, particularly for enterprises offering multiple services. For example, insurance companies in England and Wales, which once referred injured customers to personal injury firms, have bought up these same firms in part to bypass a new ban on referral fees.²⁶⁷ Similarly, non-lawyer ownership could be used to bypass other regulation such as restrictions on advertising or fee arrangements (particularly where non-lawyers can enter contingency fee arrangements, but lawyers can not, like in Australia). If one believes these professional rules serve a purpose, such actions should be of concern to both regulators and the public.

2. UNDERCUTTING PUBLIC SPIRITED IDEALS

Lawyers may not have an identity as altruistic as that of doctors or the clergy, but most lawyers would acknowledge that the pursuit of profit should not be the sole goal of those in the profession nor making money the dominant criteria for

265. For example, the SSA awarded Social Security Disability Consultants, a major social security representation company, a contract in 2006 to study the value of vocational expertise in the disability determination process. *Experts to Study the Value of Vocational Expertise at All Adjudicative Levels of the Disability Determination Process*, FED. BUS. OPPORTUNITIES, <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=7f5130f6fe72ddabc923fad66c1f5ece> [https://perma.cc/BC9H-NSXV] (last visited Oct. 5, 2015). Maximus, which has undertaken social security representation, also has been a major contractor for the SSA, particularly for its work training and placement program. Charles T. Hall, *Maximus also has conflict*, SOCIAL SECURITY NEWS (Jan. 27, 2006), <http://socsecnews.blogspot.com/search?q=maximus+conflict>. [http://perma.cc/4DX6-HJYU].

266. Dave Jamieson, *Feds Charge Walmart With Breaking Labor Law in Black Friday Strikes*, HUFFINGTON POST (Jan. 15, 2014), http://www.huffingtonpost.com/2014/01/15/walmart-complaint_n_4604069.html [http://perma.cc/GM2R-8KBD] (detailing actions by the federal government against Walmart for alleged labor violations).

267. See *supra* II.A.1.

determining what characterizes a “good lawyer” or a “good law firm.”²⁶⁸ Many lawyers value furthering the rule of law, assisting the needy, acting as a check on government or corporate power, providing competent assistance, and other social values.²⁶⁹ Non-lawyer ownership, especially that by investors seeking profit, can subvert these public-spirited ideals in at least two ways.

First, legal service providers with outside investors are likely to be concerned about the enterprise’s reputation within the investor community. The failure to meet a projected financial target can lead to a drop in stock price or the loss of a needed private equity investor.²⁷⁰ Such concerns about reputation may make these enterprises more likely to focus on meeting investors’ targets, as is alleged of publicly listed firms in Australia,²⁷¹ at the expense of more public-spirited goals, such as pro bono work or taking on riskier class actions that further the public interest. Importantly, lawyer employees, or lawyer co-owners, may change their behavior to be less public spirited not directly on the orders of non-lawyer owners, but rather if they merely believe such a change will help increase their firm’s reputation in the investor community.

Second, companies that also provide other services may be less likely to offer legal services to publicly unpopular clients out of fear of harming the larger brand of their company.²⁷² For example, in the United Kingdom, the management at the Co-operative Group was initially concerned about Co-operative Legal Services having certain kinds of clients, such as men who had abused their wives, whose association might end up tarnishing their larger brand.²⁷³ This potential problem has ended up being more hypothetical, as Co-operative Legal Services markets themselves as offering services to resolve disputes as amicably as possible, thereby attracting fewer of these clients that are likely to be actively vilified by the public.²⁷⁴ The example, though, raises the specter that unpopular clients, who

268. As R.H. Tawney writes, “[Professionals] may, as in the case of the successful doctor, grow rich; but the meaning of their profession, both for themselves and for the public, is not that they make money, but that they make health, or safety, or knowledge, or good government, or good law . . .” R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* 94 (1920).

269. For example, a RAND study of class actions in the U.S. found “plaintiff attorneys seemed sometimes to be driven by financial incentives, sometimes by the desire to right perceived wrongs, and sometimes by both.” DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 401 (1999).

270. See *supra* II.A.1. (Quindell notably lost half its stock value in one day after an unfavorable market report).

271. See *supra* II.C.1. (Slater & Gordon CEO reassuring investors that in the future most class actions will be funded through outside funders).

272. Lawrence Fox has warned that companies offering other services might be less likely to offer legal services that are unpopular either to the public or the company at issue. Fox, *supra* note 20 (“Can we expect Arthur Andersen to take a tolerant attitude toward a death penalty representation? Or Sears to be pleased its lawyer employees are supporting the Legal Services Corporation, the funder of consumer complaints on behalf of the indigent?”).

273. Interview 10, *supra* note 47.

274. See *id.* (another national legal services provider noting that unpopular clients pose a potential challenge to their brand).

already face discrimination from many law firms, might be further marginalized and have fewer alternatives in a market with a smaller number of providers that are highly sensitive to public opinion.

3. STANDARDS OF PROFESSIONAL PRACTICE

Advocates of non-lawyer ownership have claimed that allowing for outside ownership will increase the quality of legal services as these owners will be eager to build well-respected legal brands and have an advantage at implementing quality control systems.²⁷⁵ Non-lawyer ownership may sometimes improve professional standards, but it is not clear that this would always be the case, or even be the case the majority of the time. In other situations, non-lawyer ownership may lead to the systematization of more dubious business practices that undermine the quality of legal services as firms scale, attempt to create efficiencies, and their work culture is less tempered by the professional norms that lawyer ownership may bring.²⁷⁶ For example, Binder & Binder has been accused of nationalizing and normalizing questionable cost cutting practices in social security disability representation.²⁷⁷

Non-lawyer ownership has so far had an ambiguous impact on consumer complaints about legal services. There is some evidence from the UK that ABS firms receive more complaints from clients than non-ABS firms, but ABSs produce about as many formal complaints to the UK's Legal Ombudsman as ordinary solicitor firms.²⁷⁸ The higher number of recorded initial complaints may be because of the newness of some of the ABSs operating or because they do a better job of soliciting and tracking initial complaints. In Australia, at least one study has shown that customers of firms that have become ILPs make fewer complaints to regulators afterwards.²⁷⁹ This though is likely the consequence of ILPs required implementation of their own "appropriate management systems" rather than non-lawyer ownership, which is still relatively rare for ILPs in Australia.²⁸⁰ So far at least, the evidence from both the UK and Australia suggests

275. Hadfield, *supra* note 6, at 49–50.

276. Parker, *supra* note 10, at 4 (arguing that the ethical dangers commentators worry will come from non-lawyer ownership are actually a "formalisation and accentuation of existing ethical pressures on legal practice").

277. See *supra* II.C.2 (noting complaints that Binder spearheaded the normalization of not meeting with clients until the day of a hearing).

278. According to a 2013 LSB report ABSs generated £4.3 million in turnover for every complaint referred to the Legal Ombudsman, which is similar to the £4.5 million for every complaint for ordinary solicitors firms. LSB 2013, *supra* note 98, at 7, 78.

279. Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Service Profession in New South Wales*, 37 J.L. & Soc'y 466 (2010) (showing a statistically significant reduction in complaints about ILPs after they performed a self-assessment process to create their own appropriate management systems).

280. Others have argued that the potential dangers of outside investment are not adequately regulated against in Australia. Alperhan Babacan, Amalia Di Iorio, & Adrian Meade, *The (In)effective Regulation of Incorporated*

that non-lawyer ownership does not have a large effect on consumer complaints. Given this uncertain impact, those interested in increasing quality of legal services may be better off pressing for other interventions, such as entity-based regulation, requiring malpractice insurance for all legal service providers, or creating an independent ombudsman to hear complaints.

D. NEED FOR MORE DATA AND THE POTENTIAL IMPACT OF TECHNOLOGY

The country studies make clear that there is a need to improve the collection of data regarding legal services so as to assess the impact of non-lawyer ownership.²⁸¹ In particular, regulators should better track the cost of commonly used legal services, the demand for legal services, how these legal services are used, and different pathways for resolving legal issues.²⁸² Sector specific studies should also periodically examine the functioning of markets for specific legal services such as personal injury, immigration, probate, conveyancing, or family law.

While there are still many unanswered questions about the impact of non-lawyer ownership perhaps the greatest involves the increasing role of technology in legal services.²⁸³ Legal professionals in the future may need to rely on technology, and an accompanying organizational structure, that lawyers cannot efficiently provide for themselves either in-house or otherwise. If this proves true, then non-lawyer ownership will provide clear benefits for the delivery of legal services. Still, it is not certain such a future is ordained. Lawyers may find a way to effectively outsource or contract for these technological and organizational needs just as they currently do for legal databases or for online advertising.²⁸⁴ Alternatively, as is the case with LegalZoom, lawyers and their services may become the outsourced product offered by a company. Finally, the most routinized legal services—those that technology may have the greatest benefit in helping deliver efficiently—may, eventually, not be considered the practice of law at all; either lawyers or non-lawyers would be able to perform these services in different organizational and ownership contexts.

Legal Practices: an Australian Case Study, 20 INT'L J. LEGAL PROF. 315 (2013) (arguing that regulation of ILPs in Australia does not sufficiently account for new pressures from non-lawyer owners and managers).

281. See *supra* II. England and Wales are the furthest along in gathering relevant data.

282. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 47 (making similar recommendations in the UK context).

283. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008) (speculating about the transformative role technology may have in legal services); Gillers, *supra* note 46 (arguing the regulation of the profession should be adopted to harness technological changes transforming the delivery of legal services); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014) (describing how technology, particularly machine intelligence, may disrupt the legal services market in the future).

284. For example, law firms will subscribe to legal databases like Westlaw or referral networks like lawyers.com.

IV. NON-LAWYER OWNERSHIP AND A “NEW PROFESSIONALISM”

The rise of non-lawyer ownership of legal services should not be viewed in isolation. It is useful to think of those who perform traditional legal work as being controlled or organized by at least four forces: (1) the demands of the market, (2) the structure and bureaucracy of the organizations in which they work, (3) the legal profession, and (4) the government.²⁸⁵ While lawyers have always had to be responsive to market pressures, it is notable that lawyers are both becoming integrated into firms that are more similar to other types of commercial organizations and that their relationship with the rest of the economy is becoming more like those of other services.²⁸⁶ For example, the lifting of bans on advertising,²⁸⁷ the abolition of mandatory fixed fee schedules for lawyers,²⁸⁸ and increased consumer awareness of their legal options that has been witnessed in some jurisdictions have made lawyers more responsive to conventional market forces. The rise of limited liability enterprises in legal services²⁸⁹ and non-lawyer owned legal service companies in some jurisdictions have embedded lawyers in organizations more similar to those in other fields. The reducing regulatory power of the bar and the rise of new outside regulators of the profession, whether these are independent ombudsmen, specialized regulators, or competition regulators has seen the government increasingly encroach on the self-regulatory power of the profession.²⁹⁰ Other professions, such as doctors, accountants, teachers, and architects, have seen similar shifts—witnessing greater integration of their occupations into the overall economy and into more varied organizational forms, as well as greater outside regulation.²⁹¹ Indeed, such broader trends have led some to conclude we are witnessing the birth of a “new professionalism,”²⁹² that

285. Eliot Freidson, one of the founders of the sociology of professions, argued that consumers control how work is organized in the market, bureaucracies control work in organizations, and other members of an occupation control work in a profession. See ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* 12 (2001).

286. See STEPHEN BRINT, *IN THE AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* (1994) (arguing that professions are becoming marketized and commercialized and as a result their rhetorical justifications have shifted from social trusteeship to expertise).

287. For a brief history of the relaxation of restrictions on lawyer advertising in the United States, see DEBORAH L. RHODE AND DAVID LUBAN, *LEGAL ETHICS* 622–25 (1995).

288. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1979), the U.S. Supreme Court ruled that lawyers were engaged in a “trade or commerce” and that bar mandated minimum fee schedules violated anti-trust rules.

289. For a history of the spread of the Limited Liability Partnership form in the United States since the 1990s, see ALAN R. BROMBERG AND LARRY E. RIBSTEIN, *LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT* (2001) 3–15 (2012).

290. For example, in the U.K., regulatory power has shifted away from the bar to independent regulators like the Legal Services Board, the Legal Ombudsman, and the Solicitor Regulatory Authority. See *supra* II.A.

291. See Julia Evetts, *A New Professionalism? Challenges and Opportunities* 59 *CURRENT SOC.* 406, 412–14 (July 2011) (describing how professions increasingly emphasize quality control, standardization, and other managerial and governance forms of control).

292. *Id.* at 412; see also Sigrid Quack & Elke Schubler, *Dynamics of Regulation and the Transformation of Professional Service Firms: National and Transnational Developments*, in *OXFORD HANDBOOK OF PROFESSIONAL SERVICE FIRMS* (forthcoming 2016) (on file with author) (describing how the advance of competition

has led to battles about the “corporatization” of fields such as medicine and education.²⁹³

These shifts do not mean that professions are disappearing or becoming less significant, even if they might be becoming less distinctive. Occupational licensing and the competency and signaling that go with it has only increased in prominence in countries like the United States.²⁹⁴ In today’s “law-thick” world it is hard to imagine that there will not continue to be a vital and extensive role for legal professionals in the foreseeable future.²⁹⁵ Still, these broader trends facing the legal profession, of which non-lawyer ownership is a key component, raise questions about how to understand and manage these changes. While it is not possible here to systematically lay out such an analytical or normative agenda, this Article provides a number of takeaways relevant to the access debate and how to best regulate legal services to cope with non-lawyer ownership amongst broader shifts in the profession.

A. ACCESS IMPLICATIONS

Permitting non-lawyer ownership of legal services is frequently viewed as a relatively inexpensive regulatory intervention to increase access to legal services. Yet, the access benefits of non-lawyer ownership so far seem questionable. At the very least, the available evidence should warn against viewing non-lawyer ownership as a substitute for more proven access strategies, like legal aid.

In general, deregulatory strategies have had a mixed track record of increasing access in a substantial manner. As perhaps the most comprehensive review of the literature on the regulation of legal services noted, “The theoretical literature, on the whole, suggests fairly strong recommendations to policymakers regarding self-regulation [towards deregulation]. On the other hand, the limited empirical

policy, the liberalization of company forms, a shift towards more public oversight, and an increasingly transnational entanglement of the state have led countries to regulate professional service firms more like multinational companies).

293. For a recent debate about the corporatization of medicine, see *Sunday Dialogue: Medicine as a Business*, N.Y. TIMES (Feb. 8, 2014), <http://www.nytimes.com/2014/02/09/opinion/sunday/sunday-dialogue-medicine-as-a-business.html> [<http://perma.cc/54SB-LH2C>]; for one perspective about the corporatization of education, see Paul Nevins, *Shall We Corporatize Public Education Too?*, SALON (Oct. 5, 2012), http://open.salon.com/blog/paul_nevins/2012/10/05/shall_we_corporatize_public_education_too [<http://perma.cc/H7JU-ZU8Z>].

294. In fact, the professions are arguably organizing work life more than ever before. In the United States in 2008, twenty-nine percent of the labor force was in an occupation that required a license (compared to less than five percent in the 1950s). Although not all these occupations would be considered “professions” many would. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 331 J. LAB. & ECON. S173, S175–S176 (2013).

295. As Gillian Hadfield observes, “We live in a law-thick world that people are left to navigate largely in the dark.” Hadfield, *supra* note 6, at 43.

evidence does not always support such strong theoretical predictions.”²⁹⁶ This does not mean these deregulatory strategies are not worth pursuing, but rather expectations about their impact should be appropriately tempered. For example, several studies have indicated that more advertising leads to lower priced legal services.²⁹⁷ A well known study undertaken by the FTC in the 1980’s in the United States found that the five legal services it surveyed were cheaper on average in states with fewer restrictions on lawyer advertising than in states with more restrictions.²⁹⁸ However, the report also found that within the same state law firms that advertised personal injury services actually charged higher contingency fees than those that did not advertise.²⁹⁹ Stewart Macaulay in surveying, and questioning, the results of the FTC report argued that even if lawyer advertising did somewhat decrease the price of legal services that, “[W]e must be concerned that largely symbolic debates about lawyer advertising may divert us from concern with more pressing issues of access and equality.”³⁰⁰

Other regulatory solutions, such as new, and more varied, types of legal professionals, who require less training than traditional lawyers, could potentially increase access more than non-lawyer ownership. For example, in both Australia and the United Kingdom there is limited evidence to suggest that licensed conveyancers transfer property at significantly lower prices than solicitors,³⁰¹ although a more nuanced UK study of particular geographic regions where conveyancers had entered the market versus where they had not produced more ambiguous results.³⁰² Whatever the evidence, creating new categories of legal professionals who can perform a subset of legal activities requires a sufficient market. In the UK during the 2008 economic and housing downturn conveyancers were particularly hard hit, reducing the number of persons who were willing

296. Frank H. Stephen, James H. Love & Neil Rickman, *Regulation of the Legal Profession*, in REGULATION AND ECONOMICS 647, 670 (Roger J. Van Den Bergh & Alessio M. Paces eds. 2012).

297. *Id.* at 658.

298. JACOBS, WILLIAM W. ET AL., F.T.C., IMPROVING ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 79 (1984) (finding, “[a]ttorneys in the more restrictive states, on the average, charged higher prices for most simple legal services than those in the less restrictive states.”).

299. *See id.* at 125.

300. Stewart Macaulay, *Lawyer Advertising: “Yes, but . . .”*, 75 (Inst. for Legal Studies, Working Papers No. 2, 1986) (on file with the G.J. Legal Ethics).

301. BDRC CONT’L, *supra* note 39, at 86 (noting that conveyancing in the UK is more expensive when done by a solicitor compared to a licensed conveyancer—nearly £1,300 versus £785 on average); NSW GOVERNMENT SUBMISSION, PRODUCTIVITY COMMISSION REVIEW OF NATIONAL COMPETITION POLICY ARRANGEMENTS 10 (2005), http://www.pc.gov.au/__data/assets/pdf_file/0020/47342/sub099.pdf [<http://perma.cc/3YDN-2VDA>] (noting that conveyancing fees in New South Wales fell by seventeen percent between 1994 and 1996 after the removal of the legal profession’s monopoly on conveyancing).

302. Stephen, Love, & Rickman, *supra* note 296, at 656 (noting that the results of a UK study of conveyancers in the early 90s “should caution against the assumption that multiple professional bodies will necessarily be to the benefit of customers”).

to enter conveyancing.³⁰³ While the housing market over the long run may provide a sufficiently large market for a practitioner to invest in the expense of becoming a conveyancer (and not the additional expense of becoming a solicitor) other legal markets may not be robust enough to support their own specialized legal practitioners.

There is a rich theoretical literature that argues unauthorized practice of law (UPL) provisions are too broad, increasing prices and limiting access as a result of their implementation.³⁰⁴ While there has been little empirical research done to support this proposition³⁰⁵ limiting the reach of UPL provisions intuitively has merit as an access strategy. However, it is not always obvious what services should be regulated and which should not. For instance, in the UK will-writing is not a reserved legal activity, an open market position that some advocates for looser UPL restrictions might cheer. The UK Legal Services Board (LSB) though on the basis of a study and consumer feedback is pressing the government, so far unsuccessfully, to regulate will-writing as a legal activity.³⁰⁶ The LSB argues that some will-writing companies use the power and information asymmetry with their customers to sell defective, unnecessary, and costly wills, undercutting the trust of the public in the will-writing market.³⁰⁷ This experience has parallels to criticisms of “trust mills” in the U.S., which sell un-customized documents to create trusts to seniors at exorbitant rates.³⁰⁸

Besides forms of fee shifting and sharing,³⁰⁹ the two primary alternatives to deregulation to increase access to civil legal services are pro bono and legal aid. Pro bono already plays a vital role in delivering legal services, and should be expanded where possible, but it also has clear constraints both in terms of the amount and type.³¹⁰ Pro bono may also come under new pressure in a regulatory

303. Between 2007 and 2011 there was a decline in the number of students studying to become a conveyancer from 1930 to 497. COUNCIL FOR LICENSED CONVEYANCERS, ANNUAL ACCOUNTS 25 (2011), http://www.clc-uk.org/pdf_files/corporate_docs/Annual_Report_2011.pdf [<http://perma.cc/F2NJ-CRXX>].

304. See, e.g., ABEL, *supra* note 21, at 127-141 (1991); RHODE, *supra* note 1, at 87-91.

305. Stephen, Love, & Rickman, *supra* note 296, at 655 (noting “little empirical work has been done by economists to estimate the effects of professional monopoly rights . . .”).

306. LEGAL SERV. BD., SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES 14-16 (2013), http://www.legalservicesboard.org.uk/Projects/pdf/20130211_final_reports.pdf [<http://perma.cc/6TCL-MPCK>].

307. The LSB does not propose that will-writing only need to be performed by solicitors, but that it could also potentially be performed by other licensed legal professionals like paralegals. *Id.* at 24.

308. See, e.g., Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59(3) MD. L. REV. 595, 608 (2000) describing how trust mills may victimize unsuspecting seniors into buying trusts that do not accomplish their goals.

309. Class actions and contingency fees are two forms of fee sharing or shifting that can increase the ability of litigants to bring cases, particularly in cases that involve monetary damages against large businesses. For a recent overview of U.S. Supreme Court litigation limiting class actions and supporting binding arbitration on companies terms, see LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 282-299 (2014).

310. See Cummings, *supra* note 2, at 115-144.

regime that allows for non-lawyer ownership, with investor owners influencing lawyers to engage in either less pro bono or less controversial pro bono in order to increase profits. Given these limits of pro bono, increasing legal aid may be the best option to significantly expand access to legal services.

Indeed, perhaps the most noticeable change in access was not produced by any shift in regulation or by pro bono activity, but instead by cuts in UK legal aid, which created a large increase in pro se litigants in family court.³¹¹ Given recent dramatic cuts in the UK legal aid budget and declining or stagnating legal aid budgets in the United States³¹² and Australia,³¹³ advocating for renewed investment in legal aid may seem like an unrealistic strategy. Yet, the alternative of relying on regulatory changes or a dramatic increase in pro bono assistance to address access needs seems even more far-fetched. Increases in government spending may also become more realistic if regulatory strategies to improve access seem largely exhausted. Recent surveys in the United States, United Kingdom, and Australia showing that in many instances the government actually saves money in the long run by providing legal aid may further incentivize such spending.³¹⁴ Finally, the relatively small amount of money spent on government legal aid for civil legal services makes it more plausible that there could be a marked increase in legal aid budgets.³¹⁵

Importantly, increased public spending on legal assistance does not have to be directed towards “traditional” legal aid where a publicly employed legal aid attorney guides a client through a legal problem from start to finish. Where appropriate, government intervention could also include legal assistance and advice provided by non-lawyers,³¹⁶ “unbundled” legal assistance,³¹⁷ provision of

311. See *supra* II.A.2.

312. *Funding History*, *supra* note 1.

313. In 1997 Prime Minister Howard’s government instituted major cutbacks in the Commonwealth’s funding of legal aid. While Australian states made up for some of these cuts, civil legal aid programs were curtailed by legal aid commissions. PRICE WATERHOUSE COOPERS, *LEGAL AID FUNDING: CURRENT CHALLENGES AND THE OPPORTUNITIES OF COOPERATIVE FEDERALISM* 19, 57 (2009); CMTY LAW AUSTRALIA, *UNAFFORDABLE AND OUT OF REACH: THE PROBLEM OF ACCESS TO THE AUSTRALIAN LEGAL SYSTEM* 9 (2012).

314. For an overview of studies showing the cost savings of legal aid in the United States, the United Kingdom, Australia, and Canada, see GRAHAM COOKSON & FRED A MOLD, *THE BUSINESS CASE FOR SOCIAL WELFARE ADVICE SERVICES* (July/Aug. 2014), <http://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf> [<http://perma.cc/P2PF-ZKAF>]; BOSTON BAR ASS’N, *INVESTING IN JUSTICE: A ROADMAP TO COST EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS* 4–5 (2014) (noting findings of independent consulting firms that in certain categories of cases the government will save from \$2 to \$5 for every \$1 spent in civil legal aid).

315. *Funding History*, *supra* note 1; RHODE, *supra* note 1, at 187 (noting that U.S. federal spending on civil legal aid could be tripled for only \$1 billion. A fact that remains true ten years later).

316. Several studies have shown that, at least in some situations, non-lawyers can be just as effective or more so than lawyers. In the U.K., they have long relied on non-lawyers in their legal aid scheme. See, e.g., Richard Moorhead, Alan Paterson, & Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37(4) L. & Soc’y REV. 765, 794–96 (2003) (finding that non-lawyers perform at a higher standard than lawyers in a study of the UK’s legal aid system, but that non-lawyers took more hours on the same case and so cost more, perhaps because of contractual incentives); HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS*

legal self-help information, and public legal expenses insurance.³¹⁸ Such programs should be targeted at both the poor and middle class.

Where non-lawyer ownership of legal services is adopted it should be adapted to maximize its access benefits. This might be through encouraging consumer ownership, or other types of non-lawyer ownership, that may be more likely to increase access. Some jurisdictions could also choose to tax non-lawyer owned firms to subsidize the government's legal aid budget. Traditionally, one of the justifications of pro bono was that lawyers should provide legal services to those who cannot afford them in exchange for the benefit they receive from having a monopoly on legal services.³¹⁹ Since non-lawyer owners, unlike lawyer owners, cannot provide pro bono legal services they could be expected to contribute monetarily for being able to benefit from this monopoly as well. Finally, a jurisdiction could encourage that non-lawyer owned companies be set up as benefit corporations, explicitly stating that directors must consider not only maximizing profits in the decisions they make, but also increasing access to justice. Given the loose reporting standards of benefit corporations, adopting this form would certainly not guarantee these enterprises would promote access.³²⁰ However, such an organizational form might encourage these companies to pursue more public-spirited missions and would help protect legal service companies that did engage in extensive socially minded work from shareholder suits alleging that the company did not focus on maximizing profits.³²¹

B. REGULATORY IMPLICATIONS

This Article only examined non-lawyer ownership's impact on access and professionalism for civil legal services for poor and moderate-income popula-

OF REPRESENTATION AT TRIBUNALS, REPORT TO THE LORD CHANCELLOR 245–46 (1989) (finding that experience and expertise were reported as being more important than being a lawyer to successfully represent a client in the U.K. tribunal system); HERBERT KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998) (finding that non-lawyer assistance was just as effective as lawyer assistance in three of the four U.S. case studies examined).

317. For an overview of the literature on unbundled legal assistance, see Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825 (2012).

318. For one proposal for a publicly sponsored opt-out legal expenses insurance scheme in Canada, see Sujit Choudhry, Michael Trebilcock, & James Wilson, *Growing Leal Aid Ontario into the Middle Class: A Proposal for Public Legal Insurance*, in MIDDLE INCOME ACCESS TO JUSTICE (Michael Trebilcock, Anthony Duggan, & Lorne Sossin eds. 2012).

319. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2419 (1999).

320. It could even weaken directors' accountability as they can blame poor performance on trying to serve the multiple goals of the company. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporations Statutes* 2AM. U. BUS. L. REV. 1, 33 (2012).

321. *Id.* at 16 (noting that existing law in the U.S. likely already provides protection from shareholder suits for pursuing social goals, but that benefit corporations do add clarity to such protections).

tions.³²² That said, the case studies and other evidence presented in this Article do suggest that there is a need for careful regulation of non-lawyer ownership. This is truer of some types of non-lawyer owned enterprises than others. For example, non-lawyer ownership per se does not necessarily create significant new conflicts of interest. A publicly listed law firm may not have any more conflicts than a lawyer owned firm. Instead, new conflicts of interest seem to be most likely to occur for enterprises that offer legal services, but also have other commercial interests. Even of these enterprises, it is only a subset that is most likely to develop new conflicts.

Given this context, regulators should not treat all types of non-lawyer ownership the same. In situations where the potential for conflict of interest, or perceived conflict of interest is high, jurisdictions adopting non-lawyer ownership should ban such ownership, or at least heavily regulate it. When the potential for conflict is more amorphous or where the public spirited ideals of the profession, professional standards, or other values of the profession may be undermined, regulators should exercise their choice on when and how to intervene, using the available evidence to weigh the costs and benefits of different types of non-lawyer ownership.

Jurisdictions might adopt several approaches to regulate non-lawyer ownership. They could have blunt and restrictive rules, such as that non-lawyers can only own a minority of any legal services firm or only own non-voting shares.³²³ They might allow for non-lawyer ownership only in some legal sectors, or in all, or could bar legal services from being provided by enterprises also engaged in other types of services. They could have more fine-tuned licensing requirements where potential non-lawyer owners had to submit plans about how they would overcome potential conflicts of interest that would be subject to approval. Or they could only require licensing in certain sectors (like criminal law) or for certain types of owners. The point here is to not go through every possible permutation of regulation and weigh its respective merits (some may be sensible, some unwise, and others would require far more regulatory capacity than others). Rather, it is simply to observe that in designing a regulatory regime for non-lawyer ownership that a regulator faces a large number of choices many of which could plausibly be justified.

Given this extensive regulatory menu of options and the still limited empirical basis upon which to make these choices, who the regulators are making these

322. Notably, it did not study how non-lawyer ownership impacts other parts of the legal market (such as the criminal or corporate sector), how it might impact other clients (such as the upper middle class, corporations, or government), or how it might affect volatility in the legal services market, the satisfaction of legal professionals with their jobs, or other relevant considerations. For example, John Morley argues that investor ownership would have made recent law firm collapses less likely. See John Morley, *Why Law Firms Collapse: The Fragility of Worker Ownership* (Aug. 2014) (unpublished manuscript) (on file with author).

323. For instance, Singapore recently adopted minority non-lawyer ownership. Hyde, *supra* note 15.

decisions becomes all the more significant. In the past, the academic literature has been preoccupied with lawyers capturing their own regulation to further their own interests.³²⁴ Examples of this type of regulatory capture are arguably seen in the non-lawyer ownership debate. For instance, in rejecting non-lawyer ownership wholesale, the New York Bar's Taskforce on Non-Lawyer Ownership (the Taskforce), comprised exclusively of members of the bar, noted that there was not sufficient empirical evidence to know the impact of non-lawyer ownership and "that it was not worth taking the risk of impacting the core values of our profession by allowing non-lawyers to hold equity interests in law firms."³²⁵ This intense caution expressed by the Taskforce, and blanket refusal to experiment, can be seen as a protectionist decision that ensures that lawyer owners do not have to compete with non-lawyer owners for either profits or prestige.

With the advent of non-lawyer ownership there is a concern that new outside actors, who can now profit from legal services, may also try to capture the profession's regulation. For example, the Clementi report was instrumental in ushering in non-lawyer ownership in the UK.³²⁶ In recommending its largely wholesale adoption to the UK government, David Clementi argued that, "The burden of proof [in the debate over non-lawyer ownership] rests with those who seek to justify the restrictive practice."³²⁷ This was a very different burden of proof than the Taskforce of the New York Bar, which in the face of unclear evidence favored the status quo. Perhaps not surprisingly, Clementi is not a lawyer, but a Harvard Business School graduate who had been prominently involved in the movement to privatize government companies in the UK. He was also the chairman of a major insurance company when he wrote the report.³²⁸ Today, the current head of the Legal Services Board is Richard Moriarty, who is not a lawyer, but came from a competition background and before joining the LSB was the director of regulation at a private water supply company owned by Morgan Stanley.³²⁹

There is little reason to believe the divergent positions on non-lawyer ownership of these regulators, whether members of the bar or competition advocates, are not sincere. However, given these regulators backgrounds they are

324. See, e.g., ABEL, *supra* note 21, at 44–48 (arguing lawyers use professional ideology to gain market control); WINSTON ET AL., *supra* note 3, at 24–56, 82–91 (2011) (claiming that lawyers capture high rents because of licensing).

325. NYSBA REPORT, *supra* note 8, at 73.

326. See also E. Leigh Dance, *The U.K. Legal Services Act: What Impacts Loom for Global Law Firm Competition?*, 34 L. PRAC. 28, 35 (2008).

327. CLEMENTI REPORT, *supra* note 44, at 132.

328. David Clementi was the Chairman of Prudential LLC until 2008. *David Clementi, Executive Profile*, BLOOMBERG, BUSINESS <http://www.bloomberg.com/profiles/people/1538052-david-cecil-clementi> [perma.cc/K33J-TPUU] (last visited December 23, 2015).

329. See Kathleen Hall, *Super-Regulator Appoints New Chief Executive*, L. SOC'Y GAZETTE (Oct. 22, 2014), <http://www.lawgazette.co.uk/practice/super-regulator-appoints-new-chief-executive/5044599.fullarticle> [http://perma.cc/DT56-6MJH].

likely to emphasize different priorities for the organization of a legal market. In a world of non-lawyer ownership, one should expect that large legal service companies, and their owners, will try to influence regulators to approve regulation that benefits them, but may disadvantage the public or smaller, more traditional legal service enterprises.³³⁰ In other words, we should expect that non-lawyer owned companies will pressure regulators just as lawyer owned law firms have historically.

More and better data will likely continue to be collected on jurisdictions' experiences with non-lawyer ownership. This could reduce some of the potential for regulatory capture by interest groups by limiting the discretion of regulators in their choices. However, much of non-lawyer ownership's ultimate effect on both access and professionalism is likely to be subtle and remain difficult to quantify.³³¹ It is unclear how one would accurately measure whether certain types of non-lawyer ownership negatively affected the public's perception of the justice system and the consequences of any such change in attitude. Similarly, in many cases it will likely be challenging to trace whether new innovations in delivering legal services arose because of non-lawyer ownership or other factors. Yet, these are precisely the types of issues that we want regulators to consider. There is a danger that if regulators only make decisions based on what they can measure with specificity that they will deemphasize factors they cannot easily quantify, but may be just as, or more, important.³³² One can attempt to overcome this bias through more qualitative studies, such as not only commissioning a survey on the public's perception of non-lawyer ownership, but also undertaking in-depth interviews with the public or surveying the history of the impact of other similar regulatory changes. These studies though may generate as many questions as answers and could often prove too costly to undertake.

Given the frequently uncertain consequences of non-lawyer ownership, as well as the competing priorities of potential regulators, it is unlikely that in the near

330. JOHN BRAITHWAITE, *REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* 20 (2008) (noting that "large corporations often use their political clout to lobby for regulations they know they will easily satisfy, but that small competitors will not be able to manage").

331. Limited liability partnerships provide a parallel example of the difficulties of assessing impact. At the time of their introduction in the 1990s and 2000s, there were warnings that LLPs would reduce the incentive of partners to monitor each other's behavior leading to a decline in professional conduct. *See, e.g.*, N. Scott Murphy, *It's Nothing Personal: The Public Costs of Limited Liability Partnerships*, 71 *IND. L. J.* 201 (1995) (arguing that LLPs shift the costs of underinsured legal practices from firms to clients). Although nightmare scenarios about the effect of LLPs did not come true, law firms today might, and some commentators claim do, engage in riskier conduct than in earlier decades, helping contribute to law firm collapses like Dewey & LeBoeuf. *See* Michael Bobelian, *Dewey's Downfall Exposes the Downfall of Partnerships*, *FORBES* (June 7, 2012), <http://www.forbes.com/sites/michaelbobelian/2012/06/07/deweys-downfall-exposes-the-demise-of-partnerships/> [perma.cc/2KML-AYR5]. However, given the multiple factors that influence firm behavior we might never know the full effect of the widespread adoption of LLPs.

332. The availability bias, judging probability on the basis of evidence that is easily cognitively available, is a well-known problem in people's ability to assess risk. *See* Cass Sunstein, *Empirically Informed Regulation*, 78 *U. CHI. L. REV.* 1349, 1358 (2011).

future there will be expert consensus on how to regulate such ownership. Instead, such decisions should be made through regulators drawn from a diverse set of stakeholders.³³³ This more deliberative approach should include not only members of the bar or competition advocates, who tend to weigh a narrow, if valid, set of concerns, but also consumer groups, access advocates, academics, and other professional organizations that deal directly with the public's legal challenges (like doctors, educators, and accountants).³³⁴

While reforms like non-lawyer ownership, which make legal services less distinct and more integrated into the market, provide opportunities to better deliver legal services, they do not always solve the problems they were expected to and may generate their own array of challenges.³³⁵ There is a danger that the push to deregulate legal services may come to dominate the access to justice agenda as deregulation and competition become central tenants of a new set of ideals about how to organize the delivery of legal services.³³⁶ Instead, the goal of regulation of legal services should not be deregulation for its own sake, but rather to increase access to legal services that the public can trust delivered by legal service providers who are part of a larger community that sees furthering the public good as a fundamental commitment.

CONCLUSION

The adoption of non-lawyer ownership of legal services may, in some instances, bring access and other benefits. However, the evidence so far does not indicate that these access gains will be as significant for poor and moderate-

333. Such a multi-stakeholder strategy draws on scholarship on deliberative democracy that does not assume consensus, but rather how to manage conflict given different normative stances of participants. See AMY GUTMAN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 10 (2004).

334. Having a diverse group of regulators may have the added benefit of shielding regulation from future anti-trust scrutiny in the U.S. context. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Anti-Trust Scrutiny*, 162 U. PA. L. REV. 1093, 1155 (2014); Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 431–38 (2008) (arguing that one of the benefits of the move towards non-lawyer ownership may be to trigger an acceptance that the practice of law is a business and a move away from self-regulation and towards regulating legal services as an industry).

335. In most fields—not just the legal profession—a striking feature of the spread of regulation across jurisdictions is that new regulatory frameworks are frequently adopted more on the basis of ideology, or to harmonize with global norms, than on concrete evidence of their merit. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 17 (2000) (explaining that the key processes of the globalization of business regulation are “coercion, systems of reward, modeling, reciprocal adjustment, non-reciprocal coordination, and capacity-building.” Note that evidence-based learning is not amongst the most important mechanisms identified).

336. Edward Shinnick, Fred Bruinsma & Christine Parker, *Aspects of regulatory reform in the legal profession: Australia, Ireland and the Netherlands* 10(3) INT'L J. LEGAL PROF. 237, 246–47 (2003) (noting that there is “. . . a danger that the ongoing impetus for regulatory reform of the legal profession will be the . . . competition agenda alone and that access to justice and consumer critiques of the legal profession will disappear from the debate”).

income populations as some proponents suggest, and if non-lawyer ownership is seen as a substitute for other access strategies, like legal aid, such a deregulatory reform strategy could even have a detrimental impact. At the same time, the evidence also does not indicate that the professionalism concerns raised by non-lawyer ownership justify a blanket ban. Instead, jurisdictions adopting non-lawyer ownership should be aware of the potential dangers that such ownership can raise, including the possibility of new types of conflicts and the capture of regulators by interests that can now profit from legal services. Mitigating against these possibilities of non-lawyer ownership will require robust, independent, and well-informed regulators.³³⁷

337. Flood, *supra* note 38, at 508–09 (arguing liberalization of legal services requires new types of regulation).



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
 From: Mark Tuft
 Date: January 7, 2019
 Re: Why Lawyers are Regulated Under the Judicial Branch and to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar

This memo addresses these issues by briefly examining the role of the Supreme Court, the Legislature, and the State Bar in the regulation of the practice of law.

The Supreme Court

The California Supreme Court has the exclusive power to regulate attorney admission to practice law in California. “In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts” (Article VI §1 of the California Constitution). *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 592. Such power of regulation means that the Court is vested with the inherent authority to control the admission, discipline and disbarment of persons entitled to practice law in this jurisdiction. *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543. Virtually every state recognizes that the power to admit and discipline lawyers rests with the judicial branch of government, mainly because an attorney is viewed as an officer of the court and whether a person is authorized to practice law is considered a judicial and not a legislative matter. *In re Attorney Discipline System*, supra, 19 Cal. 4th at 592; and see Restatement Third The Law Governing Lawyers (ALI 2000) §1, Comments b and c.1 Hence, the Court’s inherent authority to regulate lawyers is considered a judicial function under the constitutional doctrine of separation of powers.

Lawyers have traditionally been distinguished from other professions and commercial purveyors of non-professional services who are not part of the judicial branch of government.

The right to practice law not only presupposes that the person possesses sufficient integrity, learning, and fitness to practice but also that the person acquires a special privilege and obligation to carry out a public trust in protecting the integrity of the legal system and promoting the administration of justice and confidence in the legal profession. Recent amendments to the California Rules of Professional Responsibility include these obligations in stating the purpose of

¹ According to several authorities, the judiciary’s authority to regulate and control the practice of law is universally accepted and dates back to the year 1292. *In re Shannon* (AZ 1994) 897 P. 2d 548, 571; and see Martineau, *The Supreme Court and State Regulation of the Legal Profession (1980-1981)* 8 Hastings Const. L.Q. 199.

the rules. California Rule of Professional Conduct 1.0(a). The concept of lawyers as “officers of the court” envisions more than simply providing legal services to a client. “A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the equality of justice.” California Rule of Professional Conduct 1.0, Comment [5]; and see the ABA Model Rules of Professional Conduct, Preamble ¶ 1.

Despite the special role that distinguishes lawyers from other service providers, the Supreme Court has acknowledged on occasion that there are certain realities about modern law practice and economic circumstances that influence the delivery of legal services. The Court recognized in *Howard v. Babcock*², for example, that the traditional view of law firms as stable institutions is no longer the case and that lawyer are increasingly mobile and make career decisions based on the market place rather than duties to the system of justice. The Court held in that case that there is no longer any legal justification for treating partners in a law firm differently when it comes to restrictive covenants in law firm partnership agreements than other businesses and professions.

The Court’s inherent authority to regulate lawyers is not exclusive. Practice in federal court is governed entirely by federal law and federal court rules of admission and professional conduct. Federal courts and many federal agencies regulate the conduct of lawyers appearing before them. At the same time, the power of federal courts and administrative agencies to discipline attorneys appearing before them does not pre-empt California’s disciplinary authority if a member of the State Bar commits acts in federal court or before a federal agency that reflect upon the lawyer’s integrity and fitness to practice in California. Federal courts in California typically incorporate California’s Rules of Professional Conduct and the State Bar Act as standards governing the practice of law before that tribunal. Federal agencies, such as the U.S. Patent and Trademark Office and the Internal Revenue Service, adopt and enforce standards of practice that are patterned after the ABA Model Rules.

The Court’s inherent authority includes defining what constitutes the practice of law in California (*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court (ESQ Business Services, Inc.)* (1998) 17 Cal. 4th 119, 128-129) and deciding who, besides members of the California State Bar, may practice law in California (California Rules of Court 9.40 – 9.48) and in what form. *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 50 - Court is empowered to authorize and impose restrictions on the practice of law by nonprofit “advocacy” corporations.

The Legislature

The Supreme Court has historically recognized the Legislature’s authority to adopt measures regarding the practice of law. “[T]he power of the legislature to impose reasonable regulations upon the practice of law has been recognized in this state almost from the inception of statehood.” *Brydonjack v. State Bar* (1929) 208 Cal 439, 443. For example, the “duties of attorney” currently found in Business and Professions Code §6068(a) – (h), including the duty to

² 6 Cal. 4th 409 (1993)

“maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client” (§6068(e)(1)), have been integral to lawyer regulation since their enactment in 1872. The Supreme Court has long acknowledged this “pragmatic approach” to lawyer regulation and has respected the exercise by the Legislature, under the police power, of “a reasonable degree of regulation and control over the profession and the practice of law... in this state.” *Santa Clara County Attys Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543-544 – “In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation;” *O’Brien v. Jones* (2000) 23 Cal. 4th 40, 48-57 – appointment of State Bar Court judges by the Governor, the Assembly Speaker and Senate Rules Committee did not violate the separation of powers doctrine.³

The Court’s traditional respect for legislative regulation of the practice of law is not viewed as an abdication of the Court’s inherent responsibility and authority over the regulation of lawyers. The Court has on occasion invalidated legislative enactments that materially impair the Court’s inherent power, including provisions that authorize another entity to discipline an attorney. *Hustedt v. Workers’ Comp. Appeals Bd.* (1981) 30 Cal. 3d 329, 339-341 – invaliding statute authorizing Workers’ Compensation Appeals Board to remove or suspend attorneys licensed to practice before it; *Merco Const. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727-733 – invalidating law permitting a corporation to appear in an action through a person who is not a lawyer; *In re Lavine* (1935) 2 Cal. 2d 324, 328-331 – invalidating law requiring automatic readmission of attorneys pardoned after disbarment for felony convictions.

The Court has generally respected laws enacted by the Legislature to regulate the practice of law unless the Court determines that the legislation defeats or materially impairs the Court’s inherent authority over attorney admission, discipline, and disbarment. *Santa Clara County Counsel Attys. Assn. v. Woodside*, supra, 7 Cal. 4th at 544. Ultimately, the Court has the inherent power to provide higher standards of attorney conduct than the standards prescribed by the Legislature. *Id.*; *Emslie v. State Bar* (1974) 11 Cal. 3d 210, 225.

In addition to regulating lawyers, the Legislature has enacted statutes regulating non-lawyer service providers in providing services that do not constitute the practice of law. See, e.g., Business and Professions Code §6400 et. seq. (legal document assistants and unlawful detainer assistants); § 6450 et. seq. (paralegals); §22440 et. seq. (California immigration consultants).

The State Bar

The California State Bar originally was created by the Legislature in 1927 as a public corporation by statute (Business and Professions Code §6001). Subsequently, in 1960, the State Bar became and remains today a constitutional entity within the judicial article of the California Constitution (Article VI, §9). The State Bar Act did not delegate to the State Bar, the Legislature or the

³ The California State Bar is the only State Bar in the country with independent professional judges dedicated to ruling on attorney discipline cases.

executive branch, or any other entity, the Supreme Court's inherent judicial authority over the regulation of lawyers. *In re Attorney Discipline*, supra, 19 Cal. 4th at 601.

In adopting the State Bar Act, the Legislature expressly recognized that the Court retained the same inherent authority it had prior to the Act. Business and Professions Code §6087 – “Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of (the State Bar Act).”⁴ The State Bar Act contains other provisions confirming the Court's inherent authority over the practice of law. (Business and Professions Code §6075 – the State Bar's assistance in matters of admission and discipline of attorneys is a method that is alternative and cumulative to the Court's inherent power; §6076 – requiring the Court's approval of the State Bar's formulation and enforcement of rules of professional conduct; §6100 – confirming the Court's inherent power to discipline attorneys, including summary disbarment.

The law governing lawyers in California is not confined to the Rules of Professional Conduct and the State Bar Act. Lawyers are also bound by other applicable law including opinions of California courts. California Rule of Professional Conduct 1.0(b)(2); *Santa Clara County Atty. Assn. v. Woodside*, supra, 7 Cal. 4th at 548 – the duties to which an attorney in this state are subject are not exhaustively delineated by the Rules of Professional Conduct, and the rules are not intended to supersede the lawyer's duty of loyalty recognized in the common law. Statutory provisions regulating lawyer conduct appear in many state and federal codes and regulations as well as in rules of courts and other tribunals.

The State Bar acts as an administrative arm of the Supreme Court in admission and discipline matters. The Supreme Court has delegated to the State Bar the power to act on its behalf in such matters, subject to the Court's review. The Court retains the power to control any disciplinary proceeding and its judicial authority to disbar or suspend attorneys. *In re Attorney Discipline*, supra, 19 Cal. 4th at 599-600.

Protecting the public is the State Bar's highest priority in exercising its licensing, regulatory and disciplinary functions. Business and Professions Code §6001.1. Every person admitted and licensed to practice law in California is required to be a member of the State Bar. Art. 1 §9 of the California Constitution; Business and Professions Code §6001, 6002. Non-admitted lawyers authorized to practice law in California are, with rare exception, required to comply with California's rules and law regulating lawyer conduct in practicing law in California.

The question to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar raises structural and policy issues that are yet to be considered. As a starting point, the State Bar currently regulates lawyers with managerial and supervisory authority over non-lawyer assistants in the provision of legal services. California Rule of Professional Conduct 5.3. This may include the lawyer's duty to supervise paralegals to ensure

⁴ “[S]ection 6087's express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act.” *In re Attorney Discipline*, supra, 19 Cal. 4th at 600; and see *Brydonjack v. State Bar* (1929) 208 Cal. 439, 443.

compliance with the regulatory provisions of Business and Professions Code §6400 – 6456. However, it is not apparent that the State Bar currently has primary enforcement authority over paralegals, legal document and unlawful detainer assistants and immigration consultants. The State Bar might become involved if the unauthorized practice of law is the primary issue.

Although the State Bar has the ability to enforce registration requirements for professional law corporations and other forms of law practice, the State Bar is not currently empowered to discipline law firms or other entities authorized to render legal services. California Rule 1.0.1(c) defines “law firm” to mean a law partnership, a professional law corporation, a lawyer acting as a sole proprietorship, an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

Depending on the structure and nature of non-lawyer participation in the delivery of legal services, and whether from a policy perspective the State Bar or another agency should regulate non-lawyers or entities rendering legal services in California, the Supreme Court will likely have the ultimate say over the matter.



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
 From: Andrew Arruda and Joanna Mendoza
 Date: June 18, 2019
 Re: Recommendation: Entities can be composed of lawyers, non-lawyers or a combination of the two however, regulation would be required and may differ depending on the structure of the entity.

* * * * *

Points Discussed by the Subcommittee: What exactly will be regulated, including what are the important aspects of that regulation?

Hybrid Individual and Entity Regulatory Model: The subcommittee engaged in an in-depth discussion about the type of legal service providers that would be regulated under the proposal and came to agree on many aspects. Consensus was reached that the subcommittee is recommending a hybrid model that will allow individual licensing/registration/certification as appropriate (e.g., lawyers, LLLTs, paralegals, etc.) but will also allow for entity regulation. Entity regulation would encompass all forms of entities with regulation to be adjusted accordingly depending upon the scope of attorney involvement: a) attorney-only entities that include passive outside investment; b) entities owned/operated by a combination of attorneys and non-attorneys; and c) entities owned/operated by non-attorneys.

Points Discussed by the Subcommittee: Aspects to require under new regulatory scheme

Much of the discussion was focused upon important aspects of regulating the entities and individuals under this regulatory scheme. Under the proposal, attorneys would continue under the existing regulatory scheme with rules changes as necessary to allow for implementation of the proposed structure.

Aspects considered with respect to all regulated entities and non-attorney individuals:

- 1) Create registration/certification structure/rules under the regulatory agency required in order to do business and be an exception to the UPL statute.
- 2) Incentivize specific types of legal services identified as most needed by the California Justice Gap Study. May include different fee structure for regulated entities and individuals, limiting registration/certification to those areas, and/or requiring a certain

percentage of regulatory fees to be earmarked for legal services to help close the justice gap.

- 3) Require specific disclosures to consumers if services are not provided by licensed attorney (ensured informed consent).
- 4) Extend attorney/client confidentiality requirement to entities and other individuals delivering legal services (incl. prohibition against data sharing/selling).
- 5) Require data collection and reporting to regulatory agency (including specific data tracking impact on access to justice).
- 6) Require transparency (incl. providing credentials of service providers and pricing).
- 7) Require attorney sign-off/approval of law applied to service (e.g., ensuring that technology/AI apply law correctly).
- 8) Create a code of conduct and best practices applicable to regulated entities and non-attorney individuals.
- 9) Do not allow representation in court unless by attorney (current exceptions remain).
- 10) Each regulated entity and non-attorney individual would be given a number (like State Bar number) to allow consumers to know about validity of registration/certification.
- 11) Enforcement of regulations would be in form proposed by IAALS white paper.

Aspects considered with respect to regulated entities in particular:

- 1) Outside shareholders/owners allowed (including passive investment) but consumer interest shall remain paramount.
- 2) Attorney owners can be disciplined individually for violations of entity regulations and any applicable rules violations.
- 3) Corporate entities and LLCs must be a California entity or registered foreign entity in CA with annual statement of information identifying officers and directors and registered agent for service of process. Partnerships would need to identify all partners with the regulatory agency and identify a registered agent for service.

Points Discussed by the Subcommittee: What organization(s) will regulate these individuals or entities? Two options were discussed: the State Bar (Option 1); and the State Bar and an Independent 3rd Party Agency (Option 2)

* * * * *

Option 1: State Bar to Regulate

- a) Scope of regulation would broaden to include all entities/individuals providing legal services. This could include a name change for the agency allowing consumers to more easily identify it as a regulatory agency for anything falling under the umbrella of legal services.
- b) Regulation would continue to fall under the Judicial Branch with oversight by the California Supreme Court.
- c) The regulatory Board would have one or more commissions/committees under its oversight (similar to Committee of Bar Examiners and Board of Legal Specialization) which would propose policies and regulation for the different forms of legal services (e.g., entities, LLLTs, paralegals, document preparers, etc.).
- d) The regulatory fees charged for registration/certification of each form of legal service provider would cover the cost of regulation and discipline.

Pros: Existing structure is in place that can be most easily expanded to cover new areas of regulation in the legal services space. This avoids a significant amount of the implementation cost and duplication that would be associated with a parallel regulatory agency set up just for entity regulation. For example, the State Bar already has processes in place for regulating those not licensed under California law to practice law, such as registered in-house counsel, registered legal service providers and registered military spouses. Given the State Bar's history and long expertise handling these registrations, the agency is most qualified to continue and expand upon this regulation to entities or individuals that would be encompassed within the new regulatory scheme.

Furthermore, by keeping regulation of all legal services under one umbrella it will allow the regulation of attorneys, entities and other legal service providers to be overseen by a single board with a singular mission. This will allow for coordination and complementing legal services to better serve the public, improve access to justice as well as improving the administration of justice in California. This will avoid competing or conflicting missions and duplication of efforts.

This will also avoid issues associated with attorneys being owners or operators of a newly regulated entity and yet falling under the regulation of two separate agencies. When an attorney is involved in any way it will come under the State Bar regulation, so this will ensure no different

treatment. The existing enforcement system will help ensure consistent treatment for both attorneys and non-attorneys, as appropriate.

Cons: Expanding the umbrella of the existing State Bar could bring with it challenges associated with changing how regulation is performed. Starting from zero and building a new regulatory agency from the ground up could make it easier to create a risk-based regulatory system rather than trying to change how the State Bar has operated all these years (role based regulatory system).

Could perhaps have more flexibility if not within the current agency structure, as more specifically referenced in the Option 2 discussion.

Unless the name changes, the State Bar is believed by many (attorneys and the public) to be a trade association that exists for the benefit of lawyers rather than the regulatory agency that it is. Creating an entirely new agency would avoid the stigma, preconceived ideas and misunderstanding associated with an organization that sounds like it exists to provide benefits and cover to lawyers.

Option 2: Existing State Bar and an independent 3rd party agency which would regulate individuals and entities.

Points Discussed by the Subcommittee: Regulatory Approach

Before addressing the structure of this particular option, it is important to consider the regulatory approach. Based on the UK's experience with entity regulation, this type of regulation is most successful when the regulator is given a certain degree of flexibility. To this end, an [anticipatory regulation](#) approach that has been successfully adopted in the UK, in which the regulator is given a set of objectives and functions (as set forth below) so that it can utilize these regulatory principles and adjust to the market as it evolves and new risks emerge. Having an overly-prescriptive regulatory approach can stifle the expansion of the market and the regulator's ability to efficiently and effectively do its job.

The focus on risks is crucial – a good regulator should be aiming to make the market work well for everyone – grow the legal market to its maximum size rather than most profitable for lawyers, to encourage innovation and new services, and to ensure that all needs of potential consumers are met wherever possible. The goal is for individuals, the poor, those living in rural communities, and small businesses can benefit from the legal services market in addition to large corporations and individuals who are able to afford high legal fees.

Points Discussed by the Subcommittee: Structure of the Organization

Under this option, the legislature would statutorily create a new regulatory entity, which, for purposes of this memo, we will call the Legal Services Regulatory Board (“LSRB”). The LSRB will regulate individuals as well as entities authorized to deliver “legal services.” The definition and scope of “legal services” would be determined through the public rulemaking process, incorporating public comment.

Composition: The enabling act would set forth the composition of the Legal Services Regulatory Board. Ideally, it would have a public member majority, and its members would be appointed by the Supreme Court, the Governor, and both houses of the Legislature. The legislation could even specify demographics and areas of expertise for certain members of the Board (for example, consumer organizations, economists, etc.) The Chair could also be an appointed position, possibly requiring Senate confirmation. The Board would then be tasked with appointing its own CEO.

Transparency: The Legal Services Regulatory Board would hold all of its meetings in public and be subject to the Bagley-Keene Open Meeting Act and the California Public Records Act.

Points Discussed by the Subcommittee: Regulatory Objectives

The enabling legislation would impose a set of regulatory objectives for the Legal Services Regulatory Board. (See attached article from Laurel Terry describing regulatory objectives from a variety of jurisdictions). These objectives might include:

- Public protection
- Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems.
- Advancement of the administration of justice and the rule of law.
- Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections.
- Delivery of affordable and accessible legal services.
- Efficient, competent, and ethical delivery of legal services.
- Protection of privileged and confidential information.
- Independence of professional judgment.
- Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
- Promoting an efficient and competitive market for legal services

In exercising any of its functions the Legal Services Regulatory Board should seek to deliver the regulatory objectives. This is not a standalone set of objectives – so they are not designed to force the regulator to do anything that anyone can think of that might help them, it is a constraint on how it exercises its functions. So when it sets standards for lawyers to enter the market, or when it sets some kind of threshold for a non-lawyer owner of a legal business, it must do so in a way that is compatible with the regulatory objectives. In other words, adhering to these objectives places competition and economic growth at the core rather than protectionism/lawyers interests.

Points Discussed by the Subcommittee: Accountability/Governance

In order to protect the rule of law, it is important that this Board be an independent agency. This could happen in a number of ways:

- One option would be that the Board would exist under the jurisdiction of the Supreme Court, but be separate and apart from the State Bar's regulation of individual attorneys.
- Another option would be to place the Legal Services Regulatory Board under the umbrella of the Department of Consumers Affairs in the Executive Branch, along with all of the other professional regulatory boards such as the Medical Board, Accountancy Board, etc.
- Under either approach, to ensure independence, the Board could be subject to "sunset review," by the legislature (most likely a joint session of the judiciary committees) on a regular basis, and the legislature would have the opportunity to assess the Board's performance adhering to the legislatively-set regulatory objectives. The Chair of the Legal Services Regulatory Board and CEO should be required to attend and answer questions on performance against the regulatory objectives etc.
- The legislation might also require the Regulatory Board to publish an annual report containing finance information/accounts, performance on increasing access to justice, and other reporting that is high level/proportionate/sensible. That should be laid before your elected representatives of the California Senate ahead of the annual hearing.

[Arguments in favor...] An independent body can ensure that consumer needs – and not attorney self-interests—are at the heart of the regulatory scheme. It may also be more innovative and creative in its regulatory approach as opposed to being limited by the existing framework.

[Potential concerns associated...] It might be challenging (and potentially confusing to consumers) to have one entity—the State Bar—regulating individual lawyers, and a wholly separate entity regulating entities.

California State Bar Task Force on Access Through Innovation of Legal Services Subcommittee on Artificial Intelligence and Unauthorized Practice of Law

Standards and Certification Process for Legal Technology Providers

Evaluate competence in two ways:

- metrics that would be accepted by an academic journal, to be confirmed by independent reviewer that has relevant scientific or academic experience
- licensed attorney working with the provider, as well as a licensed attorney as independent reviewer

Confidentiality

At a bare minimum providers should meet PCI DSS, though LCCA standards would be better. Ideally providers would meet many of the ISO27000 series standards, but this carries significant cost and would be an inappropriate barrier.

Providers need limit data leakage to 3rd parties. Alternatively, providers can build end-to-end encrypted systems and perform machine-learning on-device, or use techniques like homomorphic encryption or differential privacy.

Character Review

Just as lawyers submit to a moral character review, if a legal technology provider wants to undertake activities that would traditionally be considered the practice of law, they should be screened to protect the public from similar harms.

Availability & Disaster Recovery

Legal technology providers should have availability and infrastructure suitable for their business and their company's stage.

Review Process

Modeled on the "informal conference" of a moral character determination. List of specific areas of concern attached.

Open Questions

1. Is there authority to determine and assess a fee?
2. Should meetings be open or closed?
3. Information provided to the panel may contain trade secrets or confidential business records. Should some materials be protected from disclosure? If so, by what mechanism? How will materials be archived? Is a similar system to moral character determinations available and appropriate?
4. Should candidates be able to preempt certain people or groups (e.g. people that work for a legal automation company or a contract review company) from sitting as reviewers?

California State Bar Task Force on Access Through Innovation of Legal Services Subcommittee on Artificial Intelligence and Unauthorized Practice of Law

Standards and Certification Process for Legal Technology Providers

Summary

Machines, and the legal technology providers that build them, are not legally authorized to practice law under today's regulatory scheme. However, this possibility is very near and provides both potential benefits by way of enabling Access to Justice, as well as many potential harms to individuals and to society as a whole. It is the job of regulators to weigh these interests as legal technology providers look to deploy machines that arguably practice law according to current definitions.

As the modern legal profession has taken shape over the last few centuries, bar associations have helped to resolve countless ethical and regulatory issues within in the legal profession. This tradition has resulted in explicit rules of professional conduct as well as norms and customs that, at least in their highest ideal, uphold the profession's integrity and protect the public. Broadly, it is in the interest of society to retain many of these norms and customs as machines inevitably begin to automate some legal processes. To explore these issues, we evaluate the interests, uses, and harms from the perspective of the legal profession using the Model Rules of Professional Conduct. We also consider ethical issues unique to human-machine interaction, algorithmic decisions, and automating some aspects of modern legal practice.

Specifically, we seek to answer the following questions:

1. What standards should technology providers meet to have their technology licensed or excluded from UPL claims by the California State Bar? Evaluate metrics for success, ethics, competency, transparency, data security, auditability, quality control, and various insurance products like general liability, errors & omissions, cyber security/data breach.
2. What process should the State Bar follow to vet or certify technology providers?

Proposed Model

The model under discussion by the ATILS AI & UPL subcommittee would not be mandatory for legal technology companies. Rather, interested companies could voluntarily submit themselves to additional regulatory oversight by the State Bar and commit to similar ethical standards, rules, and processes as lawyers, as well as additional insurance, transparency, and accountability requirements. In exchange, these companies could be eligible for a "safe harbor" from prosecution of Unauthorized Practice of Law (UPL) claims within the limited area they are approved to operate, following a review by technical and legal professionals. Similarly, the Bar could exempt its members that use approved technology products in their practice from similar claims of Unauthorized Practice of Law and concerns of Inappropriate Supervision. No changes would be required to civil and criminal fraud, false advertising, etc. statutes, and would continue to apply to tech companies and lawyers alike. Rather, the State Bar could decline to

prosecute these companies for UPL, so long as they are in good standing and have met *all* of the ethical, competence, insurance, transparency, and review requirements proposed here.

Antitrust Concerns

While an extensive legal review of Antitrust issues would necessarily occur if the proposal moves forward, the most recent Antitrust Determination, 2018-003¹ by the State Bar Office of General Counsel provides a useful summary of some dimensions of Antitrust with respect to the State Bar. “An action may raise antitrust concerns when, for example, that action raises prices, reduces output, diminishes quality, limited choices, or creates, maintains, or enhances market power.” Briefly, regarding each of these dimensions:

- Basic economic theory would predict that expanding the practice of law would increase both choice and output (a goal of this task force) and would therefore lower prices.
- The market power of entrenched participants in legal services would likely be reduced by providing more choice and competition.
- Diminishing quality is a very real and valid concern as new technologies are unproven and only infrequently exceed human performance on many tasks. It will therefore be important for the State Bar to ensure any new market participants meet or exceed human performance, perhaps even by lawyers, on relevant metrics.

Evaluating Competence with Statistics (1.1, 1.3)

While AI systems are increasingly beating human benchmarks in limited domains, their general use is still quite limited. Naturally, a primary concern for many lawyers and members of the public is how competent legal advice could even be provided by a machine. However, with sufficient limitations on scope and by limiting externalities, expert systems have arguably provided legal advice for decades through widely used tax filing systems, systems that select and draft legal forms, as well as trademark filing, and many other situations. The companies making many of these products frequently employ many lawyers as experts to inform the creation of the systems.

As machine learning systems have gained popularity in recent years, however, systems are able to learn about increasingly complex situations from previous examples, rather than simply executing an expert’s distilled knowledge where they feel the options are sufficiently limited and appropriate for automation. Accordingly, performance metrics of self-learning systems are of critical importance to questions of competence, especially in relation to human benchmarks.

Machine learning evaluation metrics exist for every conceivable problem that researchers dream up and are applied with varying success. For example, the F_1 score, which combines precision and accuracy, is frequently used to evaluate many machine learning and Natural Language Processing (NLP) systems. However, it is a simple metric, arguably too simple for many advanced NLP problems. Other common NLP evaluation metrics, like the Bi-Lingual

¹ State Bar of California, (2018), http://www.calbar.ca.gov/Portals/0/documents/antitrust/Antitrust_Determination_2018-0003.pdf (last visited Feb 8, 2019).

Evaluation Understudy (BLEU) score are so imperfect they have led to no fewer than 10 new variants in as many years. While the Recall-Oriented Understudy for Gisting Evaluation (ROUGE) metric, commonly used for automatic summarization and translation tasks, provides another 6 variants for some of the same tasks. There is no consensus on which metric to use for any given machine learning task, so no one metric can or should be prescribed. Rather, a sufficient number of scientifically relevant and accepted metrics are needed to evaluate performance.

Recommendation

Legal technology providers should produce whatever scientifically valid metrics for the task that would be accepted by a peer-reviewed academic journal. When possible, metrics should be evaluated against relevant human benchmarks.

Evaluating Competence with a Professional (1.1, 1.3, 5.1-5.3)

As statistics can miss many fine details, professional evaluation and oversight of legal technology systems should be required at two different levels. First, internal oversight by a licensed attorney employed by the provider (or an advisor for early stage companies), should be required, just as junior lawyers are supervised. Second, the review board should include at least one licensed attorney with experience in the same area as the technology under review.

Confidentiality and Information Security (1.6-1.8)

Confidentiality demanded of lawyers by Rule 1.6 would be even more relevant for legal technology companies under the proposed model. The concentration of sensitive data in law firms has already proven an attractive target for malign actors with high profile attacks against large law firms that have dedicated security personnel like *Appleby*², *Cravath, Swaine & Moore*³, *DLA Piper*⁴, and *Weil, Gotshal & Manges*.⁵ Legal technology providers are already gathering huge amounts of some of the most sensitive data from businesses and individuals, much with potentially grave consequences should these companies be breached. Yet, legal technology companies today seem no better prepared than law firms. In a survey of 503 legal technology companies in 2017, we found failing grades on the most basic web security features across 87.5% of legal tech companies, according to the widely used Mozilla Observatory scoring

² The lawyers at the heart of the leak, November 5, 2017, <https://www.bbc.com/news/business-41878881> (last visited Feb 8, 2019).

³ Matthew Goldstein, *Cravath Law Firm Discloses a Data Attack*, The New York Times, December 21, 2017, <https://www.nytimes.com/2016/03/31/business/dealbook/cravath-law-firm-discloses-a-data-attack.html> (last visited Feb 8, 2019).

⁴ Adam Janofsky, *DLA Piper CIO on 'Petya' Attack: 'The Future of the Entire Business Was At Stake'*, Wall Street Journal, December 18, 2017, <https://www.wsj.com/articles/dla-piper-cio-on-petya-attack-the-future-of-the-entire-business-was-at-stake-1513635888> (last visited Feb 8, 2019).

⁵ Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, Wall Street Journal, March 30, 2016, <https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504> (last visited Feb 8, 2019).

methodology.⁶ Along with competence, confidentiality would seem to be the most acute concern in expanding the practice of law.

PCI DSS

At the *absolute minimum*, any legal technology provider that hopes to provide something resembling a legal service should meet widely accepted Payment Card Industry Data Security Standard (PCI DSS), and its compliance should be independently audited. Broadly, PCI DSS has 12 requirements:

1. Use a firewall to scan network traffic.
2. Change default passwords and related vendor defaults.
3. Use appropriate encryption, hashing, and masking to protect sensitive data.
4. Encrypt sensitive data in transit over public networks.
5. Protect against malware, use and regularly update anti-virus software.
6. Build secure systems and patch vulnerabilities immediately.
7. Restrict access to sensitive data to authorized personnel, “need to know” basis.
8. Identify and authenticate system access; every person needs a unique ID.
9. Restrict physical access to sensitive data.
10. Track and monitor all access to sensitive data.
11. Test security systems and processes regularly.
12. Maintain an information security policy for all personnel.

Legal Cloud Computing Association

The Legal Cloud Computing Association (LCCA) has proposed standards (Appendix A) that are not widely adopted, but well thought out and tailored to this industry. LCCA standards go further than PCI DSS by including integrity, redundancy, confidentiality, disaster recovery, and many other areas of critical importance.⁷ The LCCA standards indeed cover more areas, but are vague on some specifics, so they may require more detail for practical use.

ISO 27000 Series

The International Organization for Standardization (ISO) develops and publishes international standards across many industries, including information security. The ISO/IEC 27000 series of standards (Appendix B) for Information Security could form a well-researched and internationally recognized baseline. Notably, there are already standards in this series met by legal technology providers and accepted by courts for areas like redaction (27038), digital evidence (27042), and e-Discovery (27050-1 and 27050-2).

Recommendation

⁶ Mozilla HTTP Observatory. Contribute to mozilla/http-observatory development by creating an account on GitHub, (2019), <https://github.com/mozilla/http-observatory> (last visited Feb 8, 2019).

⁷ Standards | Legal Cloud Computing Association, , <http://www.legalcloudcomputingassociation.org/standards/> (last visited Feb 8, 2019).

At a minimum, regulators should require legal tech providers to meet PCI DSS. It would be far safer for the consumers of legal services if regulators required higher standards, like those set forth by LCCA and the ISO/IEC 27000 series. However, we must recognize doing so imposes a barrier that will disproportionately impact smaller providers. Perhaps a revenue or volume threshold could be applied to allow smaller providers to only meet PCI DSS and require more mature providers to also meet the higher standards.

As information security rapidly changes and standards are updated, the specific requirements should be promulgated in a way that enables and encourages periodic updates by regulators.

Confidentiality and Data Processors (1.4, 1.6)

Many machine learning models that form the basis for some AI systems are extremely compute-intensive and require specialized hardware (e.g. FPGAs, GPUs, and TPUs). The vast majority of this hardware is available from a limited number of companies (Amazon, Microsoft, Google, and a few others) and is usually located in public cloud infrastructure that is physically controlled by the cloud provider. Cloud providers may be located in different or multiple jurisdictions which can impact lawful data access requests, as demonstrated in *Microsoft Corp. v. United States*. While that case was recently mooted by the CLOUD Act, it provides an example of the complexity of moving increasing amounts of data into the physical control of third parties in other jurisdictions. Even more concerning is how the third-party doctrine applies when a person willingly uses a software product hosted on one of these cloud providers and architected in a way that the cloud provider could access client data. Frequently with machine learning APIs, the cloud provider can even use data it receives to improve its own machine learning models with no notice to or ownership by the ultimate client. Adding to the potential erosion of civil liberties, the cloud provider may not be able or willing to resist subpoenas or other data requests like National Security Letters (that come with a gag order) on behalf of their customer's customer.

While less common, it is currently feasible to train and execute machine learning algorithms on a client's device (i.e. phone, tablet, computer, or on-premise server) instead of sending sensitive client data to 3rd party cloud providers. Doing so enables privacy-by-design architectures that use techniques like end-to-end encryption to protect sensitive client data from third parties.

Recommendation

Legal technology providers that wish to provide a legal service should either:

1. Prevent 3rd party data access using end-to-end encryption
2. Obtain positive consent from clients knowledgeable of their rights, and that they are losing an important legal protection

If a legal technology provider uses a service where a cloud provider or other third party may access sensitive client data, they must clearly disclose this (i.e. not buried in terms of service).

End-to-end encryption could mitigate concerns over data leakage and conflicts of interest. If the technology provider has no knowledge or access to client data (this may include metadata as well as content), it seems safe for any number of parties to use the service without conducting a conflict check. Without send-to-end encryption, however, it would seem irresponsible not to conduct a conflict check on every single user, which would quickly become difficult at web scale.

Character Review

Just as lawyers must submit to a moral character review, if a legal technology provider wants to undertake activities that would traditionally be considered the practice of law, they should be screened to protect the public from similar harms. A couple recent examples of legal technology providers that would rightfully raise some concerns:

- The CEO of a legal technology provider in California had “a \$559,330 judgment entered against him to settle a lawsuit charging him with impersonating a lawyer, forging legal documents and fraudulently swindling two clients.”⁸
- The Board Chairman and largest investor in a legal technology startup was recently indicted by a federal grand jury for conspiracy and fraud relating to an alleged \$11B accounting scheme involving his previous company.⁹

There may be valid concerns regarding individuals in key management or ownership positions, as well as the company’s culture and historical regard for ethics and the rule of law. Should a company have a history of flouting regulators or harming the public, if they are on uneasy financial footing, or do not have the necessary technical skill to protect sensitive client data, the review panel should recommend corrective action or deny their application.

Availability & Disaster Recovery (1.9)

All legal technology providers should have availability and infrastructure suitable for their business and their company’s stage. For example a startup in beta need not have a multi-cloud, geographically-redundant deployment. However, a more mature company providing a legal service to thousands or millions of individuals needs to have appropriate disaster recovery and business continuity plans with regular failover and disaster recovery drills. There are many existing auditors and consultants available to service this need at all stages of business.

The review panel should verify existence of disaster recovery plans, with certification from an independent auditor after a suitable size and business maturity.

⁸ CEO of Legal Startup Settles Lawsuit Charging Fraud, Forgery and Impersonating a Lawyer, LawSites (2016), <https://www.lawsitesblog.com/2016/05/ceo-legal-startup-charged-fraud-forgery-impersonating-lawyer.html> (last visited Feb 19, 2019).

⁹ artificiallawyer, ‘Things Will Continue As Normal’ After Luminance’s Lynch Charged With Fraud Artificial Lawyer (2018), <https://www.artificiallawyer.com/2018/11/30/things-will-continue-as-normal-after-luminances-lynch-charged-with-fraud/> (last visited Feb 19, 2019).

Proposed Review Process

Interview/Demo

Pre-interview questionnaire and an in-person or video-conference interview with a handful of professionals covering expertise in relevant technology (i.e. machine learning, expert systems, blockchain, etc.) and at least one CA licensed lawyer. An existing model that may be useful is the “informal conference” preceding a moral character determination. The interview should cover areas and questions like the following:

- Describe business model and pricing
- System architecture overview
- Overview of security and privacy controls
- (after Jan 2020) Compliance with California Consumer Privacy Act
 - Is the system currently or expected to be subject to CCPA? 1) Revenue over \$25M/yr; 2) over 50k consumers, households, or devices; or 3) earns more than ½ revenue from selling data
 - Describe/demo mechanism for obtaining positive consent for data processing
 - Describe/demo mechanism for responding to data access requests
- Is potentially sensitive legal information accessible to anyone but the user? List all analytics providers or vendors that may receive user data (i.e. your GDPR service provider list). Pay special attention to screen-recording analytics tools like HotJar and Inspectlet that can easily compromise user data.
- What decisions are embedded in the software?
- How are the criteria for those decisions determined? For example, a machine learning system may learn over a corpus of legal documents, while the logic in an expert system may be constructed by a professional.
- If the system is reliant on external data, where does it come from? Is it appropriately licensed?
- How is data provenance maintained?
- Is data quality an issue? If so, how is it checked?
- Is there any attempt to explain how decisions, predictions, or results are reached?
- Is there a mechanism for both the user and people impacted by the software (these may be different) to access any decision criteria, source data, and any other materials needed question or challenge a decision?
- Mechanisms to identify and mitigate bias
- Excerpts and lessons learned from interviews with actual users
- Extensive interactive product demonstration for the members

Evaluation Metrics

A limited set of evaluation criteria covering several areas should be agreed upon by the examining authority. For example, the following sections cover areas of primary importance to protecting the public from harm by legal technology providers:

- Functional completeness

- Legal competence
- Accountability & transparency
- Compliance, security, & privacy
- Societal impacts

Procedures

The interview should not be a full code review, as that would be excessive and unlikely to actually accomplish the goal of protecting the public.

As with any human evaluation, there are potential conflict issues. It would be convenient to use an existing conflict policy from another State Bar board.

In choosing reviewers techniques like random reviewer assignment, pre-interview blinding, and other mechanisms to ensure fairness should be considered.

A standard fee covering the administrative cost of organizing the meeting as well as reasonable compensation to the reviewers should be levied, if authority to do so exists or can reasonably be obtained following a recommendation.

Open Questions

1. There may not be authority to determine and assess a fee. An alternative to direct oversight could be to license a small number of independent reviewers or organizations that make representations to the State Bar.
2. Should meetings be open or closed? Open meetings with publicly known and appointed members provides more accountability and transparency. Open meetings also may avoid some conflict issues since the pool of reviewers is known. However, open meetings could limit interest since they could expose detail rather kept private.
3. The public's business should be done in public. However, information provided to the panel may contain trade secrets or confidential business records. It is in the public interest to encourage full and complete cooperation, so should some materials be protected from disclosure? If so, by what mechanism? How will materials be archived? Is a similar system to moral character determinations available and appropriate?
4. In the course of review, trade secrets may be disclosed to the panel. Should candidates be able to preempt certain people or groups (e.g. people that work for a legal automation company or a contract review company) from sitting as reviewers?

Additional Ethical Principles

The public legal system is an integral part of a well-functioning society.

Legal technology must not interfere with or disrupt the administration of justice, limit the delivery of fair remedies, or contribute to societal imbalance. At times, public or private technology may augment, substitute, or even partially replace a legal process in the same way that arbitration can provide an alternative to a trial. However, as alternatives become available, they must not inhibit or create new barriers to existing parts of the public legal system.

One standard for suitable legal advice, whether delivered by human or machine.

It would be contrary to our concept of equal justice if technology should worsen the imbalance of our current legal system where those with means frequently receive better representation. AI in Law is still an emerging field, so it is easy to imagine technology providing a lower quality legal service through buggy software and poorly performing algorithms but this may reverse in the future. In fact, many e-Discovery systems that use machine learning technology provide far superior results than human review, but only for those who can afford such tools. As technology advances, it will become increasingly important to ensure sufficient access to legal technology, just as competent legal representation is required in criminal matters.

Legal technology must not undermine fundamental human rights or erode legal norms.

The UN Universal Declaration of Human Rights (UDHR) provides a framework for the rights that must be respected, along with the US and State Constitutions, and principles codified in Rules of Professional Conduct. Notably, UDHR Article 7 provides “All are equal before the law and are entitled without any discrimination to equal protection of the law.” Accordingly, accessibility, internationalization, localization, security, and privacy are not optional.

Legal technology must be designed to limit malicious use.

Our human-mediated legal system has inherent limits that can protect society from certain excesses that technology may exacerbate. For example, an app that enables filing of a lawsuit at the click of a button could be deployed maliciously, similar to a Distributed Denial of Service (DDOS) attack in computer security. Deliberate or inadvertent manipulation, domestic abuse, stalking, denial of access to a legal remedy, and many other potential modalities of misuse must be thoughtfully examined and mitigated where possible. Some malicious uses cannot be mitigated, but should be weighed by independent reviewers against the technology’s benefits.

Openness, transparency, and public access are critical to a fair and just legal system.

Free and public access to the laws and regulations that govern us as well as to the courts that interpret them, resolve disputes, and serve justice is necessary. While commercial involvement brings many benefits, a balance between profit and public benefit is imperative.

[Appendix A and Appendix B have been omitted.]

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.1 Competence			
a	A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.	A legal technology provider shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.	
b	For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.	For purposes of this rule, “competence” in any legal service shall mean for a legal technology provider, or their product, to apply the (i) learning and skill, and (ii) technical ability reasonably* necessary for the performance of such service.	
c	If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.	If a legal technology provider, or their product, does not have sufficient learning and skill when the legal services are undertaken, the legal technology provider nonetheless may provide competent service by (i) associating with or, where appropriate, professionally consulting a lawyer whom the legal technology provider reasonably believes* to be competent, or (ii) referring the matter to a lawyer whom the legal technology provider reasonably believes* to be competent.	Remove part (ii). For machines, performance is near instantaneous, providing little time to acquire and validate sufficient learning and skill.
d	In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.		Remove emergency exemption

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
	1.2 Scope of Representation and Allocation of Authority		
a	Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation . A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.	Subject to rule 1.2.1, a legal technology provider shall abide by a client's decisions concerning the objectives of the legal service and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to <u>Business and Professions Code section 6068, subdivision (e)(1)</u> and rule 1.6, a legal technology provider may take such action on behalf of the client as is impliedly authorized to carry out the legal service . A legal technology provider shall abide by a client's decision whether to settle a matter.	Criminal representation is beyond the scope of legal technology providers
b	A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*	A legal technology provider may limit the scope of the legal service if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*	Most legal technology services will be extremely limited scope, but still require informed consent.

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.2.1	Advising or Assisting the Violation of Law		
a	A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*	Neither a legal technology provider, nor their product, shall counsel a client to engage, or assist a client in conduct that the legal technology provider knows* or reasonably should know* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*	This sets a high bar for products like chatbots and may not be feasible with current technology. But, chatbots should not counsel clients to commit criminal acts. Still, machine reasoning over such complex scenarios may exist soon and should be available for consideration by reviewers.
b	Notwithstanding paragraph (a), a lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*	Notwithstanding paragraph (a), a legal technology provider, through their approved product, may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*	
1.3	Diligence		
a	A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.	A legal technology provider shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in providing legal services to a client.	
b	For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.	For purposes of this rule, “reasonable diligence” shall mean that a legal technology provider acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the legal technology provider.	

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.4	Communication with Clients		
a	A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act; (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation; (3) keep the client reasonably* informed about significant developments relating to the representation , including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.	A legal technology provider, or their product , shall: (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act; (2) reasonably* consult with the client about the means by which to accomplish the client's objectives of the legal service; (3) keep the client reasonably* informed about significant developments relating to the legal service , including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and (4) advise the client about any relevant limitation of the legal technology product, or legal technology provider's conduct when the legal technology provider knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.	
b	A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation .	A legal technology provider, or their product , shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the legal service .	
c	A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.	A legal technology provider may delay transmission of information to a client if the legal technology provider reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.	
d	A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.	A legal technology provider's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.	

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.4.1	Communication of Settlement Offers		
a	A lawyer shall promptly communicate to the lawyer's client: (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and (2) all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.	A legal technology provider shall promptly communicate to their client all amounts, terms, and conditions of any written* offer of settlement made to the client.	Criminal representation is beyond the scope of legal technology providers
b	As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.	As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement.	Both criminal and class representation are beyond the scope of legal technology providers

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.4.2	Disclosure of Professional Liability Insurance		
a	A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer , that the lawyer does not have professional liability insurance.	A legal technology provider who knows* or reasonably should know* that the legal technology provider does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the legal technology provider , that the legal technology provider does not have professional liability insurance.	
b	If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer , the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.	If notice under paragraph (a) has not been provided at the time of a client's engagement of the legal technology provider , the legal technology provider shall inform the client in writing* within thirty days of the date the legal technology provider knows* or reasonably should know* that the legal technology provider no longer has professional liability insurance during the provision of legal service to the client.	
c	This rule does not apply to: (1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b); (2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;	This rule does not apply to: (1) a legal technology provider who knows* or reasonably should know* at the time of the client's engagement of the legal technology provider that the legal service for the matter will not exceed four hours or \$500 ; provided that if the legal service subsequently exceeds four hours or \$500 , the legal technology provider must comply with paragraphs (a) and (b); (2) a legal technology provider providing a legal service to a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;	Add alternate \$500 limit
	(3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client ;		Remove emergency exemption
	(4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.	(3) a legal technology provider who has previously advised the client in writing* under paragraph (a) or (b) that the legal technology provider does not have professional liability insurance.	

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.5 Fees for Legal Services			
a	A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.	A legal technology provider shall not make an agreement for, charge, or collect an unconscionable or illegal fee.	
b	Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:	Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:	
	(1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;	(1) whether the legal technology provider engaged in fraud* or overreaching in negotiating or setting the fee;	
	(2) whether the lawyer has failed to disclose material facts;	(2) whether the legal technology provider has failed to disclose material facts;	
	(3) the amount of the fee in proportion to the value of the services performed;	(3) the amount of the fee in proportion to the value of the services performed;	
	(4) the relative sophistication of the lawyer and the client;	(4) the relative sophistication of the legal technology provider and the client;	
	(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;	(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;	
	(6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer ;	(6) the likelihood, if apparent to the client, that the acceptance of the particular engagement will preclude provision of other legal services or engagements by the legal technology provider ;	
	(7) the amount involved and the results obtained;	(7) the amount involved and the results obtained;	
	(8) the time limitations imposed by the client or by the circumstances;	(8) the time limitations imposed by the client or by the circumstances;	
	(9) the nature and length of the professional relationship with the client;	(9) the nature and length of the professional relationship with the client;	
	(10) the experience, reputation, and ability of the lawyer or lawyers performing the services;	(10) the experience, reputation, and ability of the legal technology provider, or its product , in performing the services;	
	(11) whether the fee is fixed or contingent; (12) the time and labor required; and	(11) whether the fee is fixed or contingent; (12) the time and labor required; and	
	(13) whether the client gave informed consent* to the fee.	(13) whether the client gave informed consent* to the fee.	

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.5 Fees for Legal Services (continued)			
c	A lawyer shall not make an agreement for, charge, or collect:	A legal technology provider shall not make an agreement for, charge, or collect	
	(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof;	any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof.	
	or		
	(2) a contingent fee for representing a defendant in a criminal case.		Criminal representation is beyond scope
d	A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.	A legal technology provider may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a legal technology provider to ensure the legal service's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.	As an example, a SaaS subscription provided by a legal technology provider could be a true retainer, but usually SaaS products include service consumption in addition to mere availability since technology products are often highly available.
e	A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.	A legal technology provider may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the legal technology provider providing those services.	

ATTACHMENT H

Rule	Current Rules of Professional Conduct	Possible Rules for Technology Providers	Notes
1.5.1 Fee Divisions Among Lawyers			
a	Lawyers who are not in the same law firm* shall not divide a fee for legal services unless:	Legal technology providers shall not divide a fee for legal services with a lawyer or law firm* unless:	
	(1) the lawyers enter into a written* agreement to divide the fee;	(1) the legal technology provider and the lawyer or law firm* enter into a written* agreement to divide the fee;	
	(2) the client has consented in writing,* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms* that are parties to the division; and (iii) the terms of the division; and	(2) the client has consented in writing,* either at the time the legal technology provider and the lawyer or law firm* enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the parties to the division; and (iii) the terms of the division; and	
	(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.	(3) the total fee charged by the legal technology provider and the lawyer or law firm* is not increased solely by reason of the agreement to divide fees.	
b	This rule does not apply to a division of fees pursuant to court order.	This rule does not apply to a division of fees pursuant to court order.	

Proposed Rule 1.1 with New Comment [1] – Clean Version

Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

- [1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- [2] This rule addresses only a lawyer’s responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.
- [3] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

Redline Comparison of Proposed Rule 1.1 with New Comment [1] to Current California Rule 1.1

Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

[~~1~~2] This rule addresses only a lawyer’s responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[~~2~~3] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

Proposed Rule 5.4 [Alternative 1] – Clean Version

Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]

- (a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
 - (1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*
 - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
 - (3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
 - (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services;
 - (5) a lawyer or law firm* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or
 - (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).
- (b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:
 - (1) the firm's sole purpose is providing legal services to clients;
 - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
 - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
 - (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

Proposed Rule 5.4 [Alternative 1] – Clean Version

- (5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;
- (6) compliance with the foregoing conditions is set forth in writing.
- (c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable* time during administration.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal

Proposed Rule 5.4 [Alternative 1] – Clean Version

services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[5] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[6] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).

Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]

- (a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*
 - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
 - (3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
 - (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; ~~or~~
 - (5) a lawyer or law firm* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, ~~or~~ recommended, or facilitated employment of the lawyer or law firm* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or
 - (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).
- (b) ~~A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~ A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:
- (1) the firm's sole purpose is providing legal services to clients;
 - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
 - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
 - (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct

Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

(6) compliance with the foregoing conditions is set forth in writing.

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

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

~~(1) a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a),
a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable* time during administration;

~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[45] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[56] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Rules and Ethics Opinions Subcommittee
From: Kevin Mohr
Date: June 18, 2019
Re: Recommendation: Adoption of Proposed Rule 5.4 [Alternative 1]

* * * * *

I. Overview of the Proposed Revisions to CRPC 5.4

The proposed revisions to CRPC 5.4 described in this memorandum are intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology. Underlying the subcommittee efforts is the understanding, from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services. The subcommittee reasons that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services, this deterrent to the adoption of technology will be removed and the concomitant practice efficiency enhancements will further access to legal services.

The proposed amendments are four in number. *First*, the subcommittee recommends that current paragraph (b)(5), which permits a lawyer or law firm to share with or give *court-awarded* fees to a nonprofit organization be expanded to permit such sharing or giving of legal fees to a nonprofit organization regardless of whether the fees have been awarded by a tribunal. *Second*, the subcommittee recommends the addition of a sixth exception to paragraph (a)'s fee sharing prohibition, new subparagraph (a)(6), which would permit fee sharing in a law firm in which nonlawyers hold a financial interest so long as the lawyer or law firm has complied with each of the requirements of paragraph (b). Paragraph (b), which replaces paragraph (b) of current CRPC 5.4, prohibits fee sharing in a law firm in which nonlawyers hold a financial interest unless each of the requirements set forth in subparagraphs (b)(1) through (b)(6) have been satisfied. *Third*, paragraph (d) is substantially revised to conform it with the changes made to paragraph (b). *Fourth*, new comment [4] has been added, and current comments [4] and [5] renumbered [5] and [6], respectively.

It is important to note that paragraph (b) is substantially more limiting than what was proposed as a "multidisciplinary practice" (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to "assist" the firm's lawyers in the firm's sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature,

e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.

Each of the foregoing changes is discussed in detail in the next section.

II. Recommendation & Explanation of Proposed Changes to CRPC 5.4

A. Paragraph (a)

The introductory paragraph of paragraph (a) provides:

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

The basic prohibition on fee sharing is preserved. The concept is that lawyers should not share fees with nonlawyers. There is a concern that such fee sharing would result in nonlawyer marketing businesses that would direct clients to lawyers who pay the most for the referral, even if the lawyer is not qualified. Similarly, the absence of this provision would permit a business operated by a nonlawyer to employ lawyers to represent clients and permit interference with the lawyers' independent professional judgment or the lawyer-client relationship. However, there are six exceptions to this basic rule (five in current rule, for which one of them the subcommittee has recommended amendments). A new exception, similar to one proposed by the ABA Ethics 20/20 Commission in 2011 (but never adopted), is provided in subparagraph (a)(6).

1. Subparagraphs (a)(1) through (a)(4).

No changes are recommended for subparagraphs (a)(1) through (a)(4).

Subparagraph (a)(1) is a long-standing exception that permits fee sharing with a deceased lawyer's survivors.¹

Subparagraph (a)(2) is another long-standing exception that conforms with the rule that permits sale of a deceased or disabled lawyer's practice to another lawyer (CRPC 1.17).²

Subparagraph (a)(3) recognizes that many businesses provide for employees to share in the businesses' profits. Without this exception, such profit sharing arrangements would not be

¹ It provides an exception to the fee sharing prohibition for "(1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*"

² It provides an exception to the fee sharing prohibition for "(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;"

permitted in a law firm.³ Comment [1] to the rule clarifies that the amount of bonus or profit share may not be based on a percentage or share of fees in specific cases or legal matters.

Subparagraph (a)(4) is a long-standing exception that conforms the rule's application to the statutes and rules governing lawyer referral services in California.⁴

2. Subparagraph (a)(5) – Sharing legal fees with a nonprofit organization.

The following amendments to current CRPC 5.4(a)(5) are recommended:

(5) a lawyer or law firm* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, ~~or~~ recommended, or facilitated employment of the lawyer or law firm* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or

At its June 3, 2019 meeting, the subcommittee voted to recommend adoption of a modified version of D.C. Rule 5.4(a)(5).⁵ The inclusion of the word “facilitate” is intended to capture the concept of a law practice incubator. See comment [4].

The phrase “including but not limited to” was substituted to expand the kinds of representations that can generate fee sharing beyond litigation.

The rationale for limiting the kinds of nonprofit organizations to those that qualify under Internal Revenue Code § 501(c)(3) is found in D.C. Rule 5.4, cmt. [8], which provides in relevant part:

“Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.”

³ It provides that “(3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;”

⁴ It provides “(4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California’s Minimum Standards for Lawyer Referral Services;”

⁵ D.C. Rule 5.4(a)(5) provides: “(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.”

Pros:

(1) By not limiting the (b)(5) exception to court-awarded fees, access to justice might be increased by providing an increased source of revenue to nonprofit legal service providers such as the ACLU.

(2) Concerns regarding potential abuse by a nonprofit specifically formed to share in legal fees are obviated by the limitation to those organizations that qualify under IR Code § 501(c)(3).

Cons:

(1) There is no evidence that expanding the exception beyond “court-awarded” fees will increase access to justice.

(2) The limitation to court-awarded legal fees ensures that “[n]ot only does this circumstance guarantee that the fee will be fairly determined and proportionate to the work performed, but it also recognizes that the litigation in which the fee was generated will have been determined to be of a kind that serves a useful public purpose.” ABA Formal Ethics Op. 93-374, at page 6.

(3) Further, limiting the exception to “court-awarded” legal fees “underscores the fact that economic considerations are of relative unimportance in the relationships between the lawyer, the sponsoring organization, and the client, and hence unlikely to be controlling of any litigation decisions.” *Id.*

(4) The limitation stated in paragraph (a)(5) restricting fee sharing to a non-profit 501(c)(3) may be too limiting by excluding other non-profits. The Task Force welcomes comments on expanding the type of organizations that ought to be permitted for this fee-sharing exception.

3. *Subparagraph (b)(6) – Sharing legal fees with nonlawyers in a law firm that satisfies all requirements set forth in paragraph (b).*

Subparagraph (a)(6) provides an explicit exception to the general prohibition against sharing fees with nonlawyers so long as the lawyer or law firm complies with each of the conditions set out in paragraph (b). It is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011.

Paragraph (a)(6) carves out the exception. Paragraph (b) sets out the six requirements or contingencies that the firm must satisfy to come within the scope of the exception. As explained in section I, above, the requirements in paragraph (b) make any firm that qualifies substantially more limited than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999.

The subcommittee has added the full statement of what is required so that there is no confusion as to what a law firm must do to qualify. The Ethics 20/20 version simply provided:

(x) a lawyer or law firm may do so pursuant to paragraph (b).

Although “do so” could be substituted, the subcommittee thought it important that the black letter text clarify that permission to “do so” mandates that “the lawyer or law firm complies with the requirements set forth in paragraph (b),” all of which requirements are mandatory.

The gist of paragraph (a)(6) is that lawyers and nonlawyers are permitted co-own a law firm, which is defined in the rules as follows:

(c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization. CRPC 1.0.1(c).

Because sharing in the profits of such a firm requires that the legal fees, which would be the source of profit in such a firm, be shared, there must be an express exception to the paragraph (a) prohibition. Subparagraph (a)(6) provides an explicit exception that affords that opportunity.

The subcommittee concluded that no further changes need to be made to the definition of “law firm” because (i) the definition focuses on an organization that practices law and (ii) the kind of firm as envisioned in paragraph (a)(6) is one whose “sole purpose” is “providing legal services to clients.” See (b)(1). That would not have been true had the recommendation been to amend CRPC 5.4 to permit an MDP.

Rather than identify pros and cons for the exception in general, the subcommittee has identified pros and cons for each of the requirements in subparagraphs (b)(1) through (b)(6) that must be satisfied for a firm to qualify under the subparagraph (a)(6) exception.

B. Paragraph (b)

As noted, paragraph (b) is based on the amendments to Model Rule 5.4 proposed by the ABA Ethics 20/20 Commission in 2011. The ABA never adopted those proposed changes to the rule.

The introductory paragraph of (b) is substituted for current CRPC 5.4(b), which absolutely prohibits lawyers from forming a partnership or other organization with a nonlawyer if any of the activities of the organization involve practicing law.⁶ The proposed introduction would provide:

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

The preceding paragraph differs from the Ethics 20/20 proposal in two ways. *First*, the clause “each of the following requirements is satisfied” has been added to emphasize that each of the requirements is mandatory. *Second*, the introductory paragraph has been rewritten to be

⁶ Current CRPC 5.4(b) provides: “(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.”

prohibitory (“shall not ... unless”) as is standard in the California Rules rather than permissive (“may ... but only if”) as in the ABA Ethics 20/20 proposed rule 5.4.

1. Subparagraph (b)(1).

Subparagraph (b)(1) is identical to the same paragraph in Model Rule 5.4 as proposed by the Ethics 20/20 Commission. It would provide:

(1) the firm’s sole purpose is providing legal services to clients;

Pros:

(1) Limiting the type of firm to one whose sole purpose is providing legal services enhances public protection because the lawyer partners, subject to codes and statutes imposing specific duties owed clients, will ultimately be responsible for decisions relating to those services.

(2) This limitation on the services provided should avoid the negative implications of a full-fledged MDP, which was soundly rejected by the ABA in 2000. See note **Error! Bookmark not defined..**

(3) This limitation on the services provided should also avoid the concerns stated in Sam Skolnik and Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#), which likely would create pushback by the legal profession. This article suggests that some rules proposals that would open up the ability of lawyers to enter professional and financial relationships with nonlawyers will merely function as stalking horses and enable the Big Four accounting firms to expand their presence in providing legal services without a corresponding increase in access to justice.

(4) Although limited, this proposal should nevertheless provide nonlawyer technologists with a financial incentive to join forces with lawyers to fashion technological solutions to the justice access problem in concert with the lawyers’ provision of legal services.

Cons:

(1) There is little or no concrete evidence that even this modest proposal will increase access to justice. The only jurisdiction that has adopted a similar rule is D.C., and that rule appears primarily intended to provide a means for nonlawyer lobbyists to share in a law firm’s profits (and enhance the law firm’s profits in that environment.)

(2) See Pro #3, above.

(3) The limitation stated in paragraph (b)(1) restricting fee sharing to a law firm, as defined by the rules, may limit the ability of law firms to join with other service providers or disciplines that would offer valuable services to clients but would not be provided by a law firm.

2. Subparagraph (b)(2).

Subparagraph (b)(2) is identical to the same paragraph in Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;

Pros:

(1) By limiting the role of nonlawyers to providing services “that assist” the provision of legal services, this provision addresses to some extent a concern expressed by members of ATILS regarding whether a tech solution can retain the protection of the privilege or work product in providing services. So long as the nonlawyers, whether through their own efforts or through apps they have designed, are assisting lawyers in providing services to the firm’s clients, the protections of privilege and work product should be preserved.

For example, with respect to privilege, see Evid. Code 952, which provides:

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those *who are present to further the interest of the client* in the consultation or *those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added)

Cons:

(1) This rule would not address the stated concern as to a nonlawyer’s business that is engaged in providing legal services directly through technology, unless that business is majority owned or at least controlled by a lawyer or lawyers.

Possible Issue: Should nonlawyer ownership be limited to nonlawyers who “assist” the lawyers of the firm in providing legal services?

If not so limited, e.g., the firm is a true MDP (i.e., providing legal, accounting, etc., services independent of one another), which could open the door wider than intended. See Sam Skolnik and Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#).

Compare the rule revision proposal of the ABA MDP Commission in their [Appendix A](#).

3. Subparagraph (b)(3).

Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;

Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 proposed by Ethics 20/20. Paragraph (b)(5) provided:

(5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;

The subcommittee believes that the balance of subparagraph (b)(5) of the Ethics 20/20 version of the rule is confusing and unnecessary. There will likely be many different ways in which nonlawyer ownership of a law firm will be implemented. The key point is that the nonlawyers in the firm must not direct or control the lawyers' independent professional judgment. This provision will allow some flexibility in setting up a firm's management structure, so long as this cardinal principle is not violated.

Pros: (1) A simple declarative statement that nonlawyers in the firm have no power to direct or control the professional judgment of a lawyer should provide sufficient assurance that the lawyers' professional judgment will not be impinged by the nonlawyers in the firm.

(2) The statement should also provide sufficient guidance on how the various ownership and voting interests should be structured in a firm set up under subparagraph (b). For further clarification, a comment could be added. Consider, for example, a variant Comment [8] to Model Rule 5.4, as proposed by Ethics 20/20, which provided:

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

However, the subcommittee does not believe that such a comment is necessary to further explain subparagraph (b)(5), which explicitly prohibits nonlawyers from controlling or directing the lawyers' decisions.

Cons: (1) This black letter provision lacks specificity as to how the goal of preventing nonlawyer control of lawyers' professional judgment will be attained.

4. Subparagraph (b)(4).

Subparagraph (b)(4) is based on paragraph (b)(3) of Model Rule 5.4 as proposed by Ethics 20/20.⁷ It would provide:

(4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

The additional language in subparagraph (b)(4) recognizes that in California, lawyer conduct is regulated not only by the Rules of Professional Conduct. Under subparagraph (b)(3), the nonlawyers must agree to undertake to conform their conduct to that of lawyers under the Rules of Professional Conduct, the State Bar Act, and the other laws that govern lawyer conduct (e.g., Evidence Code, Probate Code, Penal Code, etc.)

Pros:

(1) This provision, when read in conjunction with subparagraph (b)(5), which imposes on the firm's lawyer partners the duty to ensure the firm's nonlawyers' compliance with the Rules, etc., provides assurance that the services provided by the firm will be in compliance with the Rules.

(2) Requiring certification would not increase public protection. The key element in ensuring legal services are being provided in compliance with the Rules, etc., will be the continued monitoring of nonlawyer conduct by the lawyer partners in the firm.

Cons:

(1) The provision does not provide sufficient public protection, even when read in concert with subparagraph (b)(5). The public would be better protected by requiring that each nonlawyer partner be certified by an appropriate authority. See "Issue2," below.

Although the subcommittee concluded that the provision as drafted should provide sufficient protection when read in conjunction with subparagraph (b)(5), it did identify two further issues that the Task Force as a whole might want to address:

Issue1: The provision requires nonlawyers agree to "undertake to conform their conduct." Should the provision provide that the nonlawyers agree "to conform their conduct." In

⁷ Ethics 20/20 proposed rule 5.4(b)(3) provided:

(3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;

other words, we're not asking you to attempt to conform your conduct but telling you that you must agree to do so.

Issue2: In addition to the foregoing issues presented for the May 13-14, 2019 meeting, during the May 14 subcommittee meeting, there was a discussion whether this provision provides sufficient protection or whether each nonlawyer should be certified by some process implemented by the State Bar. The subcommittee concluded that this provision was sufficient. On reflection, perhaps a slightly revised provision that specifies that *each* nonlawyer must agree in a *signed* writing that the nonlawyer will conform his or her conduct would be an acceptable compromise. For example, subparagraph (b)(4) could be revised as follows:

(4) ~~the each~~ nonlawyer~~s~~ states in a writing signed by the nonlawyer that ~~they have the nonlawyer has~~ read and understands the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agrees in that writing to undertake to conform ~~their~~ his or her conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

See also note 8.

5. Subparagraph (b)(5).

Subparagraph (b)(5) is identical to paragraph (b)(4) of Model Rule 5.4 proposed by Ethics 20/20. It would provide:

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

Pros: (1) Subparagraph (b)(4) clarifies that managerial and supervisory lawyers are still responsible for the nonlawyers, even though they might be co-owners in the firm. There could be circumstances where a particular nonlawyer might have a larger ownership share in the firm. Nevertheless, the lawyer would still ultimately be responsible for that nonlawyer as if the nonlawyer were a nonmanagerial partner/shareholder or a subordinate lawyer.

(2) This provision would fill a gap in the current rules that would arise should the subcommittee's proposed amendments to CRPC 5.4 be adopted. Under current CRPC 5.1, managerial and supervisory lawyers are responsible for subordinate or non-managerial lawyers. Under current rule 5.3, lawyers in a firm are responsible for nonlawyer assistants (or in ABA Model Rule 5.3, nonlawyer "assistance.") This provision clarifies that the lawyers in the firm remain responsible for the nonlawyers even if they are co-owners in the law firm. See also note 8.

Cons:

(1) None identified.

6. Subparagraph (b)(6)⁸

Subparagraph (b)(6) is identical to paragraph (b)(7) of Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(6) compliance with the foregoing conditions is set forth in writing.

Subparagraph (b)(6) simply requires that the firm keep a written record, including the writings required under subparagraph (b)(4), to demonstrate that it has complied with all the requirements of paragraph (b).

Pros:

(1) This provision should have a similar effect as a lawyer failing to keep adequate trust account records, i.e., failure to keep adequate records is a violation in itself and even if records are kept, but are inadequate, that would also be a violation. Further, the lack of sufficient writings would constitute evidence of the violation.

Cons:

None identified.

C. Paragraphs (c), (e) and (f)

The subcommittee does not recommend any changes to paragraphs (c), (e) or (f) of current CRPC 5.4.

Paragraph (c) prohibits a lawyer from permitting a person who recommends, employs, or pays the lawyer to render legal services for another to direct the lawyer's independent professional judgment or interfere in the lawyer-client relationship.

Paragraph (e) requires that the Board of Trustees formulate and adopt Minimum Standards for Lawyer Referral Services, and prohibits lawyers from participating in any such service that is not in compliance with the Minimum Standards.

⁸ In addition to the six subparagraphs proposed by the subcommittee, Ethics 20/20 also proposed a seventh, subparagraph (b)(6), which provided:

(6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results;

At its May 14 meeting, the subcommittee concluded that this provision was not necessary in light of subparagraph (b)(5) regarding the lawyers' duty to be responsible for the nonlawyers as if the nonlawyers were lawyers under rule 5.1.

Paragraph (f) prohibits a lawyer from practicing in a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person to interfere with the lawyer's independent professional judgment or the lawyer-client relationship.

D. Paragraph (d)

The subcommittee proposes that current CRPC 5.4(d) be amended as follows:

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

~~(1) a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable* time during administration;

~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~

The proposed changes to paragraph (d) parallel those recommended by Ethics 20/20. These changes are necessary because the prohibitions in former paragraphs (b) and (d) have been subsumed in new paragraph (b). Thus, former paragraph (d) is deleted except for current subparagraph (d)(1) regarding the fiduciary of a lawyer's estate, which is not affected by the changes to paragraph (b).

E. Comments

Current CRPC 5.4 includes five comments. The subcommittee does not recommend any changes to these existing comments as they each address a provision in the current rule that the subcommittee does not recommend amending.

1. New Comment [4].

The subcommittee proposes the addition of new Comment [4], which would clarify the application of subparagraph (a)(5) by explaining the addition of the word "facilitate" in that subsection. New Comment [4] would provide:

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

At its 6/3/19 meeting, the Subcommittee voted to include Comment [4] to clarify that subparagraph (a)(5) is intended to also apply to law practice incubators in addition to legal services organizations.

Conclusion

The subcommittee recommends that the Task Force include in its Report a recommendation that the proposed changes to CRPC 5.4 outlined in this memo be adopted by the Board of Trustees and approved by the Supreme Court.

Proposed Rule 5.4 [Alternative 2] – Clean Version

Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 2]

A lawyer or law firm* shall not share a legal fee with a person* or organization not authorized to practice law unless:

- (a) the lawyer or law firm* enters into a written* agreement to share the fee with the person or organization not authorized to practice law;
- (b) the client has consented in writing,* either at the time of the agreement to share fees or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that the fee will be shared with a person* or organization not authorized to practice law; (ii) the identity of the person* or organization; and (iii) the terms of the fee sharing;
- (c) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

Rule 5.4 Financial ~~and Similar~~ Arrangements with Nonlawyers [Alternative 2]

~~(a)~~ A lawyer or law firm* shall not share a legal ~~fees directly or indirectly with a nonlawyer or~~
~~with an~~ fee with a person* or organization ~~that is~~ not authorized to practice law, ~~except that~~
unless:

- ~~(1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~
 - ~~(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;~~
 - ~~(3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;~~
 - ~~(4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or~~
 - ~~(5) a lawyer or law firm* may share with or pay a court awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.~~
- ~~(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~
- ~~(c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.~~
- ~~(d)~~ (a) ~~A~~ the lawyer ~~shall not practice with or in the form of a professional corporation or~~
~~other~~ or law firm* enters into a written* agreement to share the fee with the person or
organization not authorized to practice law ~~for a profit if;~~
- (b) the client has consented in writing,* either at the time of the agreement to share fees or
as soon thereafter as reasonably* practicable, after a full written* disclosure to the
client of: (i) the fact that the fee will be shared with a person* or organization not
authorized to practice law; (ii) the identity of the person* or organization; and (iii) the
terms of the fee sharing;

Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

- ~~(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;~~
- ~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~
- ~~(3)c) a nonlawyer has the right or authority to direct or control~~there is no interference with
the lawyer's independent professional judgment. or with the lawyer-client relationship;
and
- ~~(d) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.~~
- ~~(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,* organization or group to practice law in violation of these rules or the State Bar Act.~~

Comment

~~[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.~~

~~[2] Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.~~

~~[3] Paragraph (a)(5) permits a lawyer to share with or pay court awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40~~

Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

~~Cal.Rptr.3d 221]. See also rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.~~

~~[4] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].~~



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Rules and Ethics Opinions Subcommittee
From: Johann Drolshagen
Date: June 14, 2019
Re: Recommendation: Adoption of Proposed Rule 5.4 [Alternative 2]

* * * * *

The subcommittee is proposing 2 alternate rule recommendation changes to Rule 5.4. The subcommittee proposes both versions of the Rule 5.4 recommended rule changes be submitted to the public for comment in an effort to gauge discussion/concerns and support for both potential recommendations. While either recommendation may not be the ultimate recommendation of the task force in its final report, gauging the public (and legal field's) reaction to both versions of the proposed rule changes could result in useful data and suggested new business models should either version of the proposed rule ultimately be implemented.

Alternative 2 is meant to create a major shift in Rule 5.4 around ownership and fee sharing with very limited regulation. Innovation requires changes in perception, new knowledge, and often unexpected occurrences. It requires collaboration, multi-disciplinary participation and funding/investment. Expecting new innovation in A2J to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in A2J. In fact, a recent survey has suggested that A2J gap has continued to increase, suggesting that a major shift in the legal field is necessary to disrupt the continuing A2J crisis.

The #ATILS task force charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is non-lawyer ownership or investment - a specific area the current Rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the task force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to "ensure that the recommendations of the Task Force are focused on protecting the interest of the public." Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of A2J needs go unmet. The statistics evidencing the failure to meet the A2J needs are immense and well documented.

The Alternative 2 proposed rule change allows a rule change that brings about the same change in increasing access to justice by harnessing the power of technology as it did for building a task force to study regulatory changes. It invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. The State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for A2J.

Pros:

- 1) The proposed Rule provides for highly skilled and trained individuals with unique skill sets not common to lawyers to be properly vested and incentivized by partnering with lawyers in a multitude of ways.
- 2) The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided to the public.
- 3) The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.
- 4) The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.
- 5) The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
- 6) The proposed Rule provides for the inclusion of oversight by a licensed legal professional.

Cons:

- 1) There is no mechanism for regulating nonlawyers under this proposal because it does not provide the incentives as in rule 5.1 and 5.3 for lawyers to supervise the conduct of nonlawyers.
- 2) Little or no concrete evidence that this proposal would increase access to justice.



The State Bar *of California*

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Randall Difuntorum, ATILS Staff
From: Kevin Mohr, Vice Chair, ATILS Subcommittee on Rules and Ethics Opinions
Date: July 1, 2019
Re: Background Information in Support of the ATILS Recommendation for Public
Comment Consideration of a New Rule Similar to ABA Model Rule 5.7

INTRODUCTION

This memorandum responds to the action taken at the June 28, 2019 meeting of the ATILS Rules and Ethics Opinions Subcommittee (“Subcommittee”) authorizing me to work with you in revising the materials in support of the rule 5.7 recommendation. This memo does not make a specific recommendation as to whether a rule patterned on Model Rule 5.7 should be adopted, nor does it making an explicit finding that such a rule, if adopted in California, would likely enhance access to justice. Rather, the memo is informational in nature and is intended to assist public commenters in understanding the context of the task force’s rule 5.7 recommendation. The memo provides the text and background of ABA Model Rule 5.7 and a brief summary of existing California law. It also provides observations on the benefits and disadvantages of considering either a rule proposal or, in the alternative, a new ethics opinion to address the issue of ancillary law-related services.

ABA MODEL RULE 5.7

Purpose

Model Rule 5.7 addresses the duties of lawyers who provide “law-related” services as opposed to “legal” services. The rule is intended to avoid client confusion regarding the protections a client can expect when a lawyer, whether through the lawyer’s law firm or a separate entity, provides ancillary “law-related” services. The concern is that the client might assume that these services afford the same ethical protections as the client would be entitled to from legal services being delivered by the lawyer. Model Rule 5.7 places the burden on the lawyer to inform the client and clarify that such services do not provide those protections. If the burden is not met, then the Rules of Professional Conduct will apply to the lawyer’s provision of the services, i.e., the lawyer is required to perform the same duties a lawyer owes a client being provided legal services and advice, including the duties of competence, confidentiality, exercise of independent judgment, and loyalty.

Model Rule 5.7 Overview

The text of Model Rule 5.7 provides:

Rule 5.7: Responsibilities Regarding Law-related Services

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
 - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
 - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

In addition to the rule text, the rule includes 11 Comments. For the full text of ABA Model Rule 5.7, see page 9 of this attachment.

The introductory clause of paragraph (a) sets forth the rule’s operative language, i.e., that a lawyer who is providing law-related services is still subject to discipline under the rules of professional conduct if the law-related services are provided in the manner described in either subparagraph (a)(1) or (a)(2).

Subparagraph (a)(1) involves a situation where the lawyer is providing law-related services that are “not distinct” from the lawyer’s provision of legal services to a client. Such services, when provided by the lawyer or the lawyer’s firm to a client who has or had also retained the lawyer for legal services, might include a tax preparation business, e.g., [N.D. Ethics Op. 01-03 \(5/4/2001\)](#) or financial planning services, e.g., [Ind. Ethics Op. 02-01](#), at least when they are provided in a way that the services are “not distinct” from the lawyer’s legal services.

Subparagraph (a)(2) involves a situation where the law-related services are provided either directly by the lawyer or lawyer’s law firm, or by a separate entity controlled by the lawyer or firm, but the lawyer has not taken “reasonable measures” to assure that the person who is to receive the law-related services knows the services are not legal services and that the protections afforded by a lawyer-client relationship do not attach. The practical effect of subparagraph (a)(2) is to permit a lawyer who provides such ancillary services to opt-out of being regulated under the Rules. So long as the lawyer takes “reasonable measures,” e.g., provides the person using the ancillary services with a sufficient explanation that the services do not afford the protections available from the lawyer-client relationship, e.g., duty of confidentiality, then the lawyer will not be subject to the Rules when providing those services. As to what those “reasonable measures” should include, Comment [6] provides some guidance:

“[T]he the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.”

In one case, it was held that the lawyer advising his former legal clients that he was retired and now offering accounting and “business advice” services did not constitute “reasonable measures” to opt out of the Rules. See, *In re Matter of Rost* (Kan. 2009) 211 P.3d 145.

Concerning paragraph (b), Comment [8] provides guidance on the kinds of activities that might constitute “law-related” services:

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

State Adoptions of Model Rule 5.7

According the ABA, the rule has been adopted in most jurisdictions, with 29 jurisdictions having adopted a rule identical to Model Rule 5.7.¹ Five jurisdictions have adopted a rule that is substantially similar to Model Rule 5.7.² Five jurisdictions have adopted a version of the rule with substantial variations from the organization or substance of the Model Rule.³ Twelve jurisdictions, including California, have not adopted any version of Model Rule 5.7.⁴ [ABA, Variations of the Model Rules of Professional Conduct, Rule 5.7 \(9/29/17\)](#).

California Law Concerning Law-related Services

California is one of the twelve jurisdictions that has not adopted any version of Model Rule 5.7 or any rule that expressly addresses a lawyer's provision of law-related or non-legal services. See section 0, above. The only mention in the California Rules of Professional Conduct of a lawyer being subject to discipline for conduct outside the practice of law is Comment [2] to Rule 1.0, which states: “While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.” Although no rule that might be violated when a lawyer is not practicing law or acting in a professional capacity is identified, several provisions of Rule 8.4 (“Misconduct”) could be

¹ The 29 jurisdictions are: Alaska, Arkansas, Colorado, Delaware, District of Columbia, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

² The five jurisdictions are: Georgia, Idaho, Massachusetts, North Carolina and Wisconsin.

³ The five jurisdictions are: Arizona, Florida, New York, Ohio and Pennsylvania.

⁴ The twelve jurisdictions are: Alabama, California, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Montana, Nevada, New Jersey, Oregon, Texas.

violated in such situations. For example, Rule 8.4(b) and (c) are not limited to a lawyer's conduct as a lawyer.⁵ See further discussion under section "4. *Non-legal services completely unrelated to the practice of law*" at page 6 of this attachment.

California Case Law and Other Authority

There is a substantial amount of California case law and other authority that addresses the application of the Rules of Professional Conduct when a lawyer is providing services that would not be considered the unauthorized practice of law if provided by a nonlawyer. The First Rules Revision Commission recommended that no version of Model Rule 5.7 should be adopted "because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection," and that certain terms and standards in the Model Rule "are materially inconsistent with existing California authorities." *Rules and Standards Not Adopted*, p. 30, and the Second Rules Revision Commission reasoned that "[a]ppropriate guidance is currently provided by other California authorities."

"Law-related" or "non-legal" services defined.

Under California law, the concept of a "non-legal service" has been defined as "services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." [Cal. State Bar Formal Op. 1995-141](#). This differs from the term "law-related services," which as defined by Model Rule 5.7, means "services that might reasonably be performed *in conjunction with and in substance are related to the provision of legal services*, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." (Emphasis added)

Functional approach. The State Bar Committee that drafted Op. 1995-141 subsequently clarified that the appropriate inquiry should be "functional," i.e., "is the lawyer performing a service that is performed as part of the practice of law and would constitute the [unauthorized] practice of law if performed by a non-lawyer?" [Cal. State Bar Formal Op. 1999-154](#), at n. 4 & accompanying text.

Categories of Non-legal Services a Lawyer Might Provide

Applying the aforementioned "functional" approach, there appear to be four categories of non-legal services recognized in the California authorities.

1. *Non-legal services provided in circumstances "Not Distinct" from the provision of legal services.*

There is a line of cases that recognize that when a lawyer provides non-legal services that are "not distinct" from the provision of legal services, the lawyer is subject to the Rules of

⁵ Cal. Rule 8.4(b) and (c) provide it is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

Professional Conduct. See, e.g., *Layton v. State Bar*, 50 Cal.3d 888, 904 (1990) (“Where an attorney occupies a dual capacity, performing for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.”)

These cases all appear to track the scope of Model Rule 5.7(a)(1) as involving a lawyer’s provision of non-legal services that are not distinct from the practice of law.

2. Non-legal services related to the practice of law.

Even when a lawyer is offering services that are “distinct from” the lawyer’s practice of law, the lawyer might still be subject to the Rules of Professional Conduct if a recipient or potential recipient of the non-legal services reasonably might be confused as to the nature of services that the recipient is obtaining from the lawyer. See, e.g., [Cal. State Bar Op. 1999-154](#) (Where lawyer is seeking employment as an investment adviser, and uses the title “Esq.” on her stationery and promotional materials, refers to her experience in estate and tax planning law and that she is a “Certified Tax Specialist,” such advertising could lead potential customers to “misperceive the nature of the services being offered,” and thus subject the lawyer to the requirements of the lawyer advertising rules.) That same ethics opinion, however, suggested that such a result could be avoided if the promotional materials included “an express disclaimer that [the lawyer] is not offering and does not intend to provide legal services or legal advice.” The drafters cautioned, however, that “no disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice. In addition, such a disclaimer may be ineffective where the services offered are clearly law-related and may inevitably and inextricably involve activities that are legal services.”

Situations that fall into this category appear to be analogous to the situations described in Model Rule 5.7(a)(2).

3. Non-legal services requiring the exercise of fiduciary duties.

Aside from the provision of non-legal services “not distinct” from the provision of legal services and non-legal services that are related to the practice of law, California law also applies the Rules of Professional Conduct to a lawyer who provides non-legal professional services that are fiduciary in nature – even in the absence of a lawyer-client relationship. The State Bar summarized the law in a formal opinion:

When [a lawyer’s] relationship with a client in the course of rendering a purely non-legal service creates an expectation that she owes a duty of fidelity or she is exposed to a client’s confidential information in the course of rendering the non-legal professional service, [the lawyer] may be subject to the same duties to avoid the representation of adverse interests under rule 3-310 [now rule 1.7] with respect to that client as she would if there had been a lawyer-client relationship. (See Cal. State Bar Formal Opn. No. 1981-63; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232]; *Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785.)

The situations in this category do not appear to be fit neatly into either the Model Rule 5.7(a)(1) or (a)(2) category, and appear to be the kind of services that the First Rules Commission concluded required “nuanced guidance.” See section **Error! Reference source not found.**, above.

4. Non-legal services completely unrelated to the practice of law.

There is a final category of non-legal services that a lawyer might provide that bear no relation to the practice of law, for example, a lawyer-owned restaurant, antiques store, body shop, dry cleaner or other business that provides goods or services that are completely unrelated to the practice of law. Even in situations where the customers of such establishments knew that a lawyer was an owner or even if the lawyer actively participated in its operation, it would not be reasonable for the customer to expect or misperceive the kinds of goods or services being provided as being related to the practice of law. As already noted, lawyers could still be subject to discipline under the Rules of Professional Conduct even when not acting as a lawyer or in a professional capacity.⁶

SUMMARY

Although California has not adopted a version of Model Rule 5.7, there is extensive California authority addressing the concerns of the rule. The aforementioned California authority, however, is not necessarily common knowledge to lawyers or the public, nor is it definitive.

The next section of this memorandum discusses whether a rule of professional conduct or an ethics opinion might be more effective in apprising lawyers or the public of the existing law.

The Benefits and Disadvantages of Employing a Rule of Professional Conduct or an Ethics Opinion to Expand the Availability of Law-related Services Provided by Lawyers?

The charge of the ATILS Task Force includes (i) reviewing “the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public,” (ii) evaluating “existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need,” and (iii) “[w]ith a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the

⁶ See discussion at the beginning of section 0. In addition to violations of the cited provisions of Cal. Rule 8.4, lawyers are also subject to discipline for violations of the State Bar Act, including [Bus. & Prof. Code § 6106](#), which provides “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.”

Adding a new rule of professional conduct that could provide lawyers or lawyers with an ability to provide ancillary services without being subject to the Rules might not appear to be in keeping with the Task Force’s charter and its emphasis on client protection, or its charge to explore means that might increase access to justice through innovation. This section of the memorandum is not intended to decide that issue but rather to simply determine whether, if a clarification of the availability of a lawyer providing non-legal services without being subject to the Rules of Professional Conduct is amenable to the charter, which approach would be best suited to providing that clarification given the current state of California law: a rule of professional conduct or an ethics opinion promulgated by the State Bar.

Rule of Professional Conduct

There are several advantages to a Rule of Professional Conduct patterned after Model Rule 5.7. *First*, the rule would be mandatory in nature as part of a set of disciplinary rules. A lawyer who seeks to engage in providing law-related services would have to comply with the rule to receive any of its benefits and be subject to discipline for non-compliance. Public protection should be enhanced. *Second*, because all lawyers are aware of the Rules of Professional Conduct, knowledge of what the lawyer’s obligations are with respect to the provision of law-related services would be more readily available and compliance with the law enhanced, as well as any benefits to the public more likely ensured. *Third*, related to the second advantage, to the extent the extensive law concerning law-related services can be reduced to a straightforward disciplinary rule, compliance will be enhanced and public protection fostered. *Fourth*, adopting a version of Model Rule 5.7, even if it were to diverge substantially from the substance of the model rule, would nevertheless remove an unnecessary difference between the law governing lawyers in California and the law governing lawyers in the substantial majority of other jurisdictions. *Fifth*, a rule approved by the California Supreme Court would clarify the current law and, to the extent that law might be inconsistent with the objectives of the rule or the goal of increasing access to justice, overrule the inconsistent law.

To be sure, there are disadvantages with a rule approach. *First*, as noted by the First Rules Revision Commission, a rule might not be able to capture the “nuanced guidance” of the case law. *Second*, because such a rule would necessarily be simplistic, “any iteration of the rule likely would be inaccurate and misleading.” *Third*, the California Rules are narrowly tailored to be disciplinary rules; they are generally mandatory and not permissive or aspirational, nor are they intended to provide general guidance on a topic of concern to lawyers. The complexities of California law reduced to a rule might not fit within that paradigm. *Fourth*, California has been without a rule of professional conduct in this area for over a century without there having been a multitude of lawyers who have taken advantage of clients through the delivery of non-legal services; to the extent lawyers have violated the law, there are already rules available to discipline them. There is no compelling need for such a rule.

As noted, it is not certain to what extent, if any, a rule that is patterned on Model Rule 5.7 would promote innovation that would operate to increase access to justice. The adoption of such a rule in California could increase knowledge of and incentives to lawyers to provide law-related services, and thus increase opportunities for lawyers to expand the services they provide either directly or indirectly their clients or the general public, but whether such a rule will contribute to access to justice is not at present established.

Ethics Opinion Promulgated by the State Bar

There are several advantages to addressing by ethics opinion the matters regulated in other jurisdictions through a rule derived from Model Rule 5.7. *First*, an ethics opinion is generally a better vehicle than a disciplinary rule for providing the “nuanced guidance” that the First Commission concluded is necessary to understand and apply the current law in California. *Second*, by providing that “nuanced guidance,” the ethics opinion should enhance compliance with the law and thereby promote public protection. *Third*, an ethics opinion or opinions would be a better medium for identifying the different kinds of law-related services that lawyers could provide, describing the benefits and disadvantages of each, and even focusing on the kinds of services that might provide better access to justice.

The major disadvantage of an ethics opinion is the fact that such opinions are only advisory in nature. They are not mandatory and might not be viewed as carrying the weight of authority of a court opinion or rule of professional conduct. Further, although they are readily available on the State Bar’s web site, there is no assurance that a lawyer would review such an opinion before embarking on providing law-related services. Ethics opinions, although a valuable resource in applying the law and rules as they relate to a lawyer’s duties, are not controlling law, nor would the violation of a conclusion in an ethics opinion necessarily result in a lawyer’s discipline. (See separately provided memorandum from Andrew Tuft updated June 18, 2019 for a discussion of a relevant proposed ethics opinion currently circulating for public comment with a deadline of August 30, 2019.)

CONCLUSION

ABA Model Rule 5.7 has been adopted in a substantial majority of United States jurisdictions with little variation. California is one of twelve jurisdictions that have not adopted a similar rule. Nevertheless, should the Task Force determine in its final report that promoting law-related services might enhance access to justice and decide to further investigate its regulation to protect the public, there are two potential means to do so: by Rule of Professional Conduct or by an ethics opinion.

ABA Model Rule 5.7 Responsibilities Regarding Law-related Services

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
 - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
 - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions
From: Andrew Tuft
Date: February 25, 2019 (**UPDATED: 6/18/2019**)
Re: Ethics Opinion Addressing Matters Regulated in Other Jurisdictions Through a Rule Derived From ABA Model Rule 5.7

PLEASE NOTE: The Committee on Professional Responsibility and Conduct approved the above referenced opinion for a 90-day public comment circulation with a public comment deadline of August 30, 2019. The version of the opinion currently circulating for public comment is attached to this memo.

In your meeting materials, Kevin Mohr and Andrew Arruda have provided the following item: “Memo Analyzing Rule 5.7 – Consideration of a Rule of Professional Conduct Patterned on ABA Model Rule 5.7 or, in the Alternative, a State Bar Ethics Opinion.”

For informational purposes, staff is including a draft opinion currently under consideration by the State Bar of California’s Standing Committee on Professional Responsibility and Conduct (COPRAC). This draft opinion analyzes the following:

Under what circumstances is a lawyer’s conduct or provision of services in connection with a non-law business potentially subject to regulation under the California Rules of Professional Conduct and, what steps, if any, can a lawyer take to ensure that the provision of non-legal services is not subject to those Rules? How do rules governing partnership with non-lawyers, sharing of legal fees, solicitation, conflicts of interest and lawyer-client business transactions apply to a lawyer’s dealings with a non-law business in which the lawyer is involved?

It is important to note this opinion is only a draft opinion at this stage. Before an opinion becomes formally published, it must be circulated for public comment and approved for publication by the State Bar of California Board of Trustees. To that end, this draft opinion has not yet been circulated for public comment, or presented to the Board of Trustees for final approval. Accordingly, the substance of the opinion is subject to change.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 16-0003**

ISSUES: Under what circumstances is a lawyer's conduct or provision of services in connection with a non-law business potentially subject to regulation under the California Rules of Professional Conduct and, what steps, if any, can a lawyer take to ensure that the provision of non-legal services is not subject to those rules? How do rules governing partnership with non-lawyers, sharing of legal fees, solicitation, conflicts of interest and lawyer-client business transactions apply to a lawyer's dealings with a non-law business in which the lawyer is involved?

DIGEST: Although non-legal services are, by definition, not the practice of law, their provision by a lawyer or lawyer-controlled entity is presumptively subject to the Rules of Professional Conduct if they are conducted in a manner that is not distinct from activities constituting the practice of law or if they are sufficiently law-related to give rise to a reasonable risk that the customer may understand that legal services are being provided or that a lawyer-client relationship has been formed. However, where appropriate steps have been taken to distinguish non-legal from legal services and to clarify that no legal services are being provided and that no lawyer-client relationship has been formed, the Rules of Professional Conduct will not apply to the services provided. The rules governing the lawyer's separate practice of law, including rules pertaining to solicitation, conflict of interest, and lawyer-client business transactions will, however, remain applicable to the lawyer's dealings with the non-legal entity in the course of the lawyer's practice. In addition, a lawyer is always subject to professional discipline for acts involving moral turpitude, dishonesty, or corruption, whether or not those acts occur in connection with the practice of law. Accordingly, the fact that a lawyer has made clear that her distinct non-legal business does not involve the practice of law or the formation of an attorney-client relationship is not a bar to such discipline.

AUTHORITIES

INTERPRETED: Rules 1.7, 1.8.1, 5.4, 7.2, 7.3 and 8.4 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6068(e)(1) and 6106.

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

INTRODUCTION

In today's economic environment, many lawyers and law firms are interested in pursuing business opportunities that do not involve the provision of legal services. Those activities may draw on the lawyer or law firm's own non-legal background and skills or they may involve investing in or partnering with non-lawyers. This opinion addresses the circumstances under which those Rules of Professional Conduct that apply to lawyers in the practice of law may also apply to lawyers' conduct providing non-legal services individually or through a lawyer-controlled business.^{2/} It also addresses ethical issues that may arise for a lawyer in the practice of law arising from her relationship with a separate non-law business.

STATEMENT OF FACTS

A law firm is considering seeking to capitalize on capacities developed over time by marketing those capacities through businesses that do not involve the representation of clients in legal matters. The firm is considering a variety of options.

In Scenario 1, the firm would provide back office services for law firms who wish to contract out for those services. The law firm would like to provide those services to other law firms pursuant to contracts that, while fully compliant with the standards governing non-lawyer entities providing such services, avoid the complexities and compliance costs associated with the Rules of Professional Conduct relating to, among other things, conflicts of interest, lawyer trust accounts, and similar issues. The services would be provided through a separate entity, which would in turn seek investments from non-lawyer sources of funding.

In Scenario 2, the firm would provide services as a professional fiduciary, specializing in the problems of beneficiaries and conservatees whose welfare is threatened by diminished or declining capacity. The services would be provided through a separate entity. Services at the professional fiduciary firm would be provided by lawyers from the firm and by some non-lawyers trained as professional fiduciaries and the entity would be jointly owned by the law firm and the non-lawyer fiduciaries working there. In California, professional fiduciaries are subject to their own regulatory scheme. Business and Professions Code sections 6500-6592, Probate Code sections 2340 and 2341, and California Code of Regulations sections 4400-4622. From the perspective of the new business, an important and attractive feature of that separate scheme is that the applicable confidentiality rules grant a professional fiduciary implied authority to disclose an incompetent beneficiary's confidential information in the beneficiary's interest when necessary to prevent the beneficiary from suffering or inflicting harm. In contrast, the rules of lawyer-client confidentiality do not recognize such authority except in the rare case where the client intends to commit a violent crime. Business and Professions Code section 6068 (e)(1) and rule 1.6.

With respect to each of the proposed options, the firm would like to know first, whether, and under what circumstances, the provision of the services would be subject to the Rules of Professional Conduct. In addition, the firm wants to know: (a) how the rules barring partnerships or fee-splitting with non-lawyers might apply to such arrangements and (b) how the rules regarding solicitation, conflict of

^{2/} This opinion supplements and updates important earlier opinions on this topic, including Cal. State Bar Formal Opn. Nos. 1982-69, 1995-141, and 1999-154.

interest and lawyer-client business transactions might apply to the relations between the law firm and the separate entity that provides non-legal services.

BACKGROUND

1. The Definition of Non-Legal Services

This Committee's prior opinions have defined non-legal services as "services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." Cal. State Bar Formal Opn. No. 1995-141.^{3/} It is well-settled that a lawyer or law firm has the right to provide non-legal services. *Id.* (citing Charles W. Wolfram, *Modern Legal Ethics* (1986) pp. 897-898). A lawyer or law firm may engage in the provision of non-legal services either directly from the lawyer or the law firm's own offices^{4/} or through a separate entity in which the lawyer or law firm has an ownership interest. Such services may be delivered by lawyers or by non-lawyers.

The fact that a lawyer is providing services that are not part of the practice of law and that could lawfully be provided by a layperson does not mean that professional discipline and professional rules have no role to play.^{5/} Even when a lawyer's sole business is the provision of non-legal services, she is subject to professional discipline for "the commission of any act involving moral turpitude, dishonesty or corruption." Business and Professions Code section 6106 and Cal. State Bar Formal Opn. No. 1995-141 at p. 2. In addition, certain provisions of rule 8.4 clearly apply to conduct outside the practice of law. There are many reported cases of professional discipline being imposed under Business and Professions Code section 6106 for conduct occurring outside of the lawyer-client relationship.^{6/}

^{3/} Consistent with the Committee's longstanding practice, this opinion is not intended to address or opine upon the issue of the unauthorized practice of law. The prohibition against engaging in the unauthorized practice of law is set forth in statute under the California Business and Professions Code sections 6125 to 6127. Regarding what constitutes the practice of law in California, lawyers should consider the following cases: *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 858]; *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corp.* (1922) 189 Cal. 531; *Estate of Condon* (1998) 65 Cal.App.4th 1138 [76 Cal.Rptr.2d 922]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].

^{4/} The former rule forbidding the provision of legal and non-legal services from the same office has long since been disapproved. See Los Angeles County Bar Assn. Opn. Nos. 384 and 413.

^{5/} The question of whether a lawyer's performance of non-legal services is subject to professional discipline or to the Rules of Professional Conduct is related to, but distinct from, the question whether those services are "professional services" for purposes of the application of the malpractice statute of limitations in Code of Civil Procedure section 340.6. See *Lee v. Hanley* (2015) 61 Cal.4th 1226 [191 Cal.Rptr.3d 536]. We express no opinion on that issue of statutory construction here.

^{6/} Examples, several of which are discussed in more detail below, include *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298] (agent's willful misappropriation of funds); *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467] (fraud by lawyer-fiduciary); *Lewis v. State Bar* (1973) 9 Cal.3d

In addition, under certain circumstances lawyer or law firm involvement in a business providing non-legal services can trigger the application of other Rules of Professional Conduct applicable in the practice of law.^{7/} Comments to the rules note that “a violation of a rule can occur... when a lawyer is not practicing law or acting in a professional capacity.” Rule 1.0, Comment [2] and rule 8.4, Comment [1]. But with the exception of rule 8.4, the rules do not themselves specify when they apply to non-legal services, leaving that question to be resolved under other California authorities, including case law and ethics opinions.^{8/}

2. Non-Legal Services Provided in Circumstances Not Distinct from the Practice of Law

One way that services not constituting the practice of law can become subject to the Rules of Professional Conduct is when they are rendered in circumstances that are not sufficiently distinct from the provision of legal services. The authorities all involve situations where a sole practitioner offered to provide both legal and non-legal services in the same matter, from the same office, without any efforts to distinguish the two services. See, for example: *Layton v. State Bar* (1990) 50 Cal.3d 888, 904 [268 Cal.Rptr. 802] (serving as lawyer for the estate and executor in the same matter); Cal. State Bar Formal Opn. No. 1982-69 (serving as lawyer and broker with respect to the same real estate transaction); and *Libarian v. State Bar* (1943) 21 Cal.2d 862 [136 P.2d 321] (lawyer and notary). This principle may apply even if the non-legal services are provided through a separate entity devoted primarily to the provision of such services. For example, a lawyer who establishes a separate entity through which she primarily intends to provide investment advice (a non-legal service) is nevertheless subject to the Rules of Professional Conduct if she also provides legal advice to her investment advisees as part of the separate business. Cal. State Bar Formal Opn. No. 1999-154.

3. Non-Legal Services “Related to the Practice of Law”

Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer’s practice of law, the Rules of Professional Conduct can still apply if the non-legal services are sufficiently related to the practice of law that the lawyer’s involvement in them could “reasonably lead prospective clients to misperceive the nature of the services being offered.” Cal. State Bar Formal Opn. No. 1999-

704, 712-13 [170 Cal.Rptr. 634] (same); *Alkow v. State Bar* (1952) 38 Cal.2d 257 [239 P.2d 871] (misrepresentation and misappropriation); *Jacobs v. State Bar* (1933) 219 Cal. 59, 63-64 [25 P.2d 401] (deception by lawyer escrow holder).

^{7/} Several independent statutory provisions govern lawyer’s provision of certain products and services ancillary to the practice of law. (*E.g.*, Bus. & Prof. Code, §§ 6009.3 (tax preparation), 6009 (lobbyists), 6077.5 (consumer debt collection), 6175 (financial products), and 18895 (athlete agents). All are beyond the scope of this opinion.)

^{8/} Many American jurisdictions have addressed the issue of the application of professional rules to non-legal businesses by adopting a version of American Bar Association Model Rule 5.7. A drafting team of the Commission for the Revision of the Rules of Professional Conduct recommended against adoption of Rule 5.7 in California “because appropriate guidance is currently provided by other California authorities.” Memorandum from Rule 5.7 Drafting Team to Members, Commission for the Revisions of the Rules of Professional Conduct, May 16, 2016 at p. 4-5. The full Commission voted to accept that recommendation.

154. Thus, we have previously opined that an advertisement for an attorney's separate investment advisory business that lists the attorney's professional credentials as a lawyer is a "communication with respect to professional employment" within the meaning of former rule 1-400, because investment advising is an activity related to the practice of law and the use of the lawyer's legal credentials to advertise that service could therefore lead the client to misperceive the nature of the service being provided. *Id.*

At the same time, there are some forms of non-legal services that are so clearly unrelated to the practice of law that there is no risk of customer confusion between the lawyer's legal and non-legal activities. Thus, it is settled that lawyer-owned retail service businesses like a restaurant or dry cleaner that are distinct from the lawyer's practice are so clearly non-related to the practice of law that the Rules of Professional Conduct do not apply to relations with their customers. Cal. State Bar Formal Opn. No. 1995-141.

4. Types of Law Related Services Potentially Subject to the Rules of Professional Conduct

The California authorities do not provide a comprehensive listing of "law-related" non-legal activities that are potentially subject to the Rules of Professional Conduct. It is clear that acting as a fiduciary or investment advisor is such an activity. See Cal. State Bar Formal Opn. No. 1995-141 (fiduciary) and Cal. State Bar Formal Opn. No. 1999-154 (investment advisor). Beyond that, however, there is little relevant authority. Given the limited California authority defining law-related activities, it is both permissible and helpful to look for guidance in national sources of authority, such as the Model Rules of Professional Conduct.^{9/} American Bar Association Model Rule 5.7 defines "law-related services" subject to the Rules of Professional Conduct as those "that might reasonably be performed in connection with legal services and in substance are related to the provision of legal services." This definition reflects the same concern as California law: the risk of client confusion concerning the nature of the services being provided.

The Comments to Model Rule 5.7 suggest a further non-exhaustive list of "law-related" activities that are potentially subject to professional rules, including "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." ABA Model Rule 5.7, Comment [8]. Some of these activities overlap with those already recognized under California law as potentially subject to regulation under the Rules of Professional Conduct. To the extent that the list extends beyond those activities, the Committee does not opine here on whether a lawyer's provision of any of the listed services, in circumstances distinct from her practice, would be subject to the Rules of Professional Conduct. Specific circumstances may matter greatly in assessing the risk of client misunderstanding. In addition, the relationship of the non-legal business activity to activities defined as the practice of law is context-dependent and could change over time. The Committee believes, however, that this broader list may provide useful guidance to lawyers seeking to determine whether a non-law business is potentially subject to the Rules of Professional Conduct.

^{9/} See, Rule 1.0, Comment [4]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 642, 655-656 [82 Cal.Rptr.2d 799]; and Cal. State Bar Formal Opn. No. 2010-180 n.7.

5. Affirmative Steps May Avoid the Application of the Rules of Professional Conduct

The question remains whether the application of the Rules of Professional Conduct governing the practice of law to “law-related” non-legal services is automatic and inescapable, or instead can be avoided through appropriate clarifying measures that eliminate the reasons for applying those rules. No California authority directly addresses this question. It is settled, however, that a lawyer providing non-legal services has a duty to clarify whether and to what extent a lawyer-client relationship exists, at least when a lawyer knows or reasonably should know that the customer believes that such a relationship exists. Cal. State Bar Formal Opn. No. 1995-141; *compare Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499]; rule 1.13(f) and rule 4.3(a). It is also settled that: (1) a lawyer can avoid the formation of an implied lawyer-client relationship through words or actions making it unreasonable for the putative client to infer that such a relationship exists and (2) the sophistication of the client is relevant in assessing the reasonableness of the client’s belief. *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 651-52 [applying California law]; see also *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] and Cal State Bar Formal Opn. No. 2003-161 n.1. These principles suggest that appropriate efforts to distinguish legal and non-legal services, coupled with appropriate warnings that no attorney-client relationship exists and that no legal services are being provided, can be effective to take law-related non-legal services outside the coverage of the Rules of Professional Conduct.^{10/}

Allowing lawyers and law firms providing non-legal services that take appropriate clarifying measures to avoid the application of the Rules of Professional Conduct also represents sound policy, for multiple reasons. First, the primary rationales for applying the Rules of Professional Conduct to non-legal services are the risk of overlap with legal services and the risk of client confusion concerning whether the protections of the lawyer-client relationship exist. When those risks are not present, the reasons for applying the Professional Rules are also no longer present. Second, allowing such disclaimers to be effective may benefit both customers and service providers. The fact that the Rules of Professional Conduct do not apply does not mean that the relevant conduct will go unregulated. Apart from the residual power to discipline attorneys described above, the non-law business will very often be subject to regulation under an alternative regulatory or licensing scheme, such as those governing investment advisors or professional fiduciaries. There is no reason to think that the Rules of Professional Conduct, designed to regulate the practice of law, provide a superior regulatory framework for such activities. Instead, when the provision of a non-legal service is subject to its own regulatory or contractual scheme, the lawyer provider and the customer may have multiple shared reasons, including clarity, consistency and efficiency, for having the services regulated under that scheme alone. For example, in the professional fiduciary scenario described above, the parties could well conclude that a regime in which a fiduciary has implied authority to disclose confidential information for the beneficiary’s protection is superior to one in which the fiduciary does not have such authority. Third, where California policy

^{10/} The leading California ethics authorities do not consider whether such clarifying measures are available or would be effective. See, e.g., M. Tuft & E. Peck, *California Practice Guide: Professional Responsibility* (The Rutter Group [2018]) §1:324 (a lawyer or law firm that directly or indirectly provides law related services, whether to clients or non-clients, “must comply” with the Rules of Professional Conduct and the State Bar Act in the provision of those non-legal services). The authors do not, however, consider the possibility of effective clarifying measures or the authorities or reasons of policy cited in text that support their recognition.

permits, it is desirable to align California's approach with that taken in other jurisdictions. The approach outlined here, which treats the application of the Rules of Professional Conduct to law-related services as presumptive only, advances national uniformity because it aligns with the approach taken in ABA Model Rule 5.7, which states that professional rules do not apply to law-related services if the lawyer has established that those services are distinct from legal services and that reasonable measures have been taken to ensure that the customer understands both that the services are not legal services and that the protections of the lawyer client relationship do not exist. ABA Model Rule 5.7, Comments [6] - [8]. In an era when many lawyers and law firms practice (and potentially offer non-legal services) in multiple jurisdictions, having a standard that advances national uniformity is a substantial advantage.

The effectiveness of measures taken to distinguish non-legal services from legal services and to clarify the nature of the services provided and the absence of a lawyer-client relationship will depend on the circumstances, including the clarity of the measures taken, the sophistication of the customer, whether the customer is a client or former client of the lawyer,^{11/} whether the services are being provided in the same matter, and whether the customer has engaged separate legal counsel in the matter. We discuss these issues in more detail below. In some situations, particularly those involving the provision of legal and non-legal services in the same matter or to unsophisticated customers, the legal and non-legal services may be "so closely entwined" that even a very clear disclaimer may not be effective. See ABA Model Rule 5.7, Comment [8]. But where non-legal services are clearly distinguished as such, and the lawyer has taken reasonable clarifying measures, there is no reason why the business cannot be conducted under the baseline legal rules governing non-lawyers who engage in it.

DISCUSSION

1. Applicability of the Rules of Professional Conduct

For purposes of discussion, we assume, without deciding, that the businesses contemplated in Scenarios 1 and 2, if conducted by non-lawyers, would not constitute the unauthorized practice of law.^{12/} If conducted by a lawyer or law firm, however, both would be sufficiently law-related to be presumptively subject to the Rules of Professional Conduct. In Scenario 1, back office services for law firms are frequently provided in connection with, and are substantively related to, the practice of law. The same is true of fiduciary services, where the conclusion is also supported by the case law and ethics opinions. See Cal. State Bar Formal Opn. No. 1995-141. In both Scenarios 1 and 2, there is a significant risk that

^{11/} It has been suggested that the Rules of Professional Conduct should always apply to services provided by a separate non-law business to a lawyer or law firm's present or former client. No California authority supports this result, however, and we think it goes too far. While there may be some situations where the present or former client status of a customer, either individually or in combination with other factors, could render clarifying measures ineffective, there may well be others where such measures can still be effective, particularly when the non-legal services are being provided in a separate, unrelated matter and the client or former client is sophisticated and represented by separate counsel. The existence of a present or former client relationship may, of course, also trigger obligations stemming from that relationship, rather than from the nature of the non-legal services being provided. Those obligations are treated further in Section 4 of the Discussion below.

^{12/} See the discussion, *supra*, at note 2.

the customer could misunderstand the nature of the services being provided and construe them as legal services.

Because the proposed activities are law related, they will be subject to the Rules of Professional Conduct unless they are distinct from the firm's provision of legal services and the firm has taken reasonable steps to ensure that the customer for the services understands that the firm's involvement in providing them does not mean that the services involve the practice of law and is not intended to give rise to an attorney-client relationship.

To avoid the application of the Rules of Professional Conduct to law-related services the provision of those services must be distinct from the law firm's practice of law. If a single lawyer is offering both legal and non-legal services in the same matter, from the same office, the activities ordinarily will not be distinct and the Rules of Professional Conduct will apply. Conversely, if the services are being offered in different matters and by separate entities, they will normally be distinct. In between these extremes, the answer will depend on circumstances. For example, there may be circumstances where distinctness may be achieved even if the services are provided through the same entity—for example if the law firm provides legal and non-legal services through separate units of the firm that are organizationally and functionally distinct. See Model Rule 5.7 (suggesting that distinctness may be shown by using different support staff for legal and non-legal services). Similarly, there may also be occasions where even though services are being provided in the same matter, for example, by the law firm and a separate entity controlled by the law firm, the relationship between the two types of services, in terms of organizational structure, designated responsibilities, personnel, compensation and related issues, could still permit a finding that the services are distinct.

2. Effectiveness of Clarifying Measures

Assuming the provision of non-legal services is distinct from the provision of legal services, the question remains whether the law firm can avoid the application of the Rules of Professional Conduct by taking appropriate measures to clarify the nature of the services being provided and the absence of any lawyer-client relationship. With respect to Scenario 1, we think the answer is clearly yes. With respect to Scenario 2, involving the provision of professional fiduciary services, the question is closer, but we conclude that the ultimate answer is also affirmative.

The issue in connection with Scenario 2 arises from statements like those in Cal. State Bar Formal Opn. No. 1995-141, which states that, "when rendering professional services that involve a fiduciary relationship, a member of the State Bar must conform to the professional standards of a lawyer." This language—and, more important, that in the Supreme Court cases on which it relies—could be read as suggesting that a lawyer engaged in a separate non-legal business that involves any assumption of fiduciary duties is always subject to the Rules of Professional Conduct, even if the lawyer has made clear that she is not engaged in the practice of law or entering into a lawyer client relationship, and even if the Rules of Professional Conduct are inconsistent with other regulatory provisions applicable to that non-law business. Given the great range of non-legal settings in which lawyers assume fiduciary duties, the sweep of such a rule would be broad indeed. But we do not think that such a broad reading is warranted, for multiple reasons.

First, in many of the decided cases, the language concerning the fiduciary status of the lawyer was dictum, because other recognized bases for professional discipline were present.^{13/} Second, no case explicitly considers, let alone explicitly rejects, the use of clarifying measures for a distinct non-law business providing fiduciary services. Third, the facts of the decided cases do not implicitly reject that approach; in fact they are fully consistent with it.^{14/} Because the decided cases provide no explicit or implicit support for applying the Rules of Professional Conduct to non-legal work that is distinct from the lawyer's practice and clearly identified as non-legal, we do not think that they alter the conclusion that California law does and should give effect to such clarifying measures for all types of distinct non-legal businesses. Put simply, once appropriate measures have been taken to avoid consumer confusion, there does not appear to be any good reason why a lawyer who has a separate non-legal business as, for example, a professional fiduciary, should be required to comply with rules that are unique to the legal profession, rather than those that govern the conduct of non-lawyers who conduct such businesses.

Accordingly, we believe that in both Scenario 1 and Scenario 2 a lawyer who is providing non-legal services that are distinct from his or her law practice can avoid the application of the Rules of Professional Conduct to those services if she provides the customer with reasonable notice that: (1) no legal advice or services are being provided, (2) no attorney-client relationship has been formed, and (3) the protections associated with the attorney-client relationship, including the attorney-client privilege and the duty of confidentiality, will not be available. Such clarifying measures are more likely to be effective if the notice is in writing and if prospective customers of the law firm are sophisticated or represented by counsel. This will very likely be the case for the customers of an entity providing back office services for law firms, perhaps less so for a firm serving as a professional fiduciary. Where the customer is not sophisticated, it may be relevant whether the customer had, or was advised to retain, separate legal counsel in the matter.

In Scenario 2, the law firm proposes to have one or more of its lawyers take an active role in directing, performing, or delivering the services in question, as opposed to simply being a passive investor in the entity. Lawyers may be fully as capable of providing non-legal services as their non-lawyer counterparts. The direct involvement of lawyers in providing such services may, however, increase the risk that the customer may believe the services entail the formation of an attorney-client relationship. Still, where the non-legal services are clearly distinct from any legal services provided by the lawyer, the relevant disclaimers are clear, and the client is sophisticated, there is no categorical reason why the lawyer's

^{13/} In some cases, there was a lawyer-client relationship, *Priamos v. State Bar* (1987) 3 Cal. State Bar Ct. Rptr. 824; *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Jacobs v. State Bar* (1933) 219 Cal. 59 [25 P.2d 401]. In others, there was conduct involving moral turpitude. See cases cited in note 5 above.

^{14/} The reported cases all involve individual lawyers providing non-legal services that overlapped both physically and functionally with the provision of legal services. See, e.g., *Libarian v. State Bar* (1943) 21 Cal.2d 862 [136 P.2d 321]; *Jacobs v. State Bar*, *supra*; Cal. State Bar Formal Opn. No. 1982-69, or the lawyer's affirmative use of his professional status to invite the injured person's trust and confidence, *Priamos v. State Bar*, *supra*; *Beery v. State Bar*, *supra*; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467]; *Lewis v. State Bar*, *supra*; *Jacobs v. State Bar*, *supra*, or both. Because none of the decided cases involved distinct non-law businesses and appropriate clarifying measures, all would be decided the same way under the approach proposed here.

involvement should give rise to a risk of misunderstanding sufficient to require the application of the Rules of Professional Conduct.

A similar point applies to the degree of lawyer control of the non-legal business. For purposes of determining whether the Rules of Professional Conduct apply, the degree to which the lawyer or law firm controls the business is important principally insofar as it may indicate to customers of the business that the services being provided are legal in nature. Accordingly, if the degree of lawyer control is not apparent to the customer, it is unlikely to support a finding that the professional rules apply. And even if that degree of control is apparent, it is unlikely, standing alone, to lead to a finding that the Rules of Professional Conduct apply if the non-legal business has properly disclaimed the provision of legal services and the formation of a lawyer client relationship.

3. Partnership and Sharing of Income with Non-Lawyer Partners or Investors

In this section and the following section, we assume, unless otherwise stated, that the lawyer or law firm is subject to the Rules of Professional Conduct, but that the non-legal service provider has taken sufficient steps to ensure that it is not.

A lawyer or law firm may well want to share income from a non-legal business with non-lawyer partners, employees, or investors. Under the Rules of Professional Conduct, a lawyer may not form a partnership or other organization with a non-lawyer if any of the activities of that partnership consist of the practice of law, rule 5.4(b), and, except in certain limited circumstances, may not directly or indirectly share legal fees with a non-lawyer. Rule 5.4(a).

A separate entity providing exclusively non-legal services is, by definition, not engaged in the practice of law. Accordingly, rule 5.4(b) does not bar a lawyer from forming a partnership or other organization with non-lawyers to conduct such a business, or from accepting investment in such a business from non-lawyers. Moreover, fees that are derived exclusively from the provision of non-legal services are not legal fees. Thus, rule 5.4(a) does not bar the direct or indirect sharing of non-legal fees with non-lawyers who work or invest in a separate non-law business. See Cal. State Bar Formal Opn. No. 1995-141.

4. Solicitation, Conflict of Interest and Lawyer-Client Business Transactions

A law firm that practices law and a separate lawyer-controlled business that provides non-legal services may each want to pursue business on the other business's behalf or refer potential clients or customers to the other business. The two businesses may also want to make compensation for such referrals part of the relationship between them, whether in the form of referral fees or otherwise. These issues have been largely covered in earlier opinions. We discuss them below under the headings of solicitation, conflict of interest, and lawyer-client business transactions.

Solicitation. The law of solicitation governs oral or written targeted communications by or on behalf of a lawyer that are directed to a specific person and that offer to provide, or can reasonably be understood as offering to provide, legal services. Rule 7.3(e). A lawyer or law firm that solicits non-client third persons for a distinct non-legal business is not covered by this rule because the communication cannot reasonably be understood as offering legal services. See, Cal. State Bar Formal Opn. No. 1995-141 (construing former rule 1-400). For the same reasons, the solicitation rules do not apply when a lawyer-controlled entity that provides solely non-legal services is soliciting on its own behalf.

When the separate entity is engaged in efforts to obtain clients for the law firm, however, the solicitation rules that govern the law firm's conduct will apply to those efforts, because such communications are "on behalf of" the law firm and can be understood as offering to provide legal services. Moreover, any compensation, gift or promise by the lawyer given in consideration of a recommendation by the non-lawyer entity would be prohibited by rule 7.2(b), and would subject a lawyer to discipline. See Cal. State Bar Formal Opn. No. 1995-141.

Conflict of Interest. A lawyer who refers an existing client to a non-legal business in which the lawyer has an economic interest, with the expectation or intention that the client will purchase non-legal services from the entity, may be obliged to comply with rule 1.7, governing conflicts of interest. Rule 1.7(b) requires informed written consent of the affected client and compliance with rule 1.7(d), "if there is a significant risk the lawyer's representation of the client will be materially limited" by the lawyer's own interests. Rule 1.7(b). Whether the lawyer's referral to a business in which she has an interest will trigger rule 1.7(b) will depend on, among other things, the connection of the non-legal services to the representation of the client, the degree to which the choice of provider could affect the outcome or cost of the representation, and the degree to which the lawyer or law firm will benefit economically from the referral. Compare Cal. State Bar Formal Opn No. 1995-140 (construing the requirement of written disclosure of interests under former rule 3-310(B)(4)). Where the non-legal services are connected to the representation and the lawyer receives compensation for his referral, compliance with rule 1.7 is normally required, because of the risk that the lawyer's exercise of judgment in conducting the representation will be adversely affected by her economic interest. Cal. State Bar Formal Opn. No. 1995-140. Conversely, if the referral is for services unrelated to the representation or if the lawyer's economic benefit from the transaction is immaterial, compliance may not be required. Compare Cal. State Bar Formal Opn No. 2002-159, section III (discussing written disclosure requirements under former rule 3-310(B)(4)).

Lawyer-Client Business Transactions. Transactions by an existing client (and in certain circumstances, a former client) of a lawyer or law firm with an entity providing non-legal services may also be subject to rule 1.8.1, governing lawyer-client business transactions.^{15/} That rule applies not only to transactions between client and lawyer directly, but also potentially to transactions between the client and an entity in which the lawyer has a controlling interest. Cal. State Bar Formal Opn No. 1995-141.

^{15/} Rule 1.8.1 provides that:

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) the transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client;
- (b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the transaction or acquisition, and to the lawyer's role in it.

The test for determining the applicability of rule 1.8.1 to a transaction between a lawyer's client and a non-legal business in which the lawyer has an interest is "whether the transaction arises out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship." Cal. State Bar Formal Opn No. 1995-141 (applying former rule 3-300); see also *Hunnecutt v. State Bar* (1988) 44 Cal. 3d 362, 370-71 [243 Cal.Rptr. 699] (Rule 5-101 (predecessor to former rule 3-300) applies if the client placed his trust in his former attorney "because of the representation").^{16/} When a lawyer advises a client to patronize a non-legal business, and receives a referral fee for doing so, the transaction clearly arises out of the lawyer-client relationship and rule 1.8.1 applies. Cal. State Bar Formal Opn No. 1995-140. The same conclusion should follow in any other case where the lawyer's referral to or involvement in the non-legal business is reasonably likely to cause the client to transfer the trust and confidence reposed in the lawyer to the negotiation of the client's relationship with the non-legal business. *Id.*^{17/}

CONCLUSION

A lawyer engaged in a non-law business is always subject to professional discipline for conduct that violates Business and Professions Code section 6106 or rule 8.4. A lawyer's involvement in a non-law business may also trigger the application of other Rules of Professional Conduct if the business is sufficiently "law-related" that the lawyer's involvement might reasonably lead a customer for those services to believe that an attorney-client relationship was being formed, or that legal services were being provided. Even when a non-law business is "law related" in this sense, however, the rules governing the practice of law do not apply if the non-law business is conducted in a manner distinct from the lawyer's practice of law and if reasonable measures have been taken to ensure that the customer understands that no attorney-client relationship is being formed, that no legal services are being provided, and that the protections of the attorney-client relationship will not apply.

^{16/} There is a suggestion in Cal. State Bar Formal Opn No. 1995-141 that the applicability of rule 1.8.1 to a transaction with a non-legal business is determined by whether the non-legal business is offering services that involve the assumption of a fiduciary duty. If so, then the rule applies. If not, it does not. *Id.* at p.3. To the extent that Cal. State Bar Formal Opn No. 1995-141 takes that view we believe it is incorrect. As the Opinion itself acknowledges, the critical question is whether the transaction with the non-legal business arises out of the attorney-client relationship or the trust and confidence engendered there. But that question is largely independent of the type of non-legal service offered—it turns instead on the degree of risk that the trust and confidence arising from the lawyer-client relationship will influence the customer's approach to the transaction with the non-legal business. Where that risk is present, rule 1.8.1 should apply regardless of the type of law-related service being provided. Where it is not, then the rule should not apply, even if the services being provided are fiduciary in nature. See Probate Code section 16004(c) (presumption of undue influence does not apply to the initial agreement relating to the hiring or compensation of a trustee).

^{17/} Sometimes a transaction may involve the potential for exploitation of client trust both because of the lawyer's role in making the referral and the lawyer's role in the negotiation with the separate entity, as when a personal injury lawyer refers a client to a medical facility in which the lawyer practices as a doctor. Los Angeles County Bar Assn. Formal Opn. No. 477.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Randall Difuntorum, ATILS Staff
From: Kevin Mohr, Vice Chair, ATILS Subcommittee on Rules and Ethics Opinions
Date: July 1, 2019
Re: Background Information in Support of the ATILS Recommendation for Public
Comment Consideration of Revising Rules 7.1-7.5 Similar to ABA Model Rules
7.1-7.3

The following are background information for Recommendation 3.4 - Adoption of revised California Rules of Professional Conduct 7.1 - 7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1-7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.

Supplemental Materials Included:

- ABA Model Rules 7.1 to 7.3, CLEAN version, as adopted by the ABA on 8/6/2018
- ABA Model Rules 7.1 to 7.3, REDLINE version, comparing ABA Model Rules to California Rules 7.1 to 7.5, TEXT ONLY
- Excerpt from Richard Zitrin & Kevin E. Mohr, *Legal Ethics: Rules, Statutes And Comparisons* (Carolina Acad. Press 2019), describing the differences between the ABA Model Rules 7.1 to 7.3 and the California Rules 7.1 to 7.5

Links to Materials Available Online:

- [2015 Report of the APRL Regulation of Lawyer Advertising Committee](#)
- [2016 Supplemental Report of the APRL Regulation of Lawyer Advertising Committee](#)

ABA Model Rules of Professional Conduct: Chapter 7 (Rules 7.1 – 7.3)

ABA Model Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm,

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with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

ABA Model Rule 7.2 Communications Concerning a Lawyer’s Services: Specific Rules

- (a) A lawyer may communicate information regarding the lawyer’s services through any media.
- (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral agreement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the agreement; and
 - (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.
- (c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

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- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
 - (2) the name of the certifying organization is clearly identified in the communication.
- (d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the

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lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule

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does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ABA Model Rule 7.3 Solicitation of Clients

- (a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

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- (b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:
 - (1) lawyer;
 - (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
 - (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.
- (c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:
 - (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.
- (d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
- (e) Notwithstanding the prohibitions in this Rule, 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 live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal

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services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary

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capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

ABA Model Rule 7.1 Communications Concerning a Lawyer's Services

~~(a)~~ A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the ~~communication~~statement considered as a whole not materially misleading.

~~(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.~~

Comment

[1] This ~~rule~~Rule governs all communications ~~of any type whatsoever about the lawyer or the~~a lawyer's services, including advertising ~~permitted by rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*. Whatever means are used to make known a lawyer's services, statements about them must be truthful.~~

~~[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule. (See also Bus. & Prof. Code, § 6157.2, subd. (a).)~~

~~[3]~~2 This rule prohibits Misleading truthful statements ~~that are misleading~~prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is ~~also~~ misleading if ~~it is presented in a manner that creates~~ a substantial* likelihood exists that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. ~~Any communication that states or implies "no fee without recovery"~~A truthful statement is also misleading ~~unless the communication also expressly discloses whether or not the client will be liable for costs if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.~~

~~[4]~~3 A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, ~~or a testimonial about or endorsement of the lawyer,~~ may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with ~~the services or fees~~those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison or claim can be substantiated. ~~An~~The inclusion of an appropriate disclaimer or qualifying language ~~often avoids creating~~may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

~~[5] This rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.~~

~~[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. (See, e.g., Bus. & Prof. Code, §§ 6150-6159.2, 17000 et. seq.) Other state or federal laws may also apply.~~

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

~~ABA Model Rule 7.2 Advertising~~Communications Concerning a Lawyer's Services: Specific Rules

- (a) ~~Subject to the requirements of rules 7.1 and 7.3, a~~A lawyer may ~~advertise~~communicate ~~information regarding the lawyer's~~ services through any ~~written,* recorded or electronic means of communication, including public media.~~
- (b) A lawyer shall not compensate, ~~promise or~~ give or promise anything of value to a person* ~~for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm,*~~services except that a lawyer may:
- (1) pay the reasonable* costs of advertisements or communications permitted by this ~~rule~~Rule;
 - (2) pay the usual charges of a legal ~~services~~service plan or a not-for-profit or qualified lawyer referral service. ~~A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;~~
 - (3) pay for a law practice in accordance with ~~rule~~Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an ~~arrangement~~agreement not otherwise prohibited under these Rules ~~or the State Bar Act~~ that provides for the other person* to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral ~~arrangement~~agreement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the ~~arrangement~~agreement; and
 - ~~(5) offer or give a gift or gratuity to a person* having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~
 - (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.
- (c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
 - (2) the name of the certifying organization is clearly identified in the communication.
- (~~ed~~) Any communication made ~~pursuant to~~under this ~~rule shall~~Rule must include the name and ~~address~~contact information of at least one lawyer or law firm* responsible for its content.

Comment

[1] This ~~rule~~Rule permits public dissemination of ~~accurate~~ information concerning a ~~lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information~~lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. ~~This rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.~~

~~[2] Neither this rule nor rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.~~

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) ~~permits~~allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or ~~client-development~~client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers. ~~See rule~~

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

~~5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would

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mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[48] ~~Paragraph (b)(4) permits a lawyer to make referrals~~ A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. ~~(See rules~~Rules 2.1 and 5.4(c).) Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements ~~made pursuant to paragraph (b)(4)~~ are governed by ruleRule 1.7. ~~A division of fees between or among lawyers not in the same law firm* is governed by rule 1.5.1.~~Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain

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access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ABA Model Rule 7.3 Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(~~a~~b) A lawyer shall not ~~by in-person, live telephone or real-time electronic contact~~ solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the ~~person*~~ contactedcontact is with a:

(1) ~~is a lawyer; or~~

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer ~~or law firm; or~~

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(~~b~~c) A lawyer shall not solicit professional employment ~~by written,* recorded or electronic communication or by in-person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph (~~a~~b), if:

(1) the ~~person* being solicited~~target of the solicitation has made known* to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation ~~is transmitted in any manner which~~ involves ~~intrusion,~~ coercion, duress or harassment.

(~~c~~) ~~Every written,* recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word "Advertisement" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or~~

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~~electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~(de)~~ Notwithstanding the prohibitions in ~~paragraph (a)~~this Rule, 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, live telephone or real-time electronic~~person-to-person contact to ~~solicit memberships or~~enroll members or sell subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.

~~(e) As used in this rule, the terms “solicitation” and “solicit” refer to an oral or written* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.~~

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. A lawyer’s communication ~~does is~~ not ~~constitute~~ a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~electronic searches.

~~[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. (See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].)~~

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment

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and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[37] This ~~rule~~Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a ~~bona fide~~ group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting

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in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

~~{4} Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with rules 7.1, 7.2, and 7.3(b). (See also rules 5.4 and 8.4(a).)~~

~~Rule 7.4 Communication of Fields of Practice and Specialization~~

- ~~(a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:~~
- ~~(1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and~~
 - ~~(2) the name of the certifying organization is clearly identified in the communication.~~
- ~~(b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of rule 7.1.~~

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

Rule 7.5 Firm* Names and Trade Names

- (a) ~~A lawyer shall not use a firm* name, trade name or other professional designation that violates rule 7.1.~~
- (b) ~~A lawyer in private practice shall not use a firm* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates rule 7.1.~~
- (c) ~~A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm* or other organization unless that is the fact.~~

Comment

~~The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.~~

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons***DESCRIPTIVE COMPARISON OF ABA MODEL RULES 7.1 TO 7.3 WITH
CALIFORNIA RULES 7.1 TO 7.5**

[Excerpted from Richard Zitrin & Kevin E. Mohr, *LEGAL ETHICS, RULES, STATUTES AND COMPARISONS* (Carolina Acad. Press 2019)]

ABA Model Rules 7.1 – 7.5

Introduction:

In August 2018, the seventh series of the Model Rules addressing advertising and solicitation of legal business (MR 7.1 through 7.5) underwent a major revision that was intended to (i) focus the rules on prohibiting advertisements and solicitations of legal business that are false and misleading; (ii) streamline the rules by merging two rules, MR 7.4 and 7.5, into MR 7.2 and 7.1, respectively; (iii) eliminate some prohibitions that had become anachronistic in the Internet age (e.g., elimination of former MR 7.3(c) regarding notices on envelopes); (iv) permit solicitation of some persons not reasonably likely to be susceptible to a lawyer's overreaching during "live person-to-person contact"; and (v) move permissive provisions in the text of former MR 7.4 and 7.5 to a comment in MR 7.2 and 7.1, respectively.

For each rule, there is a section entitled "2002 Model Rule Text" that describes the 2002 versions of the text of those Model Rules. Within that section appear comparisons with the "2018 California Rules".

A second section, titled "2018 Model Rules Text," describes the changes made to the 2002 Model Rules text in 2018.

A third section is titled "2002 Model Rule Comment." It describes the 2002 comments to the respective model rule. Again, within that section are comparisons with the "1989 California Rules" and the "2018 California Rules" as in the other rule comparisons, comparing the relevant 2002 Model Rule to the 1989 California Rules discussions and 2018 California Rules comments, respectively.

Finally, a fourth section, titled "2018 Model Rules Comment," will describe the changes made to the 2002 Model Rules comments in 2018.

* * * * *

ABA Model Rule 7.1

2002 Model Rule Text:

The 1983 version of MR 7.1, titled "Communications Concerning a Lawyer's Services," contained the general prohibition against a lawyer making a "false or misleading

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

communication” regarding the lawyer’s services. It also defined a communication that is false or misleading.

In 2002, a revision deleted from the definition of “false or misleading” communications those statements that are likely to create an unjustified expectation about results the lawyer can achieve; state or imply results achieved by means that violate the ethics rules or other law; or compare the lawyer’s services with other lawyers’ services. These provisions were moved into the rule’s Comment as Comments [2], [3], and [4], respectively.

* * * * *

2018 California Rules. Cal. Rule 7.1(a) is identical to MR 7.1 except that it substitutes “communication” for “statement.” Cal. Rule 7.2(b) authorizes the State Bar Board of Trustees to formulate and adopt standards, similar to the 16 standards the former Board of Governors promulgated under former rule 1-400. Compare former rule 1-400(E). However, as those 16 standards have now been eliminated, converted to rule text, or moved into comments to rules 7.1 through 7.5, it is uncertain whether or to what extent the Board will exercise its authority.

* * * * *

2018 Model Rule Text:

2018 MR 7.1 is identical to the 2002 version of the rule.

2002 Model Rule Comment:

The 2002 version of MR 7.1 had four comments, including Comments [2], [3], and [4] added in 2002 that, as noted, converted prohibitions in the 1983 text into comments. In 2012, Comment [3] was amended to substitute “the public” for the phrase “a prospective client.” See discussion of the definition of “prospective client” under the Model Rule 1.18 comparison, above.

* * * * *

2018 California Rules. Cal. Rule 7.1 includes five comments. Comments [1], [3] and [4] are derived from MR 7.1, Cmts. [1], [2] and [3], respectively. Comment [1] also adds a definition of “communication” that is similar to the definition set out in the introductory clause of former rule 1- 400(A). Comment [2] addresses a “guarantee or warranty” and provides a reference to Cal. B&P § 6157.2(a). Compare former rule 1-400, Standard (1). Comment [5] carries forward the substance of former rule 1-400, Standard (15).

2018 Model Rule Comment:

2018 MR 7.1, in addition to the four comments in the 2002 version of MR 7.1, includes four comments derived from either the text or comment of former MR 7.5. Comment [5] is

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

derived from MR 7.5, Cmt. [1]. Comments [6] and [8] are derived from MR 7.5(b) and (c), respectively. Comment [7] is derived from MR 7.5, Cmt. [2]; they are similar in substance to former rule 1-400, Standard (7).

ABA Model Rule 7.2

2002 Model Rule Text:

The 1983 version of MR 7.2, titled “Advertising,” addressed a number of specific issues regarding communications directed to the general public.

MR 7.2(a) was permissive and provided that a lawyer “may” advertise the lawyer’s services through “written, recorded or electronic communication, including public media,” and described specific modes of advertising, e.g., newspaper, radio and television.

MR 7.2(b) required a lawyer to keep a copy or recording of an advertisement for two after its last dissemination.

MR 7.2(c) prohibited a lawyer from giving anything of value to a person not in the lawyer’s firm who recommends the lawyer’s services, subject to four exceptions.

MR 7.2(d) required that any advertisement must include the “name and office address” of a lawyer or law firm responsible for its content.

In 2002, many of the foregoing provisions were revised as part of the Ethics 2000 Commission’s comprehensive revision of the Model Rules. For example, MR 7.2(a) deleted specific references to modes of public media and added “electronic” media as a permissive means of lawyer advertising.

Former MR 7.2(b), requiring a lawyer to keep records of advertisements for a period of two years after distribution or broadcast, was deleted.

Former MR 7.2(c) was designated MR 7.2(b) and its subsections revised. MR 7.2(b)(2) was amended to expand the permitted payments by a lawyer to include the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service “approved by an appropriate regulatory authority.” MR 7.2(b)(4) was added to permit strategic alliances among lawyers, law firms and non-lawyers and their entities. MR 7.2(b)(4) permits non-exclusive reciprocal referring relationships subject to client disclosure.

* * * * *

2018 California Rules. Cal. Rule 7.2 largely tracks the 2002 version of MR 7.2.

Cal. Rule 7.2(a) is nearly identical to MR 7.2(a) but adds the modifier “any” before “written” and the phrase “means of” after “electronic.”

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

Cal. Rule 7.2(b), introductory clause, is similar to the corresponding clause of MR 7.2(b) but substitutes “compensate, promise or give anything of value” for “give anything of value,” and adds “or securing” in addition to “recommending” and “law firm” in addition to “lawyer.”

Cal. Rule 7.2(b)(1) and (3) are identical to the corresponding provisions in MR 7.2.

Cal. Rule 7.2(b)(2) substitutes “services” for “service,” deletes “not-for-profit,” as California law permits for profit lawyer referral services, and conforms the definition of “qualified lawyer referral service” to California law.

Cal. Rule 7.2(b)(4) is nearly identical to MR 7.2(b)(4) but substitutes “arrangement” for “agreement” and adds a reference to the State Bar Act.

Cal. Rule 7.2(b)(5), regarding gratuities, has no counterpart in the 2002 version of MR 7.2. However, see “2018 Model Rule Text,” below. Cal. Rule 7.2(b)(5) carries forward the substance of former rules 1-320(B) and 2-200(B).

Cal. Rule 7.3(c) is identical to MR 7.2(c) except that it refers to “address,” not “office address,” presumably so that the inclusion of an email address would satisfy the rule.

2018 Model Rule Text:

MR 7.2 underwent substantial change in 2018 starting with its title, which is now “Communications Concerning a Lawyer’s Services: Specific Rules,” which better captures the fact that its scope is broader than the regulation of advertising. As revised, it addresses not only communications directed to the general public, i.e., advertisements (MR 7.2(a)), but also a lawyer’s compensation of others for recommending the lawyer’s services (MR 7.2(b)), and limitations on a lawyer asserting that the lawyer is a specialist in a particular field of practice (MR 7.2(c)).

MR 7.2(a) includes several changes. First, the paragraph is no longer “subject to” rules 7.1 and 7.3. Second, the clause “communicate information regarding the lawyer’s services” is substituted for “advertise.” Third, the phrase “any media” is substituted for the laundry list of permitted media in the 2002 version.

MR 7.2(b), introductory clause, now incorporates the Cal. Rule 7.2 phrase, “compensate, promise or give anything of value,” although in a slightly different order. It also eliminates the qualification in the 2002 version that the “person” is “not an employee or lawyer in the same law firm.” Unlike the California rule, however, it does not extend the rule’s scope to the “lawyer’s law firm.”

MR 7.2(b)(2) deletes the definition of “qualified lawyer referral service.” The definition now appears in MR 7.2, Cmt. [6].

MR 7.2(b)(5), regarding gratuities, is new. It is similar in substance to Cal. Rule 7.2(b)(5).

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

MR 7.2(c) did not previously appear in MR 7.2, but rather incorporates former MR 7.4(d) regarding claims of being a “certified” specialist. The corresponding 1989 and 2018 California provisions can be found in former rule 1-400(D)(6) and Cal. Rule 7.4(a), respectively.

MR 7.2(d) substitutes the term “contact information” for “office address” in the 2002 version of MR 7.2(c).

2002 Model Rule Comment:

The 2002 version of MR 7.2 included eight comments. In 2012, a number of amendments were made to the comments to MR 7.2. As noted in the discussion of the definition of “prospective client” under the Model Rule 1.18 comparison, references to “prospective client” were deleted or substituted in Comments [3], [6] and [7], and minor additions were made to Comments [1] through [3]. The most significant changes were made to Comment [5], which elaborates on permitted payments to third persons for generating client leads, including Internet-based client leads, as well as the limitations on such payments.

2018 California Rules. Cal. Rule 7.2 includes four comments. Comments [1], [2], [3] and [4] are derived in part from MR 7.2, Cmts. [2], [4], [5] and [8], respectively.

2018 Model Rule Comment:

2018 MR 7.2 includes 12 comments. Former MR 7.2, Cmts. [1], [3] and [4] have been deleted. Former Comment [5], concerning payment for referrals, has been divided into three separate comments: [2], [3] and [5]. New Comment [4] clarifies the application of new MR 7.2(b)(5). Former Comments [6] to [8] remain largely unchanged. Comments [9] through [11] incorporate the substance of former MR 7.4, Cmts. [1] to [3]. Comment [12] defines “contact information” in revised MR 7.4(d) [former MR 7.4(c)]

ABA Model Rule 7.3

2002 Model Rule Text:

The 2002 version of MR 7.3, titled “Solicitation of Clients,” addressed a lawyer’s communications directed to particular members of the public or a particular class of persons. The title of MR 7.3 had been changed in 2012 from “Direct Contact with Prospective Clients.” See discussion of the definition of “prospective client” under the Model Rule 1.18 comparison.

The 2002 version of MR 7.3(a) prohibited a lawyer from soliciting professional employment “by in-person, live telephone or real-time electronic contact,” the latter prohibition having been added in 2002 to address the advent of certain real-time modes of communication with the Internet, e.g., chat rooms. MR 7.3 provided two exceptions, i.e., if the person contacted (i) was a lawyer or (ii) had a family, close personal, or prior professional relationship with the

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

lawyer. In 2012, references to “prospective client” in MR 7.3(b)(1) and (c) were replaced by “target of the solicitation” and “anyone,” respectively.

MR 7.3(b) was not limited to real-time communications. In effect it provided that even when the communication was “written, recorded or electronic” (not just in real-time), the lawyer was prohibited from making contact if (i) the solicitation target had “made known” to the lawyer a desire not to be solicited or (ii) the solicitation involved “coercion, duress or harassment.”

MR 7.3(c) imposed certain notice requirements that had to accompany every “written, recorded or electronic” communication.

MR 7.3(d) was permissive and provided that a lawyer “may participate” with a prepaid or group legal service plan under the prescribed conditions.

* * * * *

2018 California Rules. Cal. Rule 7.3 largely tracks the 2002 version of MR 7.3.

Cal. Rule 7.3(a) is identical to former MR 7.3(a) except for the deletion of the phrase “the lawyer’s” as a modifier of “doing so.”

Cal. Rule 7.3(b) is substantially similar to former MR 7.3(b) except: (i) the phrase “person being solicited” is substituted for “target of the solicitation,” and (ii) in subparagraph (b)(2), the phrase “is transmitted in any manner” and the term “intrusion” have been added. These substitutions and additions conform to the language in former rule 1-400(D)(5). See also discussion of MR 7.3(b) under “2018 Model Rule Text,” below.

Cal. Rule 7.3(c) is substantially similar to former MR 7.3(c) except: (i) any “person” (a defined term) is substituted for “anyone”; (ii) the phrase “the word ‘Advertisement’ or word of similar import” is substituted for “Advertising Material”; and (iii) the requirement is qualified by the following clause: “unless it is apparent from the context that the communication is an advertisement.”

Cal. Rule 7.3(d) is substantially similar to former MR 7.3(d) except that the word “live” is added to modify “telephone” and “real-time electronic contact” has been added to parallel the construction of paragraph (a).

Cal. Rule 7.3(e), a definition of “solicitation” and “solicit” has no counterpart in text of former MR 7.3. However, Cal. Rule 7.3(e) largely tracks the language of the definition in former MR 7.3, Cmt. [1].

2018 Model Rule Text:

Similar to MR 7.1 and 7.2, MR 7.3 underwent significant revision in 2018.

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

First, the definition of “solicitation” was moved from the Comment to paragraph (a) of the rule.

Second, MR 7.3(b) (former MR 7.3(a)) substitutes in the introductory clause the phrase “live person-to-person contact” for the former rule’s list of prohibited communication modes (“in-person, live telephone or real-time electronic contact”) and also adds that pecuniary gain can be a significant motive for the soliciting lawyer’s “law firm.” In addition, subparagraph (b)(2) adds as an exception a person who has a “business” relationship with the soliciting lawyer. Further, in addition to a relationship with the soliciting lawyer, subparagraph (b)(2) now excepts from the prohibition persons who have any of the listed relationships with the “law firm” of the soliciting lawyer.

Perhaps the most important change to MR 7.3 is the addition of subparagraph (b)(3), which excludes from the solicitation prohibition a “person who routinely uses for business purposes the type of legal services offered by the lawyer.” If adopted by a jurisdiction, this provision would appear to put lawyers on equal footing with accountants with respect to “cold calling” potential clients. See *Edenfield v. Fane*, 507 U.S. 761 (1993). There is no counterpart to this exception in either former rule 1-400 or Cal. Rule 7.3.

MR 7.3(c) (former MR 7.3(b)) in its introductory paragraph deletes the list of communication modes (“by written, recorded or electronic communication or by in person, telephone or real-time electronic contact”) but otherwise is identical to former MR 7.3(b).

Former MR 7.3(c) regarding the inclusion of a notation of “Advertising Material” has been deleted.

New MR 7.3(d) excepts from the rule’s scope communications authorized by law or the order of a tribunal. There is no counterpart in either former rule 1-400 or Cal. Rule 7.3.

MR 7.3(e) is substantially the same as the 2002 version of MR 7.3(d).

2002 Model Rule Comment:

The 2002 version of MR 7.3 included nine comments. In 2012, a number of changes were made to the MR 7.3 comments. Most significantly, a new Comment [1], providing a definition of “solicitation,” was added and the remaining comments were renumbered. Under that added definition, a “solicitation” was a targeted communication “initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.” Further, the term “prospective client” was replaced throughout the comments. See discussion of the definition of “prospective client” under the Model Rule 1.18 comparison. As noted, this definition has been moved into the text as MR 7.3(a).

* * * * *

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

2018 California Rules. Cal. Rule 7.3 includes only four comments. Comment [1] is identical to the second sentence of former MR 7.3, Cmt. [1]. Comment [2] is derived from former MR 7.3, Cmt. [5], and provides examples of solicitations that would not involve pecuniary gain as a significant motive. Comment [3], derived from former MR 7.3, Cmt. [7], clarifies paragraph (d)'s exception for qualifying prepaid or group legal service plans. Comment [4] is derived from the last sentence of former MR 7.3, Cmt. [9].

2018 Model Rule Comment:

2018 MR 7.3 includes nine comments. Comment [1] restates paragraph (b) and carries forward the last sentence of former Comment [1]. Comment [2] elaborates on what is meant by “live person-to-person contact.” Importantly, it clarifies that the term does not include “chat rooms, text messages or other written communications that recipients may easily disregard.”

Comments [3] and [4] are substantially similar to the 2002 versions. Comment [5], which explains the rationale for the exceptions to paragraph (b)'s prohibition on “live person-to-person contact,” has added several examples of the new exception in MR 7.3(b)(3) for a “person who routinely uses for business purposes the type of legal services offered by the lawyer.”

Comment [6] adds examples of persons who might be particularly susceptible to overreaching. Comments [7] and [9] are nearly identical to the 2002 versions. New comment [8], which explains new paragraph (d) concerning orders of a tribunal, replaces former comment [8], which explained deleted former 7.3(c) concerning the “Advertising Material” notice.

*ABA Model Rule 7.4*Note re Model Rules 7.4 and 7.5.

Although the ABA recently deleted MR 7.4 and 7.5 as standalone rules, moving the substance of the rules into MR 7.2 and 7.1, respectively, we include descriptions of the rules here because the 2018 California Rules — and as of this writing, the rules of nearly every other jurisdiction — include standalone rule counterparts to both rules.

2002 Model Rule Text:

The 2002 version of MR 7.4 addressed a lawyer's communication of fields of practice. Former MR 7.4(a) provided a lawyer “may” disavow practicing in certain fields, and paragraphs (b) and (c) permitted lawyers to state they engaged in patent or admiralty practice, respectively. Paragraph (d) regulated communications regarding certifications to practice.

* * * * *

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

2018 California Rules. Cal. Rule 7.4(a) is substantially similar to former MR 7.4(d) [now MR 7.2(c)] regarding communications about certifications.

Cal. Rule 7.4(b), first sentence, is substantially similar to former MR 7.4(a). Cal. Rule 7.4(b) adds that lawyers may also state they specialize in, are limited to, or are concentrated in a particular field of law.

2018 Model Rule Text:

As noted, former MR 7.4 has been removed as a standalone rule, its substance being moved to MR 7.2. The following table shows the location of former MR 7.4 provisions in the 2018 Model Rules:

Comparison of Former Model Rule 7.4 and New Model Rule 7.2 (2018)	
Former Model Rule 7.4	Model Rule 7.2 (2018)
Former MR 7.4(d)	MR 7.2(c)
Former MR 7.4, Cmt. [1]	MR 7.2, Cmt. [9]
Former MR 7.4, Cmt. [2]	MR 7.2, Cmt. [10]
Former MR 7.4, Cmt. [3]	MR 7.2, Cmt. [11]

2002 Model Rule Comment:

MR 7.4 included three comments, the substance of which have been moved to the comments of MR 7.2. See Table, above.

* * * * *

2018 California Rules. Similarly, Cal. Rule 7.4 has no comments.

ABA Model Rule 7.5

2002 Model Rule Text:

The 2002 version of MR 7.5 addressed the potentially misleading use of firm names and letterheads. MR 7.5(a) prohibited use of a firm name, letterhead of “other professional designation” that was false or misleading, but stated trade names were permitted if they complied with former MR 7.1. MR 7.5(b) addressed permitted designations of law firms with offices in more than one jurisdiction. MR 7.5(c) placed limits on using in a firm name the

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

name of a lawyer holding public office, and MR 7.5(d) provided lawyers may claim to practice in a partnership only if true. The substance of former MR 7.5 has been moved to the comment section of MR 7.1.

* * * * *

2018 California Rules. Cal. Rule 7.5(a) is substantively similar to the first sentence of former MR 7.5(a). Paragraph (b) is substantively similar to the second sentence of former MR 7.5(a), and paragraph (c) is substantively similar to former MR 7.5(d).

2018 Model Rule Text:

As noted, former MR 7.5 has been removed as a standalone rule, its substance having been moved to MR 7.1. The following table shows the location of former MR 7.5 provisions in the 2018 Model Rules:

Comparison of Former Model Rule 7.5 and New Model Rule 7.1 (2018)	
Former Model Rule 7.4	Model Rule 7.2 (2018)
Former MR 7.5, Cmt. [1]	MR 7.1, Cmt. [5]
Former MR 7.5(b)	MR 7.1, Cmt. [6]
Former MR 7.5(d) & Cmt. [2]	MR 7.1, Cmt. [7]
Former MR 7.5(c)	MR 7.1, Cmt. [8]

2002 Model Rule Comment:

MR 7.5 included two comments. The substance of comment [1] and [2] have been moved to MR 7.1, Cmts. [5] and [7], respectively.

* * * * *

2018 California Rules. Cal. Rule 7.5 has a single comment which clarifies that “other professional designation” includes “logos, letterheads, URLs, and signature blocks.”

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Innovation to Address the Access to Justice Gap



Report to the New Mexico Supreme
Court of the Ad Hoc Licensed Legal
Technicians Workgroup

December 2019



STATE OF NEW MEXICO

Ninth Judicial District Court

December 23, 2019

New Mexico Supreme Court
Post Office Box 848
Santa Fe, NM 87504-848

Dear Chief Justice Nakamura, Justice B. Vigil, Justice M. Vigil, Justice Bacon and Justice Thomson:

Enclosed please find the report ordered by this Court on May 13, 2019. As you will recall, the impetus for this workgroup was a team of judges, court staff and bar representatives attending the Conference of Chief Justices Innovation Summit in May 2018.

Following the summit, the Innovation Team identified projects worthy of study and implementation in New Mexico to address the access to justice gap in our state. This workgroup was tasked with studying alternative methods to address unmet legal needs for low and moderate needs individuals, specifically considering an assessment of licensed legal technicians or other non-attorney professionals.

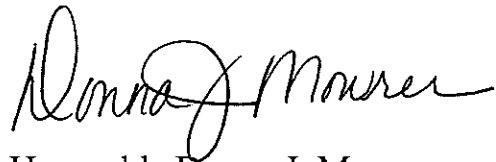
In 2015, The Access to Justice Commission recommended that the Supreme Court consider Limited Licensed Legal Technicians (although with a name change). This group would like to thank ATJ for their report and recommendation. Our report to you today contains a modified recommendation regarding further study of Licensed Legal Technicians.

Our report also makes three additional recommendations for the Supreme Court to consider. The workgroup felt these recommendations provided the best potential to ease the access to justice gap for our citizens.

Many of the materials utilized in this research project are available for your reference on the LLT Dashboard at the State Bar of New Mexico's website. The dashboard can be found at: <https://www.nmbar.org/LLLTworkgroup>.

To quote a member of our committee, "If our goal as a judiciary is justice, then the law must adapt, rather than be a barrier to justice."

Respectfully Submitted,

A handwritten signature in black ink, reading "Donna J. Mowrer". The signature is fluid and cursive, with the first name "Donna" being more prominent than the last name "Mowrer".

Honorable Donna J. Mowrer,
Ninth Judicial District Court Judge, Div. IV
Ad Hoc New Mexico Licensed Legal Technicians Workgroup Chair

Introduction

Information is easy to come by now, just enter a legal search term in virtually any search engine and one can receive thousands of hits. Self-diagnosis is possible, although not recommended, with WebMD online. A quick Google search of “how to do a will online” yielded more than 22 billion hits. Some of those hits included Rocket Lawyer, Legal Zoom and other online legal services. However, this increased access to information about the law “has done nothing to reduce the access-to-justice gap.”¹

Despite the best efforts of the Bar and Supreme Courts across the United States, “most people living in poverty and the majority of moderate-income individuals, do not receive the legal help they need.”² A staggering 86% of low-income Americans receive either inadequate or no legal assistance for their civil legal problems each year.³ Every licensed attorney in the United States would have to perform more than nine hundred *pro bono* hours each to even begin “to provide some measure of assistance to all households with legal needs.”⁴

¹ OSB FUTURES TASK FORCE, THE FUTURE OF LEGAL SERVICES IN OREGON: EXECUTIVE SUMMARY, 4 (Jun. 2017), http://www.osbar.org/docs/resources/taskforces/futures/FuturesTF_Summary.pdf

² ABA COMM’N ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES-11 (2016), http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf.

³ LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 30, 55 N.32 (Jun. 2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (stating that “This figure includes problems for which respondents indicated (1) they sought no help of any kind (2) they sought some sort of assistance from others and/or information online, but they did not seek the help of a legal professional, (3) they sought help from a legal professional, but were unable to get it, or (4) they sought and received help from a legal professional, but felt that they did not our would not be able to get as much legal help with the issue as they felt they needed.”)

⁴ ABA COMM’N ON THE FUTURE OF LEGAL SERVICES, *supra* note 2, at 14 http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf.

No program has significantly reduced the access to justice gap.⁵ Not only are the low-income individuals not able to receive legal help, the middle class has also been effectively priced out of an attorney. “Our laws and procedures are too complex, and legal advice too expensive, for poor and even middle-class Americans to get help and vindicate their rights.”⁶

The access to justice gap can be attributed to:

- A lack of attorneys in rural and underserved areas;
- The high cost of legal services;
- Generational changes;
 - Active members of the bar are aging and retiring, and not being replaced by younger members
 - The number of students entering law school has declined and those graduating are not entering a traditional law practice.

“The real world of legal problems looks like an emergency room, with too many patients and too little time and money.”⁷ Consequently it is easy to diagnose the problem. However, finding solutions is much more difficult. Our prior efforts such as on-line forms, self-help centers, unbundled legal services, endorsing limited representation, scribing programs, etc. have provided some relief. Nevertheless, the problem still exists and is growing. The legal emergency room is still too full with patients.

The medical system would triage the patients in the emergency room, treating those most ill or most seriously injured first. Paraprofessionals have been used for years in offering medical care to patients through nurse practitioners, physician’s assistants, midwives, etc. These medical professionals and paraprofessionals provide cheaper, faster care and triage, referring when necessary to surgeons, laboratories, and radiology. All these other professionals and paraprofessionals then surround the patient and consult, becoming the patient’s care team.

The legal system should triage as well. This report will examine the nature of the problem in New Mexico, identify the gap in both access to attorney representation,

⁵ *Id.*

⁶ Benjamin Barton & Stephanos Bibas, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS AND THE FUTURE OF THE LAW-4* (2017).

⁷ *Id.* at 7.

and the cost of that representation. The report will then outline possible steps, recommending four that this Court should consider. The suggestions identified in this report will not only address the low hanging fruit but will offer other solutions to more long-standing problems.

What this work group is proposing can be considered disruptive innovation. The Theory of Disruptive Innovation claims that true disruptive innovations begin by examining areas that are often overlooked and truly disruptive innovations will often initially be considered inferior.⁸ Most innovation, whether disruptive or not, often starts as a small scale experiment.⁹ Clayton Christensen in his book *The Innovator's Dilemma: The Revolutionary Book that Will Change the Way you do Business*, says a disruptive product or service addresses a market that previously was not properly served or it offers a simpler, cheaper or more convenient alternative to an existing product or service.¹⁰ Disruptive innovation is not negative, consider positive examples such as the internet, cell phones, artificial intelligence, and even online dispute resolution.

No one program or tool will fully mitigate the access to justice crisis. However, even with a small innovation, the gap could be reduced.

The Nature of the Problem in New Mexico

Approximately 97 percent of the land of the United States is considered rural.¹¹ The 2010 U.S. Census data shows that while some 60 million people live in areas

⁸ Clayton M. Christensen, Michael E. Raynor & Rory McDonald, *What is Disruptive Innovation?* Harv. Bus. Rev., Dec. 2015, 44-53, <https://hbr.org/2015/12/what-is-disruptive-innovation>.

⁹ *Id.*

¹⁰ Clayton M. Christensen, *THE INNOVATOR'S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS*, xviii (1997)

¹¹ The U.S. Census Bureau defines rural America as an area or population that is outside of an urban area and has less than 2,500 residents. Michael Ratcliffe et. al., *DEFINING RURAL AT THE U.S. CENSUS BUREAU* 1 (Dec. 2016) https://www2.census.gov/geo/pdfs/reference/ua/Defining_Rural.pdf. See also Press release, U.S. Census Bureau, New Census Data Show Differences Between Urban and Rural Populations- (Dec. 2016). <https://www.census.gov/newsroom/press-releases/2016/cb16-210.html>; CONF. OF STATE COURT ADMINISTRATORS, *COURTS NEED TO ENHANCE ACCESS TO JUSTICE IN RURAL AMERICA* (2018),

defined as rural, the population there is declining dramatically while urban growth expands.¹² New Mexico, as the fifth largest state, is no different. Urban areas inside the Rio Grande corridor continue to grow, while rural populations in New Mexico decline. Attorney demographic data is no different.

Geographic Distribution of Active Attorneys in New Mexico¹³

New Mexico has an average of one attorney for every 430 residents, but New Mexico's counties show a significant disparity in the number of attorneys per population. According to New Mexico State Bar records, three counties have no "active"¹⁴ attorneys with their primary place of business in that county: De Baca, Harding, and Hidalgo. Thirty-three percent of New Mexico counties have ten or fewer attorneys and 21% of the counties have five or fewer lawyers. Citizens in areas such as De Baca County are faced with a Hobson's Choice, go without an attorney or pay an out of town attorney and incur not only travel costs for the attorney to attend proceedings, but incur travel costs for the litigant to meet with the attorney.

The range of active attorney densities in the state runs from one attorney per 147 residents in Santa Fe County to one attorney per 4,341 residents in Guadalupe County.¹⁵ However, a per-county tally does not provide the full picture, as active

<https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Policy-Paper-1-28-2019.ashx>

¹² 2010 CENSUS URBAN AND RURAL CLASSIFICATION AND URBAN AREA CRITERIA, U.S. Census Bureau (2010), <https://www.census.gov/geo/reference/ua/urban-rural-2010.html>.

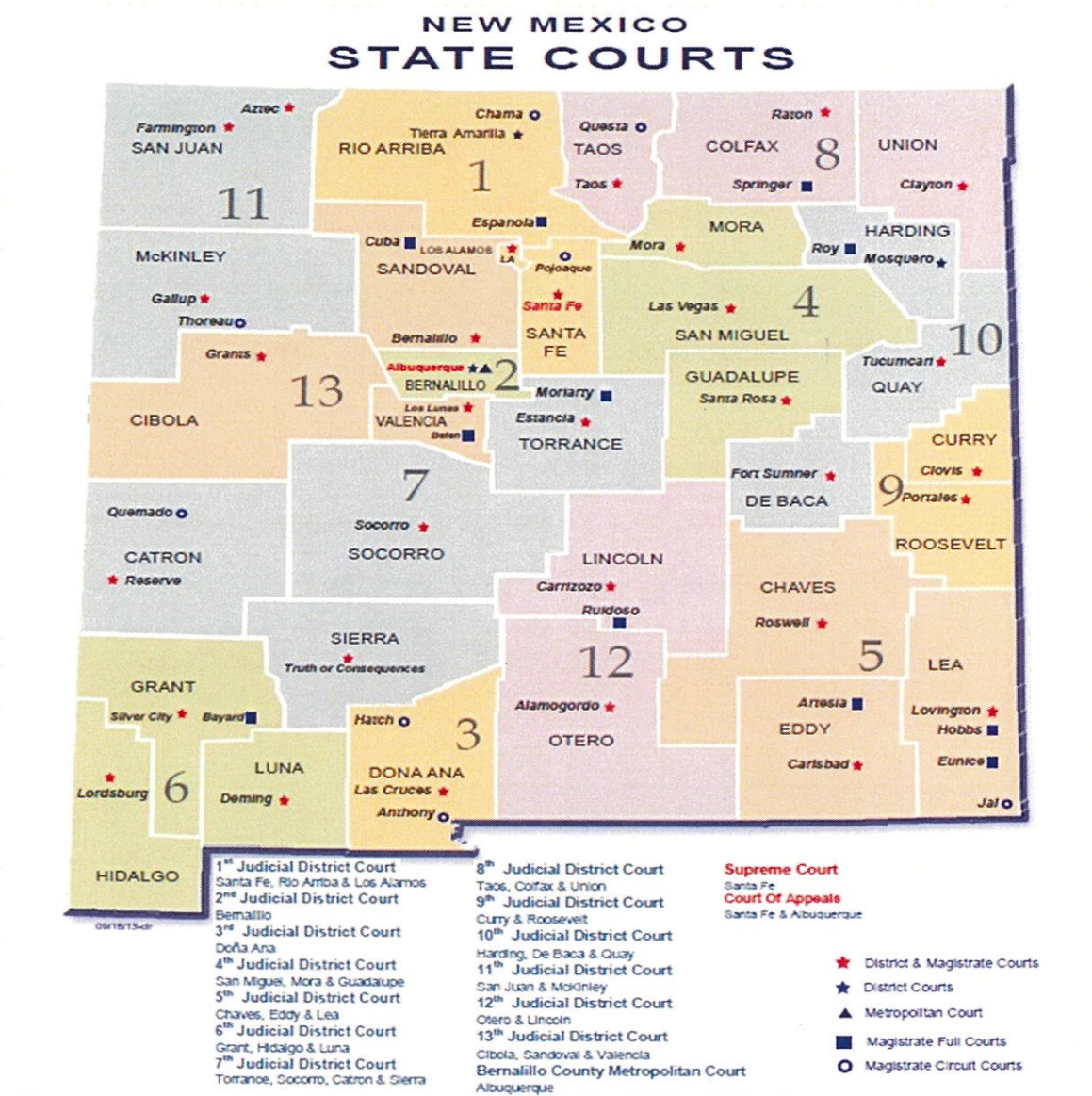
¹³ All attorney data is derived from the State Bar of New Mexico's member database, obtained on May 31, 2019 and July 17, 2019.

¹⁴ An "active" attorney, for the purpose of this report, is defined as an active-status, non-judge and non-limited license attorney. A limited license attorney is, by definition, an employee of a state or municipal government, the public defender's office, or a civil legal services provider. Not all lawyers employed by governmental entities or legal services providers have limited licenses, but their employment precludes their providing other legal services. *See* Rule 15-301.1 and 301.2 NMRA.

¹⁵ In 2009, the national average attorney density was one attorney for every 429 U.S. residents, which is consistent with the New Mexico average. Legal Services Corporation, *Documenting the Justice Gap in America* 19 (2009),

attorneys may office in one county but serve residents in several counties. The map of state judicial district courts provides useful geographic groupings and will be used here instead of breaking up the data below by county. See Figure 1, New Mexico Judicial District Map.

Figure 1: New Mexico Judicial District Map, State Bar of New Mexico¹⁶



<https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.pdf>.

¹⁶ New Mexico State Courts Map, available online at <https://www.nmcourts.gov/state-courts.aspx>

When viewed by judicial district, the data shows a range of attorney densities ranging from one attorney per 227.97 residents in the First Judicial District to one attorney per 1,493.74 residents in the Sixth Judicial District. *See Figure 2, Attorney Density by State Judicial District.*

Figure 2: Attorney Density by State Judicial District (sorted by attorneys per population)

Judicial District	Population¹⁷	Attorneys	Per Population
First Judicial District	247,572	1,086	227.97
Second Judicial District	789,810	2,992	263.97
Eighth Judicial District	60,987	93	655.77
Third Judicial District	224,286	287	781.48
Fifth Judicial District	196,527	200	982.64
Fourth Judicial District	40,902	39	1,048.77
Thirteenth Judicial District	249,981	236	1,059.24
Tenth Judicial District	12,168	11	1,106.18
Eleventh Judicial District	177,276	158	1,122.00
Twelfth Judicial District	96,441	81	1,190.63
Seventh Judicial District	50,244	40	1,256.10
Ninth Judicial District	75,903	57	1,331.63
Sixth Judicial District	68,712	46	1,493.74

The highest concentration of active attorneys by judicial district is concentrated in the First, Second, and Eighth Judicial Districts, although we acknowledge,

¹⁷ U.S. CENSUS, ANNUAL ESTIMATES OF HOUSING UNITS FOR THE UNITED STATES, REGIONS, DIVISIONS, STATES, AND COUNTIES: APRIL 1, 2010 TO JULY 1, 2018: 2018 POPULATION ESTIMATES, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2019_PEPANNHU&prodType+table. Throughout this section of the report, population and demographic data is based in census information, which is not current to 2019. The dates of each section of census data are provided where used.

anecdotally, that Bernalillo County attorneys often also practice in the Thirteenth Judicial District and similar cross-district practice likely exists throughout the state. Note, too, that these numbers do not consider New Mexico-licensed active attorneys with principal places of business along the New Mexico border in Texas, Arizona, or Colorado.

While the average population per active attorney state-wide is 430, only two districts – the state’s first and third most populous – enjoy a higher density of attorneys than the average, and eight of the thirteen judicial districts have per-population numbers above 1,000 residents per attorney.

Of course, these numbers do not paint a complete picture, as many of the attorneys in Santa Fe, for example, practice on behalf of state or federal government and are not available to work with private clients. Other attorneys across the state are prosecutors, public defenders, work for Child Support or the Children, Youth and Families Department. Still others serve as in-house counsel or lobbyists or may practice in areas applicable to only a small portion of the population, making them unavailable to or inappropriate to the needs of the average rural resident.

In its 2009 report, *Documenting the Justice Gap In America*, the Legal Services Corporation estimated that nationally “there is one lawyer providing personal legal services (that is, services aimed at meeting the legal needs of private individuals and families) for every 429 people in the general population.”¹⁸ Even an optimistic reading of the averages for New Mexico suggests that less than half of the state’s population has the access to legal services enjoyed by the country as a whole, and that this scarcity is concentrated in the state’s rural counties.¹⁹

¹⁸ Legal Services Corporation, *supra* note 16.

¹⁹ About 20% of the nation lives in a rural area, but only 2% of the small law practices are in a rural area. See Lisa Pruitt, Amanda L. Cool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-state Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15, 22 (2018); Council of State Governments, *Discovering Rural America*, Capitol Ideas Magazine, May/June 2018 at 13; see also CONF. OF STATE COURT ADMINISTRATORS, *supra* note 11.

Age of New Mexico Active Attorneys, by Judicial District

Nationally, state bars have expressed concern over the perception that the pool of attorneys is aging and is not being replaced at the same rate by new attorneys. In New Mexico, the average age of all active attorneys is 52 years old. Within the judicial districts, the average age ranges from 51 in the Second, Third, and Ninth Judicial Districts to 58 in the Eighth Judicial District. *See Figure 3, Average Attorney Age by Judicial District.*

Figure 3: Average Attorney Age by Judicial District

Judicial District	Counties	Average Attorney Age
First Judicial District	Santa Fe, Rio Arriba and Los Alamos	55
Second Judicial District	Bernalillo County	51
Third Judicial District	Doña Ana County	51
Fourth Judicial District	Guadalupe, Mora and San Miguel	55
Fifth Judicial District	Chaves, Eddy and Lea	52
Sixth Judicial District	Luna, Grant and Hidalgo	57
Seventh Judicial District	Sierra, Catron, Torrance and Socorro	56
Eighth Judicial District	Colfax, Taos, and Union	58
Ninth Judicial District	Curry and Roosevelt	51
Tenth Judicial District	De Baca, Harding and Quay	54
Eleventh Judicial District	McKinley and San Juan	52
Twelfth Judicial District	Otero and Lincoln	52
Thirteenth Judicial District	Cibola, Sandoval and Valencia	54

The Sixth, Seventh, and Eighth Judicial Districts are notable for the relative age of their active attorney populations as compared to the average for the state as a whole. New Mexico is well ahead of the national curve. Nationally, the average

age of an attorney is approaching 49.²⁰ “[T]he shortage in rural America becomes even more critical as local, rural attorneys nearing retirement age will cease practicing without anyone to replace them.”²¹

Communities in Need: Low Income

An astounding 86% of low-income Americans with civil legal problems receive inadequate or no legal help at all.²² Compounding this problem is that even moderate income individuals do not receive the legal help they need.²³ The National Center for State Courts estimates that at least one party is self-represented in approximately 75% of all civil cases.²⁴ The Self-Represented Litigation Network estimates 30 million people each year lack representation in state courts, subjecting them to potentially dire consequences.²⁵

“A hospital will not last long with no doctors, and a courthouse and judicial system with no lawyers faces the same grim future.”²⁶

²⁰ CONF. OF STATE COURT ADMINISTRATORS, COURTS NEED TO ENHANCE ACCESS TO JUSTICE IN RURAL AMERICA, 3 (2018), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Policy-Paper-1-28-2019.ashx>

²¹ *Id.*

²² Mary E. McClymont, *Nonlawyer Navigators in State Courts: An Emerging Consensus*, 8 (June 2019), <http://napco4courtleaders.org/wp-content/uploads/2019/08/Nonlawyer-Navigators-in-State-Courts.pdf> (citing Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 14 (2017)).

²³ *Id.* (citing ABA COMM’N ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf)

²⁴ *Id.* (citing National Center for State Courts, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>

²⁵ *Id.* (citing SRLN Brief: How Many SRLs? (SRLN 2019), Self-Represented Litigation Network, <https://www.srln.org/node/548/srln-brief-how-many-srls-slrn-2015> (last visited August 20, 2019)).

²⁶ South Dakota Chief Justice David Gilbertson in his 2013 State of the Judiciary message, quoted in Lisa R. Pruitt, J. Cliff McKinney & Bart Calhoun, *Justice in*

In New Mexico, as throughout the country, free civil legal services are made available to indigent clients, defined as those individuals living at up to 200% of the federal poverty level. As of July 2019, the federal poverty level per household is \$21,330 for a family of three (levels increase per household member, but at less than a 1:1 ratio), meaning that households with an annual income of \$42,660 could potentially qualify for free legal assistance from New Mexico Legal Aid.²⁷

Figure 4: Households (HHDs) at 200% of Federal Poverty Level by State Judicial District (sorted by percent at 200%, 2015)²⁸

Judicial District	Total HHDs	HHDs at 200%	Percentage at 200%
Fourth Judicial District	13,634	8,681	63.67%
Tenth Judicial District	4,056	2,537	62.55%
Seventh Judicial District	16,748	9,759	58.27%
Sixth Judicial District	22,904	13,175	57.52%
Eighth Judicial District	20,329	10,879	53.51%
Third Judicial District	74,762	38,142	51.02%
Ninth Judicial District	25,301	12,754	50.41%
Twelfth Judicial District	32,147	16,050	49.93%
Eleventh Judicial District	59,092	28,218	47.75%
Second Judicial District	263,270	113,310	43.04%
Fifth Judicial District	65,509	26,481	40.42%
Thirteenth Judicial District	83,327	33,552	40.27%
First Judicial District	82,524	31,315	37.95%

the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It, 37 U. Ark. Little Rock L. Rev. 537 (2015); see also CONF. OF STATE COURT ADMINISTRATORS, *supra* note 11.

²⁷ New Mexico Legal Aid utilizes several formulas to determine whether it can provide services to an individual. Cases funded by the Legal Service Corporation require that the client have basic income up to 200% of the current Federal Poverty Level, and additional asset limits are applied. In some cases, New Mexico Legal Aid may provide services regardless of income or assets or may apply a formula based on 80% of HUD income limits. Email interview with Carol E. Garner, Statewide Centralized Intake Unit Managing Attorney, New Mexico Legal Aid (Jul. 15, 2019)

²⁸ U.S. CENSUS, *supra* note 17.

The judicial districts showing the greatest percentage of indigent households are the Fourth, Tenth, Seventh, and Sixth, but as expected, the judicial districts with the greatest *number* of such households are the Second and Third. While an increase of legal services in rural counties and judicial districts is likely desirable, these are not necessarily the areas with the greatest projected need as a percentage of population.

Figure 5: Concentration of Attorneys and of Households at 200% of Federal Poverty Limits, Ranked

Concentration of Attorneys (high to low)	Concentration of Households (low to high)
1. First Judicial District	1. First Judicial District
2. Second Judicial District	2. Thirteenth Judicial District
3. Eighth Judicial District	3. Fifth Judicial District
4. Third Judicial District	4. Second Judicial District
5. Fifth Judicial District	5. Eleventh Judicial District
6. Fourth Judicial District	6. Twelfth Judicial District
7. Thirteenth Judicial District	7. Ninth Judicial District
8. Tenth Judicial District	8. Third Judicial District
9. Eleventh Judicial District	9. Eighth Judicial District
10. Twelfth Judicial District	10. Sixth Judicial District
11. Seventh Judicial District	11. Seventh Judicial District
12. Ninth Judicial District	12. Tenth Judicial District
13. Sixth Judicial District	13. Fourth Judicial District

Four of the judicial districts appear on the lower half of both columns, meaning that they have both a relatively low number of attorneys per population and a relatively high percentage of households at or below 200% of the federal poverty limit: the Tenth, Seventh, Ninth, and Sixth Judicial Districts.

Communities in Need: Middle Class

Scarcity of legal services is not limited to individuals living at or below the poverty level, and while those up to 200% of the federal poverty level may be able to access some free legal services through New Mexico Legal Aid, the need is greater than what can be met through existing civil legal services. In addition, middle-class individuals may be or believe themselves to be priced out of legal services.

The Pew Research Institute defines “middle class” as “those with an income that is two-thirds to double the U.S. median household income”.²⁹ According to the U.S. Census, the U.S. median household income in 2017 was \$60,336.³⁰ In New Mexico, the median was only \$47,386.³¹ Using the federal income numbers, a middle class, three-person household would have income between \$40,244 and \$120,732 per year.³² In New Mexico, there is some small crossover between the middle class and the eligibility amounts for free legal services.

Per the federal middle-class definition, the middle-class population made up approximately the following percent of the population in each judicial district:

Figure 6: Household Middle Class Density by State Judicial District (sorted by percent in middle class, 2015)³³

Judicial District	Total HHDs	HHDs in Middle Class	Percentage in Middle Class
Sixth Judicial District	22,904	13,175	57.52%
Thirteenth Judicial District	83,327	40,903	49.09%

²⁹ Richard Fry & Rakesh Kochhar, Are you in the American middle class?, Pew Research Center (Sept. 6, 2018), <https://www.pewresearch.org/fact-tank/2018/09/06/are-you-in-the-american-middle-class/>.

³⁰ U.S. CENSUS, HOUSEHOLD INCOME: 2015, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1901&prodType=table.

³¹ *Id.*

³² *Id.*

³³ U.S. CENSUS, INCOME IN THE PAST 12 MONTHS: 2017 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1901&prodType=table

Judicial District	Total HHDs	HHDs in Middle Class	Percentage in Middle Class
Fifth Judicial District	65,509	31,799	48.54%
First Judicial District	82,524	37,415	45.34%
Second Judicial District	263,270	118,169	44.89%
Twelfth Judicial District	32,147	13,958	43.42%
Eleventh Judicial District	59,092	25,425	43.03%
Ninth Judicial District	25,301	10,733	42.42%
Third Judicial District	74,762	30,231	40.44%
Eighth Judicial District	20,329	7,872	38.72%
Seventh Judicial District	16,748	6,057	36.17%
Tenth Judicial District	4,056	1,369	33.75%
Fourth Judicial District	13,634	4,472	32.80%

Two of the six judicial districts with the highest percentage of residents in the middle class, the First and Second Judicial Districts, also have the highest concentration of attorneys per population. But the attorney density does not match up in any easily recognizable way with the rest of the population data; for example, the Fourth Judicial District, which has the lowest percentage of residents in the middle class and the highest percentage meeting the 200% threshold, has a better attorney-to-resident ratio than more than half of the other districts.

Figure 7: Household Middle Class and Poverty Percentages and Attorney Density by State Judicial District (sorted by attorneys per population, 2015)

Judicial District	Middle Class	200%	Attorney Per Population
First Judicial District	45.34%	37.95%	227.97
Second Judicial District	44.89%	43.04%	263.97
Eighth Judicial District	38.72%	53.51%	655.77

Judicial District	Middle Class	200%	Attorney Per Population
Third Judicial District	40.44%	51.02%	781.48
Fifth Judicial District	48.54%	40.42%	982.64
Fourth Judicial District	32.80%	63.67%	1,048.77
Thirteenth Judicial District	49.09%	40.27%	1,059.24
Tenth Judicial District	33.75%	62.55%	1,106.18
Eleventh Judicial District	43.03%	47.75%	1,122.00
Twelfth Judicial District	43.42%	49.93%	1,190.63
Seventh Judicial District	36.17%	58.27%	1,256.10
Ninth Judicial District	42.42%	50.41%	1,331.63
Sixth Judicial District	57.52%	57.52%	1,493.74

Yellow shading: Six districts with the highest percentage of middle-class households.

Green shading: Six districts with the highest percentage of 200%-qualifying households.

Blue shading: Six districts with the lowest number of attorneys per residents.

The Sixth Judicial District stands out as well: It has identical numbers of households in both the 200% grouping and in the middle class, suggesting a large number in the crossover space between the two groups. Both groups are in the top six for the population. It also has the worst attorney per population percentage in the state.

The percentage of cases featuring self-represented litigants (SRLs) may be a useful tool for evaluating lack of access to attorneys. According to New Mexico's Judicial Information Services, the percentage of cases in New Mexico's courts, in which one or more litigants is self-represented, largely tracks with that district's

percentage of the population, suggesting that no particular district has an unusually high percentage of SRLs. There are, however, four exceptions: Both the Second and Third Judicial Districts are notable for their overrepresentation of SRLs as a percentage of the population, and both the First and Thirteenth Judicial Districts have a lower percentage of SRLs compared to their populations.

Figure 8: Number and Percentage by District of Self-Represented Litigants, Compared to Percentage of Residents in the State (sorted by difference in percentage, fiscal year 2018-2019)³⁴

Judicial District	No. SRL cases	Percentage SRL	Total Pop.	% of NM Pop.	Difference in %
First Judicial District	5,970	3.90%	247,572	10.81%	-6.90%
Thirteenth Judicial District	7,524	4.92%	249,981	10.91%	-5.99%
Fifth Judicial District	9,475	6.20%	196,527	8.58%	-2.38%
Sixth Judicial District	1,841	1.20%	68,712	3.00%	-1.80%
Ninth Judicial District	2,486	1.63%	75,903	3.31%	-1.69%
Eighth Judicial District	1,591	1.04%	60,987	2.66%	-1.62%
Seventh Judicial District	1,830	1.20%	50,244	2.19%	-1.00%
Twelfth Judicial District	5,411	3.54%	96,441	4.21%	-0.67%
Fourth Judicial District	1,997	1.31%	40,902	1.79%	-0.48%
Tenth Judicial District	418	0.27%	12,168	0.53%	-0.26%
Eleventh Judicial District	12,232	8.00%	177,276	7.74%	0.26%
Third Judicial District	30,409	19.88%	224,286	9.79%	10.09%
Second Judicial District	71,759	46.92%	789,810	34.48%	12.44%

³⁴ This is from the data provided by the Judicial Information Division regarding the number of cases with an active self-represented litigant in the fiscal year July 1, 2018 to June 30, 2019.

Note that the Districts are sorted by the difference between the percentage of the population represented by that district and the percentage of pro se cases in that district. These numbers suggest an interesting possibility: That even though both the Second and Third Districts have a relatively high percentage of middle-class residents, those residents may be affirmatively choosing to self-represent or may be unable to secure legal representation. Further study would be useful to help the group draw further conclusions from this data.

The initial conclusion the group can reach through these numbers is that the judicial districts most in need of services for the middle class and for households at 200% of the poverty level are not the same. As a result, a one-size-fits all program is unlikely to address both of the Court's concerns.

Generational Changes

Generational theory posits that each generation engages with the world in slightly different ways.³⁵ The expected behaviors of the two newest generations should be taken into consideration as the Court plans its responses to the needs in our state. While each generation is complex and no one generation is entirely uniform in its behaviors, the following have been observed of Millennials (sometimes referenced as ages 25 to 42) and/or Generation Z:

- Both generations are cautious with money and suspicious of debt. Millennials lived through the most recent recession and are leery of spending. They do, however, struggle with large student loan debt.³⁶
- Generation Z has seen how millennials struggle with their student loans and are avoiding taking out large debt through a variety of tactics, including delaying or extending higher education or working while in school.³⁷

³⁵ Kurt Cagle, *Rethinking Millennials and the Generations Beyond*, *Forges*, Aug. 22, 2019, <https://www.forbes.com/sites/cognitiveworld/2018/08/22/rethinking-millennials-and-generations-beyond/#13d3ca211893>.

³⁶ Brian Chappatta & Elaine He, *Millennials Could Be Ready to Save the Economy*, *Bloomberg.com*, Sept. 30, 2019, <https://www.bloomberg.com/graphics/2019-opinion-millennials/>.

³⁷ PBS News Hour, *Anxious about debt, Generation Z makes college choice a financial one*, Mar. 27, 2019, <https://www.pbs.org/newshour/show/anxious-about-debt-generation-z-makes-college-choice-a-financial-one>.

- Generation Z is very comfortable seeking out information on the internet and using online self-help tools.³⁸
- Generation Z is considered less sophisticated when it comes to information analysis (even adjusting for age), which may hamper their ability to self-help on more complicated matters.³⁹
- Generation Z is often more dependent than prior generations on financial and other assistance from their parents. Where the resources are there, parents may be able and willing to finance legal services for their children well into adulthood.⁴⁰

Rural New Mexico is not unique in that other barriers to access compound the attorney shortage. The numbers of lawyers in rural areas of New Mexico are declining because they are aging and retiring without replacement, much like attorneys in Georgia, Wisconsin and Minnesota.⁴¹ Recruiting lawyers to rural areas is often deterred by high student loan debt as attorneys in urban areas receive better pay than their rural counterparts.⁴² State surveys indicated that a lack of computers, cell phone or data and internet access, transportation, language barriers, illiteracy and health problems all compound the access to justice problem.⁴³ Politics also can play a factor in the access to justice gap. Rural communities “generally have little political clout when it comes to advocating successfully for their own justice system needs.”⁴⁴

The number of students applying to the University of New Mexico (UNM) School of Law has been declining for the past five years, according to data from the admissions office. UNM statistics reveal that law school applicants from New Mexico went from 339 in 2015 to 273 in 2019. The American Bar Association reported that the 1L class from 2018 at UNM is 106, some 13.82% smaller than the

³⁸ Tracy Francis & Fernanda Hoefel, *‘True Gen’: Generation Z and its implications for companies*, McKinsey & Co., <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-gen-generation-z-and-its-implications-for-companies>.

³⁹ Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. at 40 (pending), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271137##.

⁴⁰ *Id.* at 23.

⁴¹ Pruitt, Cool, et. al., *supra* note 19, at 122.

⁴² *Id.*

⁴³ *Id.* at 126-127.

⁴⁴ *Id.* at 128.

2017 1L class of 115.⁴⁵ The 2019 1L class at UNM is even smaller at 82, with only 65 of those being from New Mexico. A decline in applicants to our flagship law school is no surprise. Nationwide, numbers have declined as students realize the expense of a degree, coupled with the reduction in force at major firms do not make the debt of a degree worth the return.⁴⁶ Nevertheless, the AccessLex Institute in its 2018 report found that for those with a juris doctorate degree earned in 2010 or later, 60% had borrowed more than \$100,000 to complete the degree.⁴⁷

Law school debt means that even those students entering private practice must charge high hourly rates in order to keep the doors open and service their student loan debt. The overall hourly average rate for an attorney in New Mexico is \$213, while the median hourly rate is \$200 per hour, while the average low “starting point” per hour was \$165 in 2012.⁴⁸ Given the number of New Mexicans in poverty or even at 200% of the federal poverty level, it is apparent that many are not having their civil legal needs met.

While the problems thus far identified loom large, some solutions are available. This workgroup is recommending the implementation of three programs and the continued study of a fourth potential program.

⁴⁵ *Statistics: 2017 v. 2018 Change in 1L Enrollment*; AmericanBar.org, https://www.americanbar.org/groups/legal_education/resources/statistics/.

⁴⁶ Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, N.Y. TIMES, June 16, 2016, <https://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html>, see also Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs are Cut*, N.Y. TIMES, Jan. 30, 2013, <https://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html>; and David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, <https://www.nytimes.com/2011/01/09/business/09law.html>.

⁴⁷ ACCESSLEX INSTITUTE, *Examining Value, Measuring Engagement A National Study of the Long-Term Outcomes of a Law Degree*, 3 (2018), http://www.abajournal.com/files/AccessLex_report_1.17-2018.pdf.

⁴⁸ STATE BAR OF NEW MEXICO, *THE ECONOMICS OF LAW PRACTICE IN NEW MEXICO, LAWYER COMPENSATION: SUMMARY OF RESULTS*, 13 (2012) <https://www.nmbar.org/NMBARDOCS/PubRes/Reports/2012LawyerCompensationSurvey.pdf>.

Recommendation One – Recruit qualified attorneys to New Mexico, targeting rural areas with UBE Transfer

In 2016, New Mexico joined a group of states and other U.S. jurisdictions that participate in the Uniform Bar Examination (UBE). As of today, 36 total U.S. jurisdictions allow bar examinees to transfer qualifying bar exam scores earned in other UBE jurisdictions into their own states for the purpose of admissions.⁴⁹ Each state sets its own qualifying score, and New Mexico is among five states (also including Alabama, Minnesota, Missouri, and North Dakota) that share the lowest qualifying score in the country: 260.⁵⁰

The next highest qualifying score is 266 (shared by Connecticut, Washington D.C., Illinois, Iowa, Kansas, Maryland, Montana, New Jersey, New York, South Carolina, and the U.S. Virgin Islands). In 2021, Texas will begin to administer the UBE; its qualifying score will be 270.⁵¹

Anyone taking the UBE who scores between a 260 and a 265 is a potential target for recruitment to practice in New Mexico, as those examinees must choose, if they did not test in a 260 state, whether to try the exam again or to apply immediately to start practice via UBE score transfer. In 2018, nationwide, 1,560 examinees earned scores between a 260 and a 265, inclusive.⁵² Only 41 examinees of those 1,560 took the exam in New Mexico.

UBE Transfer offers a potential for recruitment even at scores above 260. There are, for example, seven attorneys in the Ninth Judicial District that transferred a UBE score from Vermont of 270 to practice in New Mexico. All these attorneys currently practice in either the District Attorney's Office or in the Law Offices of the Public Defender.

Law schools would have an incentive to share information about recruitment to New Mexico, as American Bar Association accreditation standards require reporting of each school's number of graduates employed in "bar passage

⁴⁹ *UBE Participating Jurisdictions*, New Mexico Board of Bar Examiners, <http://www.nmexam.org/transfer-ube-score/>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Email interview with Kellie Early, Chief Strategy Officer, Nat'l Conf. of Bar Examiners (Jul. 16, 2019).

required” occupations.⁵³ Law schools seek to place as many of their graduates into J.D.-required jobs as possible, both as a matter of mission and because job placement numbers affect rankings.⁵⁴

Simply recruiting qualifying UBE transfer applicants without partnering with local employers and communities, however, is unlikely to increase attorney presence in rural New Mexico; applicants via UBE transfer are not required to live or work in New Mexico. Some seek licensure in New Mexico in order to expand an interstate practice based in another part of the country and would typically be licensed in multiple states. Some choose to limit their practice to the Federal Courts, using a New Mexico license even though they are located elsewhere.⁵⁵

Given the well-documented high rates of student loan debt experienced by many new attorneys, New Mexico might consider a program similar to that offered to professionals working in health care, including doctors and dentists.⁵⁶ The Health Professional Loan Repayment Program (HPLRP) provides repayment for outstanding student loans in exchange for a two-year commitment to practice full-time in a “designated medical shortage area.”⁵⁷ The HPLRP pays up to \$25,000 to \$35,000 in student loan debt per year and participants may renew their commitment to the program in subsequent years.⁵⁸ The HPLRP is funded with a

⁵³ See, e.g., *University of New Mexico Employment Summary for 2017 Graduates*, UNM School of Law,

<http://lawschool.unm.edu/careers/common/docs/employment-summary-2017-grads.pdf>

⁵⁴ Robert Morse, Kenneth Hines & Elizabeth Martin, *Methodology: 2020 Best Law Schools Rankings*, U.S. News and World Reports, Mar. 28, 2019, <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

⁵⁵ As of November 4, 2019, 54% of the 191 UBE transfer licensees have a state other than New Mexico listed in their Address of Record with the New Mexico Supreme Court.

⁵⁶ AMERICAN DENTAL ASS’N, DENTAL STUDENT LOAN REPAYMENT PROGRAMS & RESOURCES 13 (2014)

<https://www.ada.org/~media/ADA/Education%20and%20Careers/Files/dental-student-loan-repayment-resource.pdf>; HEALTH PROFESSIONAL LOAN REPAYMENT PROGRAM, <https://hed.state.nm.us/financial-aid/loan-repayment-programs/health-professional> (last visited Dec. 18, 2019).

⁵⁷ HEALTH PROFESSIONAL LOAN REPAYMENT PROGRAM SUPRA note 56.

⁵⁸ *Id.*

combination of federal and state funding, which currently is not available to the legal community. However, New Mexico might assess other sources of funding and need not offer as much student loan support to new attorneys as the HPLRP offers to medical professionals.

This workgroup believes that a properly crafted loan forgiveness program could entice attorneys to relocate to New Mexico, and perhaps a rural area. To specifically target rural middle and low income New Mexicans, thereby having the most impact on the access to justice gap, a greater percentage of the law school loans could be forgiven for documented work for clients in this area. This workgroup is aware that ATJ may be considering a loan forgiveness program. However, the contours of that proposed program or legislation had not been fully fleshed out at the time of this report. We believe that a partnership with ATJ as they move forward with a loan forgiveness program would be beneficial, provided that there are mechanisms in place to target rural and underserved areas of New Mexico.

Attorneys could be recruited to rural areas of New Mexico via a UBE transfer to open a private law practice, to take over an existing practice from a retiring attorney or to partner with an attorney contemplating retirement. Recruitment could also benefit civil legal services and government agencies seeking to staff rural offices. The workgroup felt that any attempt to recruit a UBE transfer attorney to a specific area should be done in conjunction with that local community, perhaps through the chamber of commerce and possibly as part of a program that also includes Recommendation Three – Implementation of a Rural Law Opportunity Program. Additionally, the State Bar's Senior Lawyers Division could also be enlisted to provide input. As members plan to retire, recruitment could take place to insure that communities have legal services.

The workgroup recommends that the Supreme Court consider a UBE recruitment program, perhaps in cooperation with local underserved areas to actually recruit transfer applicants who desire to live and work in a more rural setting.

Recommendation Two – Implement a Court Navigators Program

“There is now a major movement in the United States to expand the use of appropriately trained and supervised individuals without full formal legal training to provide help to people who would otherwise be without legal assistance of any kind.”⁵⁹ Across the United States are some 23 Court Navigator programs in fifteen states and the District of Columbia, covering some 80 different locations.⁶⁰ These programs, according to the Georgetown Justice Lab report of June 2019, “provide direct ‘person to person’ assistance to SRLs with basic civil law issues.”⁶¹

Many jurisdictions, including New Mexico, provide legal consumers with self-help resources that are available at both courthouses and online. For example, in 2016 the New Mexico judiciary published a comprehensive District Court Self-Help Guide that offers general legal information (not advice) to self-represented litigants in domestic relations, kinship guardianship, name changes, simple probate, and appeals. Additionally, several courts have established courthouse self-help service centers where self-represented litigants can obtain forms and general information, and in some cases personal assistance, but no other guidance. Navigators, according to the Justice Lab, provide more without getting to legal advice. These Navigators have no law degree and form no attorney-client relationship.

This report will not assess each of the 23 existing Navigator programs, but will utilize information from two programs, those in New York and Colorado, to provide context.

In February 2014, New York City launched its Court Navigator Program which allows non-lawyer volunteers to assist unrepresented litigants in court appearances in landlord-tenant and consumer debt cases. According to the New York State Unified Court System website

(<https://www.nycourts.gov/courts/nyc/housing/rap.shtml>), Court Navigators support and assist unrepresented litigants - people who do not have an attorney -

⁵⁹ Rebecca L. Sandefur & Thomas Clarke, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 3 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949038.

⁶⁰ McClymont, *supra* note 22, at 5 and Appendix listing all programs, <http://napco4courtleaders.org/wp-content/uploads/2019/08/Nonlawyer-Navigators-in-State-Courts.pdf>.

⁶¹ *Id.*

during their court appearances in landlord-tenant and consumer debt cases. Court Navigators provide general information, written materials, and one-on-one assistance to eligible unrepresented litigants.

In addition, Court Navigators provide moral support to litigants, help them access and complete court forms, assist them with keeping paperwork in order, in accessing interpreters and other services, explain what to expect and what the roles of each person is in the courtroom. Court Navigators are also permitted to accompany unrepresented litigants into the courtroom in the Bronx, New York, Kings, and Queens County Housing Court and Bronx Civil Court. While these Court Navigators cannot address the court on their own, they are able to respond to factual questions asked by the judge.

New York Court Navigators:

- Help in using computers located in the courthouse to obtain information and fill out court forms using the Do It Yourself (DIY) computer programs.
- Help find information about the law and how to find a lawyer on a website called Law Help.
- Help persons find resources in the courthouse and outside the court to assist in resolving their cases.
- Help persons collect and organize documents needed for their cases.
- Accompany persons during hallway negotiations with opposing attorneys.
- Accompany persons in conferences with the judge or the judge's court attorney.
- Respond to a judge's or court attorney's questions asking for factual information on the case.

Court Navigators **do not** give legal advice or get involved in negotiations or settlement conferences. Generally, court navigators also do not give out legal information except with the approval of the Chief Administrative Judge of the Courts.

Court Navigators do not have to have any particular education or experience but are generally college students or others that the program deems suitable.

Navigators must attend a three-hour training seminar on civil and housing court processes, the basics of consumer debt cases, interviewing and communication techniques, and the proper use of court computers. In exchange for the training, Court Navigators are expected to provide 30 hours of volunteer service within the first three months after they are trained. Court Navigators appear to be supervised and regulated by Navigator Program supervisors in the New York Unified Court System rather than by attorney regulation or grievance committees.

According to a 2016 American Bar Foundation Study, the Navigator Program, “can impact several kinds of outcomes, ranging from litigants’ understanding of court processes and empowerment to present their side of the case, to providing more relevant information to the decision-maker, to formal legal outcomes and the real-life outcomes experienced by assisted litigants and their families.”⁶²

In June, 2013, the Colorado Judicial Branch created the Self-Represented Litigant Coordinator program (“Sherlocks”) to provide one-on-one procedural support for self-represented individuals.⁶³ Sherlocks do not have to have any specific education or experience and are trained by the Colorado State Court Administrative Office and local district courts on their role. In the last three years for which statistics have been compiled, 2015-2017, Sherlocks have had almost 450,000 contacts with unrepresented parties.⁶⁴

Mary E. McClymont, in the Justice Lab nationwide survey, reports that Navigators provide assistance on a variety of civil cases “such as family, housing, debt collection, domestic violence, conservatorship and elder abuse.”⁶⁵ Several states use AmeriCorps members to staff their Navigator programs, while others integrate Navigators into existing court operations.⁶⁶ Other programs use paid staff, recent college graduates, retirees or university interns to staff Navigator positions.⁶⁷ In the Justice Lab National Survey, Navigators were defined as: having no formal legal credentials, but trained to assist SRLs, without acting under an attorney/client relationship, with no traditional professional liability accruing to the Navigators or the supervising entity, and as part of a formal program so Navigators do not act in their individual capacity.⁶⁸ Navigators do not provide legal advice, but merely provide legal information, resulting in **no** complaints for the unauthorized practice

⁶² See *Roles Beyond Lawyers: Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, ABA, <http://americanbarfoundation.org/research/A2J/RolesBeyondLawyers>.

⁶³ See generally Supreme Court of Colorado Chief Justice Directive 13-01, https://www.courts.state.co.us/Courts/Supreme_Court/Directives/13-01.pdf.

⁶⁴ See *Self Help Information*, Colorado Judicial Branch, https://www.courts.state.co.us/Self_Help/information.cfm

⁶⁵ McClymont, *supra* note 22 at 6.

⁶⁶ *Id.*

⁶⁷ *Id.* at 14.

⁶⁸ *Id.* at 12.

of law.⁶⁹ Navigators traditionally only help one client at a time and offer services to either side in litigation “just for the day.”⁷⁰

This workgroup is initially recommending that the Supreme Court pilot a Navigator program in both a rural district and a large district with a high number of SRLs in civil cases. A Navigator in these Courts could provide forms, information, option guidance, procedural information as well as referrals. This workgroup envisions Navigators attending court hearings to only be supportive and not directly addressing the Court unless questioned. The workgroup felt that a Navigator program could be implemented rather quickly and would recommend that the chosen districts partner with local entities. The workgroup felt that the State Bar and/or the Access to Justice Commission could provide some level of training for the supervisors as well as the actual Navigators. Local entities such as the United Way, Chambers of Commerce and universities or community colleges would be resources to recruit volunteer Navigators. In a very small rural area, the workgroup suggests that the Navigator supervisor could actually be a specially trained court employee.⁷¹ The workgroup understands that the Access to Justice Commission is planning a report recommending that the Supreme Court consider Navigators. Additionally, a small group has been working since June 2019 to explore Navigators in central New Mexico, hoping to pilot them with an AmeriCorps volunteer coordinator in Los Lunas District Court and in the District and Metropolitan courts in Albuquerque by 2020.

With a new program, data collection and methodology analysis will be imperative to determining the success of the endeavor. A post-court survey of the SRL as to the impact of the Navigator’s assistance, education of the SRL and referrals is essential. Additionally a judicial survey of the preparedness of the SRL, the SRL’s apparent understanding of procedures, etc. could also provide valuable information.

A Navigator Program can be tailored to any district, large or small. It is relatively low cost and can truly provide assistance to those who often go without. Consequently, this workgroup recommends that the Supreme Court implement Navigators for New Mexico.

⁶⁹ *Id.* at 17.

⁷⁰ *Id.* at 19.

⁷¹ *Id.* at 31 (noting that three programs have supervisors that are court employees).

Recommendation Three – Implementation of a Rural Law Opportunity Program

“The easiest way to add a lawyer to a particular community is to educate and train a person who hails from that community and wishes to return.”⁷² However, this is not always an easy option. To combat this problem, South Dakota has taken an innovative approach to recruiting attorneys to practice in rural areas. South Dakota offers a government stipend in exchange for a commitment to live and practice in selected rural counties.⁷³ Selected attorneys work for five years in rural South Dakota and in addition to their salary, receive \$12,500 annually.⁷⁴ This unique program relies on funding not only from the bar, and the legislature, but a commitment from the local communities (counties with a population of 10,000 or less) receiving an attorney.⁷⁵ Attorneys are not recruited to move to the most remote areas of the state, as the program recognizes “that long-term fit is the most important objective when placing an attorney.”⁷⁶ None of the South Dakota attorneys placed through the Rural Attorney Recruitment Program have left the program due to a lack of work.⁷⁷

In addition to the South Dakota program, the University of Nebraska College of Law has instituted a “Rural Law Opportunities Program” partnering with other universities to jointly recruit rural incoming college freshmen to pursue legal jobs outside the urban area. Universities offer free tuition, in exchange, students must maintain a 3.5 GPA and score at an appropriate level on the Law School Admissions Test and then the law school automatically admits the students.⁷⁸

⁷² PRUITT, COOL, ET. AL., *supra* note 19 at 147.

⁷³ Conf. of State Court Administrators, *supra* note 11 at 19.

⁷⁴ *Id.*

⁷⁵ PRUITT, COOL, ET. AL., *supra* note 19 at 102-103.

⁷⁶ *Id.* at 109.

⁷⁷ *Id.* at 102, 110.

⁷⁸ Leslie Reed, “Nebraska Law Tackles State’s Rural Legal Needs”, Nebraska Today, Oct. 26, 2016; *see also* CONF. OF STATE COURT ADMINISTRATORS, *supra* note 11.

Arkansas has started a Rural Practice Incubator Project at the William H. Bowen School of Law at the University of Arkansas at Little Rock.⁷⁹ Funded by the attorney general and donations, this 18-month long program offers training, introductions to rural attorneys and judges, and law office management assistance. Most of the participants have set up solo legal practices, some in the rural counties where they grew up.⁸⁰

This workgroup recommends that the Supreme Court partner with the State Bar and the UNM School of Law to explore a rural law opportunity type program for New Mexico's underserved rural areas. New Mexico's program could conceivably be a program that takes the best portions of other programs, such as recruiting from state universities, guaranteed admission, mentoring and commitment from underserved rural areas for support. This option will require financial support at all levels. The workgroup recognizes that this option will not provide a quick solution. However, it may offer a sustainable solution to the underserved rural areas of New Mexico.

While the workgroup recognizes that an attorney in every rural area is not realistic, alternatives exist to serving rural areas. The Conference of State Court Administrators in its 2018 Policy Paper, *Courts Need to Enhance Access to Justice in Rural America*, documents an "untried solution to providing legal services for rural areas" where legal centers or community justice centers are created in rural communities in existing buildings, such as public libraries, where attorneys from around the state could have "virtual offices" and not have to travel to provide access to justice.⁸¹ For example an attorney in Deming in the Sixth Judicial District, could have a virtual office at the public library in Silver City and Lordsburg, thereby covering a three county area.

The New Mexico State Bar has an Entrepreneurs in Community Lawyering (ECL) program which acts as a legal incubator program. The workgroup felt that as part of the push to attract attorneys to rural areas, there could be an increased emphasis on the ECL program and a partnership with the State Bar and underserved areas could be created to try to encourage rural representation.

⁷⁹ April Simpson, For Hire: *Lawyers in Rural America*, *Governing*, Jun. 27, 2019, <https://www.governing.com/topics/public-justice-safety/sl-Lawyers-in-Rural-America-Wanted.html>

⁸⁰ *Id.*

⁸¹ CONF. OF STATE COURT ADMINISTRATORS, *supra* note 11 at 21.

The ECL program has only been in operation for three years. ECL's mission, according to the Bar, is two-fold: to assist entrepreneurial new lawyers develop successful solo practices; and to provide legal services for people of moderate means throughout New Mexico. In collaboration with the private and public bars, and access-to-justice non-profits and state agencies, ECL offers a flexible, twenty-four month program that provides a sheltered environment and rigorous mentorship in ethics, professionalism, law practice management and substantive law. Participating lawyers are encouraged to employ alternative billing methods, offer unbundled services and limited scope representation, and consider innovative business practices to maintain the desired affordability. While in the ECL program, participating lawyers are encouraged to practice in the areas of law most needed by the moderate-means populations in our communities, including: family law (divorce and custody, domestic violence, kinship guardianship and adoption); adult guardianship; children's advocacy; workers' compensation; probate; and simple estate planning.

By the end of December 2019, ten newly licensed lawyers will have been admitted to ECL and five will have completed a full two years in the program. The five lawyers who have completed the program have modestly successful solo practices that provide a variety of legal services to New Mexicans of moderate means. Each of these lawyers has represented clients who live outside of the Albuquerque area, including Carlsbad, Artesia, Farmington, Estancia, Los Alamos, Rio Rancho and Las Cruces. However, none of ECL's lawyers has opted to relocate their practice to a community outside of Albuquerque, preferring instead to travel to smaller towns and cities for client meetings, depositions and court hearings, which cannot be conducted by telephone or skype. Even though several lawyers admitted into the ECL program were raised in New Mexico's smaller communities (Grants, Artesia, Socorro and Rio Rancho) and have families in those communities, they have preferred to remain in Albuquerque. This has been a source of concern for ECL, as one of the program's goals is to train lawyers willing to establish practices in communities outside of Albuquerque. As ECL grows in the coming years, the State Bar of New Mexico plans to work to identify obstacles that keep new lawyers from establishing successful solo practices outside of Albuquerque and encourage successful ECL graduates to relocate to communities around the state.

As mentioned in Recommendation One, this workgroup recognizes that the high cost of a legal education is a deterrent to attorneys operating outside of the Rio Grande corridor. Dr. Paul Roth, Chancellor of the UNM Health Sciences Center on Monday October 21, 2019 announced his bold plan to address a doctor shortage

throughout New Mexico.⁸² Dr. Roth's proposal is that students would be given free tuition to UNM's medical school with a commitment that they return to NM to practice once residency is completed.⁸³ The workgroup is not advocating for free tuition for law school, but advocates that some sort of loan forgiveness be implemented. The loan forgiveness could, perhaps, be at a higher rate if services were provided in rural or underserved areas of New Mexico.

Loan forgiveness, accompanied by a Rural Law Opportunity type program and in conjunction with the State Bar's ECL could change the legal landscape in rural New Mexico⁸⁴. While the workgroup recognizes that this is a long term approach and will not provide quick access to justice, it is a program area worth our time and investment. This workgroup again respectfully recommends that the Supreme Court partner with the University of New Mexico School of Law, the State Bar and implement a program that will incentivize rural law practice.

Recommendation Four – Further study regarding licensing non-lawyers to perform limited legal work

Access to justice is more than just finding attorneys. Georgia Supreme Court Justice Nels Peterson said, "If we're going to expand access to justice, we have to think about access to justice as being more than access to a lawyer."⁸⁵ The New Mexico Access to Justice Commission in 2015 recommended to the New Mexico Supreme Court that it study and implement a program licensing non-lawyers to perform limited legal work. This workgroup, while not making an implementation recommendation, does recommend further study, accompanied by intensive survey work before moving forward.

Herbert Kritzer, a political scientist has conducted a study regarding non-lawyer advocates and their efficacy in four administrative law settings. "On the whole non-lawyers did as well as lawyers, and better than lawyers who did not have

⁸² Ryan Boetel, *UNM Dean Proposes Free Medical School*, ALBUQUERQUE JOURNAL, October 21, 2019, <https://www.abqjournal.com/1381305/med-school-dean-proposes-free-tuition-for-commitment.html>.

⁸³ *Id.*

⁸⁴ Since many of the lawyers in rural counties are government attorneys, efforts could be put into retaining them in the area when they leave public employment or retire.

⁸⁵ PRUITT, COOL, ET. AL., *supra* note 19 at 135.

experience in the particular tribunal.”⁸⁶ The conclusion of this study is rather startling: “The presence or absence of legal training is less important than substantial experience with the setting.”⁸⁷ Understanding the law does not necessarily mean having a law degree.

Washington State pioneered this innovative program, the Limited Licensed Legal Technician (LLLT). This is a program whereby trained non-lawyers offer legal services on a limited basis in a single area of law, currently family law.⁸⁸ In Washington, Limited Licensed Legal Technicians (“LLLT”) are required to: (a) obtain an associate’s degree plus 45 hours of legal studies at an American Bar Association-accredited or LLLT Board approved educational institution; (b) perform 3,000 hours of paralegal or legal assistant work; (c) pass two licensure exams and one ethics exam; and (d) pass a character and fitness evaluation.⁸⁹ In 2017, the estimated educational cost of becoming a LLLT was \$14,440.⁹⁰

Once licensed, a LLLT can provide limited services in the area of domestic relations. Such services include drafting forms, offering legal advice to clients, and generally assisting clients in navigating through a domestic relations matter. The legal matter must be relatively simple and currently LLLTs are not allowed to advocate on behalf of a client before a tribunal or in mediated negotiations.

The Washington Supreme Court, in adopting the program said:

“Our adversarial civil legal system is complex. It is unaffordable not only to low income people but ... moderate income people as well. ... Every day, thousands of unrepresented (pro se) individuals seek to resolve important legal matters in our courts. Many of these are low

⁸⁶ Barton, *supra* note 6 at 105.

⁸⁷ *Id.* at 106.

⁸⁸ *Id.* at 22.

⁸⁹ The substance of the Washington State LLLT program can be found in the Washington State Court Rules: Admission and Practice Rules, Rule 28, http://www.courts.wa.gov/court_rules/Word/gaapr28.doc.

⁹⁰ See Thomas M. Clarke and Rebecca L. Sandefur, Preliminary Evaluation of the Washington State Limited License Legal Technician Program (March, 2017), http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf.

income people who seek but cannot obtain help from an overtaxed, underfunded civil legal aid system. Many others are moderate income people for whom existing market rates for legal services are cost-prohibitive and who, unfortunately, must search for alternatives in the unregulated marketplace.”⁹¹

Utah followed Washington and in 2019 began licensing non-lawyers to provide services. In Utah, a Licensed Paralegal Practitioner (“LPP”) must have either: (a) a law degree from an American Bar Association-accredited school; (b) an associate’s or bachelor’s degree in paralegal studies from an accredited school; or (c) a bachelor’s degree in any field from an accredited school plus a paralegal certificate or 15 hours of paralegal studies from an accredited school.⁹² If the LPP candidate does not have a law degree, he/she must take a course in professional ethics, and a specialized course of instruction in each area in which he/she seeks to be licensed. Additionally, LPPs who do not have a law degree must; (a) obtain a certification from one of three national paralegal/legal assistance associations; and (b) have a total of 1,500 hours of substantive law-related experience including 500 hours in family law for licensure in family law, and/or 100 hours in forcible entry and detainer or debt collection for licensure in other areas. LPPs must pass a licensure exam in each area they wish to be licensed as well as a separate ethics exam. Further, LPPs must pass a character and fitness evaluation. Estimating the cost of becoming an LPP is difficult because of the varied educational routes a candidate might take to obtain a license.

LPPs may be licensed to provide legal assistance and advice to clients in family law, landlord-tenant disputes, and certain consumer debt matters. Like LLLTs, LPPs cannot advocate on behalf of a client before a tribunal, but unlike LLLTs they may represent a client in mediated negotiations. Utah currently has only four

⁹¹ The Supreme Court of Washington: Order No. 25700-A-1005, *In the Matter of the Adoption of New APR 28 – Limited Practice Rule for Limited License Legal Technicians*, Jun. 15, 2012, <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

⁹² The substance of the Utah LPP program can be found in the Utah Supreme Court Rules of Professional Practice, Chapter 15, https://www.utcourts.gov/resources/rules/ucja/#Chapter_15.

licensed LPPs; expectations are that the number could double by March, 2020 and grow to more than 200 within ten years.⁹³

Currently, only Washington State and Utah license paraprofessionals to practice law with a limited scope, but more are on the horizon. In 2017, Oregon's Futures Task Force recommended that the Oregon Supreme Court adopt a paraprofessional licensing program.⁹⁴ In 2019, a state bar task force in California proposed rules to create licenses for non-lawyers to provide limited legal advice and services in "areas of critical need (e.g. housing, health and social services, domestic relations, domestic violence)," to allow technology-driven online delivery of legal services, and to allow non-lawyer ownership of legal service entities.⁹⁵ The goal of each is to address the growing need for low and moderate income persons to access affordable legal services. The Washington State and Utah programs are similar in their educational and experiential requirements. "The most compelling argument for licensing paraprofessionals is that the Bar's other efforts to close the access-to-justice gap have continued to fall short."⁹⁶

Both Washington's LLLTs and Utah's LPPs can practice independent of a fully licensed lawyer and both are regulated by their respective state's regulatory body. Both are required to take continuing education after licensure; LLLTs must obtain 30 credit hours over a three-year compliance period, and LPPs must complete 12 hours in every two-year compliance period. LLLTs are required to demonstrate financial responsibility sufficient to respond to damages claims for malpractice. Specifically, they are required to maintain professional liability insurance in

⁹³Lyle Moran, *Utah's Licensed Paralegal Practitioner Program Starts Small*, ABOVE THE LAW, December 12, 2019, <https://abovethelaw.com/2019/12/utahs-licensed-paralegal-practitioner-program-starts-small/>.

⁹⁴ See State Bar of Oregon Futures Task Force, *Reports and Recommendations of the Regulatory Committee and Innovations Committee* (June 2017), https://www.osbar.org/docs/resources/taskforces/futures/FuturesTF_Reports.pdf.

⁹⁵ See State Bar of California Task Force on Access Through innovation of Legal Services, *Request to Circulate Tentative Recommendations for Public Comment*, <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf>.

⁹⁶State Bar of Oregon Futures Task Force, *The Future of Legal Services in Oregon: Executive Summary* 8 (June 2017) *The Future of Legal Services in Oregon*, p. 8, http://www.osbar.org/docs/resources/taskforces/futures/FuturesTF_Summary.pdf.

minimum amounts of \$100,000 per claim and a \$300,000 annual aggregate limit. LPPs have no such requirement.

Advocates of licensed paraprofessional programs believe that licensed paraprofessionals will be able to charge lower fees premised primarily on the idea that their educational debt is likely to be lower than a three-year law school graduate. Because of the age of each program – Washington’s first LLLTs were licensed in 2015 and Utah anticipates licensing its first LPPs in 2019 - it is too early to determine if this premise is accurate. Regardless, a March 2017 study of Washington’s LLLTs reported general client satisfaction with LLLTs, and a growth in LLLT numbers (as of April, 2019, there were 36 actively licensed LLLTs in Washington).⁹⁷ The study also found that, despite the strong pool of available clients, LLLTs who were working independent of a law firm were having difficulty attracting enough clients to sustain a viable business. The study suggested that an increased emphasis on marketing designed to educate the public on the availability of and services offered by LLLTs could potentially remedy this concern. Ultimately, the study concluded that, overall, the program was a success and met a significant need. Washington’s program is, however, costly. In the September 2019 edition of *NW Lawyer*, the Washington State Bar Treasurer, opined that the \$1.5 million spent from 2015 to 2019 for the now 37 active LLLTs means the program is not cost effective.⁹⁸ Washington is clearly struggling to make its program self-sustaining and less of a cost burden to the judiciary.

Washington State licenses a second category of individuals with a narrower scope of practice than LLLTs; Limited Practice Officers (“LPOs”). LPOs are licensed to prepare and complete documents that have been approved by the LPO Board for use in the closing of a loan, extension of credit, and the sale or other transfer of real or personal property.⁹⁹ Approved documents are limited to deeds, promissory

⁹⁷ See Thomas M. Clarke & Rebecca L. Sandefur, Preliminary Evaluation of the Washington State Limited License Legal Technician Program (March, 2017), http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf.

⁹⁸ Dan Bridges, *The Cost of LLLTs*, *NW Lawyer* (Sept. 2019), http://nwlawyer.wsba.org/nwlawyer/sept_2019/MobilePagedReplica.action?pm=2&folio=48#pg50.

⁹⁹ The substance of the Washington State LPO program can be found in the Washington State Court Rules: Admission and Practice Rules, Rule 12,

notes, guaranties, deeds of trust, reconveyances, mortgages, satisfactions, security agreements, releases, Uniform Commercial Code documents, assignments, contracts, real estate excise tax affidavits, bills of sale, and powers of attorney. Once licensed, an LPO is authorized to select and prepare the proper legal documents based on the type of transaction and the parties' written agreement or instructions. An LPO can use her/his experience and judgement in selecting which documents need to be prepared for each transaction. An LPO can perform services for a transaction only if all the parties to the transaction approve. LPOs are required to be 18 years of age and they must pass a substantive exam and a character and fitness evaluation prior to being licensed. LPOs are regulated by the LPO Board and, like Washington State LLLTs, are required to complete 30 hours of continuing education over a three-year compliance period. LPOs must either maintain professional liability insurance in a minimum amount of \$100,000 per claim or demonstrate a net worth of at least \$200,000.

Some jurisdictions, including the United States Bankruptcy Court, allow trained individuals to assist others in the preparation and/or completion of legal documents. Often considered "scriveners," these individuals are not authorized to offer legal advice in the course of completing or preparing documents but, in some cases, may offer general legal information.

Effective July 1, 2003, Arizona began certifying non-attorney legal document preparers ("CLDP") to provide document preparation assistance to individuals and entities who were not represented by an attorney.¹⁰⁰ CLDPs are not required to be supervised by a licensed attorney, and they can provide general legal information but cannot give legal advice. The program was developed, in part, in recognition of the public's need for access to legal services while allowing the Arizona Supreme Court to maintain regulatory oversight of such nonlawyer legal services. CLDPs are supervised and regulated by a Board and have their own code of professional conduct and minimum continuing education requirements (10 hours per year). It does not appear that CLDPs are required to carry professional liability insurance.

To apply to become a CLDP, an individual must have either: (a) a high school diploma and two years of legal experience; (b) a college degree and one year of legal experience; (c) a paralegal certificate from an American Bar Association-

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=apr&ruleid=gaapr12.

¹⁰⁰ See generally Arizona Legal Document Preparer Program, AZ Courts, <https://www.azcourts.gov/cld/Legal-Document-Preparer-Program>.

accredited program; or (d) a JD. In order to obtain certification, a CLDP applicant must pass an examination and a character and fitness evaluation. Once certified, a CLDP is authorized to:

- Prepare or provide legal documents, without the supervision of an attorney, for a person or entity in any legal matter when that person or entity is not represented by an attorney;
- Provide general legal information, but may not provide any kind of specific advice, opinion, or recommendation to a person or entity about possible legal rights, remedies, defenses, options, or strategies;
- Provide general factual information pertaining to legal rights, procedures, or options available to a person or entity in a legal matter when that person or entity is not represented by an attorney;
- Make legal forms and documents available to a person or entity, who is not represented by an attorney; and
- File, record, and arrange for service of legal forms and documents for a person or entity in a legal matter when that person or entity is not represented by an attorney.

With limited exceptions, a CLDP may not sign any document he or she prepares for or provides to a person or entity.

In many tribal jurisdictions across the country Tribal Court Advocates, who are not licensed attorneys, can represent clients in both civil and criminal proceedings in tribal court. The qualifications for Tribal Court Advocates vary from tribe to tribe, but generally limit the position to enrolled tribal members who can demonstrate good moral character and knowledge of the tribe's culture and legal system. In the Navajo Nation, for instance, non-attorneys can apply for membership in the Navajo Nation Bar Association upon condition that they pass an examination and maintain Navajo specific CLEs.¹⁰¹ In contrast, in the Mescalero Apache tribe, in order to practice in the Tribal Court, lay advocates need only submit a written application for approval to the Tribal Counsel and pay the \$250.00 application fee; the tribe

¹⁰¹ Courts & Peacemaking in the Navajo Nation: A Public Guide;
<http://www.navajocourts.org/publicguide.htm>.

does not maintain a bar association.¹⁰² Tribal members can represent clients in criminal and civil proceedings, while non-member attorneys must apply for approval from the Tribal Council and can only represent clients in criminal proceedings.

According to a member of the New Mexico Access to Justice Commission, New Mexico Legal Aid (“NMLA”) is piloting a project in which NMLA teaches community members, presently limited to counselors working in a domestic violence shelter in Gallup, NM, interview techniques designed to identify whether individuals being interviewed need legal representation. The interviewers, called Community Justice Workers, are taught how to spot potential legal issues and then instructed on resources available for the interviewees. The interviewer does not offer legal advice and is, essentially, triaging the interviewee’s potential legal problems.

While the concept of a licensed paraprofessional is relatively new in state court jurisdictions in the United States, it is not entirely new in other countries and venues. The Law Society of Ontario, Canada began licensing paralegals in 2007. Without having to work under the supervision of a fully-licensed lawyer, licensed paralegals in Ontario are allowed to advise clients and represent them before courts and tribunals in four types of proceedings: (a) small-claims proceedings; (b) provincial offenses before the Ontario Court of Justice (for example traffic-citations); (c) summary-conviction proceedings (criminal matters with penalties not to exceed six months in jail or a \$5,000 fine); and (d) proceedings before administrative tribunals, including landlord-tenant and immigration matters.¹⁰³ A licensed paralegal can select, draft, complete, or revise any legal document for use in the proceeding, provide advice about any legal rights or responsibilities related to the proceeding, negotiate on the client’s behalf, and advocate before a tribunal.

In order to obtain a license, an individual must graduate from an accredited paralegal program and perform a minimum of 120 hours of field work.¹⁰⁴ They

¹⁰² Tribal Law Journal UNM School of Law, *Tribal Court Handbook*, http://lawschool.unm.edu/tlj/handbook/pdfs/Mescalero_Apache_2012.pdf.

¹⁰³ The substance of the Law Society of Ontario’s licensed paralegal scope of practice can be found in the Law Society Act, Bylaw 4, <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/by-law-4.pdf>.

¹⁰⁴ The substance of the Law Society of Ontario’s licensing process for paralegals can be found in the Law Society of Ontario’s Licensing Process Policies,

must also pass an examination testing their substantive, procedural, ethical and practice management skills, and undergo a character and fitness evaluation. Ontario paralegals are regulated by the Law Society of Ontario and are required to complete 12 hours of continuing education annually and carry professional liability insurance with minimum policy limits of \$1 million per claim and \$2 million in the aggregate.

A 2012 five-year study of Ontario's licensed paralegals determined that 74% of clients surveyed were satisfied or very satisfied with the paraprofessionals' services, and 68% found their services to be a good or very good value.¹⁰⁵ The Law Society of Ontario is considering expanding paraprofessional services to include limited family law matters.

While not a state jurisdiction, in the United States, patent agents have been allowed to represent clients before the United States Patent and Trade Organization ("USPTO") for many years. Like a patent attorney, patent agents can file a patent with the USPTO and advise clients on patentability issues. A patent agent does not need to have a law degree, but must have a BS, MS or PhD in a technical or scientific field from an accredited university and must pass the same patent bar exam as a patent attorney. The USPTO regulates the conduct of patent agents in the same manner that it regulates patent attorneys. Patent agents are not required to maintain professional liability insurance. Generally speaking, patent agents are believed to be more affordable than a patent attorney but their scope of practice is much more limited in that they cannot appear in court, cannot offer legal advice on patent infringement, and cannot perform legal work in related business matters or in other areas of intellectual property such as trademark and copyright law.

Pursuant to 11 U.S.C. § 110, a person other than an attorney or someone working for an attorney may prepare for compensation bankruptcy documents for a debtor for filing with the United States Bankruptcy Court. There are no educational or experience requirements for an individual to become a bankruptcy petition preparer ("BPP"), nor does a BPP have to pass any type of exam or undergo any character or fitness evaluation. BPPs are regulated by the United States

<https://lso.ca/becoming-licensed/paralegal-licensing-process/licensing-process-policies>.

¹⁰⁵ See Law Society of Upper Canada, *Report to Attorney General of Ontario Pursuant to Section 63.1 of the Law Society Act* (Jun., 2012), <http://lawsocietygazette.ca/wp-content/uploads/2012/07/Paralegal-5-year-Review.pdf>.

Bankruptcy Court under the terms of 11 U.S.C. § 110 and cannot provide legal advice or direction, including advice about what type of bankruptcy a person should pursue, how assets and liabilities should be listed or disclosed, and whether a debtor has exempt assets. Instead, a BPP is limited to completing information on the debtor's chosen forms; in essence, serving as a scrivener.

Each of these existing programs has its benefits and drawbacks. This workgroup is not making a full recommendation for implementation of such a program for New Mexico. As mentioned above, Washington's program is not as successful at reducing the access to justice gap as officials had hoped. This workgroup recommends that New Mexico continue to monitor and study other states that are implementing these types of programs. This workgroup was not unanimous in its recommendation of further study for licensing non-lawyers, as some members felt the program should immediately move forward and others were so concerned with protection of the public that they felt this type of program should not move forward in our state. The workgroup also felt that intensive survey work needed to be done before any recommendation could be made to move forward, as Washington's program is costly and has only yielded 37 active LLLTs. Research and survey work is imperative as there is no mechanism to gauge whether litigants would actually utilize such a program, whether people would choose being an LLT as a career path and finally whether, even in a rural community, an LLT could earn a living. This workgroup recommends that the Supreme Court contract with an entity and conduct this market research before starting any program.

If the Supreme Court continues to study the possibility of licensing non-lawyers, this workgroup has identified several areas that should be considered by the Court, and perhaps be included in the initial round of market research and surveys.

Education: Washington's program has been criticized for the length of time to license new participants. Utah's program currently has only one university providing the educational component. Consequently, the workgroup, which included two representatives from New Mexico community colleges, gravitated toward local education prior to licensure. The workgroup felt that the nature of community colleges could be a good fit to keeping people in underserved areas. For example, Clovis Community College could be an avenue for a De Baca County resident to be educated. Local community colleges offer a general lower cost option and provide the farthest reach. Washington's program does not qualify to entitle its students to receive federal financial aid. The workgroup felt that perhaps a degree program like an Associate's degree could be crafted to qualify for

federal financial aid for students in need. Working with the community colleges as well as the School of Law, the parties could be able to craft an appropriate educational component. Some concern was expressed amongst workgroup members whether appropriate training could be crafted to prepare students for a limited practice while protecting the public.

Another concern of the workgroup regarding education was testing. As mentioned above, Washington's program is expensive, probably due in large part to the licensing examination. A licensing examination with appropriate testing reliability would be very costly. An ethics examination would add additional cost and should be a consideration moving forward.

Potential Pool of LLTs: The workgroup also felt, like the ATJ did in 2015 that if New Mexico were to consider LLTs in the future, that it should implement a grandfather mechanism or clause to allow appropriately trained and certified paralegals a pathway to become LLTs. Additionally, individuals who had graduated from an American Bar Association-accredited law school, but not testing for the bar examination, could, perhaps, be grandfathered in as LLTs. The workgroup, however, felt strongly that attorneys suspended or disbarred not be considered for LLTs. Finally, the workgroup recommended if the Supreme Court, in the future considered LLTs, that individuals within a few points of a 260 on the Uniform Bar Examination be considered for LLTs if they are not able to pass the bar examination. Research and survey work would be essential here, to determine whether current paralegals would want to participate as LLTs with additional training.

Areas of Practice: In addition to the types of legal service providers that may be available to the public, the committee considered the areas in which such providers could be allowed to practice. Family law, landlord-tenant, and consumer debt appear to be a common area in which licensed paraprofessionals are allowed to offer some type of service in most jurisdictions. There were 44,621 family law cases across New Mexico with a self-represented litigant within the last fiscal year. The workgroup felt that family law with its subgroups of divorce, custody, support and paternity could potentially be a good practice area for LLTs. However, some workgroup members expressed concern about the areas of practice and thought supervision of LLTs by an attorney was important and afforded the most protection to the public. The group was not in favor of allowing anyone other than an attorney to prepare a Qualified Domestic Relations Order (QDRO). This workgroup did not gather data from JID further breaking down the self-represented litigants in cases just labeled as civil. In other words, no data was mined regarding how many debt

and money due cases, tort cases, and landlord/tenant cases were represented in the civil category.

None of the U.S. jurisdictions appear to allow paraprofessionals to offer services in criminal law. Ontario, Canada does allow licensed paralegals to offer services for certain criminal misdemeanor type offenses. One area that does not appear to have been explored is mediation; i.e. training and allowing a licensed paraprofessional to serve as a mediator, whether as a supplement to an online dispute resolution program, an addition to other areas in which licensed paraprofessionals were allowed to perform services, or as a stand-alone service.

The 2015 report to the Supreme Court from the ATJ Commission identified potential activities that an LLT could perform such as “select, complete, draft, file and serve pleadings and other legal documents from statutory, court and attorney approved forms, including: petitions/complaints and summons, uncontested divorce documents, garnishment and wage withholding documents, child support worksheets, Kinship Guardianship pleadings, and standard discovery requests.” Some members of this workgroup, like the ATJ Commission believe that an appropriately licensed LLT could potentially advise clients regarding the nature of the pleadings above, draft orders by reviewing audio or court transcripts, provide advice about legal procedures, review and assess relevance of documents and exhibits, help obtain exhibits, and provide organizational assistance in preparation of hearings, to name a small few tasks.

Geographic Service Areas: One of the stated goals of many licensed paraprofessional programs is to offer legal services to underserved, rural areas. Again, because of the age of the programs in the United States, it is too early to determine if that goal is being achieved. Moreover, it does not appear to have been a specific focus of the 2012 review of the licensed paralegal program in Ontario, Canada. Despite the lack of a large amount of data on this issue, undoubtedly the question of whether a paraprofessional will provide services to or in a rural area is closely tied to whether the provider can earn a living by providing services to such communities, including: (a) whether the provider will be expected to live in the rural community; (b) whether the provider’s scope of practice is sufficiently broad to generate enough business; and (c) whether the provider can repay student loans attendant to obtaining licensure. These are all areas that should be explored with market research.

If the Supreme Court were, at some future date, to implement LLTs, this workgroup believes consideration would have to be given, among other things, to:

(a) the appropriateness of a paraprofessional living in a larger community and having “office hours” in a smaller community, or providing services remotely; (b) the likely student loan debt a paraprofessional will carry when first licensed; (c) whether some type of loan forgiveness may be available for those living in and providing services to rural communities; and (d) whether some type of incentive may be appropriate to encourage a provider to move to and provide services in a rural community.¹⁰⁶

If the New Mexico Supreme Court were to someday license LLTs, regulation would also have to be considered. Existing rules of Professional Conduct and Rules Governing Discipline could be easily adapted to provide a regulatory framework for LLT practitioners. Potentially, the regulation could be performed by the disciplinary board without a significant increase in cost because it would take some time for the program to grow. The New Mexico Disciplinary Board has indicated its willingness to regulate the licensure of paraprofessionals such as LLTs.

Furthermore, if the Supreme Court were to recommend LLTs, consideration should be given to the potential overlap as some Tribal Court Advocates may wish to work in both State and Tribal Courts.

Finally, the workgroup feels that once Navigator pilots are established (see Recommendation Two, above), the data collection and survey work done post-Court appearance for the SRL could include questions regarding the usefulness of an LLT. Questions could include topics such as if a service were available, would you utilize it, and what would you be willing to pay for such a service. At the end of a full year of Navigator service, a focus group should be convened to address whether training Navigators as potential LLTs would be appropriate. Perhaps a

¹⁰⁶ See, e.g., South Dakota Rural Attorney Recruitment Program, <https://ujs.sd.gov/uploads/RuralAttorneyRecruitmentProgram.pdf>. This program provides qualifying attorneys an incentive payment in return for five continuous years of practice in an eligible rural county. Specifically, attorneys enter into a contract with the South Dakota Unified Judicial System, the South Dakota State Bar and an eligible County (one with less than 10,000 residents) to practice in the rural county. In return, the attorney receives an incentive payment, payable in five equal annual installments, each payment equal to 90% of one year’s resident tuition and fees at the University of South Dakota School of Law, as determined on July 1, 2013.

special rule change and a pilot program of LLTs could be implemented with appropriate supervision. The pilot program, under attorney supervision, would not only protect the public, but offer an assessment of the true viability of LLTs in New Mexico. The workgroup specifically felt that a pilot project in a busy legal aid office in a more rural area could be a starting point for LLTs.

In summary, this workgroup was not unanimous on a recommendation for the Supreme Court. Even though Washington's program is the "oldest," it is still relatively new and untested. As Utah and Oregon move forward, New Mexico can monitor their programs and continue to assess. This workgroup specifically recommends that the Utah program be assessed after it has been operational for a full year.

This workgroup specifically solicits feedback from the New Mexico Supreme Court and stands willing to continue to study LLTs.

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FUTURE

THE FUTURE OF LEGAL SERVICES IN OREGON



OSB Futures Task Force

Executive Summary | June 2017

The relentless growth of technology and the effects of globalization are upending the legal services market, feeding innovation, exposing inefficiencies, and presenting opportunities for growth.

Consumers are voting with their wallets. The alternative legal services market has quickly become a multibillion dollar industry.

Oregon's access-to-justice gap disproportionately affects the most vulnerable among us.

Lawyers and nonlawyer entrepreneurs see the legal market as ripe for innovation.

OSB Futures Task Force, 2017

“It will not do for Bar members to stand still or to rage against the tide as the world around us evolves.”

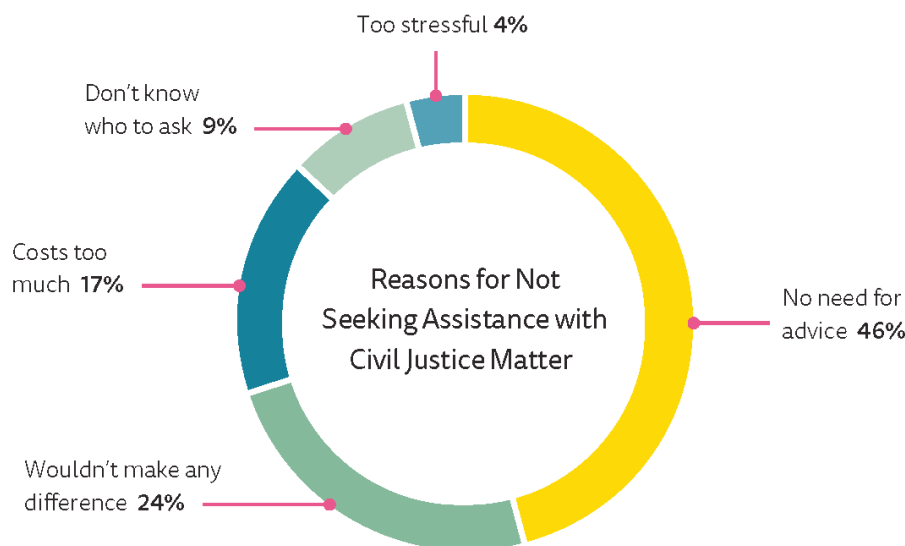
OSB Advertising Task Force Report, 2009

I. Background

The legal services market has entered a period of intense disruption. Technological advances are transforming how we deliver legal services, resolve legal disputes, and engage in legal learning. Consumers of legal services—including sophisticated corporations¹ as well as individual clients—are demanding more for less and are apt to employ self-help rather than to hire a professional.

Many lawyers are so accustomed to thinking of the law as a “full service” profession—where a client with an incipient legal issue engages a lawyer or law firm to provide a full complement of legal services until the “matter” is concluded—that it is difficult to imagine legal services being provided any other way. But they are. The future is here. Oregonians are using websites not merely to gather information about lawyers, but to actually obtain legal advice. Services traditionally provided in person-to-person interactions between lawyers and clients are now being offered by online providers such as LegalZoom and Avvo.² Customized legal forms, short telephonic consultations, and advice via chat are all available at the touch of a button. Consumers are bypassing the traditional full-service lawyer-client relationship in favor of “unbundled” legal services—limited-scope legal services that enable consumers to pick and choose the services or tasks for which they are willing to pay. Or, they are bypassing the lawyer-client relationship altogether and using “intelligent” online software to create their own wills, trusts, and other “routine” legal documents that they believe are sufficient to meet their needs.

Consumers are voting with their wallets. The alternative legal services market has quickly become a multibillion dollar industry. And why not? Consumers naturally want to resolve their legal issues efficiently and cost-effectively, as they do any other problem. Commoditization of services and the instant availability of information at the click of a mouse now set their expectations; they demand easy access to qualified lawyers and legal resources as well as



Sandefur, Rebecca. *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*. University of Illinois at Urbana-Champaign: American Bar Foundation, August 8, 2014.

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transparent, competitive pricing. And it is more tempting to simply not hire a lawyer, because the Internet's infinite amount of knowledge on any subject makes a do-it-yourself approach seem feasible for many legal matters.

Against this backdrop, one might think that the public is finding it easier than ever to access legal services. It is startling, therefore, to learn that the increased availability of *information* about the law and legal services has done nothing to reduce the access-to-justice gap. The American Bar Association Commission on the Future of Legal Services recently found that “[d]espite sustained efforts to expand the public’s access to legal services [over the past century], significant unmet needs persist” and that “[m]ost people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.”³ Specific findings from the Commission include:

Low-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year.

Legal Services Corporation,
The Justice Gap, 2017

- As of the last census, 63 million people, or one-fifth of the population, met the financial requirements for legal aid, yet funding for the Legal Services Corporation (the primary vehicle for federal legal aid funding) is inadequate. “[I]n some jurisdictions, more than eighty percent of litigants in poverty are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases.”⁴

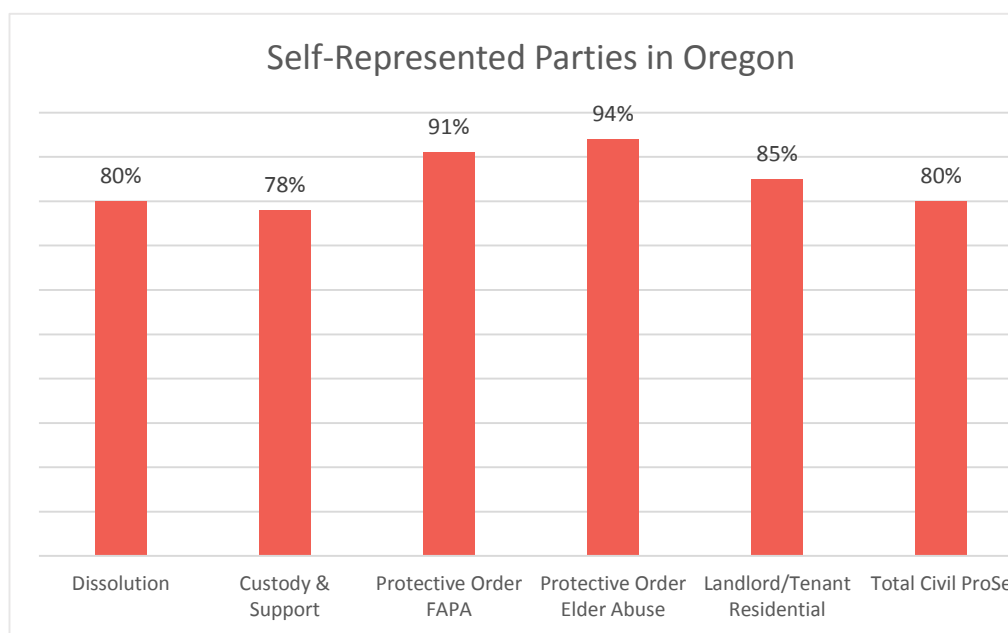
- Access to justice is not just a problem for the poor. One study showed that “well over 100 million Americans [are] living with civil justice problems, many involving what the American

Bar Association has termed ‘basic human needs,’” “including matters related to shelter, sustenance, safety, health, and child custody.”⁵

- Although financial cost is the most often cited reason for not seeking legal services,⁶ awareness may play an even larger role. The study found that “[i]ndividuals of all income levels often do not recognize when they have a legal need, and even when they do, they frequently do not seek legal assistance.”⁷ And when financial cost is an issue, it is not only direct costs “but also indirect economic costs, such as time away from work or the difficulty of making special arrangements for childcare.”⁸
- Pro bono and “low bono” efforts are insufficient to meet the needs of low- and moderate-income Americans. “U.S. lawyers would have to increase their pro bono efforts ... to over nine hundred hours each to provide some measure of assistance to all households with legal needs.”⁹ Nor have other programs across the country designed to offer assistance to this population significantly narrowed the access-to-justice gap.¹⁰

Within this context, new lawyers remain un- and underemployed.¹¹ Total student debt burdens now average in excess of \$140,000¹²—challenging new lawyers’ ability to sustain traditional law practices that might address some of the unmet legal need—while legal education remains essentially unchanged

The effect of the access-to-justice gap on the court system is staggering. A 2015 study by the National Center for State Courts found that more than 75 percent of civil cases featured at least one self-represented party.¹³ According to Oregon Judicial Department data from 2016, approximately 80 percent of family court cases involved at least one self-represented litigant. In



Oregon Judicial Department, Oregon Circuit Courts Self-Represented Parties (2016).

residential eviction proceedings, it is rare to see a lawyer anywhere—only about 15 percent of residential eviction proceedings involve lawyers. Instead, landlords are commonly represented by property managers, and tenants represent themselves.

Moreover, data shows that Oregon's access-to-justice gap disproportionately affects the most vulnerable among us. As reported at the 2016 Oregon Access to Justice Forum, people of color, homeless people, domestic violence survivors, physically disabled people, and the elderly have greater-than-average civil legal needs but are still woefully underserved. The Campaign for Equal Justice estimates the combined legal aid providers in Oregon can meet only 15 percent of the total civil legal needs of Oregon's poor. According to a survey, the biggest reason (17 percent) why low-income Oregonians did not seek legal aid was the belief that nothing could be done about their legal problems. And, given the limited resources available, that may not be wrong.

In short, three powerful forces are converging to disrupt the legal services market. First, more people than ever need legal services and are not getting them. Second, people believe that their legal needs should be capable of being served in ways different, and more cost-effective, than the traditional model. Oregonians' expectations are changing. Third, new providers are stepping in to fill that void.

Lawyers and nonlawyer entrepreneurs see the legal market as ripe for innovation. Lawyers are reaching out to solicit business through websites, blogs, and social media; increasingly relying on online advertising and referral services to connect them with prospective clients; and using web-based platforms to offer limited-scope consultations or services to clients who have been referred to them by third parties. All the while, tech businesses, awash in venture capital, have developed online service delivery models ranging from the most basic form providers to sophisticated referral networks. Online services offer to draft a pleading,¹⁴ write a will,¹⁵ or apply for an immigration visa,¹⁶ all from the comfort of a consumer's living room or mobile device.

Indeed, innovation is necessary both to meet the consumer need and for lawyers to stay competitive. The ABA Commission Report decried members of the legal profession for clinging to outdated business models and resisting change. Specifically, the Commission found that

“[t]he traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.”¹⁷ For example, the Commission recognized the conflict of interest inherent in hourly billing, where efficiency in delivering legal services can be rightfully seen as adverse to short-term revenue.¹⁸ In the long term, however, firms that have taken a proactive approach to alternative fee arrangements have retained their profitability.¹⁹

The relentless growth of technology and the effects of globalization are upending the legal services market, feeding innovation, exposing inefficiencies, and presenting opportunities for growth. While market disruption and rapid change do not spell the end of lawyering, they do demand an evolution in the manner and methods by which lawyers provide legal services, and the way in which those services are regulated.

II. Creation of Oregon State Bar Futures Task Force

The legal profession is nothing if not conservative. Lawyers are schooled in precedent, consistency, and risk avoidance. Yet, as noted in the ABA Futures Commission Report on the Future of Legal Services, “The justice system is overdue for fresh thinking about formidable challenges. The legal profession’s efforts to address those challenges have been hindered by resistance to technological changes and other innovations.”²⁰

In April 2016, the OSB Board of Governors convened a Futures Task Force with the following charge:

“Examine how the Oregon State Bar can best protect the public and support lawyers’ professional development in the face of the rapid evolution of the manner in which legal services are obtained and delivered. Such changes have been spurred by the blurring of traditional jurisdictional borders, the introduction of new models for regulating legal services and educating legal professionals, dynamic public expectations about how to seek and obtain affordable legal services, and technological innovations that expand the ability to offer legal services in dramatically different and financially viable ways.”

The Board split the Futures Task Force into two committees: a Legal Innovations Committee, focused on the tools and models required for a modern legal practice, and a Regulatory Committee, focused on how to best regulate and protect the public in light of the changing legal services market. The charges, findings, and recommendations of the two committees follows.

III. The Regulatory Committee

A. The Regulatory Committee Charge

The Regulatory Committee was charged to examine new models for the delivery of legal services (e.g., online delivery of legal services, online referral sources, paraprofessionals, and alternative business structures) and make recommendations to the Board regarding the role the Bar should play, if any, in regulating such delivery models. The Board requested a report containing the following information:

- A summary of what exists at present, both in terms of existing legal service delivery models and regulatory structures for those models;
- A discussion of the consumer-protection and access-to-justice implications presented by these models and regulatory structures;
- An analysis of the stakeholders involved, including (1) the vendors that have an interest in exploring innovative ways to deliver legal services to consumers, (2) the lawyers who are interested in utilizing these innovative service delivery models, and (3) the regulatory entities that are responsible for ensuring adequate protection for consumers in this quickly evolving legal services market;
- Specific recommendations for proactive steps OSB should take to address these new models (e.g., should OSB propose amendments to the Oregon Rules of Professional Conduct, the OSB Rules of Procedure, or state law); and
- A proposed strategic response in the face of unexpected action at the legislature or elsewhere.

B. Findings of the Regulatory Committee

The Regulatory Committee recommendations are based on the following findings:

1. Oregonians need legal advice and legal services to successfully resolve problems and to access the courts.
2. Consumers are increasingly unwilling or unable to engage traditional full-service legal representation.
3. A significant number of self-represented litigants choose not to hire lawyers, even though they could afford to do so.
4. Self-help resources are crucial and must be improved, even as we take steps to make professional legal services more accessible.
5. Subsidized and free legal services, including legal aid and pro-bono representation, are a key part of solving the access-to-justice gap, but they remain inadequate to meet all of the civil legal needs of low-income Oregonians.
6. Despite the existence of numerous under- and unemployed lawyers, the supply of legal talent is not being matched with the need.
7. Oregonians' lack of access to legal advice and services leads to unfair outcomes, enlarges the access-to-justice gap, and generates public distrust in the justice system.
8. For-profit online service providers are rapidly developing new models for delivering legal services to meet consumer demand.
9. To fully serve the Bar's mission of promoting respect for the rule of law, improving the quality of legal services, and increasing access to justice, we must allow and encourage the development of alternate models of legal service delivery to better meet the needs of Oregonians.

C. Recommendations of the Regulatory Committee

Based on its findings, the Regulatory Committee makes three broad recommendations, each with several subparts. The purpose of this summary is to identify and briefly describe each recommendation. For a more complete explanation of the recommendations, readers should refer to the accompanying workgroup reports, which have been approved by and reflect the views of the Committee as a whole.

RECOMMENDATION 1:

IMPLEMENT LEGAL PARAPROFESSIONAL LICENSURE

Oregon should establish a program for licensure of paraprofessionals who would be authorized to provide limited legal services, without attorney supervision, to self-represented litigants in (1) family law and (2) landlord-tenant proceedings.

The accompanying report reviews and analyzes developments in other jurisdictions, particularly Arizona, California, Colorado, Nevada, New York, Utah, Washington, and Ontario, Canada. We reviewed a wide variety of materials on paralegal regulation and the problem of self-represented litigants, considered arguments for and against licensing paraprofessionals, and discussed the elements of a licensing program that would be appropriate for Oregon.

The most compelling argument for licensing paraprofessionals is that the Bar's other efforts to close the access-to-justice gap have continued to fall short. We must broaden the options available for persons seeking to obtain legal services, while continuing to strive for full funding of legal aid and championing pro bono representation by lawyers. By adopting a form of paraprofessional licensing, Oregon will not be assuming the risk of being ahead of the pack. Instead, the workgroup report shows that Oregon is well-placed to benefit from the experience, trial, and error of six distinct paraprofessional programs.

Our proposal would allow limited practice by paraprofessionals in two of the highest-need areas—family law and landlord-tenant—and only in limited types of proceedings where clients are by and large unrepresented. Clients who need other kinds of legal help, have complex cases, or desire representation in court for any reason will still need lawyers.

Contrary to the commonly held belief, we are convinced that licensing paraprofessionals in the manner proposed would not undermine the employment of lawyers. First, the need for routine, relatively straightforward family law and landlord-tenant representation is vast, and lawyers are electing not to perform this high-volume, low-pay work. Second, data from existing programs demonstrates that lawyers and licensed paraprofessionals may choose to work together because they can provide tiered and complementary services based on the complexity of a client matter. Given the significant underutilization of legal services, paraprofessionals may actually create on-ramps to lawyer representation for consumers who do not realize they need legal services. Finally, there is simply no evidence that when paraprofessionals are introduced into the legal market, lawyers are harmed. For all of these reasons, the legal profession need not fear innovative service delivery models.

Given the inherent complexity of launching a paraprofessional licensing program, we recommend the Board appoint an implementation committee to formulate a detailed implementation plan for licensing paraprofessionals consistent with the recommendations in this report.

- 1.1 An applicant should be at least 18 years old and of good moral character.** Attorneys who are suspended, resign Form B, or are disbarred from practicing law should not be eligible for a paraprofessional license.
- 1.2 An applicant should have an associate's degree or higher and should graduate from an ABA-approved or institutionally accredited paralegal studies program, including approved coursework in the subject matter of the license.** Highly experienced paralegals and applicants with a J.D. degree should be exempt from the requirement to graduate from a paralegal studies program.
- 1.3 Measures should be enacted to protect consumers who rely on newly licensed paraprofessionals.** The measures should require that applicants be 18 years old and of good moral character and meet minimum education and experience requirements. The measures should also require that licensees carry malpractice insurance, meet continuing legal education requirements, and comply with professional rules of conduct like those applicable to lawyers.
- 1.4 Applicants should have at least one year (1,500 hours) of substantive law-related experience under the supervision of an attorney.**
- 1.5 Licensees should be required to comply with professional rules of conduct modeled after the rules for attorneys.**
- 1.6 Licensees should be required to meet continuing legal education requirements.**
- 1.7 To protect the public from confusion about a licensee's limited scope of practice, licensees should be required to use written agreements with mandatory disclosures.** Licensees also should be required to advise clients to seek legal advice from an attorney if a licensee knows or reasonably should know that a client requires services outside of the limited scope of practice.
- 1.8 Initially, licensees should be permitted to provide limited legal services to self-represented litigants in family law and landlord-tenant cases.** Inherently complex proceedings in those subject areas should be excluded from the permissible scope of practice.
- 1.9 Licensees should be able to select, prepare, file, and serve forms and other documents in an approved proceeding; provide information and advice relating to the proceeding; communicate and negotiate with another party; and provide emotional and administrative support to the client in court.** Licensees should be prohibited from representing clients in depositions, in court, and in appeals.
- 1.10 Given the likely modest size of a paraprofessional licensing program, the high cost of implementing a bar-like examination, and the sufficiency of the education and experience requirements to ensure minimum competence, we do not recommend requiring applicants to pass a licensing exam.** If the Board of Governors thinks that an exam should be required, we recommend requiring applicants to pass a national paralegal certification exam.
- 1.11 To administer the program cost-effectively, we recommend integrating the licensing program into the existing structure of the Bar, rather than creating a new regulatory body.**

RECOMMENDATION 2:

REVISE RULES OF PROFESSIONAL CONDUCT TO REMOVE BARRIERS TO INNOVATION

Alternative legal service delivery models, which harness technology to offer limited-scope services to consumers in lieu of the traditional model of full-service legal practice, are here to stay.

The regulatory response to this development around the country has been mixed. Some state bar associations have been very resistant to change, electing to double down on traditional regulation methods through restrictive ethics opinions and reactive lawsuits. But these efforts have not stemmed the tide of change. The lesson we draw from those experiences is that resistance from the Bar will not lead Oregonians to passively accept the status quo; the future is here. Leadership from the Bar is essential to ensure that, as the market for legal services evolves, our profession retains its commitment to protecting the consumer. We believe that there are opportunities to embrace new models of practice, leverage technological advances, and begin to close the access-to-justice gap without compromising that historical commitment.

If the Bar is to stay true to its goals of protecting the public and seeking to increase and improve access to justice, the Bar's regulatory framework must be flexible enough to allow some space for innovation and new ideas to grow. We recommend a short list of modest changes, which will loosen restrictions on lawyer advertising and facilitate innovation by allowing more economic partnership between lawyers and nonlawyers, particularly licensed paraprofessionals.

2.1 Amend current advertising rules to allow in-person or real-time electronic solicitation, with limited exceptions. By shifting to an approach that focuses on preventing harm to consumers, the Bar can encourage innovative outreach to Oregonians with legal needs, while promoting increased protection of the most vulnerable. The proposed amendments to the Oregon Rules of Professional Conduct would secure special protections for prospective clients who are incapable of making the decision to hire a lawyer or have told the lawyer they are not interested, or when the solicitation involves duress, harassment, or coercion.

2.2 Amend current fee-sharing rules to allow fee sharing between lawyers and lawyer referral services, with appropriate disclosure to clients. Currently, only Bar-sponsored or nonprofit lawyer referral services are allowed to engage in fee-sharing with lawyers. Rather than limit market participation by for-profit vendors, the Bar should amend the Oregon Rules of Professional Conduct to allow fee sharing between all referral services and lawyers, while requiring adequate price disclosure to clients and ensuring that Oregon clients are not charged a clearly excessive legal fee.

2.3 Amend current fee-sharing and partnership rules to allow participation by licensed paraprofessionals. If Oregon implements paraprofessional licensing, it should amend the Oregon Rules of Professional Conduct to allow fee sharing and law firm partnership among regulated legal professionals. Any rule should include safeguards to protect lawyers' professional judgment. The Board should also direct the Legal Ethics Committee to consider whether fee sharing or law firm partnership with other professionals who aid lawyers' provision of legal services (e.g., accountants, legal project managers, software designers) could increase access to justice and improve service delivery.

2.4 Clarify that providing access to web-based intelligent software that allows consumers to create custom legal documents is not the practice of law. Together with this effort, seek opportunities for increased consumer protections for persons utilizing online document creation software.

RECOMMENDATION 3:

IMPROVE RESOURCES FOR SELF-NAVIGATORS

Numbers do not lie. In Oregon, and nationwide, more and more people in our legal system are self-represented. Some self-represented litigants choose their path because they cannot afford a lawyer; others simply believe a lawyer is not needed or will only make their legal issues unduly complicated. While lawyers have a professional duty to continue to strive to fully fund legal aid and provide pro bono representation to the indigent, some Oregonians will always appear in court without a lawyer. Recognizing this fact, the Bar should seek to improve the experience of self-navigators and should recognize this work as another method to narrow the access-to-justice gap.

3.1 Coordinate and integrate key online resources utilized by self-navigators. Establish a committee with representatives from the three stakeholder groups—the Oregon Judicial Department (OJD), the Bar, and legal aid—to coordinate and collaborate on the information available on their respective websites, including cross-links when appropriate.

3.2 Create self-help centers in every Oregon courthouse. The Oregon State Bar and OJD should consider proposing or supporting the creation of self-help centers to assist self-navigators, including the use of dedicated and trained court staff and volunteers. The goal should be self-help centers in every court in Oregon.

3.3 Continue to make improvements to family law processes to facilitate access by self-navigators. Implement the recommendations of OJD’s State Family Law Advisory Committee regarding family law improvements to assist self-navigators. Seek to improve training and ensure statewide consistency in training to family court facilitators.

3.4 Continue to make improvements to small-claims processes to facilitate access by self-navigators. Implement the recommendations from the 2016 Access to Justice Forum regarding small-claims process. Support changes to provide better courthouse signage, instruction, and education for consumers.

3.5 Promote availability of unbundled legal services for self-navigators. Educate lawyers about the advantages of providing unbundled services, including the existence of new trial court rules. Provide materials on unbundled services to Oregon lawyers (through the OSB website, the Bar Bulletin, local bars, specialty bars, and sections), including ethics opinions, sample representation and fee agreements, and reminders about blank model forms that can be printed from OJD’s website.

3.6 Develop and enhance resources available to self-navigators. While OSB, OJD, and legal aid have made strides in providing information that is useful for self-navigators, we must continue to improve existing resources and develop new tools.

Oregon
State
Bar

IV. The Innovations Committee

A. The Innovations Committee Charge and Process

The Innovations Committee was charged with the study and evaluation of how OSB might be involved in and contribute to new or existing programs or initiatives that serve the following goals:

- Help lawyers establish, maintain, and grow sustainable practices that respond to demonstrated low- and moderate-income community legal needs;
- Encourage exploration and use of innovative service delivery models that leverage technology, unbundling, and alternative fee structures in order to provide more affordable legal services;
- Develop lawyer business management, technology, and other practice skills; and
- Consider the viability of a legal incubator program.

The committee was asked to develop recommendations for OSB to advance promising initiatives, either alone or in partnership with other entities, and to prioritize those recommendations in light of relative projected costs, benefits, ongoing projects relevant to the issues, and the capacity of OSB and other entities.

B. Findings of the Innovations Committee

The Innovations Committee agrees with the findings of the Regulatory Committee and also finds that:

1. The profession in general, and the Bar in particular, would benefit from a substantially stronger focus on the gathering, dissemination, and use of data-based evidence to support and monitor progress toward its mission, values, and initiatives.
2. The Bar is underutilizing and undermarketing the Lawyer Referral Service, which is one of its most successful programs over the past several years for connecting moderate-means Oregonians with qualified legal help.
3. Law schools, the Bar, and other legal education providers are not doing enough to prepare lawyers for the realities of modern legal practice or to encourage lawyers to learn and adopt needed skills related to technology, project and practice management, and business management.

C. Recommendations of the Innovations Committee

RECOMMENDATION 4:

EMBRACE DATA-DRIVEN DECISIONMAKING

4.1 Adopt an official policy embracing data-driven decision making (DDDM).

As the Bar looks to invest time and resources in various initiatives, including the recommendations of this Task Force, it is important that Bar leadership and the Board of

Governors emphasize the importance of using data to give context to—and measure the effectiveness of—those initiatives. Specifically, we recommend grounding each and every Bar initiative in the Bar’s mission, values, and functions, and establishing what the business world refers to as SMART (Specific, Measurable, Achievable, Realistic, Time-Based) goals around them. Additionally, to the extent that it is not already consistently doing so, we recommend that the Bar establish a DDDM framework for defining all new (and, where feasible, ongoing) initiatives.

4.2 Adopt a formal set of key performance indicators (KPIs) to monitor the Bar’s values. Without measurement, the Bar’s values risk languishing as nice-to-express sentiments instead of concrete commitments. The Board of Governors should consider commissioning a special committee of the BOG to work with Bar leadership in establishing an initial set of KPIs and determining a timeframe for periodically evaluating them.

4.3 Adopt an open-data policy. We recommend that the Bar, and also, ideally, the judiciary, adopt a formal open-data policy. While we do not go so far as to recommend specific language for this policy, we recommend that the Board of Governors convene a working group to propose a specific policy for the Bar, with an implementation target of January 2018.

4.4 Provide a dedicated resource responsible for data collection, design, and dissemination. Many successful businesses now have a chief data officer or chief information officer in addition to, or sometimes as an expansion of, the role of chief technical officer. As the availability of data increases and its potential uses proliferate, and in order to enable the other recommendations of this subcommittee, we believe a dedicated resource will be necessary.

RECOMMENDATION 5:

EXPAND THE LAWYER REFERRAL SERVICE AND MODEST MEANS PROGRAM

5.1 Set a goal to increase the number of inquiries to the Lawyer Referral Service (LRS) and Modest Means Program (MMP); adequately fund the Referral and Information Services department (RIS) to achieve the goal. The Oregon State Bar should set a goal of increasing the number of inquiries to the LRS and MMP—and, by extension, the corresponding number of referrals to Oregon lawyers—by 11 percent per year for the next four years, and should adequately fund the RIS to achieve this goal. While we do not offer an opinion on the specific amount of money that would be necessary to reinvest in the programs in order to meet this 11 percent per annum growth target, we recommend that the BOG request a proposal from the program’s managers.

5.2 Develop a blueprint for a “Non-Family Law Facilitation Office” that can become a certified OSB pro bono program housed within the circuit courts of Oregon.

RECOMMENDATION 6:

ENHANCE PRACTICE MANAGEMENT RESOURCES

6.1 Develop a comprehensive training curriculum to encourage and enable Oregon lawyers to adopt modern law practice management methods. Specifically, we recommend that the OSB CLE Seminars Department—in cooperation with the PLF, Bar Sections, Specialty Bars, or whomever else they deem appropriate—be tasked with developing a comprehensive Modern Practice Management training curriculum for Oregon lawyers comprised of no less than two hours of education in each of the following areas: automation, outsourcing, and project management.

RECOMMENDATION 7:

REDUCE BARRIERS TO ACCESSIBILITY

7.1 Promote the provision of limited-scope representation. Specifically, we recommend that the Bar set a target of increasing the number of lawyers providing unbundled legal services in Oregon by 10 percent per year over the next four years. We believe that such a goal will result in improved access to justice for Oregonians.

7.2 Promote the use of technology as a way to increase access to justice in lower income and rural communities. In addition to training lawyers in private practice on the effective use of technology to reach low-income and rural communities, the Bar should encourage and support the courts in their efforts to provide more online, user-friendly, resources for the public and opportunities to participate in court proceedings by video.

7.3 Make legal services more accessible in rural areas. In addition to leveraging technology to create better access to legal services and the courts, we recommend hosting two summits—one in eastern Oregon and one on the coast—to discuss barriers that are germane to rural communities and share what programs, initiatives, or activities have worked to improve access.

7.4 Promote efforts to improve the public perception of lawyers. The Bar should expand public outreach that highlights lawyers as problem-solvers, community volunteers, and integral to the rule of law.

RECOMMENDATION 8:

ESTABLISH A BAR-SPONSORED INCUBATOR/ACCELERATOR PROGRAM

We recommend that the OSB create a consortium-based incubator/accelerator program that will serve Oregon's low- and moderate-income populations—specifically, those individuals whose income falls between 150 and 400 percent of the federal poverty level. The program goals would be to provide legal services to those clients, to help new lawyers build sustainable practices to meet client need, and to operate as a center for innovation dedicated to identifying, developing, and testing innovative methods for the delivery of legal services into the future.

In recent years, many different law school and consortium-based incubator and/or accelerator programs have cropped up across the country, all seeking to address the persistent issue of how to bridge the justice gap for underserved lower- and moderate-income individuals who cannot afford traditional legal services but who do not qualify for legal aid. These programs come in different forms—some operating as stand-alone incubators sponsored by a consortium of private stakeholders; others operating solely under the auspices of a law school or state bar association. All, however, accomplish two goals: (1) they create a space—often for newer lawyers—to provide direct legal services to low and moderate-income individuals (the “incubator”), and (2) they create a platform for using, developing, testing, and disseminating innovative methods to making those legal services more accessible and affordable to clients in that target market (the “accelerator”).

As part of our inquiry into determining whether Oregon might benefit from a similar model, we catalogued and reviewed the resources currently available for low and moderate-income Oregonians and for new lawyers seeking to develop their legal practices. Both fall short; based on that review, we have concluded that Oregon does not have sufficient legal resources for low and moderate-income populations and that it remains challenging for lawyers to build practices to meet the needs of that market in a sustainable way.

The accompanying report describes our investigation and reviews examples of existing incubator/accelerator programs in more detail. It also includes a catalogue of the programs we researched and reviewed, a summary of the challenges we identified with other incubator/accelerator programs, and a detailed proposal for how Oregon might create an incubator/accelerator model that is structured to avoid those challenges.

Further to that recommendation, we request that the BOG and the OSB do the following:

8.1 Dedicate staff resources. We recommend that the BOG and the OSB commit staff equivalent to one FTE dedicated to managing the incubator/accelerator project. That one FTE might come from existing OSB staff, if available.

8.2 Form a program development committee. We recommend that the BOG and the OSB form a program development committee dedicated to implementing the incubator/accelerator program. One committee member should be a full-time OSB staff member. Other members would represent stakeholder organizations, including law schools; legal nonprofits; private law firms; LASO; and the law, business, and technology communities generally.

8.3 Formulate the incubator/accelerator program details. OSB staff, together with the planning development committee, should take the following additional steps toward developing Oregon’s operating incubator/accelerator program.

Coordinate with stakeholders. The committee should convene a meeting of program stakeholders, including representatives of private law firms, law schools, members of the bar, nonprofit legal services entities, and LASO, among others.

Create a business plan. The committee should develop a plan for startup and continuing financing of the proposed program. Sources of funding might include community stakeholders (including law, business, and technology companies), vendors, grant programs, and client fees.

Create a marketing plan. The committee should develop a plan for marketing the services of the incubator program. This could include marketing through

existing channels or developing new ways for reaching moderate-income Oregonians and educating the public about the program scope and resources.

Identify program hosts. We envision that the for-profit law firms in Portland and across the state will host incubator participants and provide training, mentoring, and other office resources. The program development committee should develop a plan to market, identify, and obtain commitments from those firms.

Identify options for office space. This includes office space for both the program staff and incubator participants. This task overlaps with the identification of program hosts, as many law firm hosts should include, as part of their commitment, office space for the participant(s) they host.

Design a program application process. The committee should design an application process for the participant/fellows, which will include drafting job descriptions, creating an application and review process, and developing a plan to advertise the program and solicit applications.

Develop a mechanism for assessment program success. The committee should identify the best metric for measuring the success of both the incubator and accelerator components of the program. To do so, the Committee might consider metrics such as number of matters addressed by program participants, populations served, financial success of new lawyer participants, and extra-program use of accelerator innovations.

We request that the planning development committee finalize the program, curriculum, and stakeholders by fall of 2017, with applications ready to go out in the spring of 2018. The BOG, the OSB, and the committee should aim to start the incubator/accelerator program in the fall of 2018.

V. Conclusion

The question is not whether legal services will be provided differently than in decades past. The question is whether it will occur with the active engagement of a Bar that is willing to rethink longstanding assumptions and embrace emerging technology and new legal service delivery models, or whether, as in some other states, the Bar will try to resist the forces of change. Efforts to resist change will likely be unsuccessful. The appointment of this Task Force reflects the Bar's recognition that adhering to the status quo is not really a choice at all.

We look forward to working with the Board of Governors, the Oregon judiciary, and other stakeholders to implement these recommendations in the months to come.

Respectfully Submitted,

OSB Futures Task Force

The full report and recommendations of the Regulatory and Innovations committees and workgroups are available here:
www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf

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Endnotes

- 1 Corporate clients continue to move work in house, turn to nontraditional legal services providers, and harness technology to reduce legal spending, according to the Altman Weil *Law Firms in Transition 2016* survey. Altman Weil, Inc., *Law Firms in Transition 2016: An Altman Weil Flash Survey* (May 2016), available at <http://www.altmanweil.com/LFiT2016/>.
- 2 In addition to the well-known LegalZoom, more recent entrants into the online self-help legal space include Avvo Answers (in conjunction with its better-known lawyer rating service), Rocket Lawyer, Docracy, and Shake Law, among many others.
- 3 Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States*, 11 (American Bar Association 2016), available at http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf. In June 2017, the Legal Services Corporation released a new report, finding that 86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help. Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (2017), available at <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>. The report was prepared by NORC at the University of Chicago for Legal Services Corporation in Washington, DC.
- 4 Commission on the Future of Legal Services, *supra* note 3, at 12, citing Number of Attorneys for People in Poverty, National Center for Access to Justice, available at <http://justiceindex.org/>, archived at (<https://perma.cc/89C2-6EC5>).
- 5 *Id.* (parentheticals omitted), quoting Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. Rev. 433, 466 (2016) and citing ABA House of Delegates Resolution 112A (adopted Aug. 2006), available at https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services/whitepapers.html, archived at (<https://perma.cc/R7HC-RSAN>).
- 6 *Id.* at 15.
- 7 *Id.* at 14.
- 8 *Id.* at 15.
- 9 *Id.* at 14 (quoting Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, Daedalus 5 (2014)).
- 10 *Id.*
- 11 The “Great Recession” that began in December 2007 had a particularly striking impact on private law firms. In its 2017 Report on the State of the Legal Market, the Center for the Study of the Legal Profession at the Georgetown University Law Center summarized that “[o]verall, 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.” Thus, private law firms sharply curtailed—and even stopped—hiring. *Above The Law* reports that 38 percent of 2016 law school graduates were unable to secure a full-time position in the legal profession, available at <http://abovethelaw.com/law-school-rankings/top-law-schools/>.
- 12 See <http://abovethelaw.com/2015/08/how-are-lawyers-managing-their-law-school-debt-most-will-never-be-able-to-pay-it-off/>.
- 13 National Center for State Courts, State Justice Initiative, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts* (2015) at iv, available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.
- 14 See <https://www.legalpleadingtemplate.com/>
- 15 See <https://www.rocketlawyer.com/document/legal-will.rl#/>
- 16 See <https://visabot.co/>
- 17 Commission on the Future of Legal Services, *supra* note 3, at 16.
- 18 *Id.*
- 19 Altman Weil, Inc., *supra* note 1, at i.
- 20 Commission on the Future of Legal Services, *supra* note 3, at 8–9. A number of states—including California, Florida, Michigan, New York, and Utah—have convened futures commissions, modeled on the ABA’s effort, to examine ways to innovate and respond to emergent change in the legal services market. Our Task Force reviewed these reports and recognizes the significant contributions of the many states that preceded us in approaching these challenges.

The question is not whether legal services will be provided differently than in decades past. The question is whether it will occur with the active engagement of a Bar that is willing to rethink longstanding assumptions and embrace emerging technology and new legal service delivery models, or whether, as in some other states, the Bar will try to resist the forces of change.

OSB Futures Task Force, 2017

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Narrowing the Access-to-Justice Gap by Reimagining Regulation

**Report and Recommendations from
THE UTAH WORK GROUP ON REGULATORY REFORM**

August 2019

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Narrowing the Access-to-Justice Gap by Reimagining Regulation

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INTRODUCTION: Toward Equal Access to Justice

“An estimated five billion people have unmet justice needs globally. This justice gap includes people who cannot obtain justice for everyday problems, people who are excluded from the opportunity the law provides, and people who live in extreme conditions of injustice.”¹ This predicament is not unique to third-world countries: According to the World Justice Project, the United States is presently tied for 99th out of 126 countries in terms of access to and affordability of civil justice.² An astonishing “86% of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help.”³ Yet at the same time, access to justice should be the very hallmark of the American legal system. To quote Chief Justice John Marshall, the “essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws”⁴ And “[o]ne of the first duties of government is to afford that protection.”⁵

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

In the latter part of 2018, the Supreme Court, at the request of the Utah State Bar (Utah Bar or Bar), charged Justice Deno Himonas and John Lund (past President of the Bar) with organizing a work group to study and make recommendations to the Court about optimizing the regulatory structure for legal services in the Age of Disruption. More specifically, the work

¹ Task Force on Justice, *Measuring the Justice Gap*, WORLD JUSTICE PROJECT (Feb. 6, 2019), https://worldjusticeproject.org/sites/default/files/documents/Measuring%20the%20Justice%20Gap_Feb2019.pdf (last visited Aug. 12, 2019); see also GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 281 (2017) (estimating four billion people live “outside of the rule of law—with little access to basic legal tools”).

² WORLD JUSTICE PROJECT, *Rule of Law Index 2019*, https://worldjusticeproject.org/sites/default/files/documents/WJP_RuleofLawIndex_2019_Website_reduced.pdf (last visited Aug. 12, 2019).

³ LEGAL SERVICES CORPORATION, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (last visited Aug. 12, 2019).

⁴ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

⁵ *Id.*

group was charged with optimizing regulation in a manner that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services. With this objective firmly in mind, members of the Utah court system and the Utah Bar, leading academics, and other experts, working closely together, have outlined what a new regulatory structure should look like. This new regulatory structure provides for broad-based investment and participation in business entities that provide legal services to the public, including non-lawyer investment in and ownership of these entities, through two concurrent approaches: (1) substantially loosening restrictions on the corporate practice of law, lawyer advertising, solicitation, and fee arrangements, including referrals and fee sharing; and (2) simultaneously establishing a new regulatory body (sometimes referred to as a regulator) under the supervision and direction of the Supreme Court to advance and implement a risk-based, empirically-grounded regulatory process for legal service entities. The new regulatory structure should also solicit non-traditional sources of legal services, including non-lawyers and technology companies, and allow them to test innovative legal service models and delivery systems through the use of a “regulatory sandbox” approach, which permits innovation to happen in designated areas while addressing risk and generating data to inform the regulatory process.⁶

Bridging the access-to-justice gap is no easy undertaking: it requires multi-dimensional vision, strong public leadership, and perseverance. It also requires timely action. And it is the view of the work group that the time for regulatory reform is now. Without such reform, it is our belief that the American legal system will continue to underserve the public, causing the access-to-justice gap to expand. Therefore, the work group respectfully urges the Supreme Court to adopt the recommendations outlined in this report.

THE UTAH WORK GROUP ON REGULATORY REFORM

The core mission of the work group is to optimize the regulatory structure for legal services in the Age of Disruption in a way that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services.

In the fall of 2018 and winter of 2019, Supreme Court Justice Deno Himonas and John Lund, past president of the Utah Bar, gathered members of the Utah court system and the Bar, leading academics, and other experts to form the work group. Justice Himonas and Mr. Lund

⁶ The Utah work group is not going it alone in this space. Arizona, California, and the Institute for the Advancement of the American Legal System are all evaluating and moving toward regulatory reform in an effort to narrow the access-to-justice gap. See Brenna Goth & Sam Skolnik, *Arizona Weighs Role of Non-Lawyers in Boosting Access to Justice*, BLOOMBERG BIG LAW BUSINESS (Aug. 15, 2019), <https://biglawbusiness.com/arizona-weighs-role-of-non-lawyers-in-boosting-access-to-justice> (last visited Aug. 16, 2018); see also Institute for the Advancement of the American Legal System, *Unlocking Legal Regulation*, UNIVERSITY OF DENVER (forthcoming) (on file with author).

co-chair the work group. In addition to Justice Himonas and Mr. Lund, the group is comprised of H. Dickson Burton, immediate past President of the Bar; Dr. Thomas Clarke, Vice President of Research and Technology for the National Center for State Courts (NCSC) (ret.); Cathy Dupont, Deputy Utah State Courts Administrator; Dr. Gillian Hadfield, Professor of Law and Professor of Strategic Management, University of Toronto Faculty of Law; Dr. Margaret Hagan, Director of the Legal Design Lab and Lecturer in Law at Stanford Law School; Steve Johnson, past Chair of the Court's Advisory Committee on the Rules of Professional Conduct; Lucy Ricca, former Executive Director of and current Fellow with the Stanford Center on the Legal Profession; Gordon Smith, Dean of the J. Reuben Clark Law School at Brigham Young University and Glen L. Farr Professor of Law; Heather White, past Co-Chair of the Bar Innovation in Law Practice Committee; and Elizabeth Wright, General Counsel to the Bar.⁷

The impetus for the work group was a letter sent by Mr. Burton to the Court on behalf of the State Bar.⁸ The letter correctly noted that “[a]ccess to justice in Utah remains a significant and growing problem.” The Bar set forth its belief that, to help combat that problem, “a key step to getting legal representation to more people is to substantially reform the regulatory setting in which lawyers operate.” The Bar therefore requested that “the Court establish a small working group to promptly study possible reforms and make recommendations for revisions, possibly major revisions, to the rules of professional responsibility so as to permit lawyers to more effectively and more affordably provide legal services and do related promotion of those services.”

The work group understood from the outset that, as outlined in the letter to the Court, the charge involved “the consideration” and evaluation of “(1) the effect of modern information technology and modern consumer patterns on the current rules, (2) the potential value, in terms of making legal services accessible to clients, of non-lawyer investment and ownership in entities providing legal services and the related regulatory issues, (3) the prospect of broadening the availability of legal services through flat fee and other alternative fee arrangements not currently permitted by the rules, (4) whether there is continuing justification for the rules against direct solicitation, (5) whether and how to permit and structure lawyer use of referral systems such as Avvo in light of the rule against referral fees[,] and [(6)] the related trends and approaches being considered and/or implemented in other bars, such as Oregon and the [American Bar Association’s (ABA)] work in this area.”

⁷ A short biography for each member of the work group can be found at Appendix A. We would also like to extend a special thanks to Dolores Celio, Judicial Assistant to Justice Himonas, and Kevin Heiner (J.D. 2018, Columbia Law School) and John Peterson (J.D. 2016, Harvard Law School), law clerks to Justice Himonas, for their invaluable help researching, writing, and editing this report.

⁸ A copy of Mr. Burton’s letter is attached at Appendix B.

THE NEED FOR REGULATORY REFORM TO ADDRESS THE ACCESS-TO-JUSTICE GAP IN THE AGE OF DISRUPTION

Nelson Mandela poignantly observed that “[a] nation should not be judged by how it treats its highest citizens, but its lowest ones.”⁹ In the United States, millions of our citizens who experience problems with domestic violence, veterans’ benefits, disability access, housing conditions, health care, debt collection, and other civil justice issues cannot afford legal services and are not eligible for assistance from the civil legal aid system. This failure affects not only low-income people, but wide swaths of the population.¹⁰ The inability of these people to seek and obtain a remedy through the courts or through informal dispute resolution processes undermines the operation of the rule of law. Our justice system should be judged harshly by this failure.

This failure, however, should not be laid at the feet of lawyers. As a profession, lawyers have and continue to give generously of their time and money in an effort to mind the gap. But, as history has shown, we cannot volunteer or donate the problem away. Likewise, minor tweaks, while often helpful, are just that—minor. Serious reform requires recognition that our existing regulatory approaches are not working. And they are not working because they are not risk-sensitive and market-driven. Instead, they attempt to solve potential problems by imagining what could possibly go wrong and then dictating the business model for how legal services must be provided. This protectionistic approach has had catastrophic effects on access to justice. What follows is an examination of why and how we must shift from such a prescriptive approach based on abstract risk considerations to an outcomes-based and risk-appropriate paradigm.

⁹ NELSON MANDELA, *LONG WALK TO FREEDOM* 23 (1994).

¹⁰ *See, e.g.*, GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 179 (2017).

The Access-to-Justice Gap

In this report, we describe the “access-to-justice gap” as the difference between the legal needs of ordinary Americans and the resources available to meet those needs. As noted, the civil justice system in the United States currently is tied for 99th out of 126 countries in terms of access and affordability.¹¹ And the United States has consistently shown poorly when it comes to access and affordability of civil justice: in 2015, the U.S. ranked 65th out of 102 countries¹²; in 2016, 94th out of 112¹³; and in 2017-2018, 94th out of 112.^{14,15} Without access to justice, “people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.”¹⁶ In the U.S., many people “go it alone without legal representation in disputes where they risk losing their job, their livelihood, their home, or their children, or seek a restraining order against an abuser.”¹⁷

The access-to-justice gap is especially acute among low-income Americans. In 2017, the Legal Services Corporation (LSC) contracted with NORC at the University of Chicago to explore the extent of the access-to-justice gap. NORC conducted a national survey of “low-income households” (i.e., households at or below 125% of the Federal Poverty Level (FPL)) and analyzed data from LSC’s 2017 Intake Census, through which 133 LSC grantee programs “tracked the number of individuals approaching them for help with a civil legal problem whom they were unable to serve, able to serve to some extent (but not fully), and able to serve fully.”¹⁸ The Census Bureau estimates that the number of people living below the FPL is about 60 million

¹¹ WORLD JUSTICE PROJECT, *Rule of Law Index 2019*, https://worldjusticeproject.org/sites/default/files/documents/WJP_RuleofLawIndex_2019_Website_reduced.pdf (last visited Aug. 12, 2019).

¹² WORLD JUSTICE PROJECT, *Rule of Law Index 2015*, https://worldjusticeproject.org/sites/default/files/documents/roli_2015_0.pdf (last visited Aug. 12, 2019).

¹³ WORLD JUSTICE PROJECT, *Rule of Law Index 2016*, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (last visited Aug. 12, 2019).

¹⁴ WORLD JUSTICE PROJECT, *Rule of Law Index 2017–2018*, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf (last visited Aug. 12, 2019).

¹⁵ The World Justice Project generates these rankings using data generated from questionnaires. The questionnaires are sent to people that the World Justice Project has identified as local experts. The responses to the questionnaires are codified as numeric values, normalized, and then subjected to a series of tests to identify possible biases and errors. The data are also subjected to a sensitivity analysis to determine the statistical reliability of the results. The data are then converted to country scores and rankings that represent the assessment of more than 120,000 households and 3,800 legal experts across the countries included in the rankings. See WORLD JUSTICE PROJECT, *Rule of Law Index 2019*, https://worldjusticeproject.org/sites/default/files/documents/WJP_RuleofLawIndex_2019_Website_reduced.pdf (last visited Aug. 12, 2019) (explaining methodology for the World Justice Project Rule of Law Index).

¹⁶ UNITED NATIONS AND THE RULE OF LAW, *Access to Justice*, <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last visited Aug. 12, 2019).

¹⁷ LEGAL SERVICES CORPORATION, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (last visited Aug. 12, 2019).

¹⁸ *Id.*

people, including roughly 19 million children. The three key findings of the report about this population are equal parts fascinating and disturbing:

1. Eighty-six percent [86%] of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help;
2. Of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1.0 to 1.2 million (62% to 72%) receive inadequate or no legal assistance; and
3. In 2017, low-income Americans will likely not get their legal needs fully met for between 907,000 and 1.2 million civil legal problems that they bring to LSC-funded legal aid programs due to limited resources among LSC grantees. This represents the vast majority (85% to 97%) of all the problems receiving limited or no legal assistance from LSC grantees.¹⁹

According to the LSC report, the most common civil legal problems relate to health (41% of low-income households) and consumer-finance (37% of low-income households) issues. Several other categories of civil legal problems—rental housing, children and custody, and education—affected more than one-fourth of low-income households.²⁰

In a study conducted in 2015, two years before the LSC report, NCSC looked at the access-to-justice gap by examining the non-domestic civil caseloads in 152 courts in 10 urban counties. The resulting report, *The Landscape of Civil Litigation in State Courts* [hereinafter the *Landscape*],²¹ showed that civil litigation predictably clusters around a few subjects (debt collection, landlord/tenant cases, and small claims cases involving disputes valued at \$12,000 or less) and results in very small monetary judgments (“three-quarters (75%) of all judgments were less than \$5,200”), suggesting that, “[f]or most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case.”²² Not surprisingly then, at least one party was self-represented in most cases (76%), proving that “[t]he idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.”²³ A majority of cases were disposed of through default judgments or settlements.²⁴ The report concluded, “[t]he picture of

¹⁹ *Id.*

²⁰ *Id.*

²¹ Civil Justice Initiative, *The Landscape of Civil Litigation in State Courts*, NATIONAL CENTER FOR STATE COURTS, <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> (last visited Aug. 12, 2019). The “*Landscape* dataset consisted of all non-domestic civil cases disposed of between July 1, 2012[,] and June 30, 2015[,] in 152 courts with civil jurisdiction in 10 urban counties. The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.” *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

civil litigation that emerges from the *Landscape* dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much.” The result is predictable: “[M]any litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is not economically feasible to litigate these cases.”²⁵

Raw data from the Third District Court for the State of Utah suggest that its caseload tracks the caseloads studied in the *Landscape* report.²⁶ In 2018, 54,664 civil and family law matters were filed in the Third District.²⁷ Of these cases, 51% were debt collection, 7% were landlord/tenant, and approximately 19% were family law cases. Moreover, the data show that the idealized adversarial system in which both parties are represented by competent attorneys is not flourishing in Utah: ***At least one party was unrepresented throughout the entirety of the suit in 93% of all civil and family law disputes disposed of in the Third District in 2018.***

And the public is taking notice. In the 2018 State of the State Courts-Survey Analysis commissioned by NCSC, “[a] broad majority (59%) say ‘state courts are not doing enough to empower regular people to navigate the court system without an attorney.’”²⁸ And “[o]nly a third (33%) believe courts are providing the information to do so.”²⁹

The Supreme Court and the Judicial Council are resolutely working toward narrowing the access-to-justice gap. To this end, they have established a statewide pro bono system to improve the delivery of free legal services to needy parties; established a new profession—the LPP—to deliver legal services in debt collection, landlord/tenant, and family law matters; and piloted an online dispute resolution model in small claims court. These efforts are important and should be supported and expanded. But they are not enough. As NCSC recognized in the *Landscape*, “civil justice reform can no longer be delayed or even implemented incrementally through mere changes in rules of procedure.”³⁰ What “is imperative [is] that court leaders move with dispatch to improve civil case management with tools and methods that align with the

²⁵ *Id.* A legal needs survey conducted by New York in 2010 demonstrates just how stark this problem is. For example, the New York Task Force found that, in New York City, 99 percent of tenants are unrepresented when faced with eviction and homelessness. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, *Report to the Chief Judge of the State of New York* 17 (Nov. 2010), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf> (last visited Aug. 12, 2019). In consumer credit card debt collection matters, 99 percent of New Yorkers were unrepresented, while 100 percent of the entities bringing the collections were represented. *Id.* at 16.

²⁶ The data set forth in this paragraph were provided by court services personnel for the Administrative Office of the Courts of Utah.

²⁷ For purposes of this report, the Third District Court includes all adult courts, including justice courts, in Salt Lake, Summit, and Tooele Counties.

²⁸ Memorandum from GBA Strategies to National Center for State Courts (Dec. 3, 2018) (on file with author).

²⁹ *Id.*

³⁰ Civil Justice Initiative, *The Landscape of Civil Litigation in State Courts*, NATIONAL CENTER FOR STATE COURTS, <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> (last visited Aug. 12, 2019).

realities of modern civil dockets to control costs, reduce delays, and ensure fairness for litigants.”³¹ And, perhaps, if we move efficiently and meaningfully enough, we can avoid a harsh but accurate assessment of our civil justice system by future generations.

The Age of Disruption

We live in an age where disruptive innovation is occurring non-stop.³² So-called “incumbent” institutions must continuously innovate to maintain and protect their positions and functions in society. The justice system is no exception. The shift of most court civil business to cases involving self-represented litigants, the rise of average education levels, and the unaffordability of lawyers has driven a new market for legal services serviced partly by non-traditional providers, which pushes the boundaries of what is the unauthorized practice of law.

Courts have struggled to adjust to a world in which unrepresented litigants are the norm. Many cases resolve by default or by failures to comply with required court processes. Judges either require special training to facilitate cases or must create special dockets where the rules of evidence are suspended. Civil and family caseloads are dropping as lawyers become ever more expensive and some litigants decide to proceed without assistance.³³ At the same time, alternative providers of dispute resolution are enticing more and more litigants away from the courts at both the high end (complex civil cases) and the low end (parking tickets, consumer debt, simple divorces, etc.).

Technology has been the leading force in disrupting the way we acquire and consume goods, sleep, work, and play. And it has certainly already altered the practice of law as we have heretofore known it. It has enabled litigants to reduce the costs of litigation, from providing them with access to information about the legal system they did not previously have to pressuring lawyers to use tools that make the litigation process less costly. Automated forms have empowered litigants to represent themselves and helped generate effective documents ranging from transactional documents (such as those used in wills, real estate purchase contracts, and business formations) to litigation pleadings (such as those in divorces, debt collection actions, and contract disputes). Moreover, lawyers have been forced to compete by lowering prices by means such as using electronic communications and document storage and transmittal, eliminating copying costs, electronically Bates stamping discovery documents

³¹ *Id.*

³² See Clayton M. Christensen, Michael E. Raynor & Rory McDonald, *What is Disruptive Innovation?*, HARVARD BUSINESS REVIEW (Dec. 2015), <https://hbr.org/2015/12/what-is-disruptive-innovation> (last visited Aug. 12, 2019).

³³ See NATIONAL CENTER FOR STATE COURTS, *Data Visualizations*, <https://public.tableau.com/profile/ncscviz/vizhome/CSPCaseloadDashboard/CaseDashboard> (last visited Aug. 12, 2019), and Court Statistics Project, *National Overview*, NATIONAL CENTER FOR STATE COURTS, <http://www.courtstatistics.org/NCSC-Analysis/National-Overview.aspx> (last visited Aug. 12, 2019) for data summaries of the trends.

(reducing the time to do so from hours to seconds), and even employing artificial intelligence that can review thousands of pages of documents and pull relevant documents for review and use with greater accuracy than humans.

Lawyers have also benefitted from the rise of technology in several ways. Technology has enabled lawyers and law firms to dramatically cut costs in certain areas by streamlining communications with clients, simplifying and streamlining case management and billing, automating discovery, and enabling telecommuting—which allows lawyers to conduct business remotely rather than having to travel hundreds, if not thousands, of miles—just to name a few.

And, again, courts have not been immune from disruption. They, too, compete in this ever-changing world that continuing advances in technology bring. More access for litigants means a heavier workload for many already overburdened judges and their staff. Courts also have been required to handle more cases with unrepresented litigants, which increases the time spent reviewing arguments and theories and preparing rulings and orders that people without legal training can understand and follow without explanation from a lawyer. But not all disruption has created legal burdens. Disruption has also brought with it increases in efficiency, from electronic filing and storage to telephone conferences for discovery disputes and other non-dispositive matters. Information filed with the court is now more easily retrieved as well.

The potential benefits for access to justice from legal disruptions are significant. If legal services can be provided to litigants and those with potential legal problems in a much more cost effective way, then true access to justice becomes possible for millions of people who currently get no help and do nothing. Technology, especially online legal services, exponentially increases the potential to improve access to justice. But it also simultaneously increases the risk of legal and practical harm to users if those services are not of sufficient quality. However, the potential benefits are too large to pass up, so changing how legal services are regulated to both open the door to innovation and protect litigants and other users in responsible ways is critical.

Because of the assumed monopoly on the provision of legal services by lawyers (and a few related, sanctioned roles³⁴), current regulation focuses on requirements for lawyers. If

³⁴ For example, Utah allows LPPs to assist clients in a limited number of areas in which the LPP is licensed. UTAH STATE BAR, *Licensed Paralegal Practitioner*, <https://www.utahbar.org/licensed-paralegal-practitioner/> (last visited Aug. 12, 2019). Other states have similar programs. Washington allows limited license legal technicians to advise and assist people through divorce, child custody, and other family law matters, WASHINGTON STATE BAR ASSOCIATION, *Limited License Legal Technicians* (July 24, 2019), <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians> (last visited Aug. 12, 2019), and permits limited practice officers to select, prepare, and complete certain approved documents used in loan agreements and the sale of real or personal property, WASHINGTON STATE BAR ASSOCIATION, *Limited Practice Officers*, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-practice-officers> (last visited Aug. 12, 2019). And Arizona

innovation brings a wide variety of legal services to consumers, then the strategy of regulating narrow roles will no longer suffice. There needs to be a way to regulate a broad array of legal services created and provided in different ways. This approach needs to be consistent, cost effective, and safe.

ACHIEVING REFORM—A ROADMAP TO SUCCESS

Fundamental reform of how legal services are regulated requires equal parts courage, caution, imagination, and deliberation. The current paradigm is deeply entrenched in the country's justice system, in the hearts and minds of those who have dedicated themselves to the law, and even in our society at large. With rare exception, long gone are the days when an Abraham Lincoln could "read into" the practice of law. For over a century now, the entry point to be allowed to provide legal services has been territory controlled by law schools molding Juris Doctors (JDs) and courts and bar associations assessing the character and fitness and broad legal knowledge of those JDs. Oddly though, in most jurisdictions, once admitted—and subject only to continuing legal education and conduct requirements—an attorney may provide any legal service across the entire spectrum of needs, everything from writing a will or closing a major contract to defending a felony or filing a class action. While very few divorce lawyers would take on a major real estate deal, their licenses allow them to do just that. The regulatory scheme regulates the provider, not the service.

This approach, though faithfully followed for the past century, has not yielded a broad-based legal services industry that provides affordable legal services to all members of society. Far from it. And this approach is coming under more pressure on a daily basis. Technologies and market forces keep undermining the fundamental premise that lawyers, and lawyers alone, can provide suitable legal services as consumers are increasingly finding tools to meet their needs outside of the regulated legal profession.

As to what the future holds for legal services, hardly anything is clear. What the Greek philosopher Heraclitus said in the 5th century B.C. is as true now as it was then: "Life is flux."³⁵ The only constant is change. So, realistically, drafting a roadmap for the way forward is best viewed as attempting to chart a course in the right direction, watching how the winds blow, tending the lines carefully, and trimming the sails as needed.

allows legal document preparers to prepare and provide certain legal documents without the supervision of an attorney. STATE BAR OF ARIZONA, *Legal Document Preparers*, <https://www.azbar.org/lawyerconcerns/regulationofnon-lawyers/legaldocumentpreparers/> (last visited Aug. 12, 2019).

³⁵ Joshua J. Mark, *Heraclitus of Ephesus*, ANCIENT HISTORY ENCYCLOPEDIA (July 14, 2010), https://www.ancient.eu/Heraclitus_of_Ephesos/ (last visited Aug. 10, 2019).

To correctly set that course, we have studied other regulatory reform efforts and how they have fared. The most comprehensive example, and a good source of guidance and insight, is the United Kingdom's Legal Services Act of 2007 (the LSA). We have provided a thorough discussion of the LSA and its strengths and weaknesses in Appendix C. The LSA is a broad-based reform that identifies key elements for success, such as independent regulators, a risk-based approach, use of guiding principles, and the articulation of the specific outcomes expected from the regulation. With these elements in place, room can be made both for new approaches by lawyers and for innovators with ideas for legal services that do not involve lawyers.

We have also spent a great deal of time thinking about, researching, and analyzing the rules of professional responsibility and the creation of a new regulator of legal services. Through our deliberative process we came to think of two tracks, both of which are critical to the path to successful reform.

Track A: Loosening restrictions on lawyers—To make room for new approaches by lawyers, we informed ourselves about movements across the country to loosen some of the restrictions on lawyers so that they can both compete and innovate. We collaborated with the Court's Advisory Committee on the Rules of Professional Conduct. That committee participated in a design lab led by Professor Margaret Hagan of Stanford Law, which allowed for all who participated to imagine rule changes that would still fully protect clients without unduly hampering lawyers from harnessing the power of capital, collaboration, and technology. Our specific recommendations for changes to the Rules of Professional Conduct and the supporting rationale are set forth below.

Track B: The creation of a new regulatory body—Lawyers are no longer the only ones who provide legal services. There are now LPPs and other licensed paralegal professionals.³⁶ There are companies providing online legal forms and assistance with court processes. There are referral services. There are even limited types of legal services being provided by other professionals, such as real estate professionals and tax preparers. And there are many others who would be fully capable of providing discrete legal services but who lack the required license to do so. If one considers the byzantine world of Social Security, there are undoubtedly clerks working for the Social Security Administration who, if they were allowed to, could give someone much better advice about how to process a claim than could all but a few of the lawyers licensed to practice law in Utah.

So should room be made for people other than lawyers and organizations other than law firms to provide certain legal services? The answer is clearly yes. We have concluded that allowing for greater competition, subject to proper regulatory oversight, will bring innovation

³⁶ Utah will license its first LPPs within the next few weeks.

to the legal services industry in ways that are not even imaginable today. Critically, we believe that allowing for that innovation will be the solution to the access-to-justice problem that plagues our country. The question is: How can we allow for that innovation without creating intolerable levels of risk for the consumers of legal services? Our full answer to that is the detailed recommendation set forth below and in Appendix D. But the key steps we recommend are first to create a regulatory body armed with a set of risk-based principles for regulation, and second to permit that body to allow providers to provisionally test and prove their services in a “regulatory sandbox” environment, where data can be gathered and innovation can be assessed and revised as needed before more permanent licensure is granted. This body would operate under the supervision and direction of the Supreme Court. Initial funding would be obtained through grants.³⁷

Track A: Freeing Up Lawyers to Compete By Easing the Rules of Professional Conduct

Certain rules of professional conduct have been viewed by lawyers as impeding their ability to increase business and survive in the online world. Restrictions on lawyer advertising, fee sharing, and ownership of and investment in law firms by non-lawyers are concepts that need serious amendment if we are to improve competition and successfully close the access-to-justice gap.³⁸ This is a step that we believe must be taken independent of the creation of a new regulatory body. Nor are we alone in this belief. “California has taken a step towards altering the role of lawyers after a state bar task force [in June 2019] advanced controversial proposals for new ethics rules that would allow non-lawyers to invest in law firms and tech companies to provide limited legal services.”³⁹ And Arizona has recently followed suit.⁴⁰

Lawyer Advertising

Traditionally, lawyer advertising was frowned upon as being undignified. Courts went so far as to say that advertising would undermine the attorney’s sense of self-worth and tarnish the dignified public image of the profession. This changed somewhat with the United States Supreme Court’s decision in *Bates v. State Bar of Arizona*, which recognized that the lawyer

³⁷ By way of example, the Administrative Office of the Utah Courts should soon have the opportunity to enter into a Memorandum of Understanding (MOU) with the Institute for the Advancement of the American Legal System. As envisioned, the MOU would provide partial backing for this project. Implementation of the MOU would be subject to, among other items, the Court adopting the work group’s report and recommendations.

³⁸ Some of these restrictions are already worked around and effectively bypassed through means such as litigation financing. By loosening these restrictions and bringing some of these workarounds within the purview of the new rules, we can ensure more effective regulation of those workarounds and provide better protection for consumers.

³⁹ Roy Strom, *California Opens Door to More Legal Tech, Non-Lawyer Roles (1)*, BLOOMBERG BIG LAW BUSINESS (July 2, 2019), <https://biglawbusiness.com/california-opens-door-to-more-non-lawyer-roles-tech-solutions> (last visited Aug. 10, 2019).

⁴⁰ Brenna Goth & Sam Skolnik, *Arizona Weighs Role of Non-Lawyers in Boosting Access to Justice*, BLOOMBERG BIG LAW BUSINESS (Aug. 15, 2019), <https://biglawbusiness.com/arizona-weighs-role-of-non-lawyers-in-boosting-access-to-justice> (last visited Aug. 16, 2018).

advertising ban in place in Arizona inhibited the free flow of information and kept the public in ignorance.⁴¹ The Court held that Arizona's total ban on lawyer advertising violated the free speech guarantee of the First Amendment.⁴² This case opened the door to lawyer advertising across the country.

The *Bates* Court did, however, allow states to ban false, deceptive, or misleading advertising, and to regulate the manner in which lawyers may solicit business in person. States can require warnings and disclaimers on advertising and impose reasonable restrictions on the time, place, and manner of advertising. And following the *Bates* decision, most states included such restrictions in their rules of professional conduct. Utah was one of those states.

Despite *Bates* and the many other court rulings since 1977 that removed restrictions on lawyer advertising, the belief on the part of some that lawyer advertising needs to be carefully constrained has persisted. As recently as 2013, the Bar submitted a petition to the Supreme Court requesting that lawyers be required to submit copies of all advertising and solicitations to a Lawyer Advertising Review Committee no later than the date of mailing or publishing of the advertisements or solicitations, so that the ads could be reviewed for appropriateness. The purpose of the proposed rule was to prevent Las Vegas-style advertising from creeping into Utah. Thankfully, the proposed rule was not adopted.

Last year, in recognition of the changing legal landscape, the ABA attempted to simplify the advertising and solicitation rules. Certain changes were made to the Model Rules of Professional Conduct, and states were encouraged to adopt similar rules. The Court's Advisory Committee on the Rules of Professional Conduct has monitored these changes to the Model Rules and has a review and update of the Utah advertising rules on its agenda.

The Advisory Committee's review includes an analysis of the purpose of the rules and the need to protect the public while simultaneously allowing the members of the public to be better-informed of the legal services available to them. The Committee must consider the reality that lawyers may advertise online and through attorney-matching services, pay-per-click ads, link-sharing, legal blogs, and social network accounts in order to promote services. The main concern should be the protection of the public from false, misleading, or overreaching solicitations and advertising. Any other regulation of lawyer advertising seems to serve no legitimate purpose; indeed, it is blunt, ex ante, and—like so many current regulations—neither outcomes-based nor risk-appropriate.

⁴¹ 433 U.S. 350, 365 (1977).

⁴² *Id.* at 384.

The Committee's review of advertising standards is well underway and we understand that a proposal should be sent to the Court for its consideration within the next two months. We applaud the Committee's efforts with respect to lawyer advertising.

Lawyer Referral Fees

Utah Rule of Professional Conduct 7.2 prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services or for channeling professional work to the lawyer.⁴³ But use of paid referrals is one method for allowing clients to find needed legal services and one of the ways lawyers can find new clients. Again, this rule should be amended to balance the risk of harm to prospective clients with the benefit to lawyers and clients through an outcomes-based and risk-appropriate methodology.

Ownership of Law Firms and Sharing Legal Fees with Non-Lawyers

Non-lawyers have traditionally been prohibited from owning and controlling any interest in law firms. Utah Rule of Professional Conduct 5.4 provides that a "lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁴⁴ The rules also prohibit a lawyer from "practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit" if a non-lawyer owns any interest therein, if a non-lawyer is a director or officer or has a similar position of responsibility in the firm, or if a non-lawyer has a right to direct or control the professional judgment of the lawyer.⁴⁵

The ABA Ethics 2000 Commission vigorously debated the concept of non-lawyer ownership of law firms in 2000. The ABA House ultimately rejected a proposal to allow non-lawyer ownership of law firms. Since then, however, a number of jurisdictions have seen the need to reevaluate such proposals. In Washington, D.C., the rules of professional conduct now allow for non-lawyer ownership of firms under certain conditions.⁴⁶ And as of June 2019, a state bar task force in California advanced a proposal that would allow non-lawyers to invest in law firms.⁴⁷ Most notably, "[i]n a July 11 meeting, the Arizona task force voted to recommend

⁴³ UTAH R. PROF'L CONDUCT 7.2(f).

⁴⁴ UTAH R. PROF'L CONDUCT 5.4(c).

⁴⁵ UTAH R. PROF'L CONDUCT 5.4(d).

⁴⁶ D.C. R. PROF'L CONDUCT 5.4(b). Rule 5.4(b) permits non-lawyer ownership of firms if (1) the law firm has as its sole purpose the provision of legal services, (2) all persons having management duties of an ownership interest agree to abide by the rules of professional conduct for lawyers, (3) the managing lawyers in the firm undertake to be responsible for the non-lawyer participants, and (4) these conditions are set forth in writing. *See id.*

⁴⁷ California has proposed two different amendments to its own rule 5.4. The first proposal is seen as an incremental evolution of the current rule. *See* STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF

scrapping Rule 5.4 . . . in its entirety.”⁴⁸ And, “[i]n a related move, the panel voted . . . to amend the state’s ethical rules to allow lawyers and nonlawyers to form new legal services businesses known as ‘alternative business structures.’”⁴⁹ We believe the Arizona approach has much to offer. Indeed, we view the elimination or substantial relaxation of Rule 5.4 as key to allowing lawyers to fully and comfortably participate in the technological revolution. Without such a change, lawyers will be at risk of not being able to engage with entrepreneurs across a wide swath of platforms.

Track B: The Creation of a New Regulatory Body

Alongside the proposed revisions set forth in Track A, we propose developing a new regulatory body for legal services in the State of Utah. Rule revisions are necessary to propel any change, but our position is that wide-reaching and impactful change will only follow reimagining the regulatory approach. Therefore, as the Supreme Court moves forward with revising the rules of practice, we endorse the simultaneous creation of a new regulator, operating under the supervision and direction of the Supreme Court, for the provision of legal services.

The proposed regulator will implement a regulatory system:

LEGAL SERVICES, *Recommendation Letter on Proposed Rule 5.4 [Alternative 1]* (June 18, 2019), <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000024362.pdf> (last visited Aug. 12, 2019). The second proposal is much more comprehensive and is meant to create a major shift in how financial arrangements with non-lawyers are regulated. See STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, *Recommendation Letter on Proposed Rule 5.4 [Alternative 2]* (June 14, 2019), <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000024359.pdf> (last visited Aug. 12, 2019). This proposal allows for fee sharing between a lawyer or law firm and any person or organization not authorized to practice law if:

(1) the lawyer or law firm enters into a written agreement to share the fee with the person or organization not authorized to practice law; (2) the client has consented in writing, either at the time of the agreement to share fees or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that the fee will be shared with a person or organization not authorized to practice law; (ii) the identity of the person or organization; and (iii) the terms of the fee sharing; (3) there is no interference with the lawyer’s independent professional judgment or with the lawyer-client relationship; and (4) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

Id.

⁴⁸ Brenna Goth & Sam Skolnik, *Arizona Weighs Role of Non-Lawyers in Boosting Access to Justice*, BLOOMBERG BIG LAW BUSINESS (Aug. 15, 2019), <https://biglawbusiness.com/arizona-weighs-role-of-non-lawyers-in-boosting-access-to-justice> (last visited Aug. 16, 2018).

⁴⁹ *Id.*

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1. Driven by clearly articulated policy objectives and regulatory principles (objectives-based regulation);
2. Using appropriate and state-of-the-art regulatory tools (licensing, data gathering, monitoring, enforcement, etc.); and
3. Guided by the assessment, analysis, and mitigation of consumer risk (risk-based regulation).⁵⁰

We suggest the following core policy objective for the new system: *To ensure consumers access to a well-developed, high-quality, innovative, and competitive market for legal services.*

As the core policy objective indicates, the explicit goal of this approach is to develop a regulatory framework that allows, supports, and encourages the growth of a vibrant market for legal services in Utah and, ultimately, across the United States. At every regulatory step, the regulator should consider how its actions impact the core objective, choosing those paths that enhance, not diminish, the achievement of that objective. Potential impacts on the core objective, from either the regulator's own decisions or from actions by participants in the market, will be measured and assessed in terms of risk to the core objective. The regulator will be guided by this primary question: What is the evidence of risk, if any, that this action will create in the consumer market for legal services? This is objectives-based, risk-based regulation.⁵¹

Examples:

- *What evidence do we see of consumer harm caused by improper influence by non-lawyer owners over legal decisions? What steps can we take to mitigate these risks in the market?*
- *What do the data tell us about the risks of consumer harm from software-enabled legal assistance in an area such as will writing? Are the actual risks of harm more likely or more significant than the risks of a consumer acting on their own or through a lawyer?⁵² How can the risks be mitigated?*

⁵⁰ Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MOD. L. REV. 59, 65–68 (2008) (explaining risk-based regulation).

⁵¹ *Id.*

⁵² In the U.K., for example, will writing is not a regulated legal activity. The government considered and ultimately rejected a proposal to make will writing a regulated legal activity because it found that there was not a sufficient showing that regulation was necessary or that other interventions could not address concerns around quality and service. See Catherine Fairbairn, *Regulation of will writers*, Briefing Paper No. 05683 16, HOUSE OF COMMONS LIBRARY (Nov. 29, 2018), <http://researchbriefings.files.parliament.uk/documents/SN05683/SN05683.pdf> (last visited Aug. 21, 2019). The investigation by the government showed essentially the same error rate (about 1 in 4) in wills drafted by attorneys and non-attorney legal service providers. The error rate was the same across complex and simple wills. See LEGAL SERVICES CONSUMER PANEL, *Regulating will-writing* 3 (July 2011),

- *What do the data indicate about the risk of consumer harm from non-lawyers providing legal advice in the area of eviction defense? Is the risk of these kinds of harm more significant than the harm we currently see for pro se defendants? What steps should be required to ensure and maintain quality service?*
- *What are the data on the risks of cyber and data security to consumers of legal services? Where is the impact most likely and greatest, and what regulatory resources should be brought to bear?*

This approach is meant to be open, flexible, and focused on the reality of the consumer experience with the law and legal services. The system we propose is designed specifically for the regulation of consumer-facing legal services and targeted at the risks posed to the purchasers of legal services. Opening the legal services market to more models, services, and competition will serve other important objectives including access to justice, the public interest, the rule of law, and the administration of the courts.

We propose development of the new regulatory system take place in two phases.

Phase 1

In Phase 1, the Supreme Court will set up an implementation task force much akin to the approach the Court took with respect to LPPs and online dispute resolution.⁵³ The implementation task force will be responsible for, among other items, (1) obtaining funding for the regulator, primarily through grant applications, (2) recommending necessary rule changes to the Court, (3) creating and operating a Phase 1 regulator responsible for overseeing a legal regulatory sandbox for non-traditional legal services, (4) gathering and analyzing data and other information in order to evaluate and optimize the regulatory process, and (5) preparing a final report and recommendation to the Court regarding the structure of the Phase 2 regulator. We believe Phase 1 should last approximately two years.

In short, in Phase 1, the regulator will operate as a pilot and will focus on developing an empirical approach to objectives- and risk-based regulation of legal services. The regulator will operate within the Court as part of the implementation task force.

https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf (last visited Aug. 21, 2019).

⁵³ The implementation task force may include representatives from the Court, from Bar leadership, and others with applicable expertise—including perhaps representatives from the legal technology sector.

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During Phase 1, the regulator will operate alongside the Utah Bar, which will continue to have authority over lawyers and LPPs.⁵⁴ The regulator will regulate non-traditional legal services: organizations offering legal services to the public that have ownership, a business structure/organization, or service offerings currently not authorized under Utah practice of law and professional conduct rules. Non-traditional legal entities could include: non-lawyer owned and/or managed corporations or non-profits or individuals/entities proposing to use non-lawyer human or technology expertise to provide legal assistance to the public. The regulator's focus will be on the activity or service proposed and the risks presented to consumers by that activity or service.

Also during Phase 1, the regulator will oversee the limited market of legal entities admitted to participate in a legal regulatory sandbox. The regulatory sandbox is a policy structure that creates a controlled environment in which new consumer-centered innovations, which may be illegal (or unethical) under current regulations, can be piloted and evaluated. The goal is to allow the Court and aspiring innovators to develop new offerings that could benefit the public, validate them with the public, and understand how current regulations might need to be selectively or permanently relaxed to permit these and other innovations. Financial regulators have used regulatory sandboxes over the past decade to encourage more public-oriented technology innovations that otherwise might have been inhibited or illegal under existing regulations.⁵⁵ In the legal domain, the United Kingdom's Solicitors Regulation Authority (SRA) has also created a structure—the Innovation Space—that introduces a system of waivers of regulatory roles for organizations to pilot ideas that might benefit the public.⁵⁶

Establishing a legal regulatory sandbox is inherent to Phase 1 of our proposed new regulatory system. Although we are well aware that particular rules will need to be relaxed or

⁵⁴ Given the Bar's expertise regulating lawyers, including in licensing and enforcement, the regulator may benefit from drawing on such expertise.

⁵⁵ The United Kingdom's Financial Conduct Authority created the first regulatory sandbox in 2016. Since then, it has overseen 4 cohorts of regulatory sandboxes to promote financial services innovation. The Monetary Authority of Singapore has run sandboxes to encourage experimentation with financial technology. Abu Dhabi's Regulatory Lab set up a sandbox for financial technology that involved the Abu Dhabi Registration Authority, Financial Services Regulatory Authority, and the courts. Other financial technology sandboxes have been run in Australia, Mauritius, the Netherlands, Canada, Thailand, Denmark, and Switzerland. Some of the things being tested in financial sandboxes include new insurance, retirement, retail banking, investment, and retail lending offerings. In 2018, Arizona launched a regulatory sandbox for financial technology, specifically to promote entrepreneurship and investment around blockchain, cryptocurrencies, and other emerging technologies. See Arizona Attorney General, *Welcome To Arizona's FinTech Sandbox*, STATE OF ARIZONA, <https://www.azag.gov/fintech> (last visited Aug. 21, 2019). And in May 2019, Utah launched its own financial technology sandbox. See Department of Commerce, *Regulatory Sandbox*, STATE OF UTAH, <https://commerce.utah.gov/sandbox.html> (last visited Aug. 21, 2019).

⁵⁶ SOLICITORS REGULATION AUTHORITY, *Enabling innovation: Consultation on a new approach to waivers and developing the SRA Innovation Space* (Apr. 12, 2018), <https://www.sra.org.uk/sra/consultations/enabling-innovation.page> (last visited Aug. 12, 2019).

eliminated to permit innovation, we are less certain what might be on the other side of regulatory reform. What new regulations might be appropriate to ensure that new services do not generate unacceptable risks? Because the legal market has been so strictly limited, we cannot presently catalog the risks that might develop or the regulatory methods that might be effective to appropriately identify and manage those risks. Hence, the regulatory sandbox will be as much for the development of the regulator as for the development of the models, products, and services within. Below, we have put together the key features of our sandbox for Phase 1 of the project. These are features present in regulatory sandboxes around the world.

Three key features to the regulatory sandbox:

1. **Testing out what innovations are possible.** With the relaxation or elimination of the rules around unauthorized practice, fee sharing, and corporate practice of law, we can see how much and what kinds of new innovation might be possible in the legal sector. We expect to see innovations around business models (new financing, ownership or contracting models), services (new roles for experts in other fields, collaborating with lawyers), and technology (increased use of technology to offer legal advice and guidance, use of technologies such as artificial intelligence, blockchain, and mobile). Through the sandbox, we can learn what is possible, what benefits may be realized, and what risks these new offerings present. The sandbox enables the Court and the public to understand how much innovation potential there is in the legal ecosystem, beyond mere speculation that emerging tech has promise in the legal market if regulations were changed.
2. **Tailored evaluation plans focused on risk.** The sandbox model puts the burden on companies to define how their services should be measured in regard to benefits, harms, and risks. They must propose not only what innovation is possible, but also how it can be assessed. Risk self-assessment by companies participating in the sandbox will be a key requirement in order to further our regulatory goals.
3. **New sources of data on what regulation works best.** The sandbox will be the source for the new regulator's data-driven, evidence-backed policy-making. Because sandbox participants gather and share data about their offerings' performance (at least with the regulators, if not more publicly), the sandbox can help develop standards and metrics around data-driven regulation. This is particularly needed in the legal arena because we have so little data about how people engage with the legal world. It can incentivize more companies to evaluate their offerings through a rigorous understanding of benefits and

harms to the public, and it can help regulators develop protocols to conduct this kind of data-driven evaluation.

Sandbox participants could be an accounting firm proposing to offer legal services provided by lawyers alongside its accounting services, a technology startup using AI-enhanced software to help consumers complete legal documents (wills, trusts, incorporations, etc.), or a non-profit proposing to allow its expert paralegal staff to offer limited legal advice to clients independent of lawyer supervision. To participate in the sandbox, each provider will have to agree to share relevant data with the regulator. The regulator will identify, measure, and assess potential consumer risk and then determine whether the provider will be permitted to participate in the sandbox and with what form of security (please see a more detailed outline of our proposed Phase 1 regulatory process at Appendix D). All consumer participants in the sandbox must provide informed consent. Over the course of the two-year Phase 1 sandbox, the regulator will build up its regulatory approach—in particular, its risk identification, quantification, and response approach.

Throughout Phase 1, the regulator will be in regular reporting and communication with the Supreme Court.⁵⁷ It is the goal that, by the end of Phase 1, the regulator will have developed and refined a data-driven regulatory framework focused on the identification, assessment, mitigation, and monitoring of risk to consumers of legal services, and an enforcement approach designed to respond to evidence of consumer harm as appropriate to support the core objective. The regulator will then present a comprehensive report and proposal for Phase 2 to the Court for its review and approval.

Phase 1 needs from the Supreme Court include the following:

1. Establish the Phase 1 regulator as an implementation task force of the Court and delegate regulatory authority to set up and run the regulatory sandbox. The Court should also outline regulatory objectives and regulatory principles for the Phase 1 regulator. (Suggested principles may be found at Appendix D).
2. Establish by appropriate means that providers (including their ownership/management and their employees) approved to participate in the regulatory sandbox by the Phase 1 regulator are not engaged in the unauthorized practice of law in Utah.

⁵⁷ We wish to be quite clear that, as we have reinforced throughout the report, the regulator must be, and will be, subject to the supervision and direction of the Supreme Court.

3. Establish that licensed Utah lawyers will not be subject to discipline for entering into business with or otherwise providing services with providers approved by the Phase 1 regulator for participation in the sandbox.

Phase 2

In Phase 2, we anticipate some form of an independent, non-profit regulator with delegated regulatory authority over some or all legal services.⁵⁸ However, we will not say much about Phase 2 in this report because we do not wish to put the cart before the horse. Phase 1 of this project allows for the carefully controlled research and development of objectives-based, risk-based regulation of legal services. Phase 2 may implement the regulatory approach across the Utah legal market more broadly.⁵⁹

It is our belief that the objectives- and risk-based regulatory approach should be the future of regulation for legal services in Utah, and indeed throughout the country. Utah has an opportunity to be a leader nationwide. Phase 2 could proceed in multiple different directions as long as the objectives-based, risk-based approach remains its key characteristic. The Court may determine that the regulator is best suited for entity regulation (i.e., regulation of non-traditional legal entities like companies) and should operate alongside the Bar, which will continue to regulate lawyers. It would then be up to the Bar, in cooperation with the Court, to assess whether and how it wants to implement objectives-based, risk-based regulation for lawyers.

The Court may, on the other hand, determine that the new regulator and the objectives-based, risk-based approach should be rolled out for all legal services in Utah. In that case, the Court will have to revise its delegation of authority to regulate the practice of law via Rule 14-102 from the Bar to the new regulator. The Bar could continue to function as a mandatory Bar with regulatory functions operated under the auspices of the Court, but now through the regulator. Alternatively, the Bar could function solely as a membership organization that awards professional titles and specialized practice certifications, maintains ethical standards,

⁵⁸ We also wish to be quite clear about the meaning of the word “independent.” By independent, we mean a regulator independent from management and control by those it regulates, i.e., lawyers. We do not mean independent of control of the Supreme Court. The independent regulator we propose in Phase 2 would, as the Bar is now, no longer be operating within the Court, but would, as the Bar also is now, still ultimately be answerable to the Court for achieving the core regulatory objective and would be subject to any requirements established by the Court.

⁵⁹ The task force is aware that the Institute for the Advancement of the American Legal System presently intends to “develop a model for a regulatory entity that would focus on risk-based regulation for legal services and would operate across state lines.” Institute for the Advancement of the American Legal System, *Unlocking Legal Regulation*, UNIVERSITY OF DENVER (forthcoming) (on file with author).

engages in advocacy, and provides continuing education.⁶⁰ It may be that those professional titles will be required by the regulator in certain oversight roles for legal service entities (e.g., Big Box Stores offering legal services to the public may be required to have Bar-approved lawyers in managerial roles) or that the Court will decide for public policy reasons that only Bar-approved lawyers may perform certain activities before the Court.

CONCLUSION

Decade after decade our judicial system has struggled to provide meaningful access to justice to our citizens. And if we are to be truly honest about it, we have not only failed, but failed miserably. What this report proposes is game-changing and, as a consequence, it may gore an ox or two or upend some apple carts (pick your cliché). Our proposal will certainly be criticized by some and lauded by others. But we are convinced that it brings the kind of energy, investment, and innovation necessary to seriously narrow the access-to-justice gap. Therefore, we respectfully request that the Supreme Court adopt the recommendations outlined in this report and direct their prompt implementation.

⁶⁰ The professional titles offered by the Bar in this system could be market indicators of levels of education, qualification and, perhaps, service. It is possible the Bar could continue to tie access to titles and certification to ethical standards of service. However, the Bar would no longer have the authority to regulate the market for legal services and members of the Bar would be forced to compete in a larger market.

APPENDIX A

DENO HIMONAS (CO-CHAIR)

Justice Deno Himonas was appointed to the Utah Supreme Court in 2015. For the decade prior, he served as a district court judge, where he was able to try hundreds of criminal, civil, and family law cases and run a felony drug court.

In addition to his judicial duties, Justice Himonas has taught at the S.J. Quinney College of Law at the University of Utah and has been a visiting lecturer at universities in Kiev, Ukraine. He is the 2017 Honorary Alumnus of the Year of the S.J. Quinney College of Law, a recipient of the Judicial Excellence award from the Utah State Bar, and a Life Fellow of the American Bar Foundation.

Justice Himonas is deeply involved in the access-to-justice movement and can often be found speaking about access-to-justice around the country. He currently chairs two access-to-justice task forces, one on licensed paralegal practitioners and the other on online dispute resolution, and co-chairs a third, which is reimagining the regulation of the practice of law.

Justice Himonas graduated with distinction from the University of Utah with a bachelor's degree in economics and went on to receive his J.D. from the University of Chicago. Upon graduation, he spent fifteen years primarily litigating complex civil matters in private practice.

JOHN LUND (CO-CHAIR)

John Lund has practiced law the old-fashioned way since 1984. He is a shareholder with Parsons Behle & Latimer, where he represents clients in challenging litigation and trials throughout the West. Mr. Lund is recognized by Chambers USA as a Band 1 lawyer for commercial litigation and is also a Fellow of the International Academy of Trial Lawyers. Mr. Lund is the immediate past president of the Utah State Bar and has been involved in leadership of the Utah Bar for over a decade. He recently concluded two terms as the lawyer representative on Utah's Judicial Council, which oversees Utah's judicial branch. He has served on various committees and projects relating to improving access to justice and innovation in the practice of law. These include co-chairing the Utah Bar's 2015 Futures Commission, developing the Utah Bar's online interactive directory of lawyers, serving on the Utah Supreme Court's task force for Licensed Paralegal Practitioners, serving on the Utah Supreme Court's task force for reform of Utah's attorney discipline system, and establishing Utah's newly formed Access to Justice Commission. Currently, Mr. Lund co-chairs a joint task force of the Utah Supreme Court and the Utah Bar that is recommending significant and potentially disruptive changes to the regulation of legal services in order to bring innovation to legal services and thereby improve access to justice.

H. DICKSON BURTON

Mr. Burton is the past President of the Utah State Bar, completing his term in July 2019. In his day job, Mr. Burton is the Managing Shareholder of TraskBritt, a nationally-recognized Intellectual Property law firm, where he litigates patent, trademark, and trade secret matters in courts around the country. He is also frequently called upon to mediate or arbitrate patent and other complex intellectual property disputes, with mediation training and certification from both the World Intellectual Property Organization and Harvard Law School. He has also served as an Adjunct Professor at the University of Utah S.J. Quinney College of Law teaching patent litigation.

Mr. Burton is the current Chair of the Local Rules Committee for the U.S. District Court for the District of Utah, and is currently serving on the Magistrate Judge Merit Selection Panel for that court.

Mr. Burton has been honored for many years in peer-review lists including Best Lawyers, IP Stars, Chambers USA, and SuperLawyers, including being listed as one of the Top 100 of all lawyers in the Mountain States.

THOMAS CLARKE

Tom Clarke has served for fourteen years as the Vice President for Research and Technology at the National Center for State Courts. Before that, Tom worked for ten years with the Washington State Administrative Office of the Courts first as the research manager and then as the CIO. As a national court consultant, Tom consulted frequently on topics relating to effective court practices, the redesign of court systems to solve business problems, access to justice strategies, and program evaluation approaches. Tom concentrated the last several years on litigant portals, case triage, new non-lawyer roles, online dispute resolution, public access/privacy policies, and new ways of regulating legal services.

CATHERINE DUPONT

Cathy Dupont is the Deputy State Court Administrator in Utah. Prior to serving as the Deputy State Court Administrator, Cathy was the Appellate Court Administrator and served as one of the Utah Supreme Court's legislative liaisons during the 2019 Legislative Session. Before joining the courts, Cathy worked as the Director of Strategy and External Relations for the state's Public Employee Health Plan and managed the Provider Relations Department and the Marketing and Communications Department. She also worked for over 20 years as an associate general counsel for the Office of Legislative Research and General Counsel, a non-partisan office responsible for drafting legislation and staffing legislative committees.

GILLIAN HADFIELD

Gillian Hadfield, B.A. (Hons.) Queens, J.D., M.A., Ph.D. (Economics) Stanford, is the Schwartz Reisman Chair in Technology and Society, Professor of Law and Professor of Strategic Management at the University of Toronto. She also serves as Director of the Schwartz Reisman Institute for Technology and Society. Her research is focused on innovative design for legal and dispute resolution systems in advanced and developing market economies; governance for artificial intelligence; the markets for law, lawyers, and dispute resolution; and contract law and theory. Professor Hadfield is a Faculty Affiliate at the Vector Institute for Artificial Intelligence in Toronto and at the Center for Human-Compatible AI at the University of California Berkeley and Senior Policy Advisor at OpenAI in San Francisco. Her book, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy*, was published by Oxford University Press in 2017.

Professor Hadfield served as clerk to Chief Judge Patricia Wald on the U.S. Court of Appeals, D.C. Circuit. She was previously on the faculty at the University of Southern California, New York University, and the University of California Berkeley, and has been a visiting professor at the University of Chicago, Harvard, Columbia, and Hastings College of Law. She was a 2006-07 and 2010-11 fellow of the Center for Advanced Study in the Behavioral Sciences at Stanford and a National Fellow at the Hoover Institution in 1993. She has served on the World Economic Forum's Global Future Council for Agile Governance, Future Council for the Future of Technology, Values and Policy, and Global Agenda Council for Justice. She is currently a member of the American Bar Association's Commission on the Future of Legal Education and is an advisor to courts and several organizations and technology companies engaged in innovating new ways to make law smarter and more accessible.

MARGARET HAGAN

Margaret Hagan is the Director of the Legal Design Lab at Stanford University, as well as a lecturer in the Institute of Design (the d.school). She is a lawyer, and holds a J.D. from Stanford Law School, a DPhil from Queen's University Belfast, an MA from Central European University, and an AB from University of Chicago. She specializes in the application of human-centered design to the legal system, including the development of new public interest technology, legal visuals, and policy design. Her research and teaching focuses on the development and evaluation of new interventions to make the legal system more accessible. Her recent articles include "Participatory Design for Innovation in Access to Justice" (Daedalus 2019) and "A Human-Centered Design Approach to Access to Justice" (Ind. JL & Soc. Equal. 6, 199, 2018).

STEVEN JOHNSON

Steven Johnson is a 1977 graduate of the J. Reuben Clark Law School at Brigham Young University. He has been a member of Utah State Bar since 1977, and of the State Bar of California since 1989. He has worked for a small Salt Lake City law firm, is the former general counsel for an international marketer of turkeys and turkey products, and is currently a solo practitioner in Highland, Utah, advising and representing clients in a variety of legal matters including business and corporate issues, real property matters, and contracts; and he has also served as an arbitrator and mediator in private practice and for the Better Business Bureau.

He has spent a good part of his career serving in the Bar and serving the courts of the State of Utah to enhance access to justice. He has served as an officer, including chair, of both the Corporate Counsel Section and of the Dispute Resolution Section of the Bar. He has been a member of Utah State Bar's Fee Arbitration Panel since 1999, and chaired the Panel from 2006 to 2010. He was appointed as a member of the Supreme Court's MCLE Board in 1999, and served as Trustee of the Board for 4 years. He served 7 years as an Associate Editor of the *Utah Bar Journal* beginning in his second year of law school, and served for 10 years as a member of the Bar's Government Affairs Committee.

Mr. Johnson has served 20 years on the Supreme Court's Advisory Committee on the Rules of Professional Conduct, and for the last 9 years has served as chair of that committee. He has served as a member of the Supreme Court's Commissioner Conduct Commission for the past 9 years, and currently serves as a member of the Fourth District Justice Court Nominating Commission. He is a member of the Utah State Courts' Certified Panel of Arbitrators.

The Supreme Court has also asked him to serve on three Court task forces—the Licensed Paralegal Practitioner Task Force, the Office of Professional Conduct Task Force, and the Task Force on Regulatory Reform.

In 2018, the Supreme Court awarded him the Service to the Courts Award for his contributions to Utah's judicial system. In 2019, he was awarded the Utah State Bar's Distinguished Service Award.

Mr. Johnson served on 3 different occasions in the countries of Ethiopia and Eritrea, teaching government employees how to organize and manage farmer cooperatives so that they can go out and teach farmers how to run cooperatives to better their economic status. He has helped them to amend their cooperative codes to eliminate inconsistencies and to fill in gaps in the laws.

LUCY RICCA

Lucy Ricca is a Fellow and former Executive Director of the Stanford Center on the Legal Profession at Stanford Law School. Ricca was a Lecturer at the law school and has written on the regulation of the profession, the changing practice of law, and diversity in the profession. As Executive Director, Ricca coordinated all aspects of the Center's activities, including developing the direction and goals for the Center and overseeing operations, publications, programs, research, and other inter-disciplinary projects, including development and fundraising for the Stanford Legal Design Lab. Ricca joined Stanford Law School in June 2013, after clerking for Judge James P. Jones of the United States District Court for the Western District of Virginia. Before clerking, Ricca practiced white collar criminal defense, securities, antitrust, and complex commercial litigation as an associate at Orrick, Herrington & Sutcliffe. Ricca received her B.A. cum laude in History from Dartmouth College and her J.D. from the University of Virginia School of Law.

D. GORDON SMITH

D. Gordon Smith is the Dean and Glen L. Farr Professor of Law of the J. Reuben Clark Law School, Brigham Young University. Dean Smith is a leading figure in the field of law and entrepreneurship and has done foundational work on fiduciary theory. He has also made important contributions to the academic literature on corporate governance and transactional lawyering. For his work in promoting the study of corpus linguistics and design thinking in law schools, Dean Smith was included in the Fastcase 50 (2017), which honors “the law’s smartest, most courageous innovators, techies, visionaries, & leaders.”

Dean Smith earned a JD from the University of Chicago Law School and a BS in Accounting from Brigham Young University. He has taught at six law schools in the U.S., as well as law programs in Australia, China, England, Finland, France, Germany, and Hong Kong. Before entering academe, Dean Smith clerked for Judge W. Eugene Davis in the United States Court of Appeals for the Fifth Circuit and was an associate in the Delaware office of the international law firm Skadden, Arps, Slate, Meagher & Flom.

HEATHER S. WHITE

Heather White is a partner with the Salt Lake City-based law firm of Snow Christensen & Martineau, where she leads the firm's Governmental Law Practice Group. Her primary focus is on the defense of government entities in high profile civil rights disputes. Heather is a 1996 graduate of the University of Utah, S.J. Quinney College of Law.

Heather defends governmental entities and their officers against complaints asserting the deprivation of civil rights. These include all types of claims of alleged misconduct, such as excessive force, search and seizure, wrongful arrest, false imprisonment, malicious prosecution, abuse of process and denial of medical care, to name a few. At any given time, Heather is involved in multiple officer-involved shooting cases from inception, including investigations by the Department of Justice and press inquiries, through conclusion.

With deep respect for her Utah police officer clients, and their dedication to society at great personal expense, Heather has become their trusted confidant and advisor. She listens closely to determine individual needs – whether in out-of-court settlements or in public trials – then presses forward assertively with a customized approach and legal strategy. To better understand and closely connect with her clients, and the matters they are involved in, Heather regularly joins officers in the field participating in police ride-alongs. She is certified by the Force Science Institute and conducts training sessions for law enforcement throughout the state, including both client and non-client entities.

Heather also represents the two primary insurers of government entities in the State of Utah—the Utah Risk Management Mutual Association and the Utah Local Governments Trust—as well as a number of self-insured governmental agencies. She believes in the importance of educating her clients on legally related elements of their complex, public careers. In this effort, Heather regularly speaks to agencies and insurers on police training issues, liability, risk management, and incident-prevention issues.

Heather has an extensive track record of governmental civil rights cases and trials, with multiple favorable defense verdicts in state and federal trial and appeals courts. In addition, Heather regularly defends governments against claims involving accidents with government vehicles and premises liability, such as “slip and fall” accidents that might involve sidewalks, water meters, or swimming pools, cemeteries, playgrounds, recreational centers and others.

Heather is a frequent trainer, presenter, and author, covering a wide range of governmental law topics and current governmental law headline subjects.

Heather is actively involved in professional and civic organizations including: American Academy of Trial Attorneys; Utah Bar Technology and Innovation Committee; Salt Lake County

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Bar, Utah State Bar, and Federal Bar Association; Model Utah Jury Instructions, Chair of Subcommittee on Civil Rights Instructions; Magistrate Merit Selection Panel; Defense Research Institute; Utah Defense Lawyers Association; and Utah Municipal Attorneys Association

Heather has maintained a steady 5.0 Martindale-Hubbell® Peer review rating; is consistently recognized as a Utah Super Lawyer by Super Lawyer Magazine; is regularly recognized as a Utah Legal Elite by Utah Business Magazine; is listed in Best Lawyers in America; and was named a Distinguished Faculty member by Lorman Education Services.

ELIZABETH A. WRIGHT

Elizabeth Wright is General Counsel for the Utah State Bar. She is a graduate of Hamilton College and Case Western Reserve School of Law. She is admitted in New York and Utah and was an Assistant Corporation Counsel for the City of New York before moving to Utah. Wright began working for the Utah State Bar in 2011 as the Coordinator of the New Lawyer Training Program. She became General Counsel in 2014. As General Counsel, Elizabeth represents the Bar and also works closely with Bar and Court committees to modify and propose rules governing the practice of law in Utah. Elizabeth served on both the Executive and Steering Committees for Utah's Licensed Paralegal Practitioner Program helping to develop rules for the program. Elizabeth currently serves on the Utah Task Force on Legal Reform which is exploring changing the regulatory structure in Utah to foster innovation and promote market forces to increase access to and affordability of legal services.

APPENDIX B



John C. Baldwin
Executive Director

Board of Bar Commissioners

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President
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August 22, 2018

VIA EMAIL to cathyd@utcourts.gov

Justices of the Utah Supreme Court
c/o Appellate Court Administrator
450 S. State Street
P.O. Box 140230
Salt Lake City, UT 84114

Dear Justices of the Utah Supreme Court,

Access to justice in Utah remains a significant and growing problem. It can be readily seen in the data regarding self-represented parties in the Utah court system. However, it is a much broader and complex issue which not only involves all sort of legal needs but overlaps with a host of other challenges confronted by low and middle-income people living in Utah. We believe lawyers can and should be part of the solution to this problem. There are times well before a court action when some simple advice from an attorney could prevent a problem or resolve a conflict. Yet, as the Bar's recent survey shows, very high percentages of individuals and businesses in Utah have no sense of the value lawyers can provide, they do not know how to find the right lawyer and they believe that it will be too costly to get a lawyer's help.

There are undoubtedly many steps needed in many places. However, we believe a key step to getting legal representation to more people is to substantially reform the regulatory setting in which lawyers operate. We request the Court establish a small working group to promptly study possible reforms and make recommendations to the Court. The purpose of the working group would be to evaluate and make recommendations for revisions, possibly major revisions, to the rules of professional responsibility so as to permit lawyers to more effectively and more affordably provide legal services and do related promotion of those services. The specific areas of focus would be rules concerning (1) fee sharing, (2) advertising and (3) fee arrangements. There are also some conflict of interest issues implicated by some of the possible revisions in these areas.

The work would include consideration of (1) the effect of modern information technology and modern consumer patterns on the current rules, (2) the potential value, in terms of making legal services accessible to clients, of non-lawyer investment and ownership in entities providing legal services and the related regulatory issues, (3) the prospect of broadening the availability of legal services through flat fee and other alternative fee arrangements not currently permitted by the rules, (4) whether there is continuing justification for the rules against direct solicitation, (5) whether and how to permit and structure lawyer use of referral systems such as Avvo in light of the rule against referral fees and (5) the related trends and approaches being considered and/or implemented in other bars, such as Oregon and the ABA's work in this area.

Serving the public. Working for justice.

Narrowing the Access-to-Justice Gap by Reimagining Regulation

Justices of the Utah Supreme Court
c/o Appellate Court Administrator
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Page 2

In terms of the makeup of the group, we suggest that the group be co-chaired by a Supreme Court Justice and the immediate past president of the Bar, John Lund. We believe the Bar's general counsel can provide support. We would also suggest including the chair of Court's Committee on the Rules of Professional Responsibility and would also ask that Cathy Dupont be appointed to the committee. Importantly the group should be made up of people who will actually study and consider recommended changes. In that vein, we propose including one of the leaders from the Bar's Innovation in Law Practice Committee, possibly Heather White, Co-chair of that Committee.

Once established, we believe the group could be expected to provide a report and recommendation to the Court within 6 months.

We would be most pleased to attend the Court's Conference on August 27 and discuss our proposal in more detail and answer any questions or concerns from the members of the Court.

Sincerely,



H. Dickson Burton

cc: Richard H. Schwermer (ricks@utahcourts.gov)
John R. Lund (jlund@parsonsbehle.com)
John Baldwin (jbaldwin@utahbar.org)

APPENDIX C

THE LEGAL SERVICES ACT OF 2007

The Legal Services Act (LSA) overhauled the regulation of legal services in the United Kingdom.⁶¹ The regulatory overhaul was precipitated by an overall push for regulatory reform across the U.K., looking particularly at how restrictive rules and norms in the professions impacted competition and the cost of legal services. The goal of the regulatory reform was explicitly consumer and competition focused: “Putting Consumers First.”⁶² Through these reforms, the U.K. legal profession lost its self-regulatory power. The profession is now regulated by an entity, not controlled by lawyers, answerable to Parliament.

Approach of the LSA

The LSA sought to create an objectives-based, risk-based system for the regulation of legal services in the U.K. The Act itself does not set out detailed, prescriptive rules of behavior to be followed by regulated entities. Rather, the Act sets out regulatory objectives and principles to guide the regulators. It is the responsibility of the regulators to develop the details of the system within those guidelines. “Regulation needs to be proportionate and targeted, focused on outcomes and reflecting real risks in the market. It needs to tackle risk of consumer detriment but, in doing so, stop short of creating an excessive burden that might stifle innovation or restrain competition.”⁶³

1. Objectives and Principles (set out in the LSA)

a. Objectives:⁶⁴

- i. Protecting and promoting the public interest;
- ii. Supporting the constitutional principle of the rules of law;
- iii. Improving access to justice;
- iv. Protecting and promoting the interests of consumers;
- v. Promoting competition in the provision of regulated services;

⁶¹ These reforms were limited to England and Wales. Scotland is independently assessing legal market reforms. The U.K. has always had a very different system from the U.S.—split bar system, several other legal roles, many services we consider to be practice of law are not so considered in the U.K. (including providing legal advice). See Stephen Mayson, *Independent Review of Legal Services Regulation: Assessment of the Current Regulatory Framework* (University College London Centre for Ethics & Law, Working Paper LSR-0, 2019), https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-0_assessment_1903_v2.pdf (last visited Aug. 13, 2019).

⁶² See LEGAL SERVICES BOARD, *History of the reforms*, https://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm (last visited Aug. 13, 2019).

⁶³ See LEGAL SERVICES BOARD, *Improving Access to Justice: Rationalising the Scope of Regulation*, https://www.legalservicesboard.org.uk/projects/rationalising_scope_of_regulation/index.htm (last visited June 13, 2019).

⁶⁴ The objectives are not defined in the Act but the LSB published a separate paper defining the objectives. See LEGAL SERVICES BOARD, *The regulatory objectives: Legal Services Act 2007*, https://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf (last visited Aug. 13, 2019).

- vi. Encouraging an independent, strong, diverse, and effective legal profession;
- vii. Increasing public understanding of the citizen's legal rights and duties; and
- viii. Promoting and maintaining adherence to professional principles.

b. Principles:

- i. Authorized persons should act with independence and integrity;
- ii. Authorized persons should maintain proper standards of work;
- iii. Authorized persons should act in the best interests of clients;
- iv. Those who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons should comply with their duty to the court to act with independence in the interests of justice; and
- v. Affairs of clients should be kept confidential.⁶⁵

What Is the Regulatory Structure?

The LSA establishes one overarching regulator, the Legal Services Board (LSB). The LSB is a government regulator accountable to Parliament. The primary duty of the LSB is to “promote the regulatory objectives” when carrying out its regulatory functions.⁶⁶

The Lord Chancellor, a member of the U.K. Parliament and also Secretary of State for Justice, appoints the members of the LSB. The Board is made up of both lawyers and laypeople, and has a lay chairperson.⁶⁷ The Act creates a Legal Services Consumer Panel made up of lay people that advises the LSB on various relevant topics, particularly those considering public interest.⁶⁸ The Act also establishes a separate Office of Legal Complaints to address and help resolve consumer complaints.

Instead of directly regulating legal services providers, the LSB regulates multiple “front-line” regulators, which in turn regulate different sectors of the profession (see chart below for

⁶⁵ Legal Services Act 2007, c.29, Part 1, § 1, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁶⁶ *Id.*, Part 2, § 3, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019). The LSB does not have a standalone objective or the power to promote the regulatory objectives separate from its established regulator functions.

⁶⁷ *Id.*, sch. 4, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁶⁸ *Id.*, Part 2, § 8, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019). The Consumer Panel has significant independent authority under the Act, including the ability to independently report to the public on advice that it gives the LSB.

overview). The LSB has authority to set governance requirements and performance targets, review rules and procedures, and investigate the front-line regulators.⁶⁹

The LSA defines certain regulated activities and persons. Both the activities and the persons follow historically grounded legal roles in the U.K. As will be discussed in more detail below, recent reviews of the effectiveness of the LSA reforms have offered strong criticism of the retention of these traditional activities and roles within the new regulatory regime.

The LSA designates six specific activities as “reserved activities”:

1. The exercise of a right of audience;
2. The conduct of litigation;
3. Reserved instrument activities (transactions involving real or personal property but not including wills);
4. Probate activities;
5. Notarial activities; and
6. The administration of oaths.⁷⁰

Those activities can only be performed by people (“authorized persons”) granted a license through one of the regulators. It is a criminal offense for an unauthorized person to perform any of the reserved activities.⁷¹ All activities other than these six are unregulated (such as the provision of ordinary legal advice or assistance with legal documents) and may be performed by any person or entity.⁷²

Nine roles are designated “authorized persons” under the LSA.

1. Solicitor;
2. Barrister;
3. Legal executive;
4. Notary;
5. Licensed conveyancer;
6. Patent attorney;

⁶⁹ *Id.*, Part 4, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019). The chart below does not list all of the front-line regulators. A complete list can be found here: <http://www.legislation.gov.uk/ukpga/2007/29/schedule/4>.

⁷⁰ *Id.*, Part 3, § 12(1), <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁷¹ *Id.*, Part 3, §§ 14, 17, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁷² In June 2016, the LSB published a report on the unregulated market for legal services. It estimated that, in cases in which parties sought legal advice, 37% was sought from non-profit legal service providers and between 4.5–5.5% was sought from for profit providers. See LEGAL SERVICES BOARD, *Research Summary: Unregulated Legal Services Providers* (June 2016), <https://research.legalservicesboard.org.uk/wp-content/media/Unregulated-providers-research-summary.pdf> (last visited Aug. 13, 2019). Based on this data, the LSB decided not to extend their regulatory reach at this time.

7. Trademark attorney;
8. Costs lawyer;⁷³ and
9. Chartered accountant.⁷⁴

Each group is authorized to perform certain reserved activities (e.g. barristers, solicitors, and legal executives can perform all reserved activities except for notarial activities).⁷⁵

The front-line regulators generally align with authorized persons roles (e.g. the Bar Standards Board (BSB) regulates the activities of barristers and the SRA regulates the activities of solicitors). There is certainly overlap, particularly when individuals are working within regulated entities (e.g. it is common for conveyancers, legal executives, and barristers to work in entities regulated by the SRA and almost all notaries are also solicitors).

The front-line regulators are required to promote the regulatory objectives.⁷⁶ Pre-LSA, the front-line regulators were, like our bar associations, the trade associations for their associated groups. Post-LSA, they are required to separate any advocacy work from regulatory work.⁷⁷

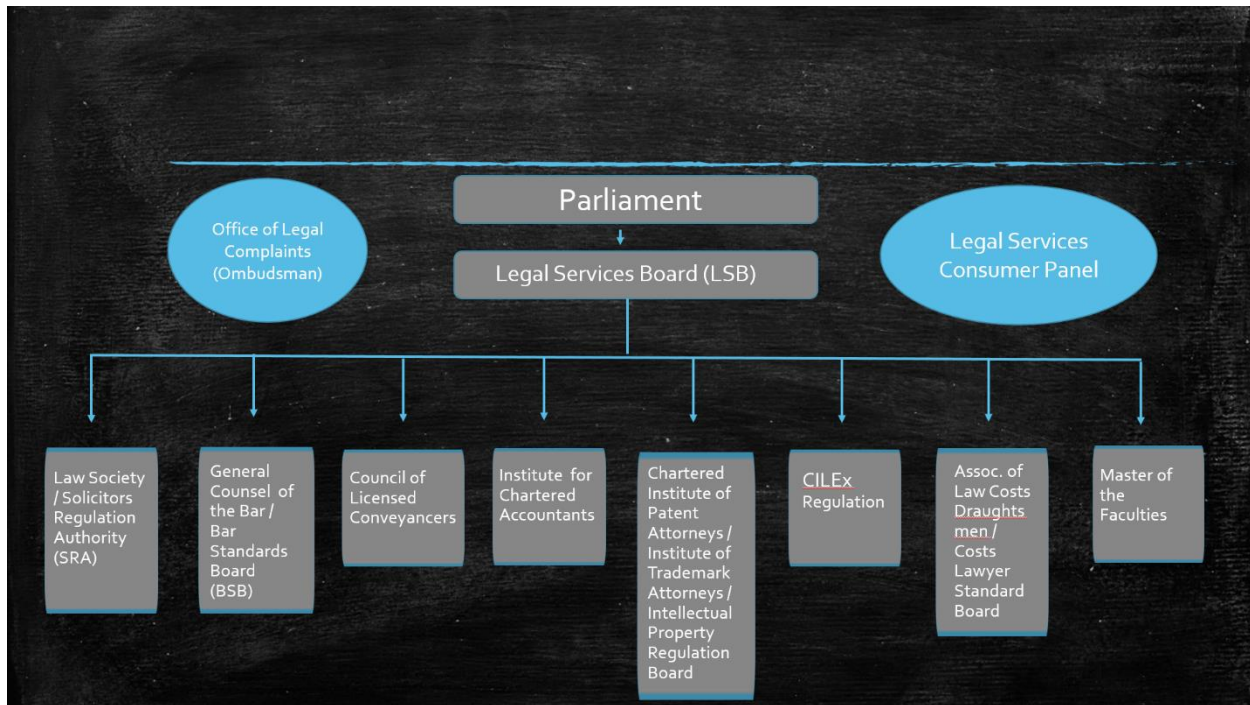
⁷³ A costs lawyer is a specialist in the law governing the allocation of costs in the U.K. legal system. Unlike the American system, under British law, prevailing parties in litigation are routinely allowed to collect their “costs” (including attorneys’ fees) from losing parties. Also, clients may seek an assessment of their legal bills from a court, which is authorized to adjust the bill.

⁷⁴ See Legal Services Act, c.29, sch. 5, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁷⁵ *Id.*, sch. 4, Part 1, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁷⁶ *Id.*, Part 4, § 28, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

⁷⁷ *Id.*, Part 4, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019). The system is somewhat complex. Under the current approach, the designated regulators under the LSB are the traditional representative organizations for the legal role (i.e. the Law Society, the General Counsel of the Bar, the Association of Law Costs Draughtsmen). Under the LSA, those organizations are required to put the regulatory function beyond the representative function, leading to the creation of the current operating regulators (i.e., the Solicitors Regulation Authority, the Bar Standards Board, and the Costs Lawyer Standard Board). One of the bigger criticisms of the LSA reforms is that this approach does not go far enough to separate the regulatory function from the representative/advocacy function and the LSB is assessing changes to make that separation more complete.



The LSA authorizes and regulates non-lawyer owned legal service entities that are called Alternative Business Structures (ABSs) (discussed in detail below).

What Does This Actually Look Like: The Solicitors Regulation Authority

The Solicitors Regulation Authority is the largest regulator of legal services in the U.K., regulating solicitors and ABSs. The SRA describes its regulatory approach as follows:

The outcomes-focused approach to regulation means that our goal is to ensure that legal services providers deliver positive outcomes for consumers of legal services and the public, in line with the intent of the LSA regulatory objectives. This is in contrast to our historical rules-based approach: we no longer focus on prescribing how those we regulate provide services, but instead focus on the outcomes for the public and consumers that result from their activities.⁷⁸

The SRA establishes specific regulatory outcomes to measure its progress toward the LSA's regulatory objectives.

- Outcome 1: The public interest is protected by ensuring that legal services are delivered ethically and the public have confidence in the legal system.
- Outcome 2: The market for legal services is competitive and diverse, and operates in the interests of consumers.

⁷⁸ SOLICITORS REGULATION AUTHORITY, *SRA Risk Framework* (Mar. 2014), <http://docplayer.net/45754930-Sra-regulatory-risk-framework-march-2014.html> (last visited June 13, 2019).

- Outcome 3: Consumers can access the services they need, receive a proper service and are treated fairly.
- Outcome 4: Regulation is effective, efficient and meets the principles of better regulation.⁷⁹

The SRA outlines ten principles for regulated individuals and entities, including upholding the rule of law and the proper administration of justice, not allowing your lawyer independence to be compromised, acting in the best interests of the client, running a legal business in a way that encourages equality of opportunity and diversity, and protecting clients' money and assets.⁸⁰

The SRA issues a Code of Conduct, which contains professional standards for people and entities under its jurisdiction. These are not “rules” but rather guidance of “indicative behaviours” that the SRA would expect to see to achieve objectives (e.g. to ensure Outcome 3, solicitors should explain the scope of their representation to their client, provide (in writing) a description of all involved parties, and explain any fee arrangements).⁸¹

The SRA also issues specific rules in certain areas: accounts rules, authorization and practicing requirements, client protection (insurance and compensation fund), discipline and costs recovery, and specialist services.⁸²

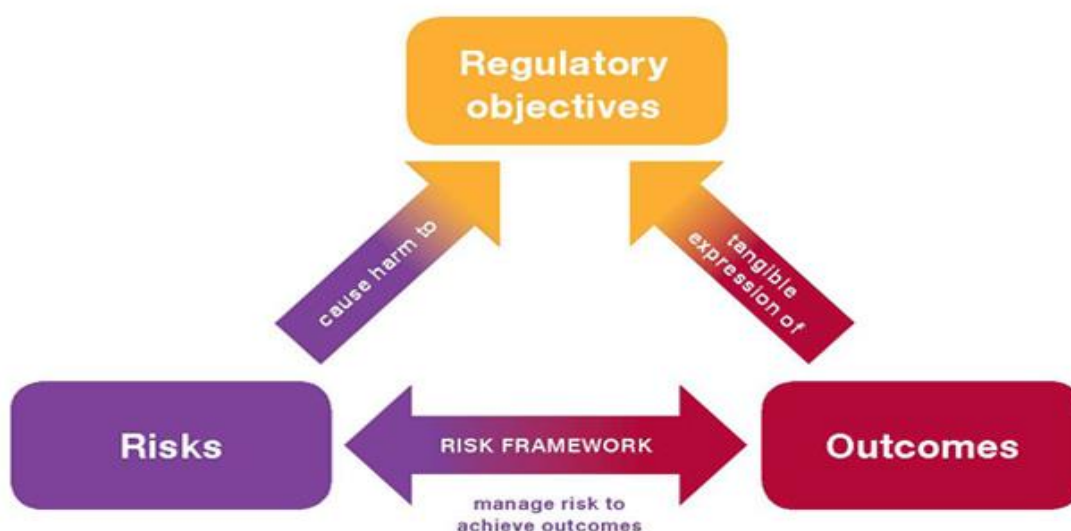
Day-to-day regulatory activity at the SRA is guided by identified risks to the regulatory objectives and outcomes. Identification and prioritization of risks enables proportionate and responsive regulation.

⁷⁹ *Id.*

⁸⁰ SOLICITORS REGULATION AUTHORITY, *SRA Handbook: SRA Principles* (Dec. 6, 2018), <https://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page> (last visited Aug. 13, 2019).

⁸¹ See SOLICITORS REGULATION AUTHORITY, *SRA Handbook: Code of Conduct*, <https://www.sra.org.uk/solicitors/handbook/code/content.page> (last visited Aug. 13, 2019).

⁸² See SOLICITORS REGULATION AUTHORITY, *How we regulate*, <http://www.sra.org.uk/consumers/sra-regulate/sra-regulate.page> (last visited Aug. 13, 2019).



The SRA uses a Regulatory Risk Index that groups risks into 4 categories:⁸³

1. Firm viability risks (Risks arising from the viability of the firm and the way it is structured)
2. Firm operational risks (Risks arising from a firm's internal processes, people and systems)
3. Firm impact risks (Risk that firm or individual undertakes an action or omits to take action that impacts negatively on meeting the regulatory outcomes)
4. Market risks (Risks arising from or affecting the operation of the legal services market)⁸⁴

The SRA assesses these risks by impact (potential harm caused) and probability (likelihood of harm occurring), and categorizes risks along individual, firm, theme, and market.⁸⁵ Risk informs the regulator's decisions on admission, governance, monitoring, enforcement, and soft regulatory interventions (education, etc.). Using this approach enables interventions to be proactive and flexible, including:

1. instituting controls on how a firm or individual practices;
2. issuing a warning about future conduct;

⁸³ According to Crispin Passmore, former Executive Director of Supervision and Education of the SRA, the SRA is moving away from the Regulatory Risk Index and focusing more of its approach on proactive and thematic risk assessments.

⁸⁴ SOLICITORS REGULATION AUTHORITY, *SRA Risk Framework* (Mar. 21, 2014), <https://www.sra.org.uk/risk/risk-framework.page> (last visited June 13, 2019).

⁸⁵ See *id.*

3. closing a firm with immediate effect or imposing a disciplinary sanction, such as a fine;
4. informing the market about undesirable trends and risks;
5. adapting regulatory policy to minimize recurrence of an issue; and
6. setting qualification standards and ongoing competency requirements.⁸⁶

Alternative Business Structures

The LSA permitted participation in legal service providers by those who are not qualified lawyers: entities with lay ownership, management, or investment are designated ABSs under the Act.⁸⁷

Multiple regulators are approved to regulate ABSs, including the SRA, the BSB, the Council of Licensed Conveyancers, the Institute for Chartered Accountants, and the Intellectual Property Regulation Board.

An ABS is either (1) a firm where a “non-authorized person” is a manager of the firm or has an ownership-type interest in the firm or (2) a firm where “another body” is a manager of the firm or has an ownership-type interest in the firm and at least 10 percent of the “body” is controlled by non-lawyers.⁸⁸

ABSs may offer non-legal services alongside legal services.⁸⁹ ABSs are regulated as entities and each authorized person within the entity is independently regulated and subject to discipline. The ABS must always have at least one manager who is an authorized person under the LSA.⁹⁰ Regardless of ownership structure, control over the right to practice law must remain

⁸⁶ *Id.*

⁸⁷ Legal Services Act 2007, c.29, Part 5, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019). See also Stephen Mayson, *Independent Review of Legal Services Regulation: Assessment of the Current Regulatory Framework* (University College London Centre for Ethics & Law, Working Paper LSR-0, 2019), https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-0_assessment_1903_v2.pdf. Note: the LSA also permitted Legal Disciplinary Practices (LDP), through which different categories of authorized persons can enter into partnerships (e.g. barristers and solicitors working together).

⁸⁸ Legal Services Act 2007, c.29, Part 5, § 72, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019); see also THE LAW SOCIETY, *Alternative Business Structures* (May 21, 2018), <https://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/> (last visited Aug. 13, 2019).

⁸⁹ See Legal Services Act, 2007, c.29, Part 5, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019). Note that the ability to offer non-legal services alongside legal services differentiates this structure from those permitted in Washington, D.C. under its Rule 5.4(b), which permits lawyers to enter into business with non-lawyers (including non-lawyer owners or managers) but the sole purpose of the business must be providing legal services. See WASHINGTON, D.C. BAR, *Rules of Professional Conduct, Rule 5.4: Professional Independence of a Lawyer*, <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule5-04.cfm> (last visited Aug. 13, 2019).

⁹⁰ Legal Services Act, 2007, c.29, Part 5, § 72, <https://www.legislation.gov.uk/ukpga/2007/29> (last visited Aug. 13, 2019).

in the hands of licensed legal professionals: designated authorized role holders.⁹¹ The SRA requires ABSs to have both legal and financial compliance officers.⁹² These roles are responsible for ensuring that the entity and all of its interest holders, managers, and employees comply both with the terms of its license and with regulations applicable to its activities (reserved and potentially non-reserved depending on the terms of the license).⁹³ If an entity, or those within it, violate the terms of the license or the rules of professional conduct, the compliance officer has a duty to correct and report to the regulator.

In keeping with the regulatory focus on opening the market and enabling competition, the bar to entry, at least within the SRA process, is relatively low. An applicant must outline which reserved activities the entity plans to offer, provide professional indemnity insurance information, and identify firm structure details (including authorized role holders) and incorporation details if applicable.⁹⁴ To grant a license, the SRA needs to be satisfied that, for example, the proposed ABS will comply with professional indemnity insurance and compensation fund requirements, appropriate compliance officers have been appointed, the authorized role holders are approved, and the lawyer-manager is qualified. The SRA may refuse to grant the license if it is not satisfied that these requirements have been shown, or if the applicant has been misleading or inaccurate, or if it feels that the ABS is “against the public interest or inconsistent with the regulatory objectives” set out in the LSA.⁹⁵ The SRA may also grant a license subject to any conditions it deems necessary.⁹⁶

Impact of the LSA

There has been some debate about the impact of the LSA on the legal services market in the U.K. and on access to justice in particular.⁹⁷ A paper produced by a workgroup chaired by Professor Stephen Mayson had this to say on the impact of the LSA:

The LSA’s reforms have gone some way in beginning to address the pressing issues of the time – independence of regulation, poor complaints handling, anti-competitive restrictions and the need for greater focus on the consumer.

⁹¹ SOLICITORS REGULATION AUTHORITY, *SRA Authorisation Rules 2011*, Rule 8.5, <https://www.sra.org.uk/solicitors/handbook/authorisationrules/content.page> (last visited Aug. 13, 2019).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ SOLICITORS REGULATION AUTHORITY, *New Firm Applications* (Sep. 29, 2017), <http://www.sra.org.uk/solicitors/firm-based-authorisation/authorisation-recognition.page> (last visited Aug. 13, 2019).

⁹⁵ THE LAW SOCIETY, *Alternative Business Structures* (May 21, 2018), <https://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/> (last visited Aug. 13, 2019).

⁹⁶ *Id.*

⁹⁷ It should be noted that as the reforms were implemented the Government dramatically reduced funding for legal aid across the U.K. and the world faced the global market downturn. See Dominic Gilbert, *Legal Aid Advice Network “Decimated” by Funding Cuts*, BBC NEWS (Dec. 10, 2018), <https://www.bbc.com/news/uk-46357169> (last visited Aug. 13, 2019).

Regulatory reform since then has been wide ranging. Regulators have increasingly simplified and focused their processes and removed barriers to market entry, enabling innovation among new and existing providers, improving consumer choice and competition.⁹⁸

In the area of non-lawyer ownership (i.e., ABSs), the market has seen increased innovation in legal services offerings but change is unsurprisingly more incremental than revolutionary. As of February 2019, it appears that regulators have licensed over 800 entities as ABSs.⁹⁹ Most entities seeking ABS licenses are existing legal services businesses converting their license; one-fifth are new entrants.¹⁰⁰ Lawyer-ownership remains the dominant form with three-fifths of ABSs having less than 50 percent non-lawyer ownership.¹⁰¹ Approximately one-fifth of ABSs are fully owned by non-lawyers and approximately one-fifth are fully owned by lawyers with some proportion of non-lawyer managers.¹⁰² A 2014 report by the SRA sought to understand how firms changed upon gaining an ABS license. Most often, firms changed either their structure or their management under the new regulatory offering.¹⁰³ Twenty-seven percent changed the way the business was financed. The SRA found that investment was most often sought for entry into technology, to change the services offered, and for marketing.¹⁰⁴ A 2018 report by the LSB found that ABSs were three times as likely as traditionally organized entities to use technology, and ABSs, as well as newer and larger providers, have higher levels of service innovation.¹⁰⁵

⁹⁸ *Legislative Options Beyond the Legal Services Act 2007*, <https://stephenmayson.files.wordpress.com/2016/07/legislative-options-beyond-the-legal-services-act-2007.pdf> (last visited Aug 13, 2019).

⁹⁹ The SRA maintains a list of all registered ABSs at <https://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page>. This is likely a small percentage of all the legal firms in the United Kingdom. In 2015, for example, there were approximately 10,300 solicitors firms in the U.K. See Mari Sako, *Big Bang or drop in the ocean?: The Authorized Revolution in legal services in England and Wales*, THOMSON REUTERS FORUM MAGAZINE (Oct. 8, 2015), <https://blogs.thomsonreuters.com/answerson/abs-ldp-drop-ocean-england-wales/> (last visited Aug. 13, 2019).

¹⁰⁰ See LEGAL SERVICES BOARD, *Evaluation: ABS and investment in legal services 2011/12-2016/17 – Main Report 4* (June 2017), <https://research.legalservicesboard.org.uk/wp-content/media/Investment-research-2017-Report-Main-report.pdf> (last visited Aug. 13, 2019).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ SOLICITORS REGULATION AUTHORITY, *Research on alternative business structures (ABSs): Findings from surveys with ABSs and applicants that withdrew from the licensing process* 17 (May 2014), <https://www.sra.org.uk/sra/how-we-work/reports/research-abs-executive-report.page> (last visited Aug. 13, 2019).

¹⁰⁴ *Id.*

¹⁰⁵ LEGAL SERVICES BOARD, *Research Summary: Technology and Innovation in Legal Services* (Nov. 2018), <https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-web-FINAL.pdf> (last visited Aug. 13, 2019).

The market continues to develop. LegalZoom has received an ABS license and has started purchasing solicitors firms in the U.K.¹⁰⁶ Each of the Big Four accounting firms has an ABS license.¹⁰⁷ Most importantly, there is little to no evidence of ABS-specific consumer harm.¹⁰⁸

The SRA will be rolling out relatively significant changes in the form of new “Standards and Regulations (STARS)” in the coming months. Those changes are targeted at increasing liberalization of the market and increasing the efficiency of the regulatory response. Perhaps the most significant change is that solicitors will now be permitted to offer non-reserved legal activities out of unregulated businesses (i.e., a solicitor may now be employed by Tesco or a bank to offer non-reserved services like will writing).¹⁰⁹

Challenges of the LSA

In December 2016, the Competition and Markets Authority (CMA) released a report reviewing the legal services market post-LSA.¹¹⁰ Professor Stephen Mayson’s reviews of the impact of the LSA are also illuminating to understand how the reforms of the LSA may have fallen short in opening the market.¹¹¹

1. **Retention of traditional roles/activities:** As noted above, although the LSA sought to implement an objectives- and risk-based regulatory system, it also relied upon traditional legal roles and their associated activities as regulatory hooks. Both the CMA report and Professor Mayson’s work identify this continued reliance on traditional activities/roles as a proxy for regulatory strategy/intervention as problematic and limiting to the impact of the reforms. Authorized persons and reserved activities were essentially “grandfathered” or lobbied into the LSA (an “accident of history” or result of

¹⁰⁶ John Hyde, *LegalZoom Enters Market with ABS License*, THE LAW SOCIETY GAZETTE (Jan. 7, 2015), <https://www.lawgazette.co.uk/practice/legalzoom-enters-market-with-abs-licence/5045879.article> (last visited Aug. 13, 2019).

¹⁰⁷ See Joseph Evans, *Deloitte Becomes the Last of the Big Four to get ABS License for Legal Services*, THE AMERICAN LAWYER (June 22, 2018), <https://www.law.com/americanlawyer/2018/06/22/deloitte-becomes-last-of-big-four-to-get-abs-licence-for-legal-services/> (last visited Aug. 13, 2019).

¹⁰⁸ See COMPETITION AND MARKETS AUTHORITY, *Legal Services Market Study: Final Report* (December 15, 2016), <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf> (last visited Aug. 13, 2019). See also Judith K. Morrow, *UK Alternative Business Structures for Legal Practice: Emerging Market and Lessons for the US*, 47 Geo. J. Int’l L. 665, 668 (2016).

¹⁰⁹ Crispin Passmore, *Look to the STARS*, Passmore Consulting (Mar. 20, 2019), <https://www.passmoreconsulting.co.uk/look-to-the-stars> (last visited Aug. 13, 2019).

¹¹⁰ See *id.*

¹¹¹ See Stephen Mayson, *The Legal Services Act 2007: Ten Years On, and “Mind the Gaps”* (June 2017), <https://stephenmayson.files.wordpress.com/2017/06/mayson-2017-legal-services-act-10-years-on1.pdf> (last visited Aug. 13, 2019).

political bargaining) and do not reflect a true assessment of risk.¹¹² The CMA report recommended that “[A]n optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it.”¹¹³

2. **Gold-plating of regulation vs. regulatory gap:** Some regulators regulate all activities of authorized persons (including non-reserved activities) while, at the same time, unreserved activities of unauthorized persons are not regulated at all (i.e., a solicitor who drafts a bad will can be subject to regulatory control but a shopkeeper who drafts a bad will is beyond legal regulatory authority because will writing is not a reserved activity). This causes excessive costs to be imposed on authorized persons, leaves possible high-risk activities beyond regulatory scope, and is very confusing to the consumer.¹¹⁴
3. **No prioritization among regulatory objectives:** The regulatory objectives set out in the LSA are listed without any indication of how the LSB or the front-line regulators are to prioritize them or weigh them in the event of a conflict between objectives.¹¹⁵
4. **Continuing challenges around consumer information gap, pricing challenges (level and transparency), and access to justice:**¹¹⁶ “[C]onsumers generally lack the experience and information they need to find their way around the legal services sector and to engage confidently with providers. Consumers find it hard to make informed choices because there is very little transparency about price, service and quality—for example, research conducted by the Legal Services Board (LSB) found that only 17% of legal services providers publish their prices online. This lack of transparency

¹¹² See *Legislative Options Beyond the Legal Services Act 2007*, <https://stephenmayson.files.wordpress.com/2016/07/legislative-options-beyond-the-legal-services-act-2007.pdf> (last visited Aug. 13, 2019).

¹¹³ See COMPETITION AND MARKETS AUTHORITY, *Legal services market study: Final report* 201 (Dec. 15, 2016), <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf> (last visited Aug. 13, 2019).

¹¹⁴ See Stephen Mayson, *Independent Review of Legal Services Regulation: Assessment of the Current Regulatory Framework* 11 (University College London Centre for Ethics & Law, Working Paper LSR-0, 2019), https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-0_assessment_1903_v2.pdf (last visited Aug. 13, 2019).

¹¹⁵ Stephen Mayson, *Independent Review of Legal Services Regulation: The Rationale for Legal Services Regulation* 9 (University College London Centre for Ethics & Law, Working Paper LSR-1, 2019), https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-1_rationale_1903_v2.pdf (last visited Aug. 13, 2019).

¹¹⁶ SOLICITORS REGULATION AUTHORITY, *Price transparency* (Nov. 2018), <https://www.sra.org.uk/solicitors/resources/transparency/transparency-price-service.page> (last visited Aug. 13, 2019).

weakens competition between providers and means that some consumers do not obtain legal advice when they would benefit from it.”¹¹⁷

5. **Incomplete separation of regulatory and representative activities:** The separation of regulatory and representative activities, as required by the LSA, is incomplete and gives rise to tension.¹¹⁸

Keeping in mind that the reforms are still relatively new (ABSs began being licensed in early 2012),¹¹⁹ the most appropriate conclusion appears to be that, while the LSA initiated much needed reforms to the regulatory process and began the process of opening up the legal services market, significant challenges remain and require continued focus.

¹¹⁷ See COMPETITION AND MARKETS AUTHORITY, Legal Services Market Study: Final Report 4 (Dec. 15, 2016), <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf> (last visited Aug. 13, 2019).

¹¹⁸ See Stephen Mayson, *Independent Review of Legal Services Regulation: Assessment of the Current Regulatory Framework* 12 (University College London Centre for Ethics & Law, Working Paper LSR-0, 2019), https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-0_assessment_1903_v2.pdf (last visited Aug. 13, 2019).

¹¹⁹ See THE LAW SOCIETY, *Setting up an ABS* (Oct. 31, 2012), <https://www.lawsociety.org.uk/support-services/advice/articles/setting-up-an-abs/> (last visited Aug. 13, 2019).

APPENDIX D

REGULATOR: DETAILED PROPOSAL

Our suggested proposal for the Phase 1 regulatory structure and approach is outlined below. Although we have put a great deal of thought into this proposal, we stress that this is just a proposal. Our model assumes that the Phase 1 period will be one of research and development regarding the regulator's structure and framework and that both will likely change with increased data from the regulatory sandbox market and other inputs.

Framework (Phase 1)

The Court will operate the regulator as a task force of the Court. The Court should outline regulatory objectives for the regulator. We propose a single core objective:

To ensure consumers access to a well-developed, high-quality, innovative, and competitive market for legal services.

As discussed above, this objective purposely focuses the regulatory authority on the consumer market for legal services. The Court should also outline regulatory principles for the regulator. We propose five regulatory principles:

1. **Regulation should be based on the evaluation of risk to the consumer.** Regulatory intervention should be proportionate and responsive to the actual risks posed to the consumers of legal services.
2. **Risk to the consumer should be evaluated relative to the current legal services options available.** Risk should not be evaluated as against the idea of perfect legal representation provided by a lawyer but rather as against the reality of the current market options. For example, if 80 percent of consumers have no access to any legal help in the particular area at issue, then the evaluation of risk is as against no legal help at all.
3. **Regulation should establish probabilistic thresholds for acceptable levels of harm.** The risk-based approach does not seek to eliminate all risk or harm in the legal services market. Rather, it uses risk data to better identify and apply regulatory resources over time and across the market. A probability threshold is a tool by which the regulator identifies and directs regulatory intervention. In assessing risks, the regulator looks at the probability of a risk occurring and the magnitude of the impact should the risk occur. Based on this assessment, the regulator determines acceptable levels of risk in certain areas of legal service. Resources should be focused on areas in which there is both high probability of harm and significant impact on the consumer or the market. The thresholds in these areas will be lower than other areas. When the evidence of consumer harm crosses the established threshold, regulatory

- action is triggered.¹²⁰ Example: Under traditional regulatory approaches, the very possibility that a non-lawyer who interprets a legal document (a lease, summons, or employment contract, for example) might make an error that an attentive lawyer would not make has been taken to justify prohibiting all non-lawyers from providing any interpretation. However, if the risk is actually such that an error is made only 10% of the time, then a risk-based approach would recommend allowing non-lawyer advisors to offer aid (particularly if the alternative is not getting an interpretation from an attentive lawyer but rather proceeding on the basis of the consumer's own, potentially flawed interpretation). If a particular service or software is actually found to have an error rate exceeding 10%, then regulatory action (suspension, investigation, etc.) would be taken against that entity or person.
4. **Regulation should be empirically-driven.** Regulatory approach and actions will be supported by data. Participants in the market will submit data to the regulator throughout the process.
 5. **Regulation should be guided by a market-based approach.** The current regulatory system has prevented the development of a well-functioning market for legal services. This proposal depends on the regulatory system permitting the market to develop and function without excessive interference.

Regulator Structure

In Phase 1, the regulator will operate relatively leanly given that it will be overseeing a small marketplace (the regulatory sandbox); however, staffing needs to be sufficient to ensure that the regulator is successful from the start. The regulator must be able to respond to applicants, questions, and demands quickly and efficiently and be able to adequately monitor and assess the market's development and respond appropriately and strategically.

We preliminarily envision an executive committee or senior staff made up of a Director, a Senior Economist, and, perhaps, a Senior Technologist. It is not necessary that these individuals be lawyers. The Director will be the face of the entity, responsible for strategy, development, budget, and reporting to the Court. The Senior Economist will be responsible for developing the quantitative analytical tools used by the regulator. The Senior Technologist will be responsible both for reviewing, assessing, and explaining the technological aspects of any proposed products or services as well as offering technological expertise on a strategic level (i.e., where regulatory resources should be targeted). The support staff would need to cover

¹²⁰ The "probability threshold" approach is not unfamiliar in the legal world. Indeed, it arguably guides First Amendment constitutional law doctrine. See Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1297 (2007).

the following functions: operations, development, and communications. Finally, we envision creating a Board of Advisors made up of both legal and non-legal leaders, including particularly leaders in technology and academics well-versed in regulatory theory.

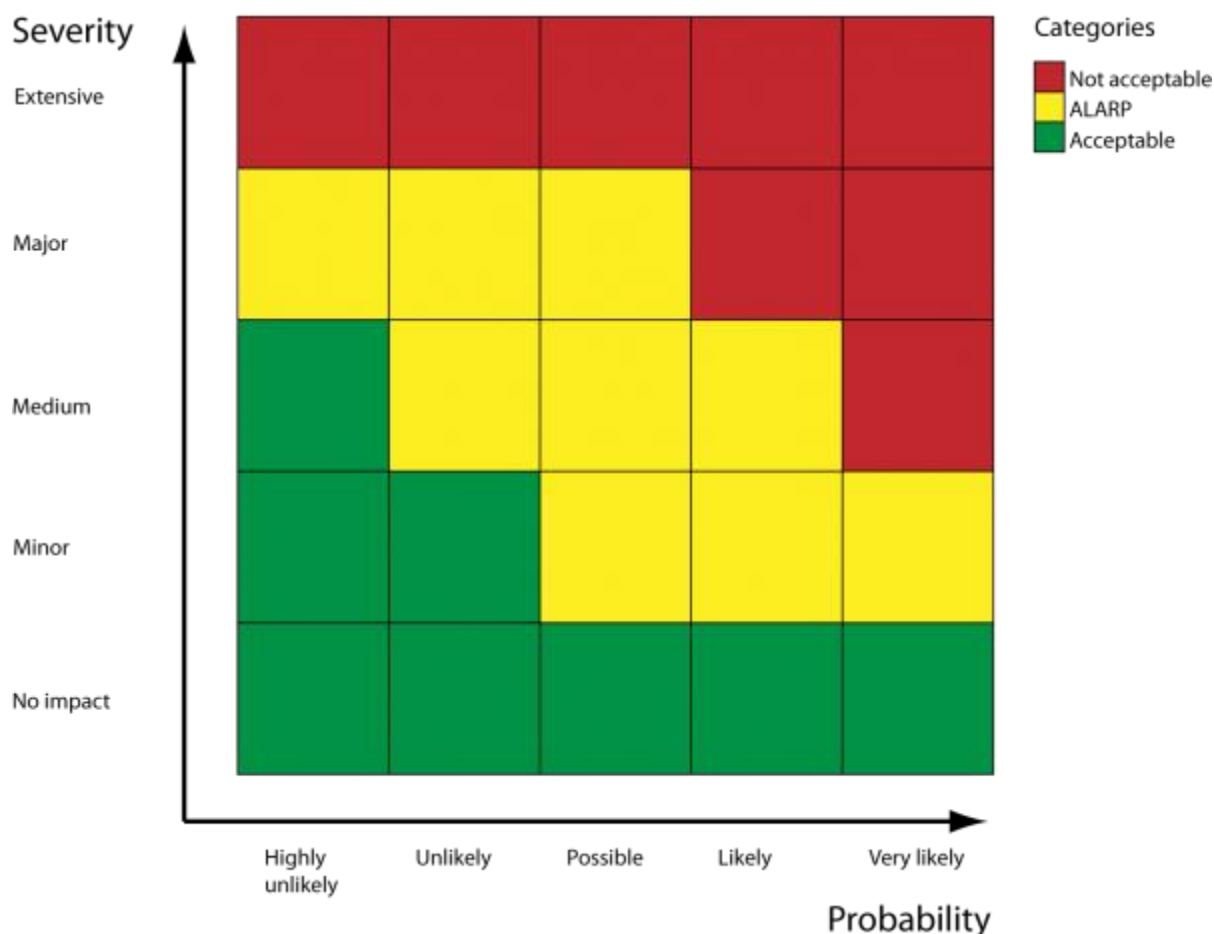
We propose that the regulator be funded primarily from fees collected from market participants. At the outset, however, we propose seeking grants for the establishment and support of the Phase 1 regulator.

Regulatory Approach

It is the regulator's job to develop a system that, applying the regulatory principles, works to achieve the regulatory objective. Identifying, quantifying, understanding, and responding to risk of consumer harm using an empirical approach is prioritized in our regulatory principles. There are two major aspects to this: (1) assessing risk of consumer harm in the market as a whole (both now and over time); and (2) assessing risk of consumer harm in a particular applicant's legal service offering.

We foresee the regulator using a risk matrix as its primary tool for identifying and understanding risk. A risk matrix is essentially a framework used to evaluate and prioritize risk based on the likelihood of occurrence and the severity of the impact. It is one of the most widespread tools used for risk evaluation. A simple example follows:

Narrowing the Access-to-Justice Gap by Reimagining Regulation



Developing the risk matrix should be the first task for the regulator in assessing the legal services market, and it should be revised and updated market-wide on an ongoing basis. The risk matrix also guides the regulator’s approach to individual regulated entities throughout the regulatory process.

We propose attention to 3 key risks:

1. Consumer achieves a poor legal result.
2. Consumer fails to exercise their legal rights because they did not know they possessed those rights.
3. Consumer purchases a legal service that is unnecessary or inappropriate for resolution of their legal issue.

Using the risk matrix, the regulator would consider likelihood and impact of each of the three key risks mentioned, as well as any other risks identified either in the market generally or as indicated for a particular participant or group of participants. For example, for an entity proposing to offer a software-enabled will drafting service (using perhaps machine learning enhanced guidance or advice or non-lawyer will experts answering questions), the regulator

would assess the likelihood that the consumer achieves a poor legal result (e.g. an unenforceable will or term) and the impact of that harm on the consumer (potentially significant, but rectifiable, in some cases).

The regulator should establish metrics by which those risks might be measured and identify the data regulated entities will be required to submit in order to assess risk on an ongoing basis. The regulated entities will be required to submit data on these in order to participate in the market. In the example above, the risk of a poor legal result can be measured through expert testing/auditing of the proposed product and through consumer satisfaction surveys. The regulator should consider what level of risk self-assessment should be required from applicants in addition to any key risks identified by the regulator.

Regulatory Process

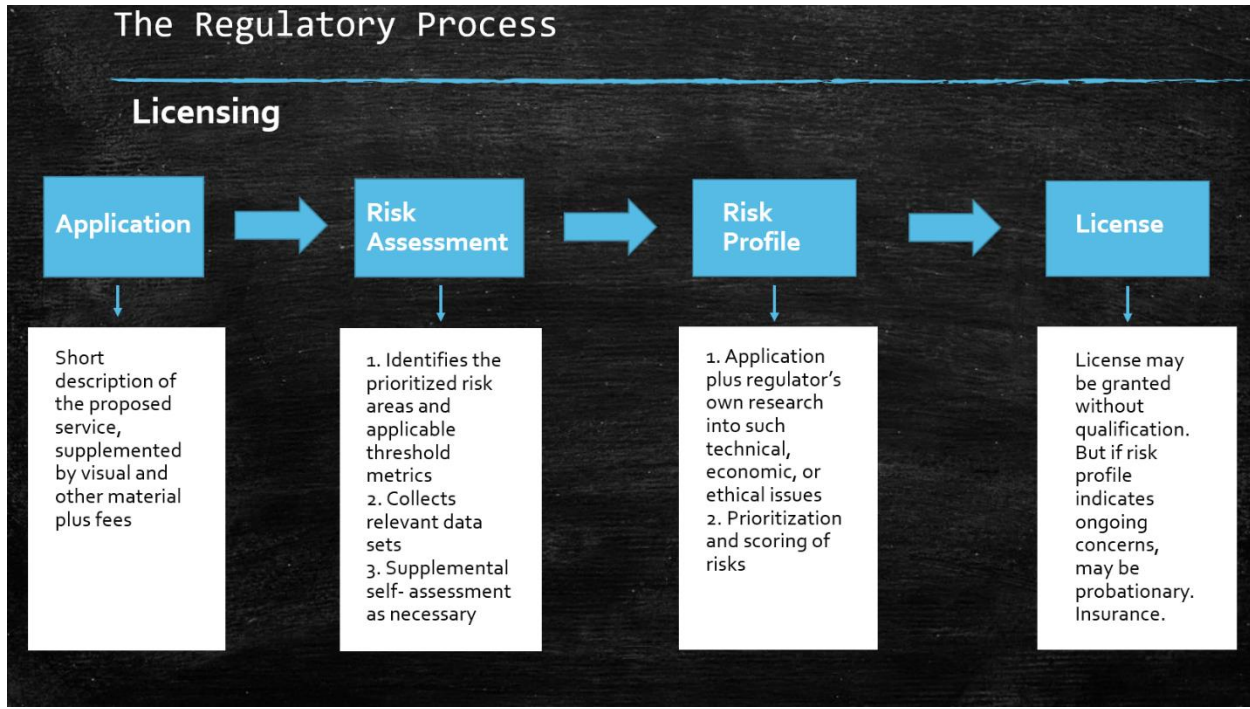
The key points of the regulatory process should be as follows: (1) licensing; (2) monitoring; and (3) enforcement. Each defines a key interaction between the regulator and the market participant.

Licensing

The licensing approach would be guided by the following analysis:

1. What is the specific nature of the risk(s) posed to the consumer by this service/product/business model?
2. Where does the proposed service/product/business model lie within the risk matrix?
3. Can the applicant provide sufficient evidence on the risk(s)?
4. What mechanisms might mitigate those risks and how? What are the costs and benefits of those mechanisms?

The visual below illustrates the proposed licensing process:



Applicant initiates process: The applicant describes the service/product/business model offered. The explanation should be simple and short. The applicant should submit supplemental materials (visuals, etc.) as necessary.

Risk Assessment: Based on the description provided in the initial application, supplemented as necessary with information requests to the applicant, the regulator initiates the risk assessment process.

1. The regulator assesses the applicant's proposal within the context of the risk matrix. Does the proposed service implicate one of the key risks, and what is the likelihood and impact of those risks being realized? The applicant must submit required data on these risks and any information on the mitigation of these risks and response to risk realization built into its model.
2. Self-assessment: the applicant will be expected to identify any risks to consumers not identified in the first step. These may be risks specific to the type of technology proposed, the business model, the area of law, or the consumer population targeted. For example, a blockchain platform for commercial smart contracting presents different concerns than a document completion tool used by self-represented litigants.
3. The regulator should develop a mechanism for sealed risk disclosures—to the extent that any necessary disclosures around technology or other risk mitigation processes should not be made public.

Fees: The applicant should submit licensing fees both at the outset of the licensing process and annually in order to maintain an active license. The fee regime will be developed to scale with the applicant's statewide revenues.

Regulator Response—Risk Profile: The regulator will then use the application and its own research into such technical, economic, or ethical issues as necessary to develop an overall risk profile of the proposed service/product/business model. A risk profile is not a list of potential risks with little or no differentiation between them. Instead, the risk profile should assess the identified risks both in relation to each other (which are the most probable, which present the greatest financial risk, etc.) and in relation to the legal services market overall. The risk profile will also guide the regulator in its regulatory approach going forward, i.e., how frequently to audit, what kind of ongoing monitoring or reporting to employ, and what kinds of enforcement tools need to be considered.

Regulator Response—Determination on Licensure: If, based on the risk profile, the regulator finds that significant risks have been identified, but it is not clear how the applicant plans to address and mitigate those risks, the regulator can impose probationary requirements on the applicant targeted to address those risks or refuse licensure.

Monitoring and Data Collection

Once an entity is licensed, the regulatory relationship moves on to the monitoring and data collection phase. The purpose of monitoring is continual improvement of the regulatory system with respect to the core objective. Monitoring enables the regulator to understand risks in the market and identify trends and to observe, measure, and adjust any regulatory initiatives to drive progress toward the core objective. Monitoring is not the regulator simply checking the box on a list of requirements.

In monitoring, the regulator can use several different tactics. The regulator should develop requirements such that regulated entities periodically and routinely provide data on the three key risks. The regulator should have the flexibility to reduce or eliminate specific reporting requirements if the data consistently show no harm to consumers. The regulator should also conduct unannounced testing or evaluation of a regulated entities' performance through, for example, "secret shopper" audits or expert audits of random samples of services or products.

The regulator should consider imposing an affirmative duty on regulated entities to monitor for and disclose any unforeseen impacts on consumers.

The regulator should also conduct consumer surveys across the market and consider how to engage with courts and other agencies to gather performance data.

The regulator should use the data gathered to issue regular market reports and issue guidance to the public and regulated entities. The regulators in the U.K., the SRA in particular, provide strong examples of the reporting opportunities. The SRA issues regular reports on risk, regulatory activities, regulated population, consumer reports, and equality and diversity.¹²¹ On risk, the SRA issues quarterly and annual reports that span across the market, as well as thematic reports (a report on risks in conveyancing, for example) and reports on key risks, risks in IT security, risks to improving access to legal services, etc.¹²²

Enforcement

Enforcement is necessary where the activities of licensed entities are harming consumers. Ideally, the regulator will take action when evidence of consumer harm exceeds the applicable acceptable harm thresholds outlined in the risk matrix or individualized risk assessment. The regulator should strive to make the enforcement process as transparent, targeted, and responsive as possible.

The regulator should develop a process for enforcement: intake, investigation, and redress. Evidence of consumer harm can come before the regulator through multiple avenues:

1. Regulator finds evidence of consumer harm through the course of its monitoring, auditing, or testing of regulated entities.
2. Regulator finds evidence of consumer harm through its monitoring of the legal services market.
3. Consumer complaints.
4. Referrals from courts or other agencies.
5. Whistleblower reports.
6. Media or other public interest reports.

The regulator should develop a process by which members of the public can approach the regulator with complaints about legal service. The U.K. approach is informative on this issue. The LSA established a separate and independent entity, the Office of Legal Complaints (OLC) and its Legal Ombudsman to address the bulk of consumer complaints against legal service providers. Complaints around poor service are directed to the Ombudsman, which has the authority to identify issues and trends and refer those to the frontline regulators like the SRA.¹²³ The frontline regulators like the SRA accept complaints that directly implicate significant

¹²¹ See SOLICITORS REGULATION AUTHORITY, *Research and reports* (July 2019), <https://www.sra.org.uk/sra/how-we-work/reports.page> (last visited Aug. 13, 2019).

¹²² See SOLICITORS REGULATION AUTHORITY, *Risk publications*, <https://www.sra.org.uk/risk/risk-resources.page> (last visited Aug. 13, 2019).

¹²³ See SOLICITORS REGULATION AUTHORITY, *Providing information and intelligence to the SRA* (Jan. 20, 2015) <https://www.sra.org.uk/consumers/problems/report-solicitor/providing-information.page> (last visited Aug. 13, 2019). The Ombudsman requires the consumer to complain to the service provider directly before accessing the

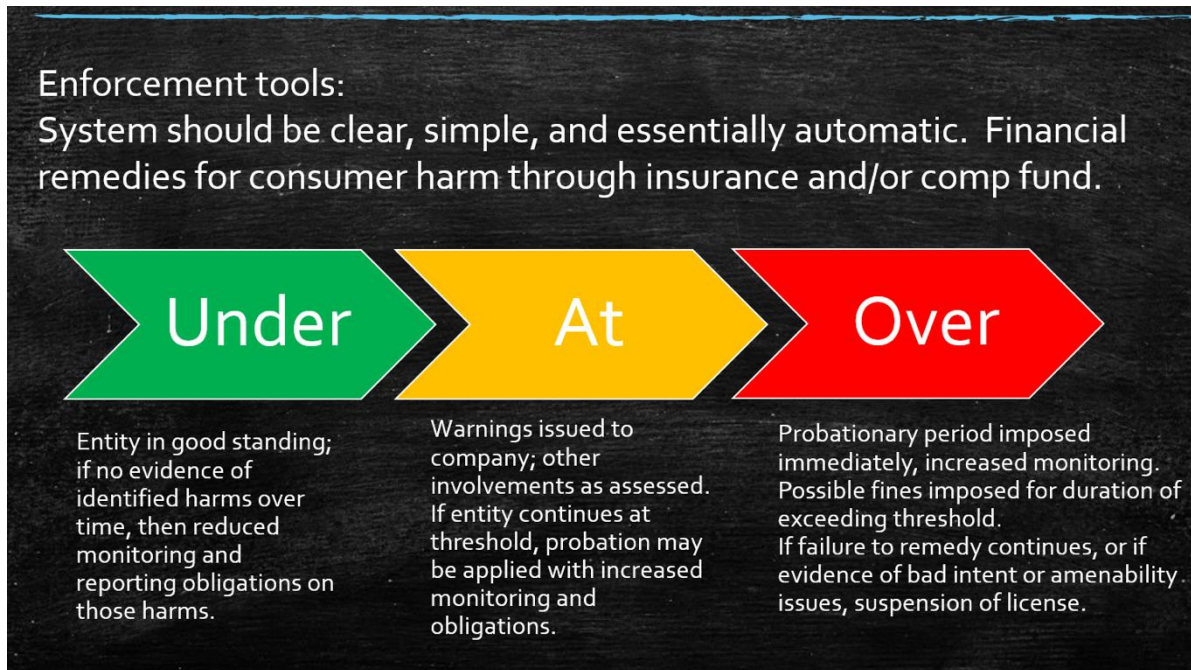
consumer risk (financial wrongdoing, dishonesty, and discrimination for example). The SRA does not, however, advocate individual complaints against service providers. Rather, the SRA will accept the information and either (1) keep the information for future use if necessary (“no engagement at present”), (2) use the information to supervise a firm more closely, or (3) use the information in a formal investigation.¹²⁴ Thus, the structure for complaints enables the frontline regulator to retain its focus on risk at the firm and market level rather than dispensing resources on investigating and managing every individual consumer complaint.

The regulator should consider establishing a Legal Ombudsperson role or office to focus on consumer questions or complaints about poor legal service (issues such as poor communication, inefficient service, trouble following client direction, etc.). This role could be contained within the regulator, but requires proper structural independence and authority to address complaints, require remedial action, and issue clear guidelines on what kinds of information should be referred to the enforcement authority of the regulator.

If the regulator makes a finding of consumer harm that exceeds the applicable threshold, then penalties are triggered. The penalty system should be clear, simple, and driven by the core objective. The regulator should strive to address harm in the market without unnecessarily interfering with the market.

office. See SOLICITORS REGULATION AUTHORITY, *Reporting an individual or firm*, <https://www.sra.org.uk/consumers/problems/report-solicitor.page> (last visited Aug. 13, 2019); see also LEGAL OMBUDSMAN, *Helping the public*, <https://www.legalombudsman.org.uk/helping-the-public/> (last visited Aug. 13, 2019). The Ombudsman has the power to require the legal services provider to take remedial actions such as return or reduce fees, pay compensation, apologize, and do additional work. See LEGAL OMBUDSMAN, *Helping the Public*, <https://www.legalombudsman.org.uk/helping-the-public/#what-problems-we-resolve> (last visited Aug. 13, 2019).

¹²⁴ See SOLICITORS REGULATION AUTHORITY, *Providing information and intelligence to the SRA* (Jan. 20, 2015), <https://www.sra.org.uk/consumers/problems/report-solicitor/providing-information.page> (last visited Aug. 13, 2019).



There should be a process to appeal enforcement decisions, both within the regulator and to the Supreme Court.

The regulator should make regular reports on enforcement data and actions to the Court.

Other Regulatory Duties

The regulator may have other duties that advance the core objective. These would obviously include its reporting duties to both the Court and the public. Reports would detail the overall state of the market, risks across the market, prioritized risk areas, and specific market sectors (by consumer, by area of law, etc.). The regulator may also have the authority to develop initiatives, including public information and education campaigns.

Regulatory Sandbox

This section presents an overview of regulatory sandboxes generally and insights into how our proposed regulatory sandbox could operate.

The regulatory sandbox is a policy structure that creates a controlled environment in which new consumer-centered innovations, which may be illegal under current regulations, can be piloted and evaluated. The goal is to allow regulators and aspiring innovators to develop new offerings that could benefit the public, validate them with the public, and understand how current regulations might need to be selectively or permanently relaxed to permit these and other innovations. Financial regulators have used regulatory sandboxes over the past decade to

encourage more public-oriented technology innovations that otherwise might have been inhibited or illegal under standard regulations.¹²⁵ In the legal domain, the U.K.'s SRA has also created a structure—the Innovation Space—that introduces a system of waivers of regulatory roles for organizations to pilot ideas that might benefit the public.¹²⁶

The regulatory sandbox structure has been used most extensively in the financial services sector. This is an area with extensive and detailed regulations and a significant amount of technological development and innovation. While there are significant differences between financial services and legal services, there are insights to be drawn from regulatory sandbox operation in that sector. Below are some general characteristics of sandboxes:

1. **Testing out what innovations are possible.** The regulatory sandbox can allow the regulator to selectively loosen current rules to see how much and what kinds of new innovation might be possible in their sector.¹²⁷ Regulators and the industry see that new types of technology developments, with the rise of artificial intelligence, digital and mobile services, blockchain, and other technologies, may bring new benefit to the public. Guarantees of non-enforcement in the sandbox can allow companies to raise more capital for experimental new offerings that may not otherwise be funded because of regulatory uncertainty about how the rules would apply to these new models. The regulators can use the sandbox to understand how much innovation potential there is in the ecosystem, beyond mere speculation that emerging tech has promise in their market if regulations were changed.
2. **Tailored evaluation plans focused on risk.** The sandbox model puts the burden on companies to define how their services should be measured in regard to benefits, harms, and risks. They must propose not only what innovation is possible, but also how it can be assessed.
3. **Controlled experimentation.** The sandbox allows for regulators to run controlled tests as to what changes to regulation might be possible, both in terms of what rules apply and how regulation is carried out. They can install safeguards to protect the experiments from spilling over into the general market, and they can terminate individual experiments or the entire sandbox if the evidence indicates that unacceptable harms are emerging.

¹²⁵ See *supra* n.55.

¹²⁶ SOLICITORS REGULATION AUTHORITY, *Enabling innovation: Consultation on a new approach to waivers and developing the SRA Innovation Space* (Apr. 12, 2018), <https://www.sra.org.uk/sra/consultations/enabling-innovation.page> (last visited Aug. 13, 2019).

¹²⁷ The selective loosening or non-enforcement of different rules is less applicable in our proposed sandbox because, as noted, we have a good idea of what rules need to be revised or removed (unauthorized practice of law, corporate practice, and fee sharing rules). What we are less certain of is what risks might come to bear as a result of the loosening or non-enforcement of those rules (see point 2).

4. **New sources of data on what regulation works best.** The sandbox can be a new source of data-driven, evidence-backed policy-making. Because sandbox participants gather and share data about their offerings' performance (at least with the regulators, if not more publicly), the sandbox can help develop standards and metrics around data-driven regulation. It can incentivize more companies to evaluate their offerings through rigorous understanding of benefits and harms to the public, and it can help regulators develop protocols to conduct this kind of data-driven evaluation.

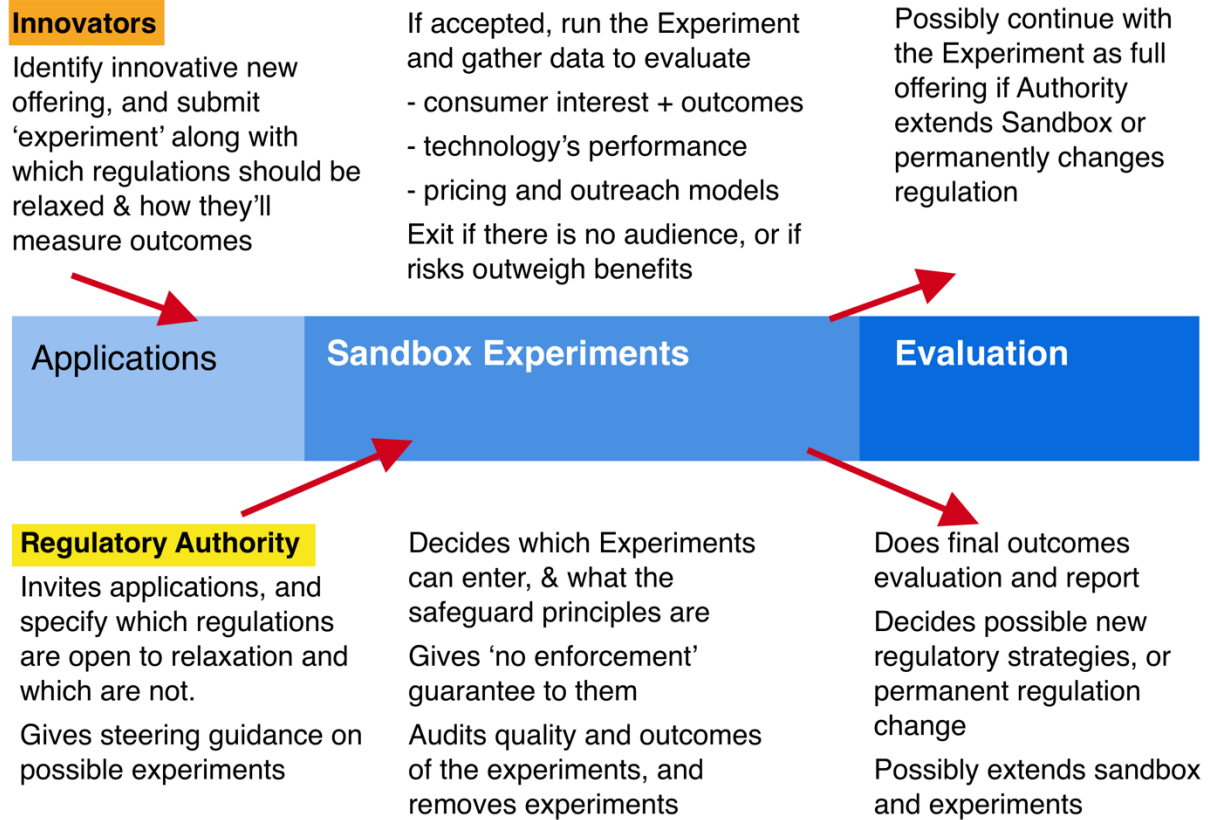
Points 2 and 4 will be key for our regulatory sandbox: identifying and assessing risk and developing data to inform the regulatory approach.

How Does A Regulatory Sandbox Work?

A regulator can create a sandbox to incentivize greater innovation and to gather more data-driven evidence on how offerings and regulations perform in regard to benefits or harms to the public. The essential steps of a regulatory sandbox are as follows:

1. **The regulator issues a call for applications.** This call defines the essential rules of the sandbox: which regulations are open to being relaxed or removed and which cannot be. It also can specify what kinds of innovations will be accepted into the sandbox, the types of data and evaluation metrics that must be prepared, the non-enforcement letters or other certifications that successful applicants will receive, and other safeguards or criteria for possible applicants. Typically, this call is for a "class" of applicants that are all accepted at the same time and run in parallel (though it could be a rolling application instead).
2. **Companies submit applications.** Any type of organization can propose a new offering to be included in a sandbox class. Applicants must detail exactly what the new offering is (e.g., what the technology is, what it intends to accomplish, and how it functions); how they expect it to benefit the public; what risks or harms they expect might arise; how they will deploy and measure this offering; and which rules or regulations need to be relaxed in order for this offering to be allowed.

A Regulatory Sandbox Model



3. **Start of the sandbox.** The regulator reviews the applications and accepts those that have demonstrated an innovative new offering, a strong assessment plan, and a strong potential for public benefit. The regulator invites these approved participants to enter the sandbox and establishes how the data-sharing, auditing, and evaluation will proceed. If the participants agree to these arrangements, they receive a letter of non-enforcement from the regulator that gives them permission to develop and launch the agreed-upon offering, within the confines of the sandbox, without being subject to the identified regulations.
4. **Sandbox runs and rolling evaluation begins.** A typical sandbox period could be six months to two years. The participant companies work on developing their offerings, putting them on the market, and collecting data on their performance. When applicants bring a new offering to the public, they must conspicuously disclose that it is part of the sandbox and refer consumers to the regulator where they can learn more about the offering and give feedback or complaints. The regulator observes the performance of the offering to see if the public uses it, if the intended benefits result, if any of

the expected or unexpected harms result, and what complaints consumers have. The regulator can suspend or cancel the non-enforcement letter at any time if the company is not performing according to the agreement, if its offering does not engage an audience, or if the offering results in harms above what the regulator has deemed acceptable.

5. **Sandbox ends and company and regulator (potentially) continue on.** Once the designated period of the sandbox finishes, the company can continue with its approved offering if it so wishes, with the non-enforcement authorization still intact. The regulator can take stock of the participants, offerings, and data, and it can use this information to shape another round of applications—perhaps changing the terms of the safeguards; the protocols for evaluation of risks, harms, and benefits; or what types of innovation it solicits. The regulator might also use the data from the completed experiments to permanently relax or change the regulations for the entire market. In this way, the sandbox can be a way to experiment with and validate different regulations. The regulator may also formalize the protocols it uses to measure harm and benefit, moving those protocols from the sandbox experiments to all company offerings in the market.

A sandbox cycle ideally will result in a class of consumer-centered innovations that demonstrate how new kinds of technologies and services can offer value to the public. It can inform regulators about what rules and protocols work best to evaluate both sandbox innovations as well as existing offerings in the market. It can also incentivize more companies to enter the market with offerings that can both serve consumers and secure investment for the company. It may also make clear which types of technologies may be harmful to the public, how better to predict and assess what kinds of harms and benefits a given potential offering may result in, and what the public does and does not want.

A Regulatory Sandbox for Legal Services

As of mid-2019, there has not been a regulatory sandbox for legal services. But there have been calls, including in the UK and in Australia, for legal regulators to create sandboxes similar to those used in financial services, to test regulatory reform for innovation and new business structures that promote broader access to justice.¹²⁸

Our team held a workshop in April 2019 to explore the prospect of a legal regulatory sandbox in the U.S. Our goal was to understand whether there might be an appetite from law firms, legal technology companies, legal aid groups, foundations, and other organizations that might be entrants into a legal services regulatory sandbox. If a state was to issue a call for

¹²⁸ Neil Rose, *Law Society calls for “innovation sandbox”*, LEGAL FUTURES (Aug. 22, 2016), <https://www.legalfutures.co.uk/latest-news/law-society-calls-innovation-sandbox> (last visited Aug. 13, 2019).

sandbox applications and the possibility to relax legal professional rules, would there be interest from groups to enter this sandbox, with an innovative offering to test?

We held the workshop as an invite-only follow-up to the Stanford Future Law conference, which is a pre-eminent gathering of those interested in legal innovation. The conference organizers helped us reach out to many attendees who might be possible sandbox entrants, including leading legal technology companies, law firms with innovation groups, venture capital groups that are interested in the legal market, other large financial and professional services companies, legal aid groups, justice technology non-profits, and foundations interested in access to justice. We then supplemented this recruitment with invites to attorneys, entrepreneurs, and funders who might be interested in new models of legal services.

The workshop was a two-hour, hands-on event. We had approximately 30 participants, which we assembled into small teams to work on exploring what ideas participants had for innovation, what current rules and regulations they might ask to have relaxed, and what concrete innovation offerings they might be interested in submitting to a sandbox. This workshop design was meant to have participants:

1. Reflect on whether a sandbox was needed,
2. Identify what kinds of innovation potential it might unlock, and
3. Validate if they would participate in a sandbox if it were to launch, and under what conditions.

Our team documented the work, discussions, and debrief of the sandbox workshop.

Positive response to sandbox and new regulatory approach. The participants were overwhelmingly positive towards the prospect of a sandbox—confirming that controlled tests were needed to encourage innovation in legal services, allow more capital investment in new technology and service models that currently would face regulatory uncertainty, and drive more benefit to the public regarding access to justice. They welcomed a risk-based, empirical approach to regulation of the legal services market. It was not difficult for them to understand the concept, and the financial services sandbox models made it easy to see how analogous models could work in law.

Willingness to enter the sandbox with near-term or long-term innovations. Many of the participants, including start-ups, alternative service providers, and consumer/legal technology companies, said that they would seriously consider entering the sandbox if it was to launch. There were near-term innovation experiments that participants would be ready to apply for within the next year. This could include projects such as chatbots that provide help and referrals to the public or a new technology-based proof-of-service offering to record digital

forms of service. There were also more long-term innovations that would only be ready for application to the sandbox once given more time and investment. Those included automated dispute resolution tools to create contract-based or court-order judgments and community-based arbitrators to resolve disputes with staffing models that include more non-lawyers and judges.

Some of the particular points raised by participants that indicate some of the conditions, safeguards, and concerns that a legal services sandbox may need to address include the following:

1. **Expanding the sandbox from legal professional rules to other rules.** Many people mentioned the possibility for a sandbox to not just suspend professional rules of conduct, but also to possibly change court rules and civil procedure rules in order to allow new services to flourish.
2. **Absolute importance of post-sandbox approval.** The participants all agreed that a crucial condition of the sandbox is that participants could continue with their offering, provided risks of harm were demonstrably within appropriate levels, after the sandbox class formally concluded. They would not invest in a new innovation if they were given a non-enforcement guarantee that would expire at the end of the sandbox. They were fine with the possibility that the guarantee might be rescinded if their offering did not perform as intended or if it harmed the public.
3. **Concern over access to evaluation data.** Participants were very concerned about who would be able to access the data that they would gather and share with the regulator about the performance and effects of their innovative offerings. Many asserted that the data should not, by default, be “public data” or subject to total transparency. They said that the prospect of having their data about acquisition cost, pricing, staffing, sales, profit and other performance analytics being shared with others would deter them from entering the sandbox. This is closely-guarded competitive information, and even sharing it with a regulator would be considered a possible threat to business strategies. They would be more comfortable sharing outcome data—such as data about number of users and outcomes of users—particularly if other competitors must share these data with the regulator as well.
4. **Concern over failed testing at the sandbox stage.** One concern of possible sandbox entrants was that a failed offering may receive more public scrutiny if it occurs as part of the sandbox than if the company stayed in the regular marketplace and had the same product failure. They expressed concern that the data about this failure would be publicly available and the story of that failure might turn out to be a liability for the company. They could instead

develop the offering in the current regulatory scheme, not expose the innovation explicitly to the regulator, and then choose how much attention to draw to their offering.

5. **More states involved, more entrants.** Several participants mentioned that they would be more likely to devote resources to entering the sandbox if there were multiple states involved in it. This multistate involvement could be explicit in the form of states as members of the sandbox, or states could be “watchers” of the sandbox with potential to also extend non-enforcement guarantees or open their markets to successful sandbox experiments. Such involvement would encourage more entrants, particularly if states with larger legal markets were to be involved. That said, participants agreed that being vetted and legitimated by a regulator in one state would be worthwhile, in the expectation that it could positively influence their relationship with other states’ regulators.

A focus on access. A final cluster of points that emerged from the workshop and subsequent conversations with interested parties was about the need to prioritize access to justice and equity in the sandbox design. Many reflected, after the workshop, that the sandbox most likely will lead to innovations, especially initially, that serve the middle and upper classes, who can afford unbundled legal service offerings. They questioned whether the sandbox could be designed to incentivize benefits to extend to people with less money to spend on services. Some specific ideas included:

1. **Obligation to distribute innovations to low-income communities.** As more offerings succeed in the sandbox, there might be obligations for the companies to give free licenses, software, or other access to people who cannot afford them.
2. **Matchmaking between technologists, legal aid, and social service groups.** Could a regulator, or associated group, help encourage more access-oriented entrants by bringing together experts with new technologies and business models with professionals who work closely with low-income communities? In this way, the regulator could help legal aid lawyers and social service providers better understand how they might harness emerging technologies and do “innovation” (when most of them do not have the resources to do this on their own). The regulator might also offer incentives and training to possible entrants who are focused on low-income consumers.
3. **Particular encouragements in the application call.** Participants also recommended that the regulator might specifically call for access-oriented innovations when it announces the sandbox. The regulator could identify promising uses of data, AI, staffing, and business models that the literature and experts have already identified for promoting access to justice.

The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans

June 2017

LSC | America's Partner
for Equal Justice
LEGAL SERVICES CORPORATION



About the Legal Services Corporation

The Legal Services Corporation (LSC) was established by Congress in 1974 to promote equal access to justice. LSC operates as an independent 501(c)(3) non-profit corporation and currently serves as the single largest funder of civil legal aid for low-income Americans. More than 93% of LSC's total funding is currently distributed to 133 independent non-profit legal aid programs with more than 800 offices across America. LSC's mission is to help provide high-quality civil legal aid to low-income people. To learn more about LSC, please visit www.lsc.gov.

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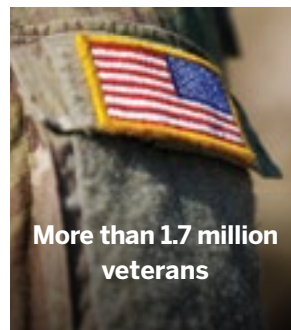
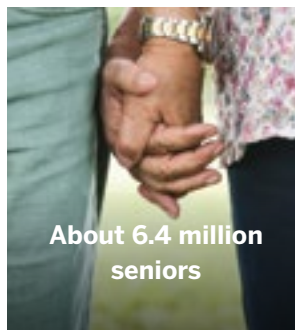
The Legal Services Corporation (LSC) contracted with NORC at the University of Chicago to help measure the justice gap among low-income Americans in 2017. LSC defines the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs. NORC conducted a survey of approximately 2,000 adults living in households at or below 125% of the Federal Poverty Level (FPL) using its nationally representative, probability-based AmeriSpeak® Panel. This report presents findings based on this survey and additional data LSC collected from the legal aid organizations it funds.

86% of the civil legal problems reported by low-income Americans in the past year **received inadequate or no legal help.**

In the past year, **71%** of low-income households **experienced at least one civil legal problem**, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care.

In 2017, low-income Americans will approach LSC-funded legal aid organizations for support with an estimated **1.7 million** problems. They will **receive only limited or no legal help for more than half of these problems** because of a lack of resources.

More than **60 million** Americans have family incomes at or below 125% of FPL, including:



Data Source: U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates

Key Findings: Experience with Civil Legal Problems

Data Source: 2017 Justice Gap Measurement Survey



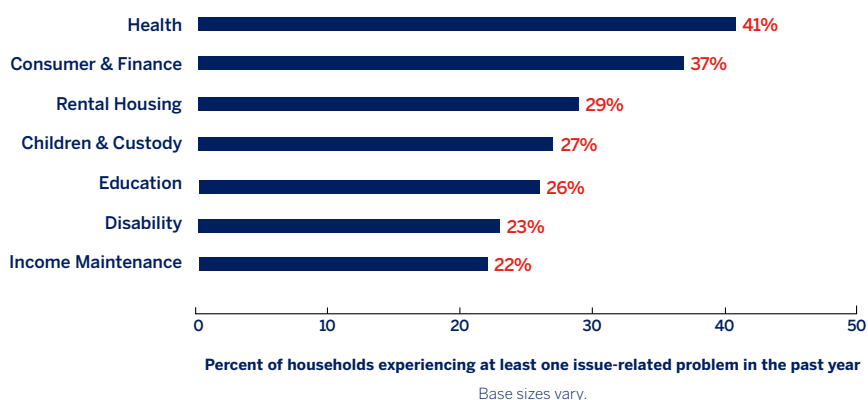
71% of low-income households have experienced a civil legal problem in the past year. **The rate is even higher for some:** households with survivors of domestic violence or sexual assault (**97%**), with parents/guardians of kids under 18 (**80%**), and with disabled persons (**80%**).

1 in 4 low-income households has experienced 6+ civil legal problems in the past year, including **67% of households with survivors of domestic violence or sexual assault.**

7 in 10 low-income Americans with recent personal experience of a civil legal problem **say a problem has significantly affected their lives.**

71% of households with **veterans or other military personnel** have experienced a civil legal problem in the past year. They face the same types of problems as others, but **13%** also report problems specific to veterans.

Common Civil Legal Problem Areas



Key Findings: Seeking Legal Help

Data Source: 2017 Justice Gap Measurement Survey



Low-income Americans seek professional legal help for only **20%** of the **civil legal problems they face.**

Top reasons for not seeking professional legal help are:

- Deciding to deal with a problem on one's own
- Not knowing where to look for help or what resources might exist
- Not being sure whether their problem is "legal"

Low-income Americans are most likely to seek professional legal help on problems that are more obviously "legal," like **custody issues** and **wills/estates.**

Key Findings: Reports from the Field

Data Source: LSC 2017 Intake Census and LSC 2016 Grantee Activity Reports



The 133 LSC-funded legal aid organizations across the United States, Puerto Rico, and territories will serve an estimated **1 million** low-income Americans in 2017, but **will be able to fully address the civil legal needs of only about half of them.**

Among the low-income Americans receiving help from LSC-funded legal aid organizations, the top three types of civil legal problems relate to **family, housing, and income maintenance.**

In 2017, low-income Americans will **receive limited or no legal help** for an estimated **1.1 million** eligible problems after seeking help from LSC-funded legal aid organizations.

A lack of available resources accounts for the vast majority **(85% - 97%)** of civil legal problems that LSC-funded organizations **do not fully address.**

Special Focus

The Special Focus section of this report presents key findings for several groups of interest.

Seniors

56% of seniors' households had at least 1 civil legal problem in past year.



Rural Residents

75% of households in rural areas had at least 1 civil legal problem in past year.



Veterans

71% of households with veterans or other military personnel had at least 1 civil legal problem in past year.



Persons with Disabilities

80% of households with persons with disabilities had at least 1 civil legal problem in past year.



Parents of Children under 18

80% of households with parents or guardians of minor children had at least 1 civil legal problem in past year.



Survivors of Domestic Violence or Sexual Assault

97% of households with survivors of domestic violence or sexual assault had at least 1 civil legal problem in past year in addition to domestic violence or sexual assault.



The phrase “with liberty and justice for all” in the U.S. Pledge of Allegiance represents the idea that everyone should have access to justice, not just those who can afford legal representation. In criminal cases, legal assistance is a right. Americans accused of a crime are appointed legal counsel if they cannot afford it. As a general matter, however, there is no right to counsel in civil matters. As a result, many low-income Americans “go it alone” without legal representation in disputes where they risk losing their job, their livelihood, their home, or their children, or seek a restraining order against an abuser.

This “justice gap” – the difference between the civil legal needs of low-income Americans and the resources available to meet those needs – has stretched into a gulf.¹ State courts across the country are overwhelmed with unrepresented litigants. In 2015, for example, an estimated 1.8 million people appeared in the New York State courts without a lawyer.² And we know that 98% of tenants in eviction cases and 95% of parents in child support cases were unrepresented in these courts in 2013.³ Comparable numbers can be found in courts across the United States.

This study explores the extent of the justice gap in 2017, describing the volume of civil legal needs faced by low-income Americans, assessing the extent to which they seek and receive help, and measuring the size of the gap between their civil legal needs and the resources available to address these needs.



The **justice gap** is the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.

Background

The Legal Services Corporation (LSC) was created by Congress in 1974 with the mission to expand access to the civil justice system for low-income Americans. LSC supports civil legal aid organizations across the country, which in turn provide legal assistance to low-income Americans grappling with civil legal issues relating to essential human needs, such as safe housing and work environments, access to health care, safeguards against financial exploitation, and assistance with family issues such as protection from abusive relationships, child support, and custody.

In 2005 and 2009, LSC published studies measuring the justice gap.⁴ Both were consistent in finding that about 50% of people who approached LSC-funded legal aid organizations for help did not receive help because of insufficient resources. The 2009 Report, *Documenting the Justice Gap in America*, also found that many courts were seeing increased numbers of unrepresented litigants.

LSC's two previous reports on the justice gap used three approaches to describe the gap:

- An intake census – a count of people seeking assistance from LSC grantees who were not served because of a lack of resources;
- A review of state-level studies about access to civil justice and about unrepresented litigants in state and local courts; and
- A comparison of the ratio of legal aid attorneys per capita for low-income Americans with the ratio of all private attorneys per capita for all Americans.

These approaches permitted analysis that shed light on the scarcity of resources and the expressed needs that go unmet. But they left key questions unanswered about the civil legal needs experienced by low-income Americans who do not seek professional legal help and about the paths they take when facing a civil legal problem (with or without the help of LSC-funded legal aid organizations).

The 2017 Justice Gap report seeks to answer these questions. It includes analysis of data from the 2017 Justice Gap Measurement Survey, which is the first national household survey on the justice gap in over 20 years. The most recent national study that assessed the justice gap with a household survey was conducted by the Institute for Survey Research at Temple University in 1994, with funding from the American Bar Association.⁵ Since that time, a number of individual states have also conducted justice gap studies.⁶ Notably, the Washington State Supreme Court conducted a study in 2014 (refreshing work completed in 2003), which took a comprehensive look at the civil legal needs of the state's low-income households.⁷ The Washington State work served as a point of departure for the 2017 Justice Gap Measurement Survey, which is described in more detail below.

This report also presents analysis of data from LSC's 2017 Intake Census. LSC asked its 133 grantee programs to participate in an "intake census" during a six-week period spanning March and April 2017. As part of this census, grantees tracked the number of individuals approaching them for help with a civil legal problem whom they were unable to serve, able to serve to some extent (but not fully), and able to serve fully. Grantees recorded the type of assistance individuals received and categorized the reasons

individuals were not fully served where applicable. LSC sent the resulting data to NORC for analysis. The findings presented in this report are based on data from the LSC grantees that receive Basic Field Grants. See Appendix B4 for more information about the LSC 2017 Intake Census and how the data are used in this report.

In addition to the 2017 Justice Gap Measurement Survey and LSC's 2017 Intake Census, this report uses data from the U.S. Census Bureau's American Community Survey (ACS). More information about the ACS data used can be found in Appendix B1. Finally, this report uses data from LSC's 2016 Grantee Activity Reports, and more information about these data can be found in Appendix B4. Where the report relies on other data sources, this is referenced in endnotes as appropriate.

The 2017 Justice Gap Measurement Survey

LSC contracted with NORC at the University of Chicago to conduct a survey of more than 2,000 adults living in low-income households using its nationally representative, probability-based AmeriSpeak® Panel. For the purposes of the survey, "low-income households" are households at or below 125% of the Federal Poverty Level (FPL), the income eligibility standard for people seeking assistance from an LSC-funded legal aid program. The survey was administered using telephone and web interview modes, which allowed a flexible survey logic to gather detailed information about low-income Americans' civil legal needs at the individual level, household level, and level of specific civil legal problems.

The survey was designed to accomplish the following goals:

- Measure the prevalence of civil legal problems in low-income households in the past 12 months;
- Assess the degree to which individuals with civil legal problems sought help for those problems;
- Describe the types and sources of help that low-income individuals sought for their civil legal problems;
- Evaluate low-income Americans' attitudes and perceptions about the fairness and efficacy of the civil legal system; and
- Permit analysis of how experiences with civil legal issues, help-seeking behavior, and perceptions vary with demographic characteristics.

This report uses data from the 2017 Justice Gap Measurement Survey to provide insight into the extent of the justice gap in 2017. It does not present or discuss all of the findings from the survey. Readers are encouraged to see the accompanying survey report that presents results from the entire 2017 Justice Gap Measurement Survey. Additionally, the survey instrument and data will be made publicly available.

More details on the survey and the AmeriSpeak® Panel can be found in Appendix A and also at www.lsc.gov/justicegap2017.

The units of analysis and the base sizes for the survey results presented throughout this report vary. Some results are based on respondents (or their households), some are based on their civil legal problems, and others are based on subsets of respondents, households, or problems. Readers are encouraged to pay close attention to information describing the units of analysis and which sets of observations comprise the relevant bases for results. Wherever a result is based on a variable containing a small number of observations ($n < 100$), we indicate this with a special endnote, “SB-X” (where “SB” stands for “small base” and “X” corresponds to the endnote number in this series).

Report Overview

The core findings of this report are organized in four sections:

Section 1: Low-income America | Using current data from the U.S. Census Bureau and other sources, this section describes the low-income population in America. More specifically, it explores how many people live in households below 125% of the Federal Poverty Level (FPL), how they are distributed across the U.S., and how key demographics like education and racial and ethnic background are distributed among them.

Section 2: Experience with Civil Legal Problems | Using data from the 2017 Justice Gap Measurement Survey, this section presents findings on the prevalence of civil legal problems among low-income households, the types of problems they face, and the degree to which civil legal problems affect their lives.

Section 3: Seeking Legal Help | Using data from the 2017 Justice Gap Measurement Survey, this section presents findings on which types of problems are most likely to receive legal attention, where people turn for legal help, what types of legal assistance they receive, and the reasons why people do not seek legal help.

Section 4: Reports from the Field | Using data from LSC's 2017 Intake Census and 2016 Grantee Activity Reports, this section presents findings on the assistance low-income Americans receive after seeking help from a legal aid organization funded by LSC.

The report concludes with a "Special Focus" section. This section presents key findings for six groups that are highlighted throughout the report. These groups include seniors, persons with disabilities, veterans, parents and guardians of minor children, rural residents, and survivors of domestic violence or sexual assault. At the end of Sections 1, 2, and 3, we include a page that presents related findings for these groups.⁸ The findings for these highlighted groups are then summarized in this final "Special Focus" section of the report.

Client stories are presented throughout the report. These are meant to help readers understand the types of problems faced by low-income Americans. The stories were collected by LSC, primarily through searches of grantees' annual reports and websites, but also through specific requests to grantees for such stories. These stories were first edited by LSC's Government Relations and Public Affairs unit and vetted by the corresponding grantees for accuracy. NORC later completed additional minor edits to the stories in an effort to shorten them for inclusion in this report. In this report, the names have been changed to protect the identity of individuals. Likewise, the accompanying photos are not of the actual clients.

Study Findings in Brief

The findings presented in this report add important, new insights to the growing body of literature on the justice gap. We find that seven of every 10 low-income households have experienced at least one civil legal problem in the past year. A full 70% of low-income Americans with civil legal problems reported that at least one of their problems affected them very much or severely. They seek legal help, however, for only 20% of their civil legal problems. Many who do not seek legal help report concerns about the cost of such help, not being sure if their issues are legal in nature, and not knowing where to look for help.

In 2017, low-income Americans will approach LSC-funded legal aid organizations for help with an estimated 1.7 million civil legal problems. They will receive legal help of some kind for 59% of these problems, but are expected to receive enough help to fully address their legal needs for only 28% to 38% of them. More than half (53% to 70%) of the problems that low-income Americans bring to LSC grantees will receive limited legal help or no legal help at all because of a lack of resources to serve them.

Based on the analysis presented in this report, we have three key findings relating to the magnitude of the justice gap in 2017:

- Eighty-six percent of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help (see Section 3);
- Of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1.0 to 1.2 million (62% to 72%) receive inadequate or no legal assistance (see Section 4),⁹
- In 2017, low-income Americans will likely not get their legal needs fully met for between 907,000 and 1.2 million civil legal problems that they bring to LSC-funded legal aid programs, due to limited resources among LSC grantees. This represents the vast majority (85% to 97%) of all of the problems receiving limited or no legal assistance from LSC grantees (see Section 4).

Low-income America



As a general rule, LSC funds may be used only to serve the legal needs of people with family incomes at or below 125% of the Federal Poverty Level.¹⁰ This section describes this population of Americans. It explores how many people have family incomes at this level, how they are distributed across the U.S., and some key demographics of this population.



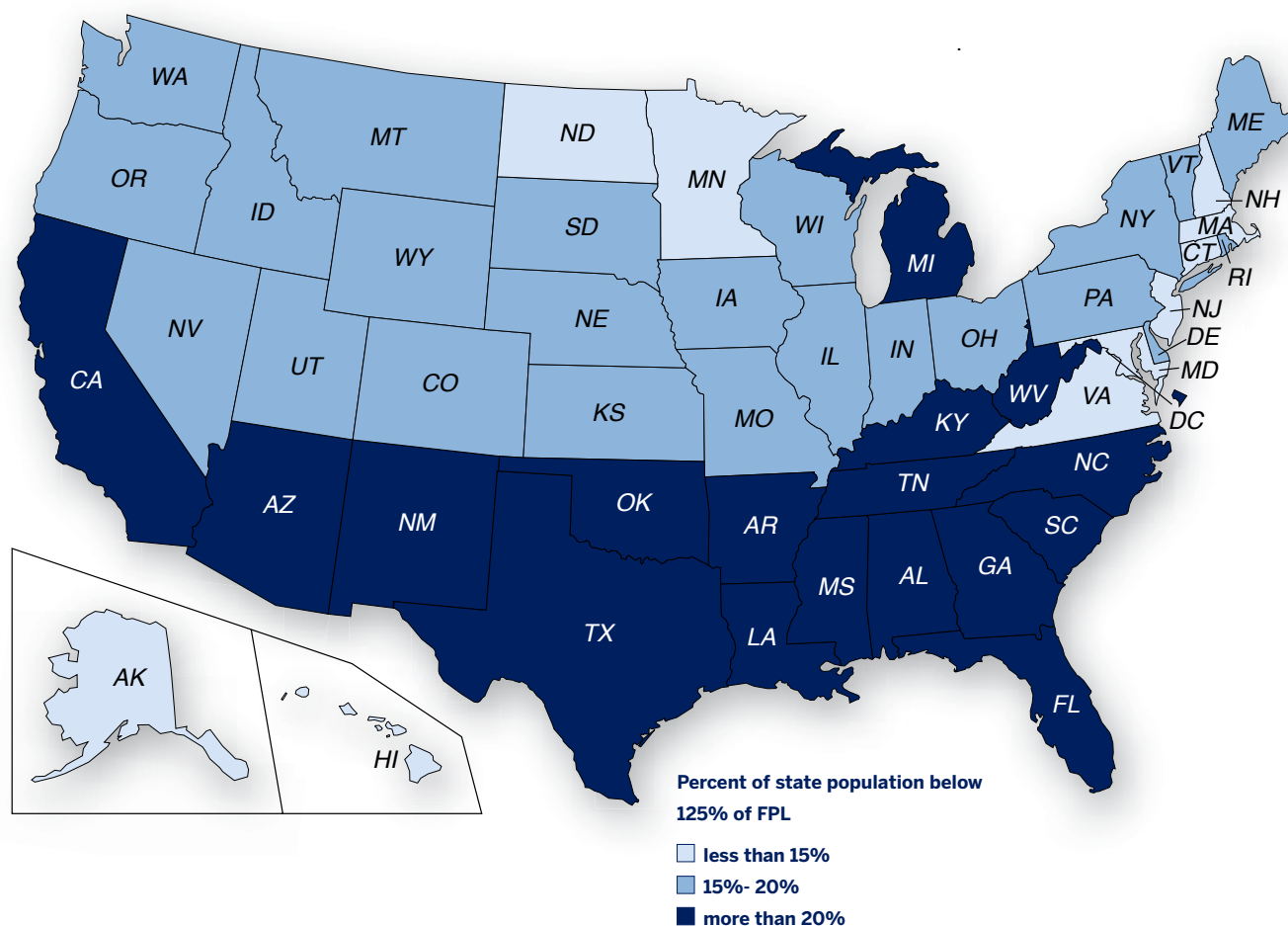
About the Data

Most of the population estimates presented in this section come from the 2015 American Community Survey (ACS) Single Year Estimates.¹¹ Note that the ACS reports on people with family incomes *below* 125% of the Federal Poverty Level rather than *at or below* this income level (which is how income eligibility for LSC-funded services is defined). Occasionally, other data sources are also used and are noted accordingly. The unit of analysis in this section is individuals.

More than 60 million Americans have family incomes below 125% of the Federal Poverty Level.

A family income below 125% of the Federal Poverty Level (FPL) corresponds to \$30,750 per year or less for a family of four.¹² Based on recent estimates from the Census Bureau, nearly one in five Americans (19%) have family incomes below 125% of FPL. This comes to about 60 million people, including approximately 19 million children (0-17 years), 35 million adults aged 18-64 years old, and 6.4 million seniors (65+ years).^{13,14}

As Figure 1 shows, some states have higher proportions of people with family incomes below 125% of FPL. The states with the highest proportions of people in low-income families include Mississippi (28%), New Mexico (26%), Arkansas (25%), and Louisiana (24%). Looking at population counts, a few other states stand out. For example, California alone has 7.7 million people with family incomes below 125% of FPL and Texas has 5.7 million people.¹⁵ Appendix B1 presents the population counts and proportions for all states in the U.S.

Figure 1: Percentage of Each State's Population Below 125% of the Federal Poverty Level, 2015¹⁶**[CLIENT STORY]**

Mary | Ohio | Health | Mary lives in an assisted-living community. When a health condition required rehabilitation, she entered a skilled nursing facility for what she expected would be a short-term stay. Once therapy was completed, however, the nursing home refused to begin discharge, insisting she required 24-hour care and demanding payment for her continued stay. Mary could not afford to pay for both the nursing home and her assisted living residence. Legal aid attorneys got involved, advocating for her right to make an informed decision about her living situation. They also helped Mary work with her primary care physician to arrange for the necessary home health services she needed to return to her home.

Source: LSC Client Success Stories.

Most American adults with family incomes below 125% of FPL do not have any college education.

There is great disparity in education levels by income. About 62% of low-income Americans aged 25 years or older have no more than a high school education. Americans of the same age with higher family incomes are nearly three times more likely to have graduated from college (34% vs. 12%).¹⁷ Existing literature on the justice gap suggests that educational background is important for understanding access to justice.¹⁸



88% of low-income adults do not have a college degree, including **62%** who have no more than a high school education.

While low-income Americans come from very diverse racial and ethnic backgrounds, a plurality identify as white (with no Hispanic origin).

Forty-four percent of Americans with family incomes below 125% of FPL identify themselves as white and claim no Hispanic origin. Another 28% identify as Hispanic, and 21% identify as black with no Hispanic origin. Four percent identify as Asian, 1% as American Indian, 8% as another race, and 4% as two or more races.¹⁹ The life experiences of people with different racial and ethnic backgrounds are thought to be important for understanding people's likelihood to trust institutions and to seek civil legal assistance.²⁰

| Special Focus | Millions of Americans from the various groups highlighted in this report have family incomes below 125% of FPL. This page presents population estimates for the number of low-income people for each group wherever such estimates are available. No such estimates are available for recent survivors of domestic violence or sexual assault, but we cite other information that speaks to rates of such violence among low-income Americans.



Seniors

Approximately **6.4 million** seniors have family incomes below 125% of FPL.²¹



Rural Residents

Approximately **10 million** people living in rural areas of the U.S. have family incomes below 125% of FPL.²²



Veterans

More than an estimated **1.7 million** veterans have family incomes below 125% of FPL.²³



Persons with Disabilities

More than **11.1 million** people with a disability have family incomes below 125% of FPL.²⁴



Parents/Guardians of Children under 18

Approximately **18 million** families with related children under 18 have incomes below 125% FPL.²⁵



Survivors of Domestic Violence/Sexual Assault

Rates of intimate partner violence among people with family incomes at or below 100% of FPL are about **four times** the rates among people with incomes at or above 400% of FPL.²⁶

Experience with Civil Legal Problems



A large majority of low-income American households face civil legal problems in their everyday lives. These problems are most often related to basic needs like health care, safety, making ends meet, and housing. Using data from the 2017 Justice Gap Measurement Survey of low-income households, this chapter presents findings on the prevalence of civil legal problems among these households, the types of problems they face, and how civil legal problems affect their lives.

About the Data

The findings presented in this section come from the 2017 Justice Gap Measurement Survey. Respondents were presented with an extensive list of specific problems that typically raise civil legal issues. They were asked whether they had experienced any of these problems in the past 12 months and whether anyone else in their household had. While not all of the reported problems would be able to be addressed through civil legal action, the resulting data make it possible to estimate how common various civil legal problems are at the household level. A total of 88 distinct problems (divided into 12 main categories) were explored in the survey. The primary unit of analysis in this section is households.

A large majority of low-income American households face civil legal problems.

The 2017 Justice Gap Measurement Survey assessed the prevalence of various types of problems that typically raise “justiciable civil legal issues,” that is, issues that could be addressed through civil legal action. This is consistent with standard practice in the literature for measuring the prevalence of civil legal problems. While an in-depth interview with a legal professional would reveal that some of the problems reported by respondents are not actually justiciable, most will be. For ease of reporting, and to be consistent with established literature, we refer to these problems as “civil legal problems” throughout this and the next section.



71% of low-income households have experienced at least **one civil legal problem in the past year.**

Seventy-one percent of low-income households have experienced at least one civil legal problem in the past year. Many of these households have had to deal with several issues. Indeed, more than half (54%) faced at least two civil legal problems and about one in four (24%) has faced six or more in the past year alone. The civil legal problems these Americans face are most often related to basic needs like getting access to health care, staying in their homes, and securing safe living conditions for their families.

Common civil legal problems among low-income households relate to issues of health, finances, rental housing, children and custody, education, income maintenance, and disability.

As Figure 2 shows, civil legal problems related to health and to consumer and finance issues affect more households than any other type of issue. Health issues, for example, affect more than two in five (41%) low-income households. The most common problems in this area include having trouble with debt collection for health procedures (affecting 17% of households), having health insurance that would not cover medically needed care or medications (17%), and being billed incorrectly for medical services (14%).

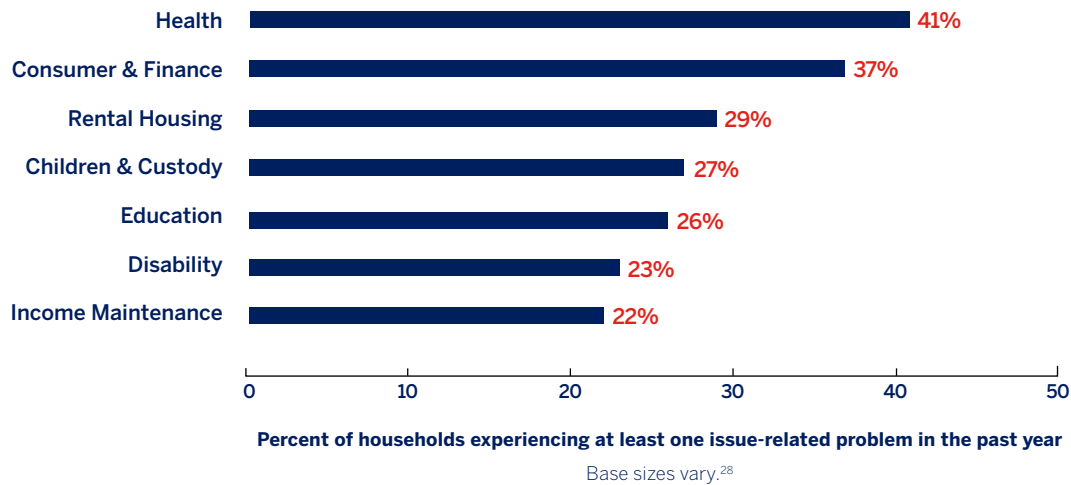
Over one-third (37%) of low-income households have experienced consumer and finance problems in the past year. These issues typically follow from not being able to make payments for debt or utilities on time. The most common issues in this area include difficulties with creditors or collection agencies (affecting 16% of households), having utilities disconnected due to nonpayment or a billing dispute (14%), and having problems buying or paying for a car, including repossession (8%).

Other common categories of civil legal problems include rental housing, children and custody, and education. Each of these problem categories affects more than one in four low-income households in which the issue is relevant (e.g., rental housing problems affect 29% of households living in a rented home). Income maintenance and disability issues affect one in five issue-relevant households.

[CLIENT STORY]



Ronald | Louisiana | Consumer and Finance | Ronald needed legal help when FEMA filed a claim against him for repayment of disaster funds issued after Hurricane Katrina. He had never even applied for, much less received, any FEMA funds. FEMA seized his income tax refund and told him he had to pay an additional \$8,000. With the help of legal aid, Ronald was able to demonstrate that the funds in question had been issued to someone else. FEMA dismissed the claim and returned the money wrongfully seized from Ronald's accounts.

Figure 2: Common Civil Legal Problem Categories²⁷

Rental Housing | A full 29% of households living in a rented home have experienced a related civil legal problem in the past year. Such problems include having a landlord fail to provide basic services or repairs (affecting 16% of rental households), having a dispute with a landlord or public housing authority over rules or terms of a lease (11%), and living in unsafe rental housing (9%).



Children and Custody | Twenty-seven percent of households with parents or guardians of children under the age of 18 have experienced a civil legal problem related to children or custody in the past year. Related problems include difficulty collecting child support payments or setting up a child support obligation (affecting 13% of these households), being investigated by Child Protective Services (9%), and having trouble with custody or visitation arrangements (8%).



Education | Twenty-six percent of households with someone who is in school or someone who has a child in school have experienced at least one civil legal problem related to education in the past year. Problems in this area include being denied access to special education services or problems with access to learning accommodations (affecting 15% of these households), attending a school that was unsafe or had problems with bullying (9%), and being suspended from school (7%).



Disability | Twenty-three percent of low-income households where someone lives with disability report at least one civil legal problem related to disability in the past year. The most common problems are being denied state or federal disability benefits or services or having them reduced or terminated (affecting 14% of these households) and being denied or experiencing limited access to public programs, activities, or services because no reasonable accommodation was made (8%).



Income Maintenance | Twenty-two percent of low-income households have experienced at least one problem related to income maintenance in the past year. Related problems include not being approved for state government assistance or having that assistance reduced or terminated (affecting 15% of households), being denied or terminated from Social Security Disability income (SSDI) or Social Security Survivors benefit (6%), and being denied or terminated from Supplemental Security Income (SSI) (6%).

Other Types of Civil Legal Problems

Other areas where low-income Americans report civil legal problems include the following:

Employment. Civil legal problems related to employment affect 19% of all low-income households. Problems include being terminated from a job for unfair reasons (8%), having a workplace grievance not taken seriously or not adequately addressed (7%), and being exposed to working conditions that were physically unsafe or unhealthy (7%).

Family. Civil legal problems related to family affect 17% of all low-income households. Problems include experiencing domestic violence or sexual assault (8%), filing for divorce or legal separation (5%), and situations where a vulnerable adult has been taken advantage of or abused (4%).

Homeownership. Civil legal problems related to homeownership affect 14% of low-income homeowners. Problems include falling several payments behind on a mortgage (9%) and having a home go into foreclosure (5%).

Veterans' Issues. Civil legal problems related to veterans' issues affect 13% of low-income households with veterans or other military personnel. Problems include difficulty getting medical care for service-related health conditions (9%), being denied service-related benefits (8%), and problems with discharge status (4%).

Wills and Estates. Civil legal problems related to wills and estates affect 9% of all low-income households. Problems include needing help drawing up a legal document like a will or advance directive (7%) and needing help with probate or administering an estate, trust, or will (5%).



Civil legal problems affect people's lives.

Civil legal problems can have a substantial impact on people's lives. Many of the civil legal problems low-income Americans face relate to life-essential matters like losing a home, dealing with debt, or managing a health issue. There are also less direct, yet important, ways these problems affect people's lives. For example, other research has shown that the stress of dealing with civil legal issues can lead to mental health conditions like anxiety and depression, which further complicate the situations of the families affected.²⁹ Many civil legal problems, like having unsafe housing and losing benefits to buy food, can also pose a threat to physical health.

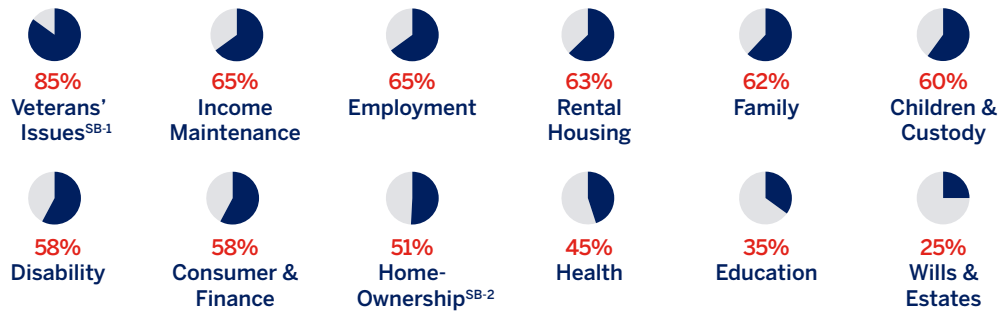
For each issue that respondents indicated they had personally experienced within the last 12 months, the survey asked them to rate the effect the problem had on them on a five-point scale from "not at all" to "severe." Seventy percent of low-income Americans who personally experienced a civil legal problem in the past year, say at least one of the problems has affected them "very much" or "severely." This amounts to more than half (55%) of all the problems personally experienced by low-income Americans. The types of problems most likely to have a substantial impact are those related to veterans' issues (85%),^{SB-1} income maintenance (65%), employment (65%), rental housing (63%), and family (62%). See Figure 3 below.

[CLIENT STORY]



Jill | Indiana | Housing | Jill, a senior and legal guardian of two young granddaughters, faced possible homelessness. Jill's sole income came from Social Security Disability benefits, which qualified her for Section 8 subsidized housing. When Jill's apartment was cited for not meeting Section 8 standards, the landlord refused to make the repairs, and the housing authority stopped its payments. The landlord filed an eviction notice for failure to pay rent despite Jill's attempts to continue paying her portion of the rent. A legal aid attorney represented Jill in small claims court, and Jill and her two granddaughters were allowed to stay in the apartment while she searched for another suitable place to live. Without an eviction on her record, Jill retained her Section 8 eligibility and found a new, safe home for her granddaughters.

Source: LSC Client Success Stories.

Figure 3: Civil Legal Problems Substantially Affecting People's Lives³⁰

Percent of personally experienced problems affecting individuals "very much" or "severely"



70% say at least one of their civil legal problems has "very much" or "severely" affected their lives.

[CLIENT STORY]



Misty | Nebraska | Income Maintenance | While giving birth to her third child, Misty, 32, went into cardiac arrest and was left with a serious heart condition that made her eligible for Social Security Disability benefits. She filed for benefits to help make ends meet and take care of her family, but was denied two times. With the help of legal aid attorneys, Misty's third application for disability benefits was expedited and shortly thereafter, she received a favorable decision. The decision, which granted her \$700 per month, also granted her Medicaid, which allowed her to secure a Ventricular Assist Device that has allowed her to live a more full life with her family again.

Source: LSC Client Success Stories.

| Special Focus | Civil legal problems are common among the groups highlighted in this report, and many have experienced multiple problems. Households with survivors of domestic violence or sexual assault are particularly likely to experience civil legal problems. Ninety-seven percent have experienced at least one problem in addition to their problems related to violence. Additionally, compared to other households, households with survivors tend to face more problems in a year and are more likely to experience problems in most of the issue areas covered in the survey.



Seniors' Households (n=286)

56% had at least 1 civil legal problem in past year

10% had 6+ problems in past year

Common problem areas: **Health** (33%), and **Consumer/Finance** (23%), and **Income Maintenance** (13%)



Households in Rural Areas (n=285)

75% had at least 1 civil legal problem in past year

23% had 6+ problems in past year

Common problem areas: **Health** (43%), **Consumer/Finance** (40%), and **Employment** (25%)



Households with Veterans or Other Military Personnel (n=297)

71% had at least 1 civil legal problem in past year

21% had 6+ problems in past year

Common problem areas: **Health** (38%), **Consumer/Finance** (36%), and **Employment** (20%)



Households with Persons with Disabilities (n=950)

80% had at least 1 civil legal problem in past year

32% had 6+ problems in past year

Common problem areas: **Health** (51%), **Consumer/Finance** (44%), **Income Maintenance** (28%), and **Disability** (23%)



Households with Parents/Guardians of children under 18 (n=874)

80% had at least 1 civil legal problem in past year

35% had 6+ problems in past year

Common problem areas: **Health** (46%), **Consumer/Finance** (45%), and **Income Maintenance** (28%), **Custody** (27%), **Family** (26%), **Employment** (26%), and **Education** (25%)



Households with Recent Survivors of Domestic Violence/Sexual Assault (DV/SA) (n=194)

97% had at least 1 civil legal problem in past year in addition to DV/SA

67% had 6+ problems

Common problem areas: **Consumer/Finance** (66%), **Health** (62%), **Employment** (46%), **Rental Housing** (45%), **Income Maintenance** (44%), and **Family** (40%) (in addition to DV/SA)



Seeking Legal Help



While most low-income Americans face at least one civil legal problem in a given year, only one in five seeks help from a legal professional. Using data from the 2017 Justice Gap Measurement Survey, this section presents findings on which types of problems are most likely to receive legal attention, where people turn for legal help, what types of legal assistance they receive, and reasons why so many people do not seek legal help. One noteworthy finding from this section is that 86% of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help.

About the Data

The findings presented in this section come from a section of the 2017 Justice Gap Measurement Survey that asked detailed questions about a subset of the civil legal problems reported by respondents. For each respondent, the survey randomly selected up to four personally-experienced problems affecting them more than “not at all.” Due to the low incidence of problems relating to veterans’ issues and disabilities, these problems were always selected if they met the other criteria. Respondents answered questions about what, if any, help they sought to address each of these problems. The unit of analysis in this section is problems.

Low-income Americans do not seek the help of legal professionals for most of their civil legal problems.

Low-income Americans report seeking the help of a legal professional for only 20% of their problems. Interestingly, people are only slightly more likely to seek professional legal help for problems that substantially affect them (24% of problems that affect them very much or severely) compared to problems that do not affect them much (17% of problems that affect them moderately or slightly).

Additionally, while we might expect to see differences in help-seeking behavior across education levels, low-income Americans with less education are only slightly less likely to seek professional legal help for their civil legal problems. Those with no more than a high school education seek professional legal help for 19% of their civil legal problems, and people with more education seek it for 22% of their civil legal problems. In fact, none of the differences observed by educational attainment are statistically significant.



Low-income Americans seek professional legal help for only
20% of the civil legal problems they face.

Low-income Americans get inadequate or no professional legal help for most of the civil legal problems they face.

Low-income Americans say they have received or expect to receive as much legal help as they need for 69% of the problems where they sought professional legal help. While this is a promising result, it is important to remember that they seek professional legal help for only 20% of their problems. Additionally, some respondents indicate that they tried to get professional legal help but were unable to do so.³¹ Taking all of this together, we find that low-income Americans receive inadequate or no professional legal help for 86% of their civil legal problems in a given year.³²

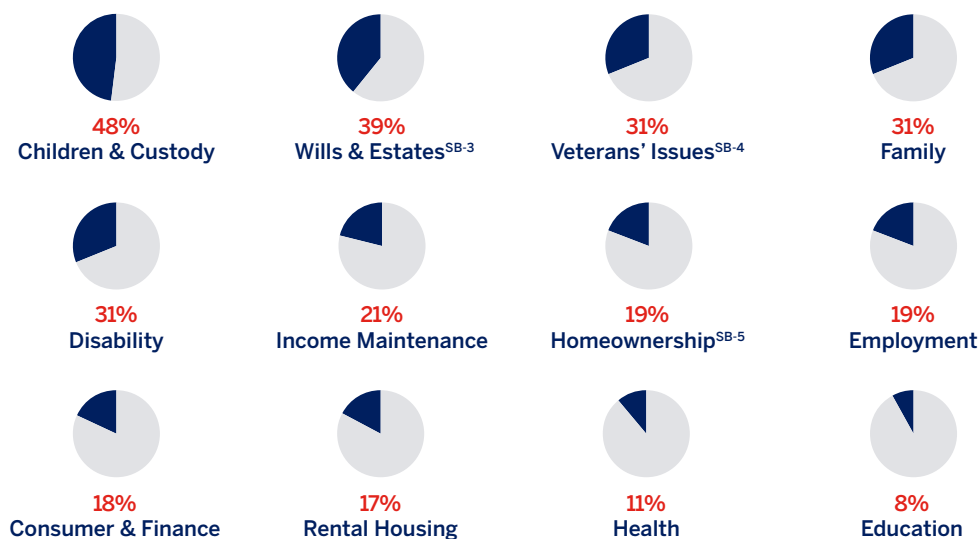


Low-income Americans receive inadequate or no professional legal help for **86%** of the civil legal problems they face in a given year.

People are more likely to seek professional legal help for problems that are more plainly “legal” in nature.

People are most likely to seek professional legal help for problems related to children and custodial issues and wills and estates. Low-income Americans seek such help for 48% of their civil legal problems related to children and custody and for 39% of their problems related to wills and estates.^{SB-3} Of all the civil legal problems explored in the survey, the ones in these categories are more obviously “legal.” Issues relating to children and child custody, for example, usually have to be decided or approved by a judge. Similarly, issues dealing with wills and estates involve legal paperwork and often lawyers as well.

While civil legal problems related to health issues and consumer and finance issues are the most commonly experienced problems among low-income Americans, they are not the problem areas most likely to get attention from a legal professional. As Figure 4 shows, people seek professional legal help for only 18% of their civil legal problems related to consumer and finance and for only 11% of those related to health.

Figure 4: Civil Legal Problems for which Professional Legal Help Is Sought³³

Percent of issue-related problems for which professional legal help is sought

Base sizes vary.

Low-income Americans who seek professional legal help rely on a variety of sources and most often receive help in the form of legal advice.

People who seek the help of a legal professional rely on various sources. They most often turn to legal aid organizations (30% of problems), paid private attorneys (29%), and social or human services organizations (24%). They go to volunteer attorneys 11% of the time and to disability service providers 10% of the time. Finally, low-income Americans reach out for help through legal hotlines for 8% of their civil legal problems.

As Figure 5 shows, when people get help from legal professionals, they are most likely to receive this help in the form of legal advice. Two in five (40%) problems receiving some sort of professional legal help are addressed with legal advice. People report receiving assistance filling out legal documents or forms for 21% of these problems, being represented by a legal professional in court for 20% of them, and getting help negotiating a legal case for 14% of them.

The legal services that people receive vary for at least two reasons. Of course, different types of problems require different types of help and to varying degrees. The help people receive also varies according to what resources might be available to help them address their specific civil legal needs. In the next section, discussion about the work of LSC grantees sheds light on how limited resources means that some cases receive more attention from legal aid professionals than others.

Figure 5: Types of Services Received from Legal Professionals³⁴



[CLIENT STORY]



Michaela | New Jersey | Veterans | Michaela is a lifelong New Jersey resident, always living there except for six years serving in the armed forces in the 1990s. While stationed in Alabama, she divorced, but a name change was not included in the divorce. As a result, when she returned to New Jersey after her service ended, she was compelled to obtain a driver's license using her married name. Michaela used her maiden name in all other matters, causing issues in the various aspects of her life that involve identification (e.g., finances, utilities, leases, etc.). A legal aid attorney represented Michaela in a name change, permitting her to resume use of her maiden name and to once and for all clarify her identification in all aspects of her life.

Source: LSC Client Success Stories.

When people do not seek professional legal help, they often turn to other resources.

Low-income Americans do not seek professional legal help for 78% of the civil legal problems they face in a given year. When someone does not seek such help, they turn to other resources about half of the time (for 54% of problems for which professional legal help is not sought). They speak with others who are not legal professionals (commonly friends and family members) for 33% of these problems, search for information online for 13% of these problems, or take both of these actions for 8% of these problems. When people search for information online, they often search for legal information about procedures to resolve a specific civil legal problem, legal rights on specific issues, or how to get legal assistance.³⁵

Many people do not seek legal help because they think they can handle their problems on their own or because they do not know where to turn for help.

Combining the survey results on seeking professional legal help with those on searching for legal information online, we find that low-income Americans do not seek either type of legal help for 72% of the civil legal problems they face in a given year. Their reasons for not seeking either type of legal help or information are varied. See Figure 6. The most common reason is that they decide to deal with the problem on their own. This is cited 24% of the time. This is consistent with previous studies that find that many people are inclined to believe they can take care of their civil legal problems on their own.³⁶ The next most common type of reason relates to not knowing where to look for help or what resources might be available. People cite this type of reason 22% of the time.

Not seeing their problem as a “legal” problem is another major barrier to seeking legal help.

We know from other studies related to the justice gap that a major reason people do not seek legal help is because they do not perceive their civil legal problems to be legal.³⁷ We find that low-income Americans cite this reason for one in five (20%) civil legal problems where no legal help was sought. This is also consistent with the findings above showing that people are more likely to seek professional legal help for issues that are more plainly legal in nature like custody issues and wills, and less likely to do so for problems like health and finances, which are not as obviously legal.

Other reasons people give for not seeking legal help are being concerned about the cost of seeking such help (14%), not having time (13%), and being afraid to pursue legal action (12%). See Figure 6.

Figure 6: Reasons for Not Seeking Legal Help³⁸



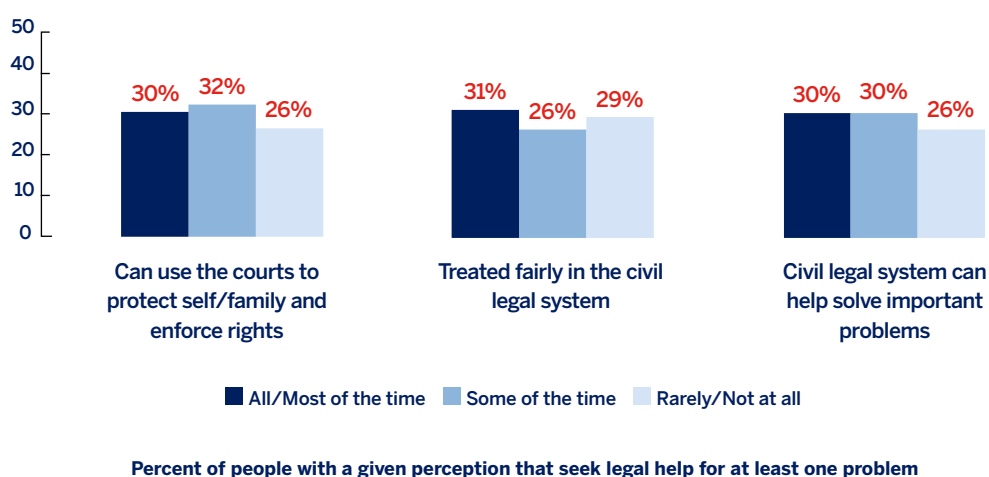
Views of the justice system do not seem to influence whether or not one seeks legal help.

The survey asked respondents the following three questions to assess their perceptions of the civil legal system:

- To what extent do you think people like you have the ability to use the courts to protect yourself and your family or to enforce your rights?
- To what extent do you think people like you are treated fairly in the civil legal system?
- To what extent do you think the civil legal system can help people like you solve important problems such as those you identified in this survey?

We compared people offering more positive views with those offering more negative views to see if there are any noteworthy differences in their patterns of seeking legal help. More specifically, we compared people to see if those holding certain perceptions would be more or less likely than others to seek legal help for at least one of their civil legal problems explored in depth in the survey. They are not. Low-income Americans who view the system in a more negative light are no more or less likely to seek professional legal help or to search for legal information online. See Figure 7.

Figure 7: Seeking Legal Help by Perceptions of the Civil Legal System³⁹



| Special Focus | Rates of seeking professional legal help do not vary much across the groups highlighted in this report.⁴⁰ All seek such help for only about one in five of their civil legal problems. For most, the two most common reasons for not seeking legal help are not knowing where to look and deciding to deal with the problem on their own. The only exception is recent survivors of domestic violence or sexual assault, who cite not being sure if a problem was a legal issue 31% of the time. Also noteworthy is that seniors are more likely than others to cite not having time as a reason for not seeking legal help.

65+

Seniors (n=306 problems)

Seek professional legal help for
19% of problems]

Top reasons for not seeking legal help: **didn't know** where to look (22%), **decided to deal with problem on own** (21%), and **didn't have time** (19%)



Rural Residents (n=558 problems)

Seek professional legal help for
22% of problems

Top reasons for not seeking legal help: **decided to deal with problem on own** (26%), **wasn't sure if legal** (21%), and **didn't know where to look** (18%)



Veterans (n=511 problems)

Seek professional legal help for
21% of problems

Top reasons for not seeking legal help: **didn't know** where to look (29%), **decided to deal with problem on own** (25%), and **wasn't sure if legal** (18%)



Persons with Disabilities (n=1986 problems)

Seek professional legal help for
20% of problems

Top reasons for not seeking legal help: **decided to deal with problem on own** (25%), **didn't know where to look** (21%), and **wasn't sure if legal** (19%)



Parents/Guardians of Children under 18
(n=1758 problems)

Seek professional legal help for
21% of problems

Top reasons for not seeking legal help: **decided to deal with problem on own** (25%), **didn't know where to look** (21%), and **wasn't sure if legal** (20%)



Survivors of Domestic Violence/Sexual Assault
(n=621 problems)

Seek professional legal help for
23% of problems

Top reasons for not seeking legal help: **wasn't sure if legal** (31%), **didn't know where to look** (23%), and **decided to deal with problem on own** (20%)

Reports from the Field



The previous section explored the demand side of the justice gap. This section explores the supply side. Using data from LSC's 2017 Intake Census, this section presents findings on the assistance low-income Americans receive after seeking help from an LSC-funded legal aid organization. One key finding is that, given the number of low-income Americans who are expected to seek help in 2017, LSC grantees will not be able to provide adequate legal assistance for an estimated 1 million civil legal problems due to a lack of resources.



About the Data

Most of the findings in this section are based on analysis of the data collected during LSC's 2017 Intake Census. For six weeks in March and April 2017, LSC grantees tracked the individuals who contacted them seeking assistance with civil legal problems. Individuals coming to LSC grantees with problems were grouped into three main categories: unable to serve, able to serve to some extent (but not fully), and able to serve fully.⁴¹ The resulting data permit estimates of the rates at which people seeking legal help for a problem from LSC-funded legal aid organizations receive the legal assistance necessary to meet their needs. The unit of analysis in this section is problems.⁴²

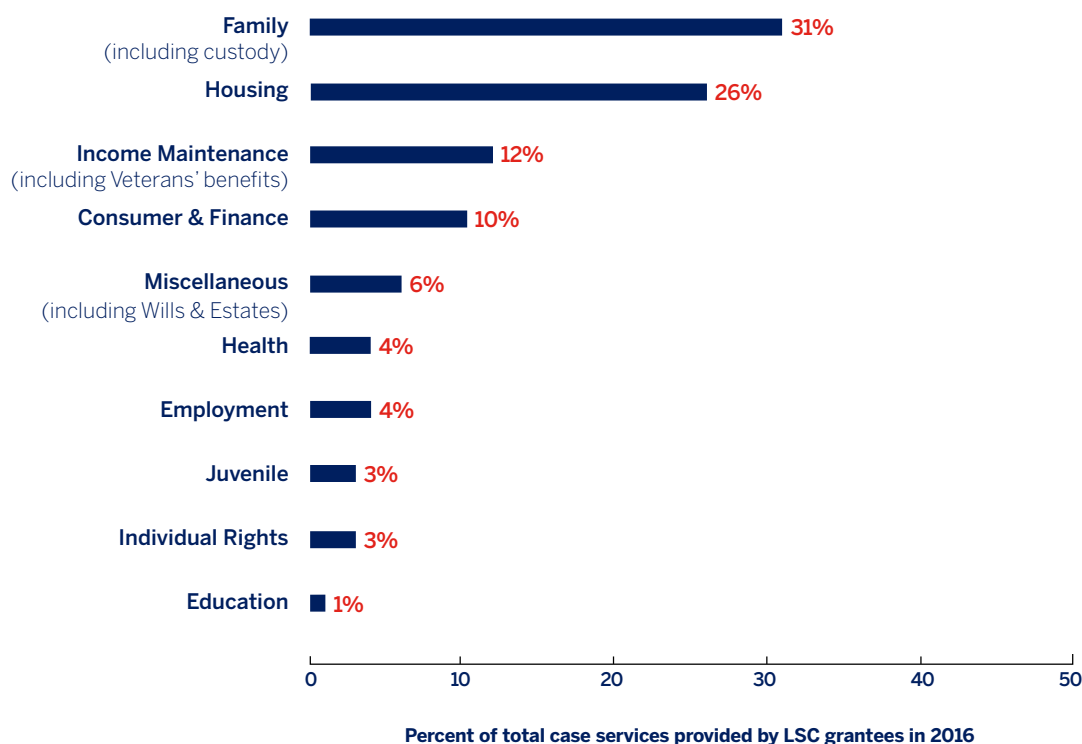
More than half of the problems receiving legal case services from LSC-funded legal aid programs involve family and housing issues.

As a general rule, to be eligible for LSC-funded legal assistance, an individual must have a family income at or below 125% of the Federal Poverty Level (FPL), and their civil legal problem cannot be related to issues for which use of LSC funds is prohibited, like abortion, euthanasia or class-action litigation.⁴³ We will refer to civil legal problems that meet these criteria as “eligible problems” or “eligible civil legal problems” throughout this section.

Not all income-eligible individuals with a legal problem receive the legal assistance they need. To maximize the use of available legal aid resources, LSC grantees develop guidelines on the types of legal problems they prioritize for service. LSC requires grantees to conduct comprehensive legal needs assessments in their communities on a regular basis to inform these guidelines. Some income-eligible individuals have problems that fall within these priority guidelines, but still do not receive the assistance they need for other reasons. We examine these instances throughout this section, trying to assess the extent to which they are shaped by a lack of resources.



The types of problems for which LSC grantees provided case services in 2016 are summarized in Figure 8.⁴⁴ Family problems, including child custody, as well as housing problems like evictions and rental repairs, form the bulk of LSC grantees' casework. The reader will notice that the distribution across the problem categories reported by LSC grantees is different from the distribution of problems experienced by low-income Americans that was presented in Section 2 (see Figure 2). This is due in large part to the types of problems LSC grantees prioritize as well as the fact that people are more likely to seek legal help for certain types of problems, as was discussed in Section 3.

Figure 8: Civil Legal Case Services by Problem Category, 2016^{45,46}

In 2017, low-income Americans are expected to approach LSC-funded legal aid organizations for help with more than 1.7 million civil legal problems.

During LSC's six-week-long Intake Census, low-income Americans approached grantees for assistance to address nearly 196,000 eligible civil legal problems. Based on this, we project that low-income Americans will approach LSC grantees with an estimated 1.7 million eligible civil legal problems in 2017.

Our projection likely underestimates the number of eligible problems that will be brought to LSC grantees. While the vast majority (89%) of reporting grantees said their intake during this six-week period was typical in terms of the number and type of problems brought to them, 12 grantees reported they processed fewer problems than normal due to staff shortages, office closures, or other reasons. Three other grantees reported it was atypical in other ways, including one who says they experienced more traffic than usual. Additionally, one grantee (out of a 133 total grantees) did not report any data for

the Intake Census and, thus, the problems they processed during the six-week period are not accounted for in the sample counts nor in the 12-month projections. Finally, LSC grantees counted individuals (not problems or case services) during the Intake Census, and it is possible that one person could seek assistance for more than one civil legal problem.

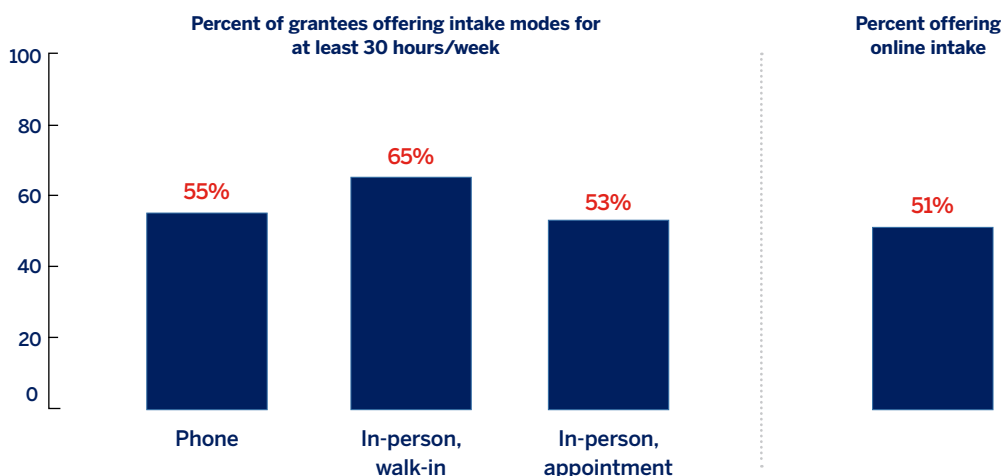
It is important to keep in mind that these estimated 1.7 million civil legal problems represent less than 6% of the total civil legal problems faced by low-income Americans. Recall from Section 3 that low-income Americans seek professional legal help for only 20% of their civil legal programs, and they turn to legal aid organizations for only 30% of the problems for which they seek such help. Taken together, this means they seek professional legal help from legal aid organizations 6% of the time. Note that this corresponds to help sought from the set of all legal aid organizations in the U.S., not just those funded by LSC.

Low-income Americans likely seek the help of legal aid organizations for even more problems that do not get processed for intake.

The estimated 1.7 million problems low-income Americans will bring to LSC grantees in 2017 is more accurately described as the number of problems that LSC grantees will process for intake in 2017. There are likely other problems that people consider bringing or try to bring to an LSC grantee, but are unable to get to or through the point of intake. These situations are not captured in the Intake Census data. It is difficult to know how often this happens, but because legal aid organizations can only offer intake for so many hours and in so many ways, it is bound to happen. The types and availability of various intake modes varies across LSC grantees, depending on the resources they have at their disposal (e.g., staffing, technology, and other resources).

There are three primary intake modes currently offered by LSC-funded legal aid organizations:

- In-person: This a face-to-face interview that takes place at the legal aid program's office. This can happen on a walk-in basis or as the result of an appointment.
- Phone: This involves conducting the screening process over the phone. This often involves a mix of going through an automated process (e.g., "press two if you...") and speaking with a legal aid staff member directly.
- Online: This method involves submitting interview information via an online form or web application.

Figure 9: Intake Modes Offered by LSC-funded Legal Aid Programs⁴⁷

Most legal aid organizations have set hours for intake, which are scheduled times when new requests for assistance are received. Intake hours can vary for a variety of reasons, including program resources and community needs. Online options are the exception; these screening tools are usually available continuously and monitored regularly by staff during business hours.

When grantees submitted their Intake Census data to LSC, they also indicated how many hours per week they offered various intake modes (on average). Figure 9 presents the percent of LSC grantees that offer various intake modes for at least 30 hours per week and that offer online intake. Sixty-five percent of grantees offer in-person intake on a walk-in basis for at least 30 hours per week; 53% offer in-person intake by appointment for at least 30 hours per week; and 55% offer intake by phone for at least 30 hours per week. About half (51%) of LSC grantees offer online modes of intake.

[CLIENT STORY]



Donna | New York | Domestic Violence | Donna, a rural resident of New York State, suffered from severe mental health problems resulting from domestic violence and the sexual abuse of one of her children. She did not feel comfortable speaking about her situation before contacting an LSC grantee, who helped her address various civil legal problems she was facing. Specifically, the legal aid attorney helped Donna avoid a workfare sanction by the local Department of Social Services and won her SSI appeal, permanently removing her from the county welfare rolls. Donna received over \$40,000 in retroactive SSI benefits, which has allowed her to establish her own home and provide a college education for her child.

Low-income Americans receive some kind of legal help for 59% of the eligible civil legal problems they bring to LSC-funded organizations.

In 2017, LSC grantees will provide some form of legal assistance for an estimated 999,600, or 59%, of eligible problems presented by low-income Americans. The type and extent of help vary, depending on the requirements and complexity of a given problem and the resources available. From the Intake Census data, we can group eligible problems for which LSC grantees provide assistance into three main categories: “fully served”; “served, but not fully”; and “served, but extent of service pending” (or, for short, “served, extent pending”). This information is summarized in Table 1 along with corresponding 12-month projections for 2017.

Table 1: Distribution of Eligible Problems by Extent of Service⁴⁸

	Percent of total eligible problems	Total from 2017 Intake Census sample	Total 12-month projection
Total eligible problems	100%	195,776	1,701,400
Total served to some extent	59%	115,024	999,600
Served fully	28%	54,657	475,000
Served, but not fully	21%	41,371	359,500
Served, but extent of service is pending	10%	18,996	165,100
Not served	41%	80,752	701,800
Total problems not served or not served fully (excluding pending)	62%	122,123	1,061,300
Total problems not served or not served fully (including pending)	72%	141,119	1,226,400

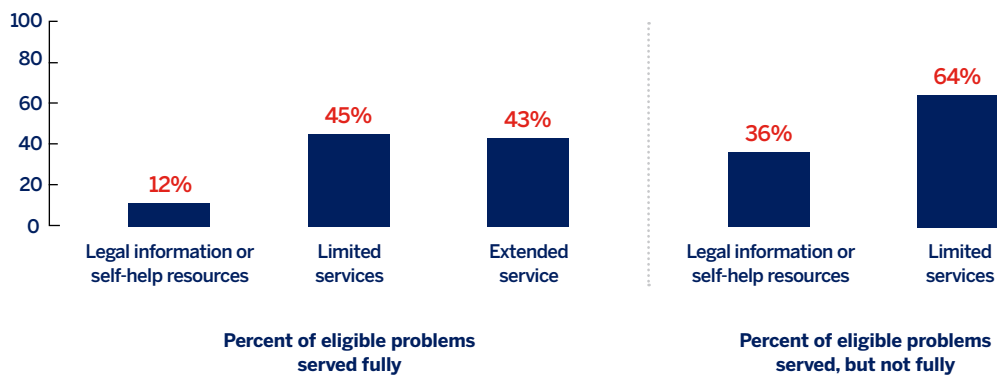
Problems fully served

LSC grantees reported they will be able to “fully serve” at least 28% of all the eligible problems low-income Americans presented during the intake census (see Table 1 above). In these instances, people receive legal assistance expected to fully address their legal needs. This can take the form of providing legal information or self-help resources (12% of fully-served problems) or of “limited services” like providing legal advice, speaking with third parties on behalf of a client, or helping to prepare legal documents (45% of fully-served problems).⁴⁹ Another 43% of fully-served problems receive “extended service,” which includes cases in which a legal aid attorney represents a client in negotiated settlements (with or without litigation), in administrative agency hearings or other administrative processes, or in a court proceeding.⁵⁰ See Figure 10.

Problems served, but not fully

Of all the eligible problems low-income Americans presented to LSC grantees during the intake census, at least 21% will receive some legal assistance, but not to the extent necessary to fully address the clients' legal needs (see Table 1 above). Help for people with these "served, not fully" problems takes the form of providing legal information or self-help resources (36% of problems served, but not fully) and "limited service" like providing legal advice, speaking with third parties on behalf of a client, or help preparing legal documents (64% of problems served, but not fully).⁵¹ See Figure 10.

Figure 10: Types of Legal Assistance Provided⁵²



Problems served, but extent of service pending

At the conclusion of the Intake Census, LSC grantees had not yet determined the level of legal assistance for 10% of eligible problems presented to them.

After seeking legal assistance from LSC grantees, low-income Americans will not receive any legal assistance for an estimated 700,000 eligible problems in 2017.

Forty-one percent of the eligible problems low-income Americans presented to LSC grantees during the intake census will not receive any legal help from grantees. This corresponds to slightly more than an estimated 700,000 problems for 2017. There are many reasons why an individual with an eligible civil legal problem might not receive legal assistance. More than half (54%) of these problems are not served because they fall outside of the guidelines grantees use to prioritize eligible problems due to limited resources. About one in four (24%) eligible problems falls within grantees' priorities, but is not served due to insufficient resources. A small portion (6%) are not served because

the grantee has identified a conflict of interest. For example, the organization might already be representing another party to the dispute. Finally, 16% do not receive legal assistance for other reasons, often involving situations where contact with a client is lost.

Low-income Americans will receive insufficient or no legal help for an estimated 1.1 million eligible problems this year alone.

Estimating the number of eligible problems for which low-income Americans will receive insufficient legal help (“underserved”) or no legal help (“unserved”) requires making some assumptions. Because the extent of legal assistance provided for the problems currently categorized as “served, but extent pending” is not known, we cannot provide a simple estimate for the percent of eligible problems that receive insufficient or no legal assistance. However, by making some assumptions about the extent to which these problems will be served, we can arrive at a range of estimates. We find that between 62% and 72% of all eligible problems brought to LSC grantees either receive no legal assistance or receive a level of assistance that is not expected to fully address the client’s legal needs. That corresponds to an estimated 1.1 to 1.2 million eligible civil legal problems expected to go unserved or underserved in 2017 alone.

The 62% figure underestimates the problems unserved or underserved. It treats “served, but extent pending” problems as being “served fully.” Conversely, the 72% figure is an overestimation, treating “served, but extent pending” problems as “served, but not fully.” In reality, the rate will fall somewhere in between. See Table 1 above.

A lack of available resources accounts for the vast majority of eligible civil legal problems that go unserved or underserved.

Civil legal problems that are unserved or underserved due to limited resources account for the vast majority of the problems that do not receive the assistance necessary to fully address the client’s needs. Table 2 presents two estimates of the number of eligible problems that go unserved or underserved for this reason. Overall, we estimate that insufficient resources account for between 85% and 97% of all unserved or underserved eligible problems, representing 53% to 70% of all eligible problems. This corresponds to an estimated range of about 900,000 to 1.2 million problems for which the assistance necessary to meet the legal needs of low-income Americans cannot be provided due to a lack of resources. See Table 2.

The upper-bound estimate of 97% is likely an overestimation. Only problems that involve a conflict of interest between parties are not included, corresponding to 3% of unserved or underserved problems. In this case, we assume the worst-case scenario and count all of the “served, but extent pending” problems as served but not to the full extent necessary and attribute this to a lack of resources.

Table 2: Estimates of Eligible Problems that are Unserved or Underserved Due to a Lack of Resources⁵³

	Lower-bound	Upper-bound
Intake Census sample count	104,364	136,278
12-month projection count	907,000	1,184,300
Percent of all eligible problems	53%	70%
Percent of all eligible problems that are unserved or underserved	85%	97%

Additionally, this 97% estimate treats eligible problems that go unserved due to “other reasons” as unserved due to a lack of resources, because many of the underlying reasons could potentially be resolved or avoided if there were more resources. For example, these reasons often involve situations where legal aid staff lose touch with clients. If there were more resources to facilitate follow-up by legal aid staff or to help clients with transportation to and from meetings, for example, many of these problems would receive the legal assistance needed. To create a simple upper-bound estimate, we assume all of these problems would have received the necessary legal assistance had more resources been available.

The lower-bound estimate of 85% is likely an underestimation. In this case, we assume that all of the “served, but extent pending” problems will be served to the full extent necessary and that none of the problems that are unserved for “other reasons” could have been successfully served had more resources been available.

See Appendix B4 for a detailed explanation of how these estimates were calculated.



In 2107, an estimated **1 million civil legal problems** brought to LSC grantees by low-income Americans **will not receive the legal assistance required** to fully address their needs due to a lack of available resources.

Special Focus



This section presents key findings for the six groups of low-income Americans highlighted throughout this report. These groups include seniors, persons with disabilities, veterans, parents and guardians of children under 18, rural residents, and survivors of domestic violence or sexual assault.

65+

Seniors

Key findings related to the civil legal needs and experiences of low-income seniors include the following:

- Approximately 6.4 million seniors have family incomes below 125% of FPL.^a
- 56% of low-income seniors' households experienced a civil legal problem in the past year, including 10% that have experienced 6+ problems.^b
- LSC-funded legal aid organizations provided legal services to low-income Americans aged 60+ years old for about 135,000 cases in 2016.^c
- The most common types of civil legal problems for low-income seniors' households include: health (33%), consumer and finance (23%), income maintenance (13%), and wills and estates (12%).^b
- Low-income seniors seek professional legal help for 19% of their civil legal problems, receiving inadequate or no professional legal help for an estimated 87% of all their problems.^b
- The top reasons low-income seniors give for not seeking legal help include the following:^b
 - Not knowing where to look or what resources were available (22%)
 - Deciding to deal with problem on their own (21%)
 - Not having time (19%)
 - Wasn't sure if it was a legal issue (17%)

Low-income seniors **received inadequate or no professional legal help for 87%** of their civil legal problems in 2017.

[CLIENT STORY]

Helen | Pennsylvania | Income Maintenance | Helen is a 68-year-old widow whose only income is a monthly Social Security Administration (SSA) widow's benefit. When she sought help from an LSC grantee, she was scared, vulnerable and overwhelmed. She had just received a letter from the SSA indicating they had overpaid her \$47,000 and notifying her that they would stop her monthly benefit payment until the debt was repaid. The legal aid attorney found that the overpayment was caused by fraudulent conduct by Helen's late ex-husband that occurred after their divorce and long after they had separated. The attorney helped Helen resolve the situation, and she continued to receive her SSA widow's benefit.

Source: LSC Client Success Stories.

^aU.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months. Senior is defined as ages 65+. ^b2017 Justice Gap Measurement Survey. ^c2016 Legal Services Corporation Grantee Activity Report.



Rural Residents

Key findings related to the civil legal needs and experiences of low-income, rural residents include the following:

- Approximately 10 million rural residents have family incomes below 125% of FPL.^a
- 75% of low-income rural households experienced a civil legal problem in the past year, including 23% that have experienced 6+ problems.^b
- The most common types of civil legal problems among low-income, rural households include: health (43%), consumer and finance (40%), and employment (25%).^b
- Low-income rural residents seek professional legal help for 22% of their civil legal problems, receiving inadequate or no professional legal help for an estimated 86% of all their problems.^b
- The top reasons low-income, rural residents give for not seeking legal help include the following:^b
 - Deciding to deal with problem on their own (26%)
 - Wasn't sure if it was a legal issue (21%)
 - Not knowing where to look or what resources were available (18%)

Low-income rural residents **received inadequate or no professional legal help** for **86%** of their civil legal problems in 2017.

[CLIENT STORY]



Charles | California | Housing | Charles and his wife care for their elderly parents and grandchildren in their home in rural California. They first experienced financial problems when Charles's employer reduced his work hours. Then he became ill from a life-threatening disease. He and his wife asked their lending bank for help. When the bank did not respond to their modification request, they sought help from an LSC grantee. The legal aid staff succeeded in obtaining a modification that lowered their monthly mortgage payment and established a fixed payment for principal and interest.

Source: LSC Client Success Stories.

^aU.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. Senior is defined as ages 65+. ^b2017 Justice Gap Measurement Survey.



Veterans

Key findings related to the civil legal needs and experiences of low-income veterans and other military personnel include the following:

- More than 1.7 million veterans have family incomes below 125% of FPL.^a
- 71% of low-income households with veterans or other military personnel experienced a civil legal problem in the past year, including 21% that have experienced 6+ problems.^b
- LSC-funded legal aid organizations provided legal services to low-income households with veterans for about 41,000 cases in 2016.^c
- The most common types of civil legal problems for low-income households with veterans and other military personnel include: health (38%), consumer and finance (36%), and employment (20%).^b
- Low-income veterans and other military personnel seek professional legal help for 21% of their civil legal problems, receiving inadequate or no professional legal help for an estimated 88% of all their problems.^b
- The top reasons low-income veterans and other military personnel give for not seeking legal help include the following:^b
 - Not knowing where to look or what resources were available (29%)
 - Deciding to deal with problem on their own (25%)
 - Wasn't sure if it was a legal issue (18%)

Low-income veterans and other military personnel **received inadequate or no professional legal help** for **88%** of their civil legal problems in 2017.

[CLIENT STORY]



Bud | West Virginia | Veteran Benefits | Bud is a 68 year-old Vietnam veteran who had been receiving his Marine pension benefits for the past eight years. After a government clerk keyed in the wrong social security number, his benefits were suspended. Moreover, the Department of Veterans Affairs (VA) deemed the money he had been receiving as overpayment and threatened action against him. Bud tried to correct his record, but he was having a difficult time and, meanwhile, his savings were being depleted. An attorney with an LSC grantee's Veteran's Assistance Program worked with the Social Security office, the VA, and the Internal Revenue Service, and was eventually able to establish Bud's identity, win reinstatement of his pension, and resolve the false overpayment issue.

Source: LSC Client Success Stories.

^aU.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months. Senior is defined as ages 65+. ^b2017 Justice Gap Measurement Survey. ^c2016 Legal Services Corporation Grantee Activity Report.



Persons with Disabilities

Key findings related to the civil legal needs and experiences of low-income persons with disabilities include the following:

- More than 11.1 million people with a disability have family incomes below 125% of FPL.^a
- 80% of low-income households with someone with a disability experienced a civil legal problem in the past year, including 32% that have experienced 6+ problems.^b
- The most common types of civil legal problems among low-income households with someone with a disability include: health (51%), consumer and finance (44%), income maintenance (28%), and disability (23%).^b
- Low-income persons with a disability seek professional legal help for 20% of their civil legal problems, receiving inadequate or no professional legal help for an estimated 87% of all their problems.^b
- The top reasons low-income persons with a disability give for not seeking legal help include the following:^b
 - Deciding to deal with problem on their own (25%)
 - Not knowing where to look or what resources were available (21%)
 - Wasn't sure if it was a legal issue (19%)

Low-income persons with a disability **received inadequate or no professional legal help** for **87%** of their civil legal problems in 2017.

[CLIENT STORY]



Elinor | New York | Housing | Elinor has a daughter with a disability who had to crawl four flights of stairs each day to their apartment. Her daughter spent about 30 minutes sliding down the steps to reach the wheelchair stashed under the stairwell alcove and more than an hour getting in and out of her building to attend school five days a week. When there was a vacancy on the ground floor, Elinor sought to move there, but the landlord told them “transfers” weren’t allowed. Represented by an LSC grantee lawyer, the family was able to acquire the apartment on the ground floor and maintain their \$700 rent for their three-bedroom, rent-controlled apartment.

Source: LSC Client Success Stories.

^aU.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. ^b2017 Justice Gap Measurement Survey.



Parents of Children under 18

Key findings related to the civil legal needs and experiences of low-income parents and guardians of minor children include the following:

- Approximately 18 million families with related children under 18 have incomes below 125% of FPL.^a
- 80% of low-income households with parents or guardians of minor children experienced a civil legal problem in the past year, including 35% that have experienced 6+ problems.^b
- Common types of civil legal problems among low-income households with parents or guardians of minor children include: health (46%), consumer and finance (45%), income maintenance (28%), children and custody (27%), family (26%), employment (26%), and education (25%).^b
- Low-income parents and guardians of minor children seek professional legal help for 21% of their civil legal problems, receiving inadequate or no professional legal help for an estimated 87% of all their problems.^b
- The top reasons low-income parents and guardians of minor children give for not seeking legal help include the following:^b
 - Deciding to deal with problem on their own (25%)
 - Not knowing where to look or what resources were available (21%)
 - Wasn't sure if it was a legal issue (20%)

Low-income parents and guardians of minor children **received inadequate or no professional legal help** for **87%** of their civil legal problems in 2017.

[CLIENT STORY]



Patricia | Georgia | Education | Patricia was worried about her 13-year-old daughter, a middle-schooler diagnosed with leukemia. She was being bullied at school and, because she was often ill or hospitalized, she needed help with academics and extra time to complete assignments. After speaking with school officials, Patricia did not feel her concerns were being heard. LSC grantee lawyers worked with the school to develop a special education plan, bringing in an education specialist from the hospital where her daughter was being treated. An individual education plan (IEP) was developed, giving Patricia's daughter the extra support she needed and permission to wear a hat to cover her bald head. School officials also addressed the bullying, making her time in school safer and more productive.

Source: LSC Client Success Stories.

^aCPS Table Creator, Current Population Survey Annual Social and Economic Supplement, US Census Bureau, 2016. <https://www.census.gov/cps/data/cpstablecreator.html>. ^b2017 Justice Gap Measurement Survey.



Survivors of Domestic Violence or Sexual Assault

Key findings related to the civil legal needs and experiences of low-income survivors of domestic violence or sexual assault include the following:

- Rates of intimate partner violence among people with family incomes at or below 100% of FPL are about four times higher than the rates among people with incomes at or above 400% of FPL.^a
- 97% of low-income households with survivors of recent domestic violence or sexual assault (DV/SA) experienced a civil legal problem in the past year (in addition to problems related to DV/SA), including 67% that have experienced 6+ problems.^b
- Common types of civil legal problems among low-income households with recent survivors include: consumer and finance (66%), health (62%), employment (46%), rental housing (45%), income maintenance (44%), and family (40%) (in addition to DV/SA-related problems).^b
- Low-income survivors seek professional legal help for 23% of their civil legal problems, receiving inadequate or no professional legal help for an estimated 86% of all their problems.^b
- The top reasons low-income survivors give for not seeking legal help include the following:^b
 - Wasn't sure if it was a legal issue (31%)
 - Not knowing where to look or what resources were available (23%)
 - Deciding to deal with problem on their own (20%)

Low-income survivors of recent domestic violence or sexual assault **received inadequate or no professional legal help** for **86%** of their civil legal problems in 2017.

[CLIENT STORY]



Frida | Washington | Domestic Violence | Frida, a domestic violence survivor, and her four children, fled abuse at the hands of her husband. The children were sexually molested by their father, confined to the house, and repeatedly threatened with weapons. During the subsequent divorce, the husband was granted unsupervised telephone contact with the children. When one child became suicidal, a legal aid attorney helped Frida secure an order to stop the phone calls. The grantee was able to secure a lifetime protection order and child support. Frida has since started her own business, and her children are doing well in therapy.

Source: LSC Client Success Stories.

^aErika Harrell, Ph.D., and Lynn Langton, Ph.D., BJS Statisticians, Marcus Berzofsky, Dr.P.H., Lance Couzens, and Hope Smiley-McDonald, Ph.D., *RTI International, Household Poverty and Nonfatal Violent Victimization, 2008–2012*, Table 2, Rate of violent victimization, by victim–offender relationship and poverty level, 2008–2012,

^b2017 Justice Gap Measurement Survey.

- ¹ This is how the Legal Services Corporation (LSC) defines the justice gap and is consistent with the way others in the literature on the topic use the term.
- ² New York State Courts Access to Justice Program, "Report to the Chief Judge and the Chief Administrative Judge of the State of New York," 2015. www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2015report.pdf.
- ³ James J. Sandman, "Rethinking Access to Justice", Hawaii Access to Justice Conference, June 20, 2014. <http://www.lsc.gov/rethinking-access-justice-james-j-sandman-hawaii-access-justice-conference>.
- ⁴ Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans*. September 2005 (Updated June 2007 and September 2009). <http://www.lsc.gov/sites/default/files/LSC/images/justicegap.pdf>; and http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.
- ⁵ American Bar Association. 1994. *Legal Needs and Civil Justice: A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study*. http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf.
- ⁶ See, for example: Documenting the Justice Gap in Michigan, State Bar of Michigan in Collaboration with Michigan's Legal Services Corporation Funded Providers, Spring 2012 (Updated Spring 2015). <http://www.michbar.org/file/programs/atj/pdfs/JusticeGap.pdf>;
Florida Commission on Access to Civil Justice Interim Report, October 1, 2015. http://devlamp2.flabar.org/wordpress/flaccesstojustice/wp-content/uploads/sites/3/2015/10/CivilLegalNeedsstudy_October2015_V21_Final10_14_15.pdf.
- ⁷ Washington State Supreme Court's Civil Legal Needs Study Update Committee. 2015. *2015 Washington State Civil Legal Needs Study Update*. http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.
- ⁸ Unfortunately, given the nature of the data analyzed in Section 4, it was not possible to present findings specific to these groups in that section.
- ⁹ These figures include only problems for which LSC funds may be used to help an individual based on the person's income and the type of problem they are facing. LSC eligibility is discussed in further detail in Section 4.
- ¹⁰ See 45 CFR part 1611.3 (October 2015 Edition): <https://www.gpo.gov/fdsys/pkg/CFR-2015-title45-vol4/pdf/CFR-2015-title45-vol4-subtitleB-chapXVI.pdf>. In limited circumstances, an LSC grantee can provide legal assistance to individual up to an income of 200% of the federal poverty level: 45 CFR Part 1611.5.
- ¹¹ See Appendix B1 for details on the data used and estimates made.
- ¹² U.S. Federal Poverty Guidelines used to Determine Financial Eligibility for Certain Federal Programs, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, January 2017. <https://aspe.hhs.gov/poverty-guidelines>. Note that these guidelines are estimated by household size for households in the 48 contiguous states, with higher guidelines issued for households in Hawaii and Alaska, where Americans face higher prices on average for basic household necessities.
- ¹³ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, *Table S1701, Poverty Status in the Past 12 Months*. The base for this estimate is the entire population for whom poverty status is determined.
- ¹⁴ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. The base for this estimate is the entire population for whom poverty status is determined.

- ¹⁵ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. The base for this estimate is the total number of people for whom poverty status is determined in the state.
- ¹⁶ This map is based on the map presented in the Legal Services Corporation FY2018 Budget Request, available at <http://www.lsc.gov/media-center/publications/fiscal-year-2018-budget-request>. The data are from the U.S. Census Bureau, 2015 American Community Survey 1-year estimates, Table S1701, Poverty Status in the Past 12 Months.
- ¹⁷ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. The base for this estimate is the total number of people for whom poverty status is determined in the U.S who are age 25+.
- ¹⁸ Charn, Jeanne. "Celebrating the 'Null' Finding: Evidence-Based Strategies for Improving Access to Legal Services," 122 *The Yale Law Journal*, 2206-2234 (2013).
- ¹⁹ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. The base for this estimate is the estimated number of people below 125% FPL.
- ²⁰ Greene, Sara Sternberg. "Race, Class, and Access to Civil Justice," 101 *Iowa Law Review* 1234-1322 (2016).
- ²¹ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*. Senior is defined as ages 65+.
- ²² American Community Survey Single Year Estimates, 2015. Table C17024: Age by Ratio of Income to Poverty Level in the Past 12 Months. Geography: United States – Rural. The ACS defines rural as 'Territory, population and housing units not classified as urban. 'Rural' classification cuts across other hierarchies and can be in metropolitan or non-metropolitan areas.' See <https://factfinder.census.gov/help/en/index.htm#rural.htm>.
- ²³ Calculated from U.S. Bureau of the Census, American Community Survey 2015 1-Year Estimates, *Table S1701: Poverty Status In The Past 12 Months and Table S2101: Veteran Status*. To compute this estimate, the ratio of the estimated number of persons with incomes less than 125% of FPL to Persons with incomes less than 100% FPL was applied to the total number of veterans below 100% FPL to estimate the number of veterans below 125% FPL.
- ²⁴ U.S. Bureau of the Census, American Community Survey, 2015 1-year estimates, S1703: *Selected Characteristics Of People At Specified Levels Of Poverty In The Past 12 Months*.
- ²⁵ CPS Table Creator, Current Population Survey Annual Social and Economic Supplement, US Census Bureau, 2016. <https://www.census.gov/cps/data/cpstablecreator.html>.
- ²⁶ Erika Harrell, Ph.D., and Lynn Langton, Ph.D., BJS Statisticians, Marcus Berzofsky, Dr.P.H., Lance Couzens, and Hope Smiley-McDonald, Ph.D., *RTI International, Household Poverty and Nonfatal Violent Victimization, 2008–2012*, Table 2, Rate of violent victimization, by victim–offender relationship and poverty level, 2008–2012, see <https://www.bjs.gov/content/pub/pdf/hpnnv0812.pdf>.
- ²⁷ 2017 Justice Gap Measurement Survey, 2017, computed variables indicating whether households and individuals experienced at least one civil legal problem in each category in the past 12 months, based on several questionnaire items.
- ²⁸ Base sizes vary and can be referenced in the supporting Justice Gap Appendix B2 Tables at www.lsc.gov/justicegap2017.

- ²⁹ Rebecca L. Sandefur, "Accessing Justice in the Contemporary United States. Findings from the Community Needs and Services Study," American Bar Foundation and University of Illinois at Urbana-Champaign, August 2014; Megan Sandel, Mark Hansen, Robert Kahn, Ellen Lawton, Edward Paul, Victoria Parker, Samantha Morton, and Barry Zuckerman, "Medical-Legal Partnerships: Transforming Primary Care by Addressing the Legal Needs of Needs of Vulnerable Populations," 29 Health Affairs 9, 1697-1705.
- ³⁰ 2017 Justice Gap Measurement Survey, 2017, computed variable indicating the severity of each civil legal problem that was personally experienced, based on responses to questionnaire items asking: How much did the following issue(s) personally affect you? Response options: not at all, slightly, moderately, very much, and severely.
- ^{SB1}Note small base size of n=56 for personally experienced problems relating to veterans' issues; this statistic has a large standard error. See Justice Gap Appendix B2 Tables at www.lsc.gov/justicegap2017.
- ^{SB2}Note small base size of n=84 for personally experienced problems relating to homeownership; this statistic has a large standard error. See Justice Gap Appendix B2
- ³¹ At certain points in the survey, some respondents were able to indicate that they had sought help but did not receive it. Unfortunately, not all respondents who sought help had the opportunity to explicitly indicate this so it is not possible to give an estimate of how often this occurs.
- ³² This figure includes problems for which respondents indicated (1) they sought no help of any kind, (2) they sought some sort of assistance from others and/or information online, but they did not seek the help of a legal professional, (3) they sought help from a legal professional, but were unable to get it, or (4) they sought and received help from a legal professional, but felt that they did not or would not be able to get as much legal help with the issue as they felt they needed.
- ^{SB3}Note small base size of n=69 for problems relating to wills and estates; this statistic has a large standard error. See Justice Gap Appendix B3 Tables at www.lsc.gov/justicegap2017.
- ³³ 2017 Justice Gap Measurement Survey, 2017, computed variable summarizing legal help-seeking behavior for civil legal issues, based on multiple questionnaire responses.
- ^{SB4}Note small base size of n=32 for problems relating to veterans' issues; this statistic has a large standard error. See Justice Gap Appendix B3 Tables at www.lsc.gov/justicegap2017.
- ^{SB5}Note small base size of n=45 for problems relating to issues of homeownership; this statistic has a large standard error. See Justice Gap Appendix B3 Tables at www.lsc.gov/justicegap2017.
- ³⁴ 2017 Justice Gap Measurement Survey, question 30: What kind of legal help [have you received so far / did you receive]? (multiple response).
- ³⁵ Due to limited survey data on online searches for legal information, we cannot present detailed findings on this topic.
- ³⁶ Sarah Sternberg Greene, "Race, Class, and Access to Civil Justice," 101 Iowa Law Review, 1263-1321 (2016); Rebecca L. Sandefur, "Accessing Justice in the Contemporary United States. Findings from the Community Needs and Services Study," American Bar Foundation and University of Illinois at Urbana-Champaign, August 2014.
- ³⁷ Rebecca L. Sandefur, "Bridging the Gap. Rethinking Outreach for Greater Access to Justice," University of Arkansas at Little Rock Law Review 4, 721-740, 2015.
- ³⁸ 2017 Justice Gap Measurement Survey, questions 35 and 37: Why [haven't you talked / didn't you talk] to a legal professional for this issue? Why [haven't you talked / didn't you] talk to anyone else for help or looked for information online about this issue? (multiple response).

- ³⁹ 2017 Justice Gap Measurement Survey, questions 41, 42, and 43: To what extent do you think people like you have the ability to use the courts to protect yourself and your family or enforce your rights?, To what extent do you think people like you are treated fairly in the civil legal system?, To what extent do you think the civil legal system can help people like you solve important problems such as those you identified in this survey?
- ⁴⁰ We present the total number of problems examined in this section of the survey for each group listed. Please see the Justice Gap Appendix B3 Tables at www.lsc.gov/justicegap2017 for the number of corresponding respondents as well as other supporting statistical information on these findings.
- ⁴¹ See Appendix B4 for more information about LSC's 2017 Intake Census and the resulting data analysis.
- ⁴² The Intake Census tracked the number of individuals, not the number of problems, but it is fair to assume that the number of individuals approaching LSC grantees is very close to the number of problems presented to them in this six-week period of time. It is possible that an individual had more than one problem, but this is not likely a common occurrence given the short span of time. For the remainder of this section, we assume that the number of individuals and the number of problems tracked during the Intake Census are equivalent, referring to the number of problems for the purposes of analysis. Our estimates are therefore conservative: to the extent individuals and problems are not equivalent, we are underestimating the number of legal problems for which low-income Americans will seek help from LSC grantees in 2017.
- ⁴³ For more information on the rules governing the use of LSC funds, see: <http://www.lsc.gov/lsc-restrictions-and-funding-sources>.
- ⁴⁴ Case services incorporate eligible problems for which LSC grantees provide legal advice and/or representation. Case services do not include problems for which LSC grantees provide pro se assistance if only legal information or referrals to resources is provided. Case services correspond with "cases closed" and "cases open" in the Grant Activity Reports submitted to LSC.
- ⁴⁵ Grant Activity Reports, Calendar Years 2014-2016, Legal Service Corporation. Note that the proportions calculated are based on both open and closed cases in a given calendar year.
- ⁴⁶ Note that the distribution of case services presented for 2016 is consistent with for other recent years, including 2013, 2014, and 2015.
- ⁴⁷ 2017 LSC Intake Census. Note, LSC grantees also regularly engage in outreach intake. The numbers for this are not represented in Figure 9.
- ⁴⁸ LSC 2017 Intake Census. See Appendix B4 for details on calculations.
- ⁴⁹ The problems coded as fully served with "limited services" include cases that are expected to be fully resolved with the legal assistance provided and have been closed with the following LSC Case Service Report (CSR) Closure categories: A "Counsel and Advice", B "Limited Action", and L "Extensive Service (not resulting in settlement or court or administrative action)". See the LSC 2017 Case Service Report (CSR) Handbook for more information on these definitions: <http://www.lsc.gov/csr-handbook-2017>.
- ⁵⁰ The problems coded as fully served with "extended services" include cases that have been closed with the following LSC Case Service Report (CSR) Closure categories: F "Negotiated Settlement without Litigation", G "Negotiated Settlement with Litigation", H Administrative Agency Decision, and I "Court Decision." See LSC 2017 CSR Handbook referenced above for more information: <http://www.lsc.gov/csr-handbook-2017>.
- ⁵¹ The types of cases counted as receiving more involved assistance like providing legal advice, speaking with third parties on behalf of a client, or help preparing legal documents include cases that have been closed with the following LSC CSR Closure categories AND are expected to be fully resolved with the legal assistance provided: A "Counsel and Advice", B "Limited Action", and L "Extensive Service (not resulting in settlement or court or administrative action)". See the LSC 2017 Case Service Report (CSR) Handbook for more information on these definitions: <http://www.lsc.gov/csr-handbook-2017>.
- ⁵² LSC 2017 Intake Census. See Appendix B4 for details.
- ⁵³ LSC 2017 Intake Census. See Appendix B4 for details on calculations.

Appendix A: 2017 Justice Gap Measurement Survey Methodology

Readers are encouraged to visit www.lsc.gov/justicegap2017, where they can find the full technical survey report, the questionnaire, and the codebook corresponding to the 2017 Justice Gap Measurement Survey. In this appendix, we present some important methodological information about the survey, including information about sampling, survey structure, survey administration, statistical weighting, and the demographic profile of the sample. Additional methodology details can be found in the full technical survey report.

Sampling

For this study, LSC was specifically interested in surveying approximately 2,000 adults living in households with incomes at or below 125% of the federal poverty threshold. Identifying and interviewing a large number of respondents meeting this criterion via many traditional survey methods would be logistically challenging and costly due to the amount of outreach and screening that would be necessary. To efficiently identify individuals residing in such households and interview them in a cost-effective manner, LSC contracted with NORC to conduct the survey using AmeriSpeak®, which is NORC's probability-based panel designed to be representative of the entire U.S. household population. The AmeriSpeak Panel is designed to provide a nationally representative sample of US households for public opinion research. AmeriSpeak was built using a rigorous sampling and recruitment methodology based on probability sampling techniques employed by federally sponsored research.

There are three principal design elements responsible for the scientific integrity of AmeriSpeak. First, it is probability-based, meaning that randomly selected households are sampled with a known, non-zero probability of selection from a documented sample frame. (Almost all other commercially available household panels are based on non-probability, convenience sampling.) AmeriSpeak's sample source is the NORC National Frame, which is an area probability sample designed to provide at least 97% sample coverage of the U.S. population, and allows for increased sample coverage for rural and low-income households. The NORC National Frame is the sample source for landmark NORC surveys such as the General Social Survey and the Survey of Consumer Finance.

Second, AmeriSpeak has the highest American Association for Public Opinion Research (AAPOR) response rate – a key measure of sample quality – among commercially available household panels. The industry-leading response rate for AmeriSpeak is attributable to the extraordinary contact and gaining cooperation techniques used by AmeriSpeak in recruiting randomly sampled US households. The gaining-cooperation techniques rely on traditional methodologies employed in federally sponsored research for decades. Households selected for AmeriSpeak are contacted in English and Spanish, by a series of U.S. mailings and by NORC telephone and field interviewers. Use of field interviewers for in-person recruitment (i.e., face-to-face interviewing) enhances response rates and representativeness for young adults, lower socio-economic households, and non-internet households.

Third, AmeriSpeak in its design facilitates the representation of US households that are commonly under-represented in online panel research. While many panels conduct surveys via the web only, AmeriSpeak recruits households using a combination of telephone and face-to-face methodologies in order to assure that non-internet, "net averse" households, and persons with low literacy levels are represented in AmeriSpeak. Moreover, after joining AmeriSpeak, panelists have the option to participate in the survey program via web or

telephone (speaking with NORC’s professional telephone interviewers). Because AmeriSpeak conducts its surveys in both the telephone and web modes of data collection, AmeriSpeak provides data collections for panelists whether they are comfortable or uncomfortable with web-based surveys.

While NORC keeps recently updated income information on file for all AmeriSpeak panelists, it was important to verify each household’s income level relative to the federal poverty guidelines for this study. NORC drew a sample of roughly 10,500 adults age 18 and older who had previously indicated that their household earnings were at or below 200% of the federal poverty level, with the plan to screen these panelists and select only those with current household incomes at or below 125% of the federal poverty threshold as eligible to complete the survey. The 2016 federal poverty guidelines set by the U.S. Department of Health and Human Services were used to determine income thresholds for screening households of various sizes.^a

Survey Structure

The household screening portion of the survey consisted of only two questions, which assessed current household size and income level. Following the screening questions, eligible respondents proceeded to a section containing questions about household characteristics. This was followed by the largest portion of the main survey instrument, which contained questions assessing the prevalence of various types of civil legal needs. LSC and NORC worked to refine a list of common civil legal issues to include in this portion of the survey, arriving at a final list of 88 distinct issues. These issues were divided into 12 categories.

Some of the categories of civil legal problems were issues that might affect any low-income family, including employment, health, consumer and finance, income maintenance, family and custodial issues, as well as assistance with wills and estates. Other categories of problems only applied to certain subpopulations – survivors of domestic violence, homeowners, renters, households with children, individuals with disabilities, and veterans, so the survey was structured in a way that used earlier answers about household characteristics to selectively present questions related to those characteristics. For example, survey respondents were asked about their living situations, and those who indicated that they owned their homes were presented with a section covering civil legal problems experienced by homeowners, while those who indicated that their homes were rented were presented with a battery of questions about issues with rental housing instead. In addition, only those respondents who indicated that someone in the household was in school (or had children in school) received the section about civil legal issues related to education, while others did not. Finally, sections about disability issues and veterans’ issues were only presented to respondents who indicated that at least one member of their household had a disability, or were military personnel or veterans, respectively.

Within each section of the survey assessing the prevalence of civil legal problems, respondents were presented with a number of specific issues and asked to indicate for each one whether they personally had experienced the issue and whether someone else in their household had experienced the issue within the last 12 months. Each of these questions allowed for multiple selections, so it was possible for respondents to indicate that the issue had been experienced both by themselves and by others. There was also an option to indicate that no one in the household had experienced the problem in the last 12 months.

To delve further into the problems affecting individual respondents, the survey dynamically presented questions about problem severity at the conclusion of each battery of problems. For each issue that

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^aU.S. Department of Health and Human Services. 2016. <https://aspe.hhs.gov/poverty-guidelines>

respondents indicated they had personally experienced within the last 12 months, they were asked to rate the effect the problem had on them on a five-point scale from “not at all” to “severe.”

Following the problem prevalence and severity sections, respondents who had reported that they were personally affected by at least one civil legal issue were presented with a section related to help-seeking behaviors. The first item in this section was a multi-part question covering each relevant civil legal problem and asking respondents to indicate whether they had talked to someone about the problem, had looked for information online, both talked to someone and gone online, or not engaged in either of these behaviors. This question covered all personally experienced problems, except for those that were rated as affecting respondents “not at all”.

Next, the survey included detailed questions about help-seeking behaviors for a subset of the problems reported. As to not overburden respondents who had reported a large number of issues, the survey randomly selected a maximum of four problems for follow-up questions. Each respondent looped through this section up to four times, depending on the number of issues he or she had reported earlier in the survey. The detailed questions included items about the current state of each problem, who (if anyone) the respondent had talked to about the problem (including legal professionals), the type of information sought online (if any), the type of legal assistance received (if any), and reasons why help was not sought (if appropriate). The final section of the survey included three questions assessing perceptions about the fairness and efficacy of the civil legal system.

Survey Administration

A total of 2,028 respondents completed the survey between the dates of January 5, and February 10, 2017, including 1,736 who completed via the web and 292 who completed via telephone. Interviews were completed in both English and Spanish, depending on respondent preference. The screener completion rate for this study was 38.5%. The incidence or eligibility rate was 56.4%. The interview completion rate was 89.1%. The final response rate was 11.2%, based on the American Association for Public Opinion Research Response Rate 3 Method.

Statistical Weighting

Statistical weights for the study-eligible respondents were calculated using panel base sampling weights to start. Panel base sampling weights for all sampled housing units are computed as the inverse of probability of selection from the NORC National Sample Frame (the frame used to sample housing units for AmeriSpeak) or address-based sample. The sample design and recruitment protocol for the AmeriSpeak Panel involves subsampling of initial non-respondent housing units. These subsampled non-respondent housing units are selected for an in-person follow up. The subsample of housing units that are selected for the nonresponse follow up have their panel base sampling weights inflated by the inverse of the subsampling rate. The base sampling weights are further adjusted to account for unknown eligibility and nonresponse among eligible housing units. The household-level nonresponse adjusted weights are then post-stratified to external counts for number of households obtained from the Current Population Survey. Then, these household-level post-stratified weights are assigned to each eligible adult in every recruited household. Furthermore, a person-level nonresponse adjustment accounts for nonresponding adults within a recruited household.

Finally, panel weights are raked to external population totals associated with age, sex, education, race/ethnicity, housing tenure, telephone status, and Census division. The external population totals are obtained from the Current Population Survey.

Study-specific base sampling weights are derived using a combination of the final panel weight and the probability of selection associated with the sampled panel member. Since not all sampled panel members respond to the screener interview, an adjustment is needed to account for and adjust for screener non-respondents. This adjustment decreases potential nonresponse bias associated with sampled panel members who did not complete the screener interview for the study.

Furthermore, among eligible sampled panel members (as identified via the survey screener questions), not all complete the survey interview for the study. Thus, the screener nonresponse adjusted weights for the study are adjusted via a raking ratio method to 125% of the federal poverty line population totals associated with the following socio-demographic characteristics: age, sex, education, race/ethnicity, and Census division.

Population totals for the 125% of the federal poverty line sample for the Justice Gap Study were obtained using the screener nonresponse adjusted weight for all eligible respondents from the screener question(s). At the final stage of weighting, any extreme weights were trimmed based on a criterion of minimizing the mean squared error associated with key survey estimates, and then, weights re-raked to the same population totals. The overall margin of sampling error was +/- 3.27 percentage points for a 50% statistic, adjusted for design effect resulting from the complex sample design.

A more detailed description of AmeriSpeak panel recruitment and management methodology, and additional information about the Justice Gap Study methodology, are included in Appendices A and B, respectively.

Sample Demographic Profile

The respondents who completed the survey represent households in the United States with incomes at or below 125% of the federal poverty level, based on the 2016 federal poverty guidelines set by the Department of Health and Human Services. These households include a range of incomes depending on household size, from \$14,850 for a single person household to \$61,520 for households of 10 or more. For a family of four, the threshold was \$30,380. About a quarter (24%) of this group have annual household incomes of \$9,999 or less, while 19% have incomes between \$10,000 and \$14,999, 31% have incomes between \$15,000 and \$24,999, and 26% have incomes of \$25,000 or more.

Roughly one third (34%) of this group are under the age of 35, and the remainder are evenly split between the age groups of 35 to 49 (23%), 50 to 64 (22%), and 65 and older (21%). There are more women than men in low-income households (58% vs. 42%). In terms of racial and ethnic identification, just under half (46%) are white, a quarter are Hispanic, 21% are African-American, and 8% fall into some other category or identify as multi-racial. Eighty-five percent live within a metropolitan area, while 15% live outside of metropolitan areas. Most have at least a high school education, but few have a college degree. Twenty-eight percent have not finished high school, while 35% have a high school diploma or equivalent, 29% have completed some college, 6% have a bachelor's degree, and 2% have a graduate degree. Over a third (35%) are currently employed, but

nearly two-thirds (65%) are not working, including 17% who are retired, 13% who are looking for work, and 21% who are not working due to disabilities.

Over a third (34%) reported that the home they live in is owned, and roughly the same number (36%) said they live in a rented home without public assistance, while 17% live in a home that is rented with public assistance, and 13% report having some other housing arrangement. Roughly a quarter are married, and three-quarters are not. Nearly 3 in 10 (28%) live alone, and about half live in households with at least two other members. Four in 10 of these households include parents of children or teenagers under the age of 18 in their households. Six in 10 have internet access at home, at work, or at some other location, while the remaining 4 in 10 only have internet access on a mobile phone or have no access at all.

Appendix B1: Section 1 Data Sources and Methodology

Most of the descriptive data on the population below 125% FPL come from the American Community Survey (ACS) 2015 Single Year Estimates. Most figures are based on data from table S1703: Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months. At times additional tables were used to provide estimates and are noted in endnotes. To estimate the number of Americans under 125% FPL for each of the groups presented in the report, we used the percent of the population that is estimated to be under 125% FPL and the total number of people estimated to comprise each group. Figures for the estimated number of veterans under 125% FPL are not readily available and had to be calculated. We estimated this figure by calculating ratio of the number of people below 100% FPL and the number of people below 125% FPL nationwide. We applied this ratio to the total number of veterans living below 100% FPL in order to estimate the total number of veterans living below 125% FPL nationwide.

Appendix Table B1.1:

Percent of state populations below 125% of the Federal Poverty Level (FPL).

Data Source: United States Census Bureau, American Community Survey 2015 1-year Estimates, Table S1703: Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months, accessed June 6, 2017.

State	Total Population	Percent of Population below 125% FPL
Alabama	4,736,333	23.8%
Alaska	720,765	13.9%
Arizona	6,671,705	22.3%
Arkansas	2,887,337	25.3
California	38,398,057	20.2%
Colorado	5,339,618	15.2%
Connecticut	3,480,932	13.7%
Delaware	920,355	15.9%
District of Columbia	638,027	21.4%
Florida	19,850,054	21.1%
Georgia	9,943,145	22.1%
Hawaii	1,394,121	13.2%

State	Total Population	Percent of Population below 125% FPL
Idaho	1,622,116	19.9%
Illinois	12,559,422	17.8%
Indiana	6,417,418	19.0%
Iowa	3,021,823	16.3%
Kansas	2,830,943	17.3%
Kentucky	4,290,022	23.3%
Louisiana	4,541,688	24.8%
Maine	1,292,996	17.8%
Maryland	5,863,290	12.7%
Massachusetts	6,558,724	14.8%
Michigan	9,698,396	20.2%
Minnesota	5,366,594	14.0%
Mississippi	2,896,579	28.3%
Missouri	5,901,967	19.4%
Montana	1,007,727	19.1%
Nebraska	1,842,682	16.6%
Nevada	2,850,472	19.7%
New Hampshire	1,288,060	10.7%
New Jersey	8,781,575	14.3%
New Mexico	2,044,431	26.0%
New York	19,283,776	19.8%
North Carolina	9,790,073	21.8%
North Dakota	731,354	14.4%
Ohio	11,295,340	19.3%
Oklahoma	3,795,764	21.5%
Oregon	3,952,077	20.0%
Pennsylvania	12,385,716	17.0%
Rhode Island	1,016,343	18.0%
South Carolina	4,750,144	21.7%
South Dakota	829,644	18.4%
Tennessee	6,440,381	22.1%
Texas	26,846,203	21.1%
Utah	2,947,861	15.2%
Vermont	600,659	15.0%
Virginia	8,131,328	14.8%
Washington	7,036,725	16.0%
West Virginia	1,793,096	23.2%
Wisconsin	5,620,223	16.1%
Wyoming	572,319	15.0%

Appendix B2: Section 2 Data Sources and Methodology

The findings presented in Section 2, “Experience with Civil Legal Problems,” come exclusively from the 2017 Justice Gap Measurement Survey. Respondents were presented with an extensive list of specific problems that usually raise civil legal issues. They were asked whether they had experienced any of these problems in the past 12 months and whether anyone else in their household had experienced any of them.

Readers are encouraged to visit www.lsc.gov/justicegap2017, where they can find a document that supplements this appendix called, “Justice Gap Appendix B2 Tables.” This document presents a number of tables with additional information on the survey results presented in Section 2 of this report. For a given set of survey results, the tables present the calculated proportion (or “percent”) along with the standard error of the percent and the unweighted base for the corresponding variable.

On the same landing page (www.lsc.gov/justicegap2017), readers can find the full technical survey report, the questionnaire, and the codebook corresponding to the 2017 Justice Gap Measurement Survey.

Appendix B3: Section 3 Data Sources and Methodology

The findings presented in Section 3, “Seeking Legal Help,” come exclusively from the 2017 Justice Gap Measurement Survey. More specifically, this section presents findings from a part of the survey that asked detailed questions about a subset of the civil legal problems reported by respondents. For each respondent, the survey randomly selected up to four personally-experienced problems affecting them more than “not at all.” Due to the low incidence of problems relating to veterans’ issues and disabilities, these problems were always selected if they met the other criteria. Respondents answered questions about what, if any, help they sought to address each of these problems. The primary unit of analysis in this section is problems.

Readers are encouraged to visit www.lsc.gov/justicegap2017, where they can find a document that supplements this appendix called, “Justice Gap Appendix B3 Tables.” This document provides additional information on the survey results presented in Section 3 of this report. For a given set of survey results, the table presents the calculated proportion (or “percent”) along with the standard error of the percent and the unweighted base for the corresponding variable. Because the primary unit of analysis in this section is problems, the bases represent a number of problems (with the exception of Appendix Table B3.6, where individuals are the unit of analysis). For reference, we have also included the (unweighted) number of respondents corresponding to those problems.

On the same landing page (www.lsc.gov/justicegap2017), readers can find the full technical survey report, the questionnaire, and the codebook corresponding to the 2017 Justice Gap Measurement Survey.

Appendix B4: Section 4 Data Sources and Methodology

Most of the findings presented in Section 4, “Reports from the Field,” are based on data collected during the Legal Services Corporation’s (LSC) 2017 Intake Census. Additional data used in that section come from LSC’s 2016 Grantee Activity Report. This appendix provides more information about both of these data sources as well as details about the assumptions underlying estimates presented in Section 4.

The Legal Services Corporation 2017 Intake Census

Data Collection

As with LSC's two prior justice gap studies, LSC asked its grantees to conduct an Intake Census by documenting the number of individuals who approached LSC grantees with legal needs that could not be addressed because of insufficient resources. The 2017 Intake Census instrument has more categories than the two previous instruments to yield a more granular analysis of the reasons why an individual may not receive services from a grantee. LSC recognizes that this process is imperfect and will not capture all of the unmet need, which is why LSC pursued the national survey with NORC using the AmeriSpeak Panel in addition to conducting the Intake Census.

From March 6, 2017 to April 14, 2017, LSC grantees tracked and collected data about those individuals who approached their program with a legal problem. The Intake Census Instrument has three main data collection categories: (1) Unable to Serve, (2) Unable to Serve Fully, and (3) Fully Served.

Unable to Serve. An individual may fall into the "Unable to Serve" category for a number reasons, including being financially ineligible for services (with a household income that is too high) or being a non-citizen. Other reasons for placing an individual in this category are that the person's problem was not the type of legal issue the grantee handles on a regular basis (e.g., commercial transactions) or the grantee has insufficient resources to assist the individual with their problem.

The five subcategories within "Unable to Serve" are:

- Unable to Serve – Ineligible
- Unable to Serve – Conflict of Interest
- Unable to Serve – Outside of Program Priorities or Case Acceptance Guidelines
- Unable to Serve – Insufficient Resources
- Unable to Serve – Other Reasons

Unable to Serve Fully. An individual may be placed in the "Unable to Serve Fully" category if the individual received some form of legal information or legal advice to help address their problem. In this category, the grantee assesses if the case would have been appropriate for full representation if the grantee had sufficient funding. The legal information or legal advice the individual received is not expected to fully resolve the individual's case.

The two subcategories within "Unable to Serve Fully" are:

- Unable to Serve Fully – Insufficient Resources – Provision of Legal Information or Pro Se Resources
- Unable to Serve Fully – Insufficient Resources – Provided Limited Service or Closing Code "L"

Fully Served. An individual is categorized as "Fully Served" if the grantee has sufficient resources to fully address the individual's problem at an appropriate level given the facts and nature of the case. The legal assistance provided in these cases can vary from providing brief legal advice, or help filling out a form, to full legal representation in court.

The three subcategories within "Fully Served" are:

- Fully Served – Provision of Legal Information or Pro Se Resources
- Fully Served – Provision of Limited Services or Closing Code L
- Fully Served – Extended Service Case Accepted

Finally, there is an additional category called “Pending,” which includes individuals that will receive legal help of some kind, but for whom program management had not made a final decision on the level of legal assistance they will be able to provide before data collection for the Intake Census had ended. Had data collection continued for a longer period of time, such individuals would most likely have been coded into one of the following subcategories:

- Unable to Serve Fully – Insufficient Resources – Provided Limited Service or Closing Code “L”
- Fully Served – Provision of Limited Services or Closing Code L
- Fully Served – Extended Service Case Accepted

Additional information about the 2017 Intake Census, including the detailed definitions of each of these categories and the data collection instructions given to grantees, can be found at www.lsc.gov/justicegap2017.

A total of 132 LSC grantees (out of 133) submitted 2017 Intake Census data. When submitting their data, grantees were also asked to provide the average number of hours they offer intake to potential clients in various modes (e.g., by phone, online, in-person appointments, walk-in) on a weekly basis. They were also asked to indicate the extent to which the six-week Intake Census period was typical and, where applicable, to elaborate about why intake might have been atypical. Fifteen of the total 132 grantees indicated that this period was atypical for them. Twelve of the 15 who said it was atypical, say they processed fewer people for intake than usual because of holidays, staff shortages, or other reasons.

Data Analysis

Unit of Analysis. It is important to note that while the Intake Census tracked the number of individuals, the analysis in Section 4 uses problems as the unit of analysis. It is fair to assume that the number of individuals approaching LSC grantees is very close to the number of problems presented to them in this six-week period of time. It is possible that an individual had more than one problem, but this is not likely a common occurrence given the short span of time covered during data collection. Throughout Section 4, we assume that the number of individuals and the number of problems tracked during the Intake Census are equivalent, referring to the number of problems for the purposes of analysis. The estimates in this report are therefore conservative: to the extent individuals and problems are not equivalent, we are underestimating the number of legal problems for which low-income Americans will seek help from LSC grantees in 2017.

12-month Projections. Throughout this section, we provide 12-month projection estimates for the total number of problems low-income Americans will present to LSC grantees in 2017 and subsets of those problems. These projections were calculated by multiplying the relevant Intake Census figure by 8.6905 (52.14 weeks divided by 6 weeks) and rounding to the nearest hundred.

Estimating the Number of Problems Unserved and Underserved Due to Lack of Resources. In Section 4, we present a range of estimates for the number of problems presented to LSC grantees that do not receive any legal help (“unserved”) or do not receive enough legal help to fully address the client’s needs (“underserved”). In that section, we describe the assumptions we make to produce these estimates and the reasoning behind them. Here, we lay out these assumptions in terms of the original data collection coding scheme.

To produce the upper-bound estimate, we make the following assumptions:

- All observations coded as “Pending” would eventually be coded as “Unable to Serve Fully” and the reason they would not be “Fully Served” is for reasons related to a lack of resources.

- All observations coded in the following categories were “Unable to Serve” for reasons related to a lack of resources:
 - Unable to Serve – Outside of Program Priorities or Case Acceptance Guidelines
 - Unable to Serve – Insufficient Resources
 - Unable to Serve – Other Reasons
- All observations coded in the following subcategories were “Unable to Serve Fully” for reasons related to a lack of resources:
 - Unable to Serve Fully – Insufficient Resources – Provision of Legal Information or Pro Se Resources
 - Unable to Serve Fully – Insufficient Resources – Provided Limited Service or Closing Code “L”

To produce the lower-bound estimate, we make the following assumptions:

- All observations coded as “Pending” would eventually be coded as “Served Fully.”
- All observations coded in the following categories were “Unable to Serve” for reasons related to a lack of resources:
 - Unable to Serve – Outside of Program Priorities or Case Acceptance Guidelines
 - Unable to Serve – Insufficient Resources
- None of the observations coded as “Unable to Serve – Other Reasons” would have been served if more resources were available.
- All observations coded in the following subcategories were “Unable to Serve Fully” for reasons related to a lack of resources:
 - Unable to Serve Fully – Insufficient Resources – Provision of Legal Information or Pro Se Resources
 - Unable to Serve Fully – Insufficient Resources – Provided Limited Service or Closing Code “L”

Legal Service Corporation Grantee Activity Report

Section 4 presents the distribution of the types of problems for which LSC grantees provided case services in 2016. The data for this come from the Legal Services Corporation Grantee Activity Report (GAR) data. GAR is the largest and longest running data collection effort on civil legal aid in the United States. Dating back to 1976, LSC has recorded and reported data from grantees in a variety of ways. Information from the Grantee Activity Reports is summarized on an annual basis by LSC staff for public reports and for internal use by management and program staff. The data are also publicly available through the Grantee Data Page on the LSC site and as a full dataset at LCS’s DATA.GOV site: <https://catalog.data.gov/organization/legal-services-corporation>.

The data are gathered annually from all grantees on a calendar year basis. Grantees use automated reporting forms that are accessible via the Internet. Grantees report on the conduct of their Basic Field, Agricultural Worker and Native American grant programs to LSC on a calendar year basis, using automated reporting forms that are accessible via the Internet. The reports are collected in January and February of each year.

More information about the GAR can be found at <http://www.lsc.gov/grant-activity-reports>.

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OPEN SESSION AGENDA ITEM

703 JULY 2018

DATE: July 19, 2018

TO: **Members, Board of Trustees**

FROM: Randall Difuntorum, Program Manager, Professional Competence

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

EXECUTIVE SUMMARY

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

BACKGROUND

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

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

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

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

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

DISCUSSION

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

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

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

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

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

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

RECOMMENDATION

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

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

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

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

ATTACHMENT(S) LIST

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

Legal Market Landscape Report

Commissioned by the State
Bar of California

July 2018

William D. Henderson



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

Executive Summary

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

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

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

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

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

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

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

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

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

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

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

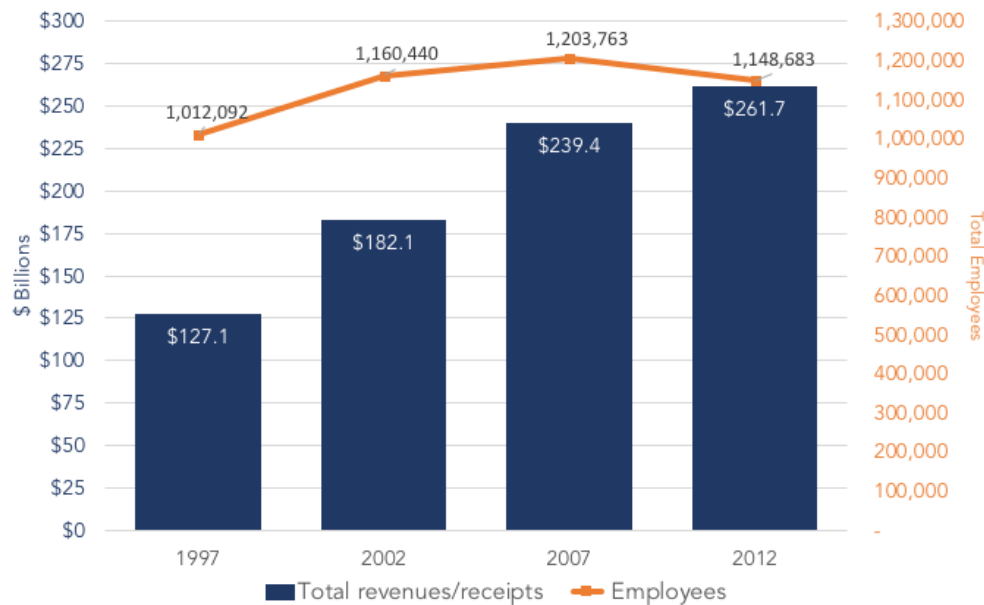
¹ See Business and Professions Code section 6001.1 State Bar— Protection of the Public as the Highest Priority ("Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever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

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

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

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

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



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

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

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

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

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

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

Source: U.S. Census Bureau 2012 Economic Census

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

Table 2. California Legal Services Market, 2012

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

Source: U.S. Census Bureau 2012 Economic Census

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

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

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

1.2. In-House and Government Lawyers

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

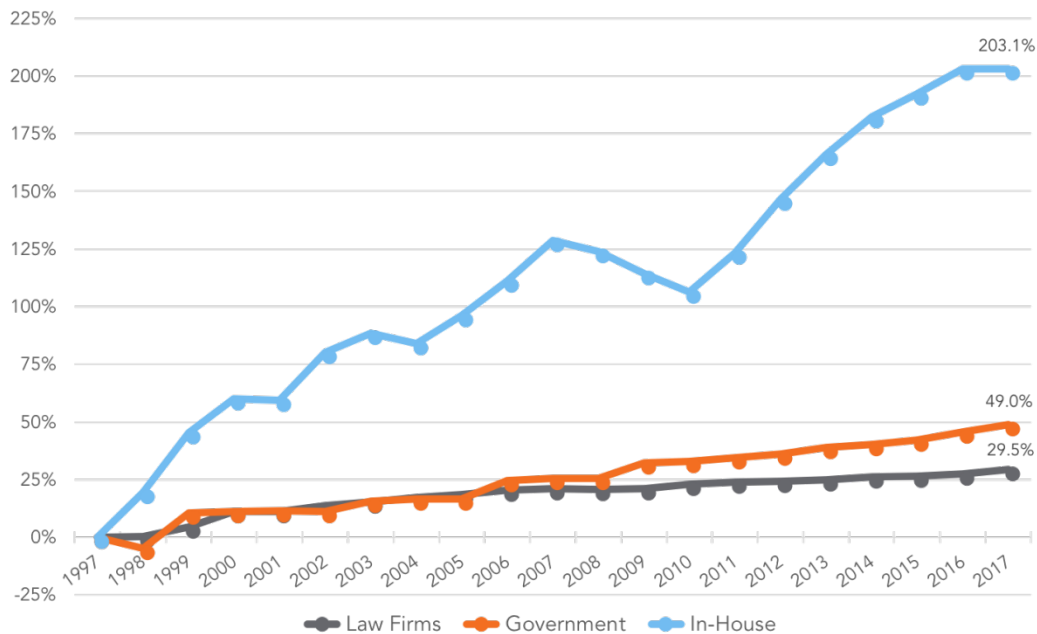
According to the latest government statistics, there are currently 628,370 lawyers employed as W-2 employees working in various parts of the U.S. (Similar to the Economic Census, these government data also do not include law firm partners and solo practitioners.)⁶ The largest industry category of employer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

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

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

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

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



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

1.3. Employed Lawyers Working in California

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

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

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

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

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

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

1.4. Lawyers Working in the Gig Economy

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

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

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

¹⁰ See Sections 2.4 and 4.2, *infra*.

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

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

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

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

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

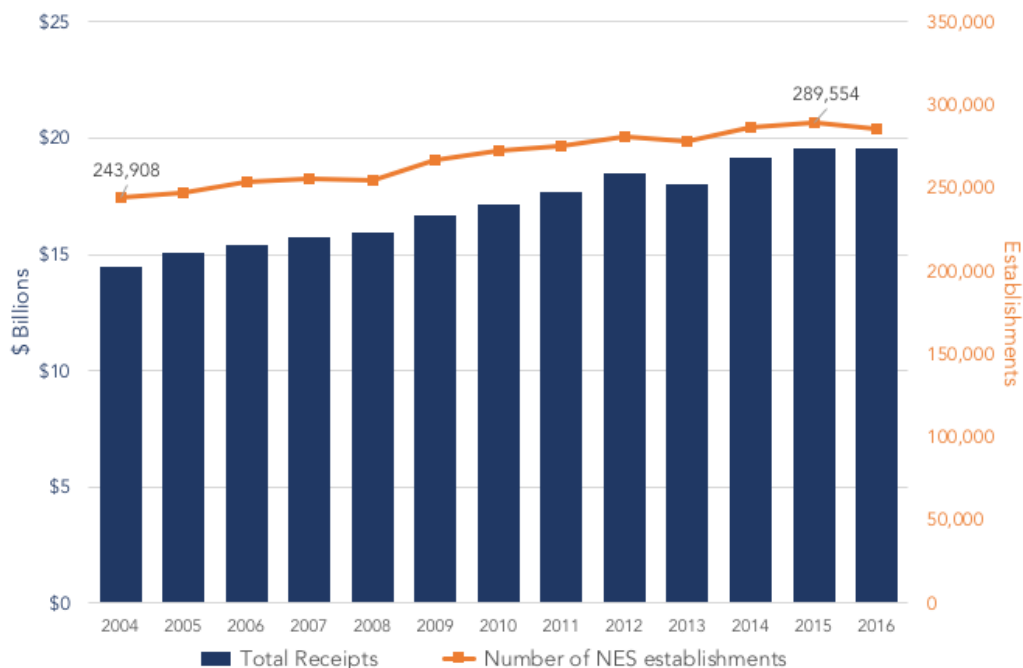
Table 3. 2016 Nonemployer Statistics: Count, Receipts, Average Revenue

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

Source: U.S. Census Bureau 2016 Nonemployer Statistics

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

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



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

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

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

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

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

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

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

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

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

¹⁸ See Bushey, *supra* note 11.

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

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

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

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

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

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

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

²³ *Id.*

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

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

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

1.5. Alternative Legal Service Providers (ALSPs) and LegalTech

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

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

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

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

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

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

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

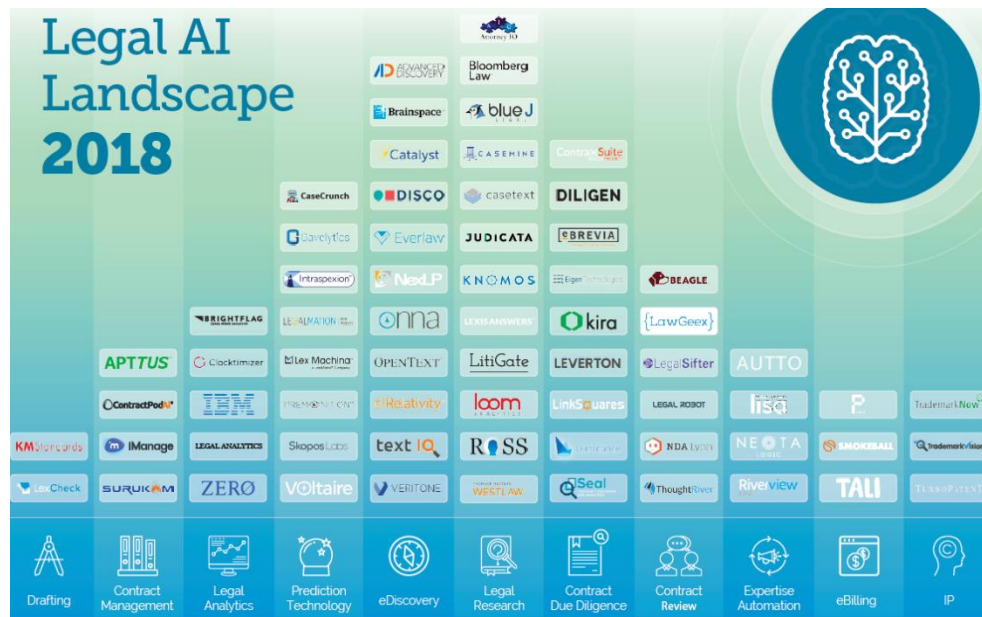
²⁹ See Steve O’Hear, *LawGeex raises \$12M for its AI-powered contract review technology*, TECHCRUNCH, Apr. 17, 2018, at <https://techcrunch.com/2018/04/17/lawgeex-raises-12m-for-its-ai-powered-contract-review-technology/> (last visited June 28, 2018).

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

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

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

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



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

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

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

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

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

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

2. Individual versus Organizational Clients

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

2.1. Chicago Lawyers I and II Studies

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

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

³³ See, e.g., Judith A. 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).

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

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

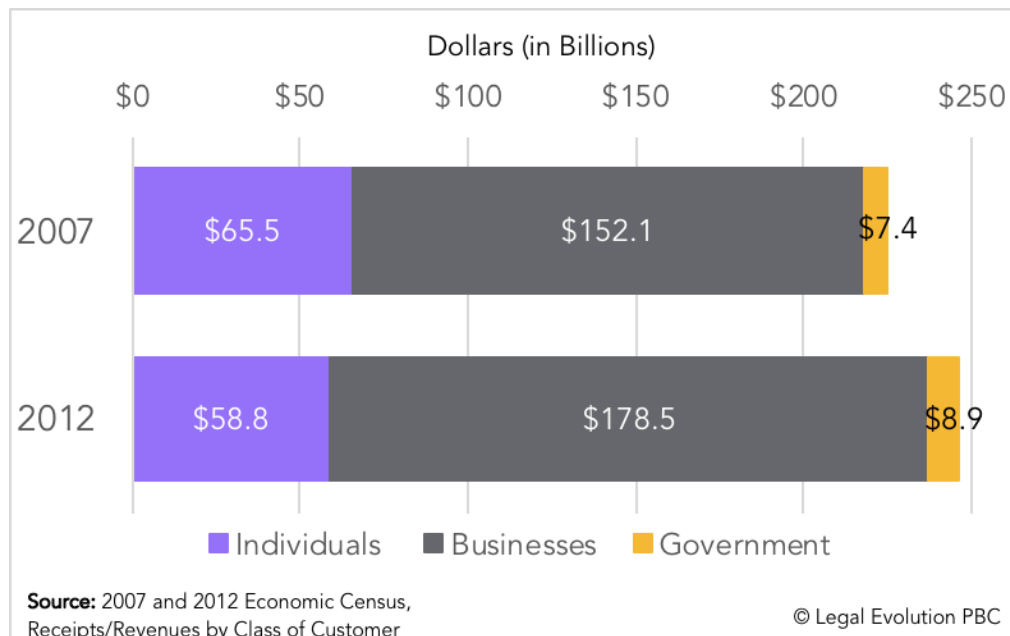
figure had dropped to \$55,000. Further, in 1995, 32 percent of these lawyers were working second jobs compared to 2 percent in 1975.

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

2.2. How Type of Client Shapes the Economics of Practice

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

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



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

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

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

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

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

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

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

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

2.3. The Economics of PeopleLaw

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

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

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

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

³⁸ *Id.* at 13.

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

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

2.4. The Economics of Large Organizational Clients

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

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

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

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

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

⁴⁰ See Rule 5.4.

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

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

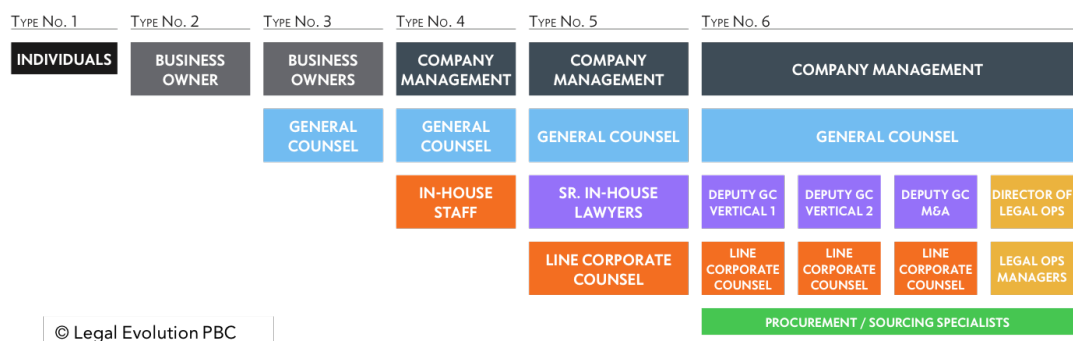
⁴³ See SUSSKIND, *supra* note 32, at 12 (discussing more-for-less imperative).

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

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

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

Figure 6. Six Types of Clients



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

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

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

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

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

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

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

3. The Problem of Lagging Legal Productivity

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

3.1. Cost Disease

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

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

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

3.2. Law Compared to Medical Care and Higher Education

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

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

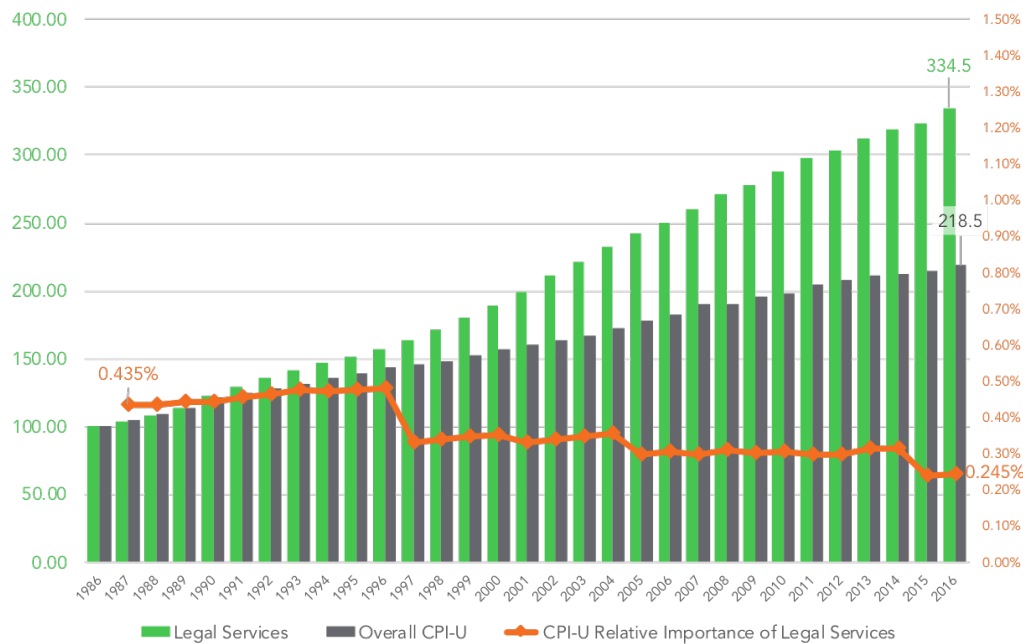
⁴⁷ See Barbara Rose, *Law, the Investment*, ABA JOURNAL (Sept. 2010) (quoting Nick Baughan of Marks Baughan & Co.).

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

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

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

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



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

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

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

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

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

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

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

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

3.3. Impact on the Practice of Law

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

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

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

3.4. Courts and Access to Justice

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

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

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

⁵³ See Section 2.4, *supra* page 15.

⁵⁴ See Figure 5 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶² See SUSSKIND, *supra* note 32.

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

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

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

4. Ethics Rules and Market Regulation

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

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

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

4.1. The PeopleLaw Sector: LegalZoom and Avvo

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁵ See Sections 2.3 and 3.4, *supra*.

⁷⁶ See Appendix B.

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

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

⁷⁹ *Id.* at 1114.

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

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

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

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

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

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

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

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

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

⁸⁴ *Id.* at 77.

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

4.2. The Organizational Client Sector

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

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

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

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

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

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

⁸⁶ See Rule 5.4.

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

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

⁸⁹ See Section 2.2, *supra*.

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

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

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

4.3. The U.K. and Australian Models

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

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

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

⁹¹ See Section 1.3 and 2.4, *supra*.

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

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

⁹⁴ See Section 1.5, *supra*.

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

⁹⁶ *Id.*

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

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

5. Conclusion

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

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

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

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

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

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

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

¹⁰⁰ *Id.*

¹⁰¹ See generally McMorrow, *supra* note 33.

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

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

Appendix A



Appendix B

Table of Ethics Opinions on Avvo*

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

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

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

About the Author



Professor William Henderson

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

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

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

ATTACHMENT B

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

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