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Alternative Business Structures: Good for the Public, Good for the Lawyers

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ARTICLE

Jayne R. Reardon

Alternative Business Structures: Good for the Public, Good for the Lawyers

Abstract. There has been a shift in consumer behavior over the last several decades. To keep up with the transforming consumer, many professions have changed the way they do business. Yet lawyers continue to deliver services the way they have since the founding of our country. Bar associations and legal ethicists have long debated the idea of allowing lawyers to practice in “alternative business structures,” where lawyers and nonlawyers can co-own and co-manage a business to deliver legal services. This Article argues these types of businesses inhibit lawyers’ ability to provide better legal services to the public and that the legal profession’s resistance to change is not in the best interest of the public or the profession.

Author. Jayne R. Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism and the Chair of the American Bar Association Standing Committee on Professionalism. The viewpoints expressed in this Article are hers personally and do not necessarily reflect the position of any organization with which she is affiliated. The author gratefully acknowledges the contributions of Ellyn Rosen, Deputy Director of the ABA Center for Professional Responsibility, who reviewed a previous draft of this Article.

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I. INTRODUCTION

There has been a paradigm shift in consumer behavior over the last several decades. To keep up with the transforming consumer, many professions have changed the way they do business, either by leveraging technology or partnering with other service providers. Yet, in many respects lawyers continue to deliver services the way they have since the founding of our country—in law firms owned and controlled only by lawyers. Bar associations and legal ethicists have long debated the idea of allowing lawyers to practice in “alternative business structures,” (ABSs) where lawyers and nonlawyers can co-own and co-manage a business to deliver legal services.¹ In all but two United States jurisdictions, lawyers cannot

1. For example, the American Bar Association’s Kutak Commission (early 1980s), the Commission on Multidisciplinary Practice (1998), and the Commission on Ethics 20/20 (2009) have

form business ventures with nonlawyers to deliver legal services.²

This Article argues these rules inhibit lawyers' ability to provide better legal services to the public and that the legal profession's resistance to change is not in the best interest of the public or the profession. Part II discusses the history of the debate surrounding ABSs. The Article then proposes it is time for a state supreme court to go further than the Washington State Supreme Court³ and change its rules of professional conduct to provide lawyers licensed in its state greater flexibility in adopting business forms through which they deliver legal services. In conclusion, this Article suggests a regulation reform blueprint for any state supreme court wishing to adopt ethics rules that permit ABS.

engaged in the debate. See Candace M. Groth, *Protecting the Profession Through the Pen: A Proposal for Liberalizing ABA Model Rule of Professional Conduct 5.4 to Allow Multidisciplinary Firms*, 37 *HAMLIN L. REV.* 565, 568, 570–73 (2014) (describing the history of Model Rule 5.4 and efforts to permit types of multidisciplinary practices, and proposing the ABA liberalize Rule 5.4 of the Model Rules to allow multidisciplinary firms); *ABA Commission on Ethics 20/20*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited May 14, 2017) (noting the Commission on Ethics 20/20 was formed in 2009 to review the Model Rules).

2. The District of Columbia and Washington State (limited to Limited Licensed Legal Technicians) are the two jurisdictions where these structures are allowed. See Memorandum from the ABA Comm'n on the Future of Legal Servs. to ABA Entities, Courts, Bar Ass'ns (State, Local, Specialty & Int'l), Law Sch., Disciplinary Agencies, Individual Clients & Client Entities (Apr. 8, 2016), http://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issue_s_paper.pdf [hereinafter ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*] (“In the United States, two jurisdictions permit forms of ABS: the District of Columbia and Washington State.”); see also Groth, *supra* note 1, at 577–80, 586 (discussing the rarity of multidisciplinary practice and alternative disciplinary structure models permitting nonlawyer partnership and passive investment).

3. In 2012, the Washington Supreme Court created a new paraprofessional license, the Limited License Legal Technician (LLLT), to give legal advice and practice law in a limited scope. See Paula C. Littlewood, *The Practice of Law in Transition*, *NWLAW*, July/Aug. 2015, at 13, 13, http://nwlawyer.wsba.org/nwlawyer/july-august_2015?pg=15#pg15 (describing the new LLLT license as “the first independent legal paraprofessional in the United States that is licensed to give legal advice,” and informing the Washington “Supreme Court stepped in and created the LLLT license”). In 2015, the Washington Supreme Court issued a new rule allowing LLLTs to own a minority interest in law firms. *In re Expedited Adoption of Proposed Amendments to Rules of Prof'l Conduct*, Order No. 25700-A-1096 (Wash. Sup. Ct. Mar. 23, 2015), <http://op.bna.com.s3.amazonaws.com/mopc.nsf/r/%3FOpen%3djros-9vcl5h> (promulgating a new Rule of Professional Conduct in Washington allowing a business structure between an LLLT and a lawyer where “a lawyer and an LLLT may practice in a jointly owned firm or other business structure” as long as the “LLLTs do not possess a majority ownership interest,” do not have “direct supervisory authority over any lawyer,” do not regulate or direct any attorney’s “professional judgment in rendering legal services,” and the firm’s attorneys with managerial authority “expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm”).

II. THE CURRENT ETHICAL FRAMEWORK

United States lawyers are regulated by the highest court in the jurisdiction from which they received a license to practice.⁴ Each state supreme court adopts rules of professional conduct applicable to those lawyers, and most states' rules closely follow the American Bar Association Model Rules of Professional Conduct (the Model Rules).⁵ The current rules prescribing the acceptable business structures were put in place at a different time and under different circumstances. They must be re-examined with a critical eye.

A. *What Are Alternative Business Structures for Lawyers?*

In most United States jurisdictions, lawyers are only allowed to practice in three business formats: sole proprietorships, partnerships, or limited liability companies (LLCs).⁶ These models are allowed because they are not prohibited by a jurisdiction's version of the American Bar Association's Model Rule of Professional Conduct 5.4.⁷ Generally, Model Rule 5.4, entitled "Professional Independence of a Lawyer," prohibits a lawyer or law firm from sharing fees with a nonlawyer except under certain circumstances and from "form[ing] a partnership with a nonlawyer if any of the partnership's activities "consist of the practice of law."⁸ Rule 5.4(d) prohibits a lawyer from practicing law in a corporation or organization that

4. See Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, to ABA Entities, Courts, Bar Ass'ns (State, Local, Specialty & Int'l), Law Sch., & Individuals (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf (explaining the highest appellate court within each United States jurisdiction "possesses the inherent or constitutional authority to regulate the legal profession); see also *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html#3 (last visited May 14, 2017) ("Today, judicial regulation of lawyers is a principle firmly established in every state.").

5. See *Model Rules of Professional Conduct*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited May 14, 2017) (announcing each state implements their version of the Model Rules but "California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct").

6. See generally Edward S. Adams, *Rethinking the Law Firm Organizational Form and Capitalization Structure*, 78 MO. L. REV. 777, 778-84 (2013) (discussing the evolution of permissible business models state statutes provide attorneys).

7. See MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 2012) (prohibiting a lawyer from (1) "shar[ing] legal fees with a nonlawyer" absent enumerated exceptions; (2) "form[ing] a partnership with a nonlawyer if" the partnership's activities could be viewed as the practice of law; (3) allowing another who compensates, hires, or recommends the lawyer to direct the professional judgment of the lawyer; and (4) practicing law in for-profit corporations that allow nonlawyer ownership, nonlawyer directorship, or for a nonlawyer's control of the lawyer's professional judgment).

8. *Id.* r. 5.4(a) & (b).

seeks to make a profit if a nonlawyer is a director or officer, can control the attorney's professional judgment, or has an ownership interest in the enterprise.⁹

In this Article, ABSs refer to any of the following: (1) a business structure allowing nonlawyers to have a larger percentage of ownership or managerial interest; (2) a business structure permitting passive investment in the ABS; or (3) a business structure allowing nonlegal as well as legal services (sometimes referred to as multidisciplinary practices or MDPs). Except in a limited manner prescribed in two jurisdictions,¹⁰ all of these structures would run afoul of the current rules of professional conduct in effect in the United States that prohibit fee sharing with nonlawyers (Rule 5.4(a)–(b))¹¹ and the unauthorized practice of law (Rule 5.5).¹²

B. *Brief History and Rationale of Model Rule 5.4*

As noted above, most states hew closely to the Model Rules. For that reason, although the American Bar Association (ABA) is a voluntary professional association with no official regulatory authority,¹³ its Model Rules are incredibly influential.¹⁴

The ABA rules have contained a prohibition against lawyers sharing fees with nonlawyers since 1928,¹⁵ which can be further traced back to both court decisions and legislation¹⁶ emerging in the prior two decades

9. *Id.* r. 5.4(d).

10. See Adams, *supra* note 6, at 797 (“[N]ot all jurisdictions agree [with the prohibition]. The District of Columbia permits partnerships and fee sharing among lawyers and non[lawyers] as long as the entity provides *solely* legal services.” (citing D.C. RULES OF PROF'L CONDUCT r. 5.4 (2007))).

11. See MODEL RULES OF PROF'L CONDUCT r. 5.4(a) & (b) (AM. BAR ASS'N 2012) (prohibiting lawyers and nonlawyers from splitting fees derived from the provision of legal services and from forming partnerships together if the partnership engages in the practice of law).

12. See *id.* r. 5.5 (outlining the rules for the unauthorized practice of law and practice in more than one jurisdiction).

13. One exception is the regulatory authority that the ABA has in the bar admissions context. See Section of Legal Education and Admissions to the Bar *About Us*, AM. B. ASS'N, http://www.americanbar.org/groups/legal_education/about_us.html (last visited May 14, 2016) (“[The Section of Legal Education and Admissions to the Bar] provide[s] leadership and services to those involved in legal education and admissions to the bar.”).

14. See Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839, 854 (2001) (“The fundamental source of lawyers' professional obligations are the rules of professional conduct adopted by courts in each jurisdiction. In the vast majority of jurisdictions, these rules are based on the ABA's Model Rules of Professional Conduct.”).

15. See CANONS OF PROF'L ETHICS canon 34 (AM. BAR ASS'N 1928) (promulgating the prohibition on dividing legal fees with nonlawyers).

16. By 1935, almost half of the states had passed legislation prohibiting corporations from employing lawyers to provide third parties with legal services and subsequently supply the fees to the corporation. See Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J.

prohibiting corporations from practicing law in the United States.¹⁷ The fee-sharing prohibition was extended to all nonlawyers in the 1928 formal compilation of ethical rules for lawyers by the ABA.¹⁸ Canon 34 provided “[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.”¹⁹ The rationale has been described as a way to stop large banks from “grab[bing] off all the legal business in the community” and to prevent personal injury attorneys from paying networks of ambulance chasers, both of which were major issues of the day.²⁰

The ethical rules were reformulated in 1969 when the ABA adopted the Model Code of Professional Responsibility (the Model Code).²¹ The Model Code was organized by Canons containing a general proposition followed by ethical considerations (ECs) and disciplinary rules (DRs).²² ECs were designed to be an aspirational guide to conduct, while a violation of DRs would subject an attorney to sanction.²³

1069, 1078–79 (1989) (discussing the history of fee sharing with nonlawyers). See generally Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—the Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. WEST L. REV. 65 (2009) (contrasting the regulatory actions of the legislative and the judicial branches in the early twentieth century).

17. See Simon, *supra* note 16, at 1078–79 (explaining the development and current state of the prohibition against the sharing of legal fees with nonattorneys); see also *In re Co-Operative Law Co.*, 92 N.E. 15, 16–17 (N.Y. 1910) (holding a corporation that provided legal services through staff attorneys since 1901 was incapable of lawfully engaging in the practice of law, and reasoning lawyers working for a corporation would be beholden to the corporation rather than the client). In 1925, the holding of *In re Co-Operative Law* was applied to the sharing of fees with non-profit organizations. See ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 8 (1925), reprinted in AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 71 (1957) (noting ABA opposition to fee sharing with non-profit organizations).

18. See CANONS OF PROF’L ETHICS canon 34 (AM. BAR ASS’N 1928) (limiting fee sharing to that done between attorneys when it is “based upon a division of service or responsibility”).

19. *Id.*

20. Simon, *supra* note 16, at 1080 & nn. 48–49 (citations omitted).

21. See W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 744 (1981) (reporting that in 1981, at the time the article was published, the current Code of Professional Responsibility was the one adopted in 1969); see also *Model Rules of Professional Conduct*, *supra* note 5 (explaining the 1969 Model Code of Professional Responsibility replaced the 1908 Canons and preceded the Model Rules).

22. F. LaMar Forshee, *Professional Responsibility in the Twenty-First Century*, 39 OHIO ST. L.J. 689, 692 (1978) (listing the three components of the 1969 code as: (1) the admonitory Canons; (2) the precatory Ethical Considerations; and (3) the mandatory Disciplinary Rules).

23. The Model Code explained the ECs and DRs as follows:

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without

Three rules germane to this discussion were organized together under Canon 3, entitled “A Lawyer Should Assist In Preventing the Unauthorized Practice of Law.”²⁴ Under these three disciplinary code provisions, a lawyer or law firm should not: (1) “aid a non[]lawyer in the unauthorized practice of law” or practice in a jurisdiction where such practice would violate that jurisdiction’s professional regulations; (2) “share legal fees with a non[]lawyer, except” in certain circumstances; and (3) “form a partnership with a non[]lawyer if any of the activities of the partnership consist of the practice of law.”²⁵

In 1983, the rules were again reformulated and renamed from the Model Code of Professional Responsibility to the Model Rules of Professional Conduct.²⁶ Under the Model Rules, the language of DR 3-101 of the Model Code was incorporated into Model Rule 5.5(a),²⁷ and the language of DR 3-102 and DR 3-103 was incorporated into Rule 5.4(a)–(b).²⁸

being subject to disciplinary action. . . . The Model Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances.

MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (AM. BAR ASS'N 1980) (footnotes removed).

24. *Id.* canon 3.

25. *Id.* DR 3–101–03 (footnote removed).

26. *Model Rules of Professional Conduct*, *supra* note 5 (acknowledging the Model Rule’s 1983 adoption followed the 1908 Canons of Professional Ethics and 1969 Model Code of Professional Responsibility).

27. *Compare* MODEL CODE OF PROF'L RESPONSIBILITY DR 3–101 (AM. BAR ASS'N 1980) (prohibiting lawyers from assisting “a non[]lawyer in the unauthorized practice of law,” as well as “practice[ing] law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction”), *with* MODEL RULES OF PROF'L CONDUCT r. 5.5(a) (AM. BAR ASS'N 1983) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”).

28. Model Rule of Professional Conduct 5.4 is titled “Professional Independence of a Lawyer,” and the portion of the rule adopting DRs 3-102 and 3-103 provides:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) [death benefits may be paid to a deceased] lawyer’s estate or to one or more specified persons;
 - (2) a lawyer [may] purchase[] the practice of a deceased, disabled, or disappeared lawyer [and] may[] . . . pay to the estate or other representative of that lawyer the agreed-upon the purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained[,] or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the

The ethical considerations animating Canon 3 had a different focus from the language included in the current Comments to Model Rules 5.4 and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).²⁹ Canon 3's ECs stated that "[t]he purpose of the legal profession is to make educated legal representation available to the public" and that the rationale for "[t]he prohibition against the practice of law by a layman" was the need for the public to be able to rely upon the "integrity and competence of those who undertake to render legal services."³⁰

partnership consist of the practice of law.

MODEL RULES OF PROF'L CONDUCT r. 5.4(a)–(b) (AM. BAR ASS'N 1983). The rule added subsection (4), which did not appear in DRs 3-102 and 3-103. *Id.*; *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 (AM. BAR ASS'N 1980) (providing the same provisions as rule 5.4(a)–(b), but remaining silent on fee sharing with nonprofit organizations). The remainder of Model Rule 5.4 provides:

- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation[]; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROF'L CONDUCT r. 5.4(c)–(d) (AM. BAR ASS'N 1983).

29. In a conundrum that has plagued drafters of the ethical rules, the Code included no definition of the "practice of law" because it was "neither necessary nor desirable to attempt the formulation of a single, specific definition." MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (AM. BAR ASS'N 1980). The challenge in defining the "practice of law" has only grown more acute and tautological over the years. Most states' Unauthorized Practice of Law (UPL) provisions make no distinction between ordinary legal work performed by attorneys licensed in another jurisdiction and advice given by people who have no legal training at all. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT 9-10 (2003), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.authcheckdam.pdf. Several commissions of the ABA, most notably the ABA Task Force on the Model Definition of the Practice of Law, attempted to define the term. *Id.* at 3. In August 2003, this Task Force came up with a general framework but ultimately recommended each state should develop its own definition of what constitutes the practice of law. *See id.* ("The Task Force . . . became convinced that the necessary balancing test for determining who should be permitted to provide services that are included within the definition of the practice of law is best done at the state level."). The rationale was that each state has a unique legal culture and history "with nonlawyer activity and an economic, political[] and social environment that will affect its judgment about the types and amount of nonlawyer activity likely to enhance access to justice and protect the public." *Id.* at 3 n.6 (citation omitted). Although UPL is closely related to ABSs and current Rule 5.4, a discussion of the interrelation is not possible in the space constraints of this Article.

30. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1, 3-7 (AM. BAR ASS'N 1980).

Thus, the rationale animating Rule 5.4 and its predecessor rules against fee sharing between lawyers and nonlawyers includes elements of protectionism as well as concerns about client loyalty and that legal services provided to the public are competent and honest.

C. *United States Jurisdictions Have Adopted Modified Versions of Model Rule 5.4*

Currently, two United States jurisdictions have adopted a modified Rule 5.4 to allow lawyers to practice together with nonlawyers: Washington State and the District of Columbia.³¹

This change in Washington State applies to joint efforts between lawyers and only one other type of nonlawyer, a new paraprofessional created by the Supreme Court of Washington in 2012.³² In Washington State, Limited License Legal Technicians (LLLTs) may provide certain legal services in specified substantive areas.³³ In 2015, the Washington Supreme Court issued a new court rule allowing that state's LLLTs to form a minority partnership interest with lawyers in rendering legal services.³⁴

Rule 5.9 of the new Washington Rules of Professional Conduct, titled "Business Structures Involving LLLT and Lawyer Ownership," provides:

- (a) . . . [A] lawyer may;
 - (1) share fees with an LLLT who is in the same firm as the lawyer;
 - (2) form a partnership with an LLLT where the activities of the partnership consist of the practice of law; or
 - (3) practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which an LLLT owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility."³⁵

31. See Groth, *supra* note 1, at 580, 585–87 (discussing multidisciplinary practice and alternative disciplinary structure models that permit nonlawyer partnership and passive investment); see also Littlewood, *supra* note 3, at 13 (recognizing the promulgation of the Washington rule).

32. See Brooks Holland, *The LLLT Program in Washington State Progresses with a Comprehensive RPC Proposal*, SALT (Nov. 15, 2014), <https://www.saltlaw.org/the-lllt-program-in-washington-state-progresses-with-a-comprehensive-rpc-proposal/> (acknowledging the 2012 invention of the LLLT license, which "effectively initiated a new legal profession," and discussing the then-proposed Rule 5.9, which would permit LLLTs and lawyers "to partner with each other"); see also Littlewood, *supra* note 3, at 13 (noting Washington created the LLLT license in 2012 thereby giving rise to "the first independent legal paraprofessional in the United States").

33. See generally Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 108, 110–11 (2015) (enumerating the permissible scope of LLLT participation, and describing the utility of providing these limitations).

34. WASH. RULES OF PROF'L CONDUCT r. 5.9 (2015).

35. *Id.* r. 5.9(a). Subsection (b) of rule 5.9 goes on to condition joint ownership upon the

Over twenty-five years ago, the District of Columbia adopted a version of Model Rule 5.4 that allowed lawyers to form a partnership with nonlawyers for the rendering of legal services.³⁶ The limitations only allow this type of organization if: (1) its sole purpose is providing clients with legal services; (2) all people with managerial authority or a financial interest must abide by the District of Columbia Bar's Rules of Professional Conduct; (3) lawyers with managerial authority or a financial interest must be responsible for the conformity of all nonlawyers with the Rules of Professional Conduct as required of lawyers in Rule 5.1; and (4) all the

following:

- (1) LLLTs [may] not direct or regulate any lawyer's professional judgment in rendering legal services;
- (2) LLLTs [may not] have . . . direct supervisory authority over any lawyer;
- (3) LLLTs [may] not possess a majority ownership interest or exercise controlling managerial authority in the firm; and
- (4) lawyers with managerial authority in the firm [must] expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Rule 5.1.

Id. r. 5.9(b).

36. See Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 410 (1988) (classifying the version of Rule 5.4 then-under consideration as "a reasonable intermediate alternative"); see also *5.4:101 Model Rule Comparison*, LEGAL INFO. INST., https://www.law.cornell.edu/ethics/dc/narr/DC_NARR_5.HTM#5.4:100 (last visited May 14, 2017) (indicating paragraph (b) of the District of Columbia's Rule 5.4 has permitted attorneys to practice in organizations with nonlawyer owners or managers since "the beginning" and subject to specified conditions). The District of Columbia Rule provides, in part:

- (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
 - (1) The partnership or organization has as its sole purpose providing legal services to clients;
 - (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
 - (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
 - (4) The foregoing conditions are 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 professional judgment in rendering such legal services.

D.C. RULES OF PROF'L CONDUCT r. 5.4(b)–(c) (D.C. BAR ASS'N 2015).

preceding conditions are in writing.³⁷

Although the District of Columbia has allowed ABSs for many decades, few ABS firms have organized there.³⁸ Writers postulate that the reasons include a concern by lawyers licensed in the District of Columbia who are also licensed in other jurisdictions that they might run afoul of ethical rules in other jurisdictions that do not allow fee splitting or nonlawyer ownership.³⁹

D. *The ABA's Attempts to Modify Model Rule 5.4 Have Been Met With Stiff Resistance.*

Over the decades, the ABA, through various commissions, has made numerous attempts to modify the anti-fee-sharing rule. Such efforts have been soundly rejected by the House of Delegates, the governing body of the organization.

In the late 1970s and the early 1980s, the Kutak Commission reformulated the Model Code of Professional Responsibility into the Model Rules of Professional Conduct, subsequently adopted by the ABA House of Delegates in 1983.⁴⁰ The Kutak Commission's initial proposed draft of Model Rule 5.4 would have permitted multidisciplinary practices,⁴¹ but the

37. See *id.* r. 5.4(b) (promulgating the limitations for a partnership between lawyers and nonlawyers in Washington D.C.). For an in depth discussion on the District of Columbia's rule, set forth in the comments to the rule, see *Rules of Professional Conduct: Rule 5.4—Professional Independence of a Lawyer*, DCBAR, <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule5-04.cfm> (last visited May 14, 2017).

38. See Groth, *supra* note 1, at 586 (claiming few District of Columbia firms have converted to nonlawyer partnership due to the unknown liabilities inherent in transitioning if the firm practices outside of the District of Columbia).

39. See ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (acknowledging attorneys licensed in both the District of Columbia and another jurisdiction might fear that participation in a District of Columbia ABS would violate the other jurisdiction's ethical rules by which they are also bound); see also Gorelick & Traynor, *supra* note 4 (attributing the fear to many multijurisdictional District of Columbia firms that would add nonlawyer partners if not for other jurisdictions' prohibition on such ownership).

40. See *The Kutak Commission*, KUTAK ROCK LLP, <http://www.kutakrock.com/kutak-commission/> (last visited May 14, 2017) ("In 1977, a commission of the American Bar Association was created and tasked with an initial review, and eventually a complete restatement, of the then[-]existing Code of Responsibility . . . [wherein o]ver a six-year period . . . the Commission produced innumerable drafts of various parts of what became the overall proposal.>").

41. MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N, Proposed Final Draft, 1981), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.authcheckdam.pdf (stating a lawyer may work for an organization where the "financial interest is held or managerial authority is exercised by a nonlawyer[] or by a lawyer acting in a capacity other than that of representing clients"). Multidisciplinary practices (MDPs) is a term referring to entities that provide legal and other professional services. See Report to the House of Delegates *Commission on Multidisciplinary Practice*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_

ABA House of Delegates rejected the idea.⁴² Although a variety of reasons were put forth, “concerns about competitive threats to the profession loomed large.”⁴³ This fear was created due to the concerns about nonlawyers, also called the “fear of Sears.”⁴⁴

In 1999, the ABA Commission on Multidisciplinary Practice (the MDP Commission) proposed that lawyers and other professionals should be allowed to share fees as part of a practice that delivers both legal and nonlegal services.⁴⁵ The ABA House of Delegates rejected the idea, concluding it should not be pursued again “until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession’s tradition of loyalty to clients.”⁴⁶ The MDP Commission conducted additional research and prepared a revised recommendation that the House again resoundingly rejected, going on to adopt a resolution stating that multidisciplinary practices were inconsistent with the profession’s “core values.”⁴⁷

In 2009, the ABA established the Commission on Ethics 20/20 (the 20/20 Commission) to consider amendments to the Model Rules in light of technology and globalization.⁴⁸ In 2012, the 20/20 Commission stated “it

responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html (last visited May 14, 2017) (defining multidisciplinary practice).

42. See *id.* (summarizing how, in 1999, the ABA House of Delegates refused to make any changes to Model Rule 5.4 to allow “a lawyer to offer legal services through a multidisciplinary practice”).

43. Perlman, *supra* note 33, at 75 (citing Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 876–77 (1999)). “For example, during the House debate a member asked whether the proposal would have allowed Sears Roebuck to open a law office in each of its stores” and once Professor Geoffrey Hazard, the Commission’s reporter, “answered ‘yes,’ . . . the proposal was promptly defeated.” See *id.* (citing JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 165–66 (2013)). For a discussion on the evolution of legal services regulation and a proposal of a regulatory framework that includes those who provide law-related assistance but do not have a *juris doctor* degree, see generally *id.*

44. See JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 165–66 (2013) (explaining the phrase originated from the fear Sears had created in the marketplace); see also Perlman, *supra* note 33, at 76 & n.147 (stressing now the fear is likely to be of powerhouses such as Walmart or Sam’s Club (citations omitted)).

45. See Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, in STEPHEN J. MCGARRY, *MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS* 2-1, § 2.04, at 2-13 (2002), <http://www.personal.psu.edu/faculty/l/s/lst3/McGarry%20Mutlidisciplinary%20Ch2.PDF> (detailing the Commission’s recommendations).

46. *Id.* at § 2.02, at 2-4.

47. *Id.* at § 2.02, at 2-5 to -6. For a discussion on the focus of the 20/20 Commission’s second recommendation and ultimate rejection, see *id.* at 2.04, at 2-18.

48. Perlman, *supra* note 33, at 58 (“The ABA Commission on Ethics 20/20 undertook the most recent law of lawyering reform effort in the United States. . . [by] studying how the ABA Model Rules

would not propose changes to ABA existing policy prohibiting non[|]lawyer ownership of law firms, but it also announced at that time that it would continue its effort to find a way to permit fee splitting between lawyers and non[|]lawyers.”⁴⁹ Thus, in 2012, the Illinois State Bar Association (ISBA) responded to the 20/20 Commission’s study of nonlawyer investments and ownership of law firms (referred to as Alternative Law Practice Structures) by way of a resolution.⁵⁰ Reaffirming its previously-stated ABA policy, the ISBA held the position that the sharing of legal fees with nonlawyers, and any ownership by nonlawyers of a law practice or business that delivers legal services, is “inconsistent with the core values of the legal profession.”⁵¹ Several state bar associations joined in support of the ISBA, but the Resolution was not adopted.⁵² However, the ISBA’s efforts had some success.⁵³ The 20/20 Commission subsequently indicated “it had or would drop all of its proposals pertaining to non[|]lawyer ownership of law firms or fee splitting between lawyers and non[|]lawyers.”⁵⁴

The ABA’s Commission on Future of Legal Services (the Future Legal Services Commission), in existence from 2014 through 2016,⁵⁵ took

of Professional Conduct should be updated to address increasing globalization and changes in technology.” (citation omitted).

49. Richard L. Thies, *Sharing Fees, Ownership of Law Firms with Non-Lawyers*, SENIOR LAW., Feb. 2013, at 8, 8, <https://www.isba.org/sites/default/files/sections/seniorlawyers/newsletter/Senior%20Lawyers%20February%202013.pdf>.

50. *See generally* JOHN G. LOCALLO, ILL. STATE BAR ASS’N, & EDWARD J. SCHOENBAUM, SENIOR LAWYERS DIV. OF THE AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES (2012), http://iln.isba.org/sites/default/files/blog/2012/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates/joint_isba_sr_lawyers_div_resolution%20authcheckdam.pdf (responding to any amendments that could be recommended by the 20/20 Commission, and urging the ABA to reaffirm its 2000 policy against lawyers sharing fees with nonlawyers and nonlawyer control or ownership of law practices).

51. *See id.* at 10 (proposing the ABA reaffirm principles stated in a 2000 ABA House of Delegates Resolution, which prohibits lawyers from sharing legal fees with nonlawyers, rather than revise that Resolution).

52. *See* Thies, *supra* note 49, at 8 (announcing the indefinite postponement of the Resolution after a House of Delegates floor debate where ISBA and other state bar associations spoke against revisions).

53. *See id.* (noting that although ISBA’s Resolution was postponed indefinitely, the debate made it clear “that changes in ethical standards to permit non[|]lawyer ownership of law firms or fee splitting with non[|]lawyers would be defeated if finally proposed by the Commission”).

54. *Id.*

55. *See Commission on the Future of Legal Services*, AM. B. ASS’N, https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html (last visited May 14, 2017) (indicating the Future Legal Services Commission’s report took into consideration suggestions and ideas it received from 2014 until 2016); *see also* Robert Ambrogi, *This Week in Legal Tech: ABA Future Panel Calls for Broad Changes in Legal Services*, ABOVE L. (Aug. 8, 2016, 11:50 AM), <http://abovethelaw.com/2016/08/this-week-in-legal-tech-aba-future-panel-calls-for-broad-changes-in-legal-services/> (acknowledging the Future Legal Services Commission issued its “final report” after a two-year study period).

another run at ABSs but fell short of making a recommendation to the House of Delegates.⁵⁶ The Future Legal Services Commission disseminated an issues paper on ABS⁵⁷ that drew comments that are posted on the ABA's website.⁵⁸ Most are from traditional bar and other legal organizations voicing opposition to the idea.⁵⁹

III. CURRENT PRACTICAL FRAMEWORK

Despite the constancy of lawyer regulation prohibiting, except in delineated instances, fee sharing with nonlawyers,⁶⁰ the landscape in which lawyers practice has changed and continues to change at an exponential rate.⁶¹ A major driver of change is technology.⁶²

Before the advent of the Internet, legal information was the exclusive

56. The only proposal of the Future Legal Services Commission presented to the House of Delegates was a resolution and report on regulatory objectives. JUDY PERRY MARTINEZ, COMM'N ON THE FUTURE OF LEGAL SERV., & ANDREW PERLMAN, COMM'N ON THE FUTURE OF LEGAL SERV., PROPOSED RESOLUTION AND REPORT (2016), https://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/105.html (follow "Proposed resolution and report" hyperlink). The House of Delegates adopted the model regulatory objectives with a condition "that nothing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non[lawyer] ownership of law firms or the core values adopted by the House of Delegates . . . on July 11, 2000." HOUSE OF DELEGATES RESOLUTION 105 (AM. BAR ASS'N 2016) (adopted as revised & amended), <http://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf>.

57. See generally ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (describing recent developments that have occurred since "[t]he ABA Commission on Ethics 20/20 conducted the last ABA review on" ABSs, and requesting feedback and information pertaining to ABSs to develop a recommendation).

58. See *Comments - Alternative Business Structures Issues Paper*, AM. B. ASS'N, https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services/Comments4.html (last visited May 14, 2017) (displaying links to comments, delineated by the issuing entities, received in response to the Alternative Business Structures Issue Paper).

59. See *id.* (listing comments from ABA entities and from outside entities, such as LegalZoom, law firms, and state bar associations from New Jersey, New York, and Texas).

60. See Simon, *supra* note 16, 1076–77 (tracing the prohibition's English roots back to 1729 and the early 1800's).

61. See Adams, *supra* note 6, at 806 (acknowledging legal practice "has become increasingly global, growing exponentially since the mid-1980s" (citing James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455, 465 (2008))); Groth, *supra* note 1, at 602 ("Given the momentum of the rapidly changing legal market and the growth of legal services providers, it is only a matter of time before the ABA is forced to confront the issue of multidisciplinary practices." (citations omitted)); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 3 (2012) (arguing for "an entirely new framework for the delivery of legal service," which is necessary due to "[o]ur commercialized, technology-driven, and increasingly global society").

62. See Perlman, *supra* note 33, at 67 (recognizing the change in times and transformation of the legal market due to technology and globalization fueling lawyer mobility and cross-border practice (citation omitted)).

province of lawyers and legally-trained individuals.⁶³ Lawyers, historically, have been able to both access the legal information and give legal advice—often at the same hourly rate.⁶⁴ Those without legal training had difficulty accessing the arcane organization of legal reference materials. And if they could access the information, they had an equally daunting task of understanding it.⁶⁵

However, lawyers and the legally trained no longer have a monopoly on legal information.⁶⁶ Legal information is readily available and understandable to anyone with access to the Internet.⁶⁷

Against this backdrop, let's consider how those who deliver and consume legal services are faring under the current business models for lawyers.

A. *The Current Model Is Not Working Well for Consumers.*

1. Individual Customers

There is a dearth of information about the satisfaction level of individuals who actually receive lawyers' services in the United States.⁶⁸ A quick Internet search reveals a multitude of tools to measure customer satisfaction in various contexts. However, the only actual reports of surveys conducted of customers who have consumed legal services appear to be from the United Kingdom.⁶⁹

63. See Thomas R. Bruce, *Some Thoughts on the Constitution of Public Legal Information Providers*, CORNELL UNIV. SCH. L., <https://www.law.cornell.edu/working-papers/open/bruce/warwick.html> (last visited May 14, 2017) (“[O]ur definition of ‘public access’ to law has implicitly but dramatically changed. We must now imagine an expanded public seeking smaller and more relevant granules of information[] and seeking it via the Internet.”).

64. See Groth, *supra* note 1, at 566 (describing the provision of legal and law-related services as being performed solely by attorneys in the past (citing John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 110–12 (2000))).

65. See Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Non-Lawyers*, 67 S.C. L. REV. 429, 430 (2016) (reporting that unrepresented parties are frequently confronted with forms with archaic jargon and “procedures of excessive and bewildering complexity”).

66. See Perlman, *supra* note 33, at 99 (“The number of people who are not lawyers and are already involved in the delivery of legal or law-related services is growing rapidly.”).

67. See Bilal Kaiser, *10 Years of New Technology and How Our Lives Have Changed*, LEGALZOOM, <https://www.legalzoom.com/articles/10-years-of-new-technology-and-how-our-lives-have-changed> (last visited May 14, 2017) (“What was once pretty much impossible, simple and common legal matters can now be completed online. Creating last wills and living trusts, protecting intellectual property[,] and even forming a business no longer require going through an expensive attorney’s office.”).

68. See Rhode, *supra* note 65, at 434 (indicating the public is rarely asked for its opinion).

69. See, e.g., RES. WORKS LTD., CMA LEGAL SERVICES: QUALITATIVE RESEARCH REPORT 52 (2016), <https://assets.publishing.service.gov.uk/media/577f634eed915d3cfd000123/Research-Works-Legal-Services-Report.pdf> (reporting on the satisfaction of people in the United Kingdom

In sharp contrast, a multitude of studies document an increasing segment of the population, primarily low- and moderate-income Americans, are not accessing legal services.⁷⁰ Deborah Rhode notes from her research that, “[a]ccording to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”⁷¹ Gillian Hadfield has found that the provision of legal services in comparison to the unmet legal need is “startlingly low.”⁷²

The public’s access to justice continues to worsen in the United States as shown by the World Justice Project’s *Rule of Law Index*.⁷³ The 2016 *Index* ranks the United States eighteenth out of the 113 countries surveyed.⁷⁴ However, the ranking—with respect to providing civil legal services—is far from laudable.⁷⁵ On the metric of “the accessibility and affordability of civil courts, including whether people are aware of available remedies, can access and afford legal advice and representation, and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers,”⁷⁶ the United States ranked ninety-fourth out of 113 countries.⁷⁷ Therefore, on this metric, the United States *dropped* an embarrassing near thirty spots

regarding the quality of legal services providers).

70. See, e.g., REBECCA SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf (“A majority of respondents to the CNSS believe that lawyers’ fees are out of reach for poor people: 58% of those surveyed agreed with the statement that ‘lawyers are not affordable for people on low incomes.’”).

71. DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004). When subsequently writing on this in 2016, Deborah Rhode indicated that “over four-fifths” of the poor’s legal needs are unaddressed and “a majority” of middle-income Americans needs are unmet. Rhode, *supra* note 65, at 429 (citations omitted).

72. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 146 (2010).

73. See WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016 20–21 (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (illustrating the grave difference in 113 reporting countries’ “adherence to the rule of law,” and ranking the United States eighteen).

74. *Id.* at 21.

75. See *id.* at 40–41 (providing the United States ranks twenty-eighth out of the 113 countries considered for civil justice).

76. *Id.* at 166. The *Index* ranks countries based on several factors comprising the public’s access to legal services and the countries’ “adherence to the rule of law.” See generally *id.* at 9–17 (detailing the methodology of the *Index*).

77. U.S. Rank on Access to Civil Justice in Rule of Law Index Drops to 94th out of 113 Countries, NCCRC (Oct. 27, 2016), http://civilrighttocounsel.org/major_developments/217. For an interactive compilation of data pertaining to the United States’ 2016 results, see *United States*, WORLD JUST. PROJECT, <http://data.worldjusticeproject.org/#/groups/USA> (last visited May 14, 2017).

between 2015 and 2016, continuing a multi-year slide.⁷⁸

Despite facing frequent and serious civil justice issues, such as housing, family matters, and access to health care, most low- and middle-income people do not turn to lawyers or the legal system for help.⁷⁹ Cost is cited as a significant impediment to people reaching out to lawyers.⁸⁰ Millions in need of representation cannot afford to hire a lawyer.⁸¹ But cost is not the only impediment.⁸²

According to a 2013 study, 46% of respondents who had experienced a civil legal issue saw no need for third-party assistance, 24% believed assistance would not help, 17% said it would cost too much, and 9% did not know where to seek help.⁸³ Their most common responses were to either do nothing or to seek self-help.⁸⁴

A large percentage of the population seems to be deliberately avoiding contact with lawyers even as they avail themselves of nontraditional legal services.⁸⁵ Some people seem empowered (perhaps by the availability of resources on the Internet) to do it themselves—DIY is a growing

78. U.S. Rank on Access to Civil Justice in Rule of Law Index Drops to 94th out of 113 Countries, *supra* note 77 (indicating the United States' slide in rank "has occurred over the past three years").

79. See Knake, *supra* note 61, at 2, 4 (reasoning unmet legal needs result from unaffordability and because individuals do not have information about their legal needs, such as when they need to hire an attorney or how to find one); Rhode, *supra* note 65, at 429–30 (stating the majority of the legal needs of low- and middle-income Americans are unmet, and that courts handling small claims, bankruptcy, housing, and family matters demonstrate that "parties without attorneys are often now the rule rather than the exception").

80. See Perlman, *supra* note 33, at 93 ("A significant percentage of the public does not have the ability to pay for a lawyer, so . . . the choice for many people is between a person who lacks a law license and no help at all." (footnote omitted)).

81. In a 2015 study by the National Center for State Courts, 33% of the survey participants agreed with the statement that "hiring a lawyer is usually not worth the cost." Memorandum from GBA Strategies to Nat'l Ctr. for State Courts (Nov. 17, 2015), http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx.

82. See Knake, *supra* note 61, at 2, 4, 44 (blaming many factors, including individuals being unable to afford attorneys, lacking information regarding their legal needs, or viewing the provision of legal input as overly time consuming, scary, convoluted, and cumbersome).

83. SANDEFUR, *supra* note 70, at 12–13.

84. See *id.* at 12 (reporting 46% of those surveyed did not seek legal input and, instead, employed self-help, whereas 16% of respondents did nothing and another 16% received assistance from family and friends).

85. See Rhode, *supra* note 65, at 431 (referring to research that finds parties undergoing a divorce "prefer simpler, less adversarial procedures," and, thus, many are deterred from hiring attorneys as they are scared of intensifying conflict (citing Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106, 2117–18 (2013))); see also Knake, *supra* note 61, at 41 (portraying consumers as skeptical of attorneys and more willing to acquire legal services in familiar environments such as Walmart (quoting LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 815 (2d ed. 2008))).

phenomenon.⁸⁶ And why should technology not help educate and empower consumers to handle some of their simple legal matters themselves?

The Internet has provided a vehicle for nontraditional providers to make legal information and services available.⁸⁷ And the public is availing themselves of these resources.⁸⁸ One of the best known of the nontraditional providers may be LegalZoom.⁸⁹ According to figures published with the U.S. Securities and Exchange Commission (SEC), as of 2011, LegalZoom had served two million customers.⁹⁰ Avvo, another online provider, claims to have received 7.5 million legal questions.⁹¹ These are just two of the growing number of online providers of legal services.⁹² “Online providers in the aggregate have double[d] their revenues since 2006.”⁹³ Ironically, the growing influence and market share of these non-regulated individuals and companies delivering services that formerly were the province solely of lawyers, such as LegalZoom, RocketLawyer, and Avvo, seems to have galvanized the bar’s continued opposition to regulatory

86. See Rhode, *supra* note 65, at 435 (commenting on “the increasing public interest in do-it-yourself publications and services” (citing Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL’Y REV. 31, 44 (2013))). Legal service providers already help consumers prepare documents and, in some cases, represent individuals before federal agencies and other tribunals. ABA COMM’N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER CONCERNING NEW CATEGORIES OF LEGAL SERVICES PROVIDERS 3–4 (2015), http://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services_completed_evaluation.pdf.

87. See Bruce, *supra* note 63 (“[O]ur definition of ‘public access’ to law has implicitly but dramatically changed. We must now imagine an expanded public seeking smaller and more relevant granules of information[] and seeking it via the Internet.”).

88. See Perlman, *supra* note 33, at 102–03 (discussing consumers’ increasing awareness of and interest in automated document assembly documents).

89. See Richard Granat, *What is LegalZoom?*, ELAWYERING BLOG (Apr. 8, 2008), <http://www.elawyringredux.com/2008/04/articles/competition/what-is-legalzoom/> (“LegalZoom . . . offers on-line paralegal document preparation services on a nationwide basis . . . LegalZoom, as a non-[l]aw firm, cannot give legal advice of any kind, cannot modify a customer’s answers in any way, and cannot do any custom drafting that is responsive to a customer’s particular set of facts.”).

90. LegalZoom.com, Inc., Registration Statement (Form S-1) 1 (May 10, 2012), <https://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm>.

91. Lorelei Laird, *Avvo Founder Tells Lawyers to ‘Get Rid of UPL’ If They Want Innovation and Access to Justice*, ABA J. (Aug. 03, 2015, 08:45 PM CDT), http://www.abajournal.com/news/article/avvo_founder_tells_lawyers_to_get_rid_of_upl_if_they_want_innovation_and_to.

92. See *id.* (noting one former state bar president admitted “his state bar was initially scared of organizations like Avvo and LegalZoom”).

93. ILL. STATE BAR ASS’N’S TASK FORCE ON THE FUTURE OF LEGAL SERVS., REPORT AND RECOMMENDATIONS 7 (2016), <https://www.isba.org/sites/default/files/committees/Future%20of%20Legal%20Services%20Report.pdf> (citation omitted).

reform.⁹⁴

2. Corporate Customers

For many years, general counsel and other executives in corporations have demonstrated that they are growing weary of inefficiencies and the lack of service from outside counsel.⁹⁵ At the same time, in surveys of managing partners of law firms, partners have repeatedly reported that they are not inclined to change the way they bill or staff matters, and the most likely change agent to the terms of service delivery would be corporate law departments.⁹⁶ With an oversupply of lawyers competent to service corporate needs, general counsels are wisely driving down the costs their corporation pays in legal fees.⁹⁷ Corporate law departments are outsourcing and insourcing more work away from private lawyers and law firms.⁹⁸

In addition, corporations are refusing to pay for the training of new lawyers, often barring associates of limited experience from working on their matters.⁹⁹ At the same time, corporate counsel and firms are hiring attorneys directly out of law school,¹⁰⁰ then training them from the

94. See HOUSE OF DELEGATES RESOLUTION 105 (AM. BAR ASS'N 2016) (adopted as revised & amended), <http://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf> (“[N]othing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non[lawyer ownership of law firms or the core values adopted by the House of Delegates.”]).

95. See William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 381 (2011) (explaining general counsels’ goal is to find “methods of workplace organization and process that will deliver higher quality legal inputs and outputs” and “drive down overall costs to their corporation”).

96. Cf. *id.* at 388 (indicating most law firm partners are less likely to alter ingrained work habits and, instead, are more likely to view the pressure for lower fees as cynical).

97. *Id.* at 381.

98. In Altman Weil’s 2016 *Law Firms in Transition* survey, for example, 68% of managing partners reported their firm was “losing business to corporate law departments” that are taking more work in house. ERIC A. SEEGER & THOMAS S. CLAY, ALTMAN WEIL, INC., LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 12 (2016), http://www.altmanweil.com/dir_docs/resource/95e9df8e-9551-49da-9e25-2cd868319447_document.pdf [hereinafter 2016 ALTMAN WEIL FLASH SURVEY]. Similar results were reported in 2015. See THOMAS S. CLAY & ERIC A. SEEGER, ALTMAN WEIL, INC., LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 20 (2015), http://www.altmanweil.com/dir_docs/resource/1c789ef2-5cff-463a-863a-2248d23882a7_document.pdf (reporting 67% of the managing partners and chairs polled indicated that corporate law departments were taking business away from the firm by insourcing more legal work).

99. See Henderson, *supra* note 95, at 380 (crediting the market’s overabundance of specialized attorneys for strongly reducing corporate clients’ incentive to subsidize entry-level lawyers training, especially when such training comes “at inflated pay scales that are disconnected from the value provided to clients” (citation omitted)).

100. NALP hiring data shows that in 1992, while 72.5% of law school graduates started jobs in the legal field, 59% started jobs at law firms. *Employment Rate of New Law Grads Unchanged as Both the Number of Graduates and the Number of Jobs Found Decline*, NALP (Oct. 2016),

beginning in a corporate mindset.¹⁰¹ Furthermore, they are bringing work previously provided to outside counsel in-house, where they can better keep an eye on the costs.¹⁰²

B. *The Current Model Is Not Working Well for Lawyers.*

As mentioned in the prior Section, lawyers who serve individuals have competition from Internet providers and those who serve corporations are losing their business to outsourcing or insourcing.¹⁰³ Meanwhile, newer members of the profession face stark struggles.

Newer lawyers struggle with unemployment and underemployment. New lawyers graduate from law school with increased debt and fewer job choices.¹⁰⁴ Of those who are employed, the starting salaries are startlingly low.¹⁰⁵ College students have gotten the memo, and law school

<http://www.nalp.org/1016research#table1>. Thus, 13.5% of 1992 law school graduates began full-time jobs in a legal capacity at a non-law firm business or organization. *Id.* In 2012, the law firm percentage dropped to a near all-time low of 49.5% and the business percentage jumped up to 18.1%. *Employment for the Class Of 2011—Selected Findings*, NALP 2 (2012), <http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf>.

101. See Henderson, *supra* note 95, at 380–81 (analyzing the immense supply of corporate attorneys due to “the specialized technical skills young lawyers have learned from their large law firm training”).

102. For example, the Association of Corporate Counsel’s 2011 census showed growth of in-house legal departments through the recession and “that in-house counsel are turning less frequently to outside counsel to handle their legal matters and they are handling more work in-house.” *Association of Corporate Counsel Census Reveals Power Shift from Law Firms to Corporate Legal Departments*, ASS’N CORP. COUNSEL (Mar. 28, 2012), http://www.acc.com/aboutacc/newsroom/pressreleases/acc_census_press.cfm.

103. In its 2016 survey of managing partners of over 356 firms of fifty or more employees, including almost half of the top 350 largest United States firms, Altman Weil asked whether firms were losing work to “[c]orporate law departments in-sourcing more legal work.” 2016 ALTMAN WEIL FLASH SURVEY, *supra* note 98, at 5. Sixty-eight percent responded affirmatively that they were “[t]aking business . . . now” whereas 24.2% said it was a “[p]otential threat” and only 5.1% were not concerned. *Id.*

104. The ABA requires law schools to report employment data as of ten months following graduation. See *Employment Statistics*, VT. L. SCH., <http://www.vermontlaw.edu/careers/employment-statistics> (last visited May 14, 2017) (acknowledging law schools report the statistics ten months after graduation every year). As of March 2016, only 59.2% of the 2015 law school graduates had full-time, long-term legal employment, which required bar passage and were not subsidized by their law schools. *2015 Law Graduate Employment Data*, ABA SEC. LEGAL EDUC. & ADMISSIONS TO B. (Apr. 26, 2016), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_law_graduate_employment_data.authcheckdam.pdf. Nearly 10% of each of the classes of 2014 and 2015 reported they were “[u]nemployed/[s]eeking.” *Id.*

105. In the twenty years between 1991 and 2011, NALP figures show the distribution of income of new lawyers at nine months after graduation has widened from a bell curve to two peaks. *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NALP (Aug. 2012), <http://www.nalp.org/august2012research>; see also *Employment Data for Recent Graduates*, NYU L., <http://www.law.nyu.edu/careerservices/employmentstatistics> (last visited May 14, 2017) (indicating

applications are down.¹⁰⁶ We have seen a drop in the number of new lawyers being admitted to practice law.¹⁰⁷ And Pew Research Center reports that 10,000 people a day are reaching the age of sixty-five.¹⁰⁸ Thus, not too far in the future, the profession will experience an exponential increase in the number of lawyers retiring or leaving the practice.

While they remain in practice, it appears that lawyers are struggling. Research shows lawyers are increasingly suffering from substance abuse, mental illness, and anxiety disorders—at a much higher rate than other high-stress professions.¹⁰⁹

The lawyers providing services to low- or moderate-income clientele are primarily solo and small firm practitioners.¹¹⁰ According to the most recent data from the ABA, 49% of American practicing lawyers are solo practitioners.¹¹¹ And this population of lawyers is under financial strain.

The Internal Revenue Service (IRS) data on lawyer earnings is striking. Over the past thirty years, solo practitioners have realized a significant loss in income, adjusted for inflation. In 1967, a solo practitioner's average

the ABA switched the reporting deadline from nine months to ten months after graduation starting with the Class of 2014). Over time, more new lawyers reported income in the lower range. *Salaries for New Lawyers: An Update on Where We are and How We Got Here, supra*. In the 1990s, 45% of the lawyers reported income in the \$30–40,000 range, whereas in 2011, 52% reported income in the \$40–65,000 range. *See id.* (reporting the 1991 data reflects 40% of salaries were in the \$30–40,000 range, and indicating by 1996 that range increased to 45%). Meanwhile, the graph of those who reported a big law salary sharpened into spikes. *See id.* (noting the two spikes emerged with the Class of 2000 when big law firms increased starting salaries and more law graduates began taking jobs with large firms). Whereas 6% were making the large median income of \$90,000 by the end of the 1990s, 14% reported income at the median level of \$125,000 in 2000 and at the salary of \$160,000 in 2011. *Id.*

106. According to the Law School Admission Council, 2015 was the fifth straight year of declining law school applicants. *End-of-Year Summary: ABA (Applicants, Applications & Admissions), LSATs, Credential Assembly Service, LSAC* <http://www.lsac.org/lscresources/data/lsc-volume-summary> (last visited May 14, 2017).

107. According to the National Conference on Bar Admissions, the scores continue to slide from 2014 and are “likely to continue for at least a couple more years.” Mark Hansen, *Multistate Bar Exam Average Score Falls to 33-Year Low*, ABA J. (Mar. 31, 2016, 02:53 PM CDT), http://www.abajournal.com/news/article/multistate_bar_exam_average_score_falls_to_33_year_low.

108. *See* D’vera Cohn & Paul Taylor, *Baby Boomers Approach 65 – Glumly*, PEW RES. CTR. (Dec. 20, 2010), <http://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly/> (predicting roughly 10,000 individuals will hit the age of sixty-five every day for the next nineteen years).

109. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (2016).

110. *See* Ann Juergens, *Valuing Small Firm and Solo Law Practice: Models for Expanding Service to Middle-Income Clients*, 39 WM. MITCHELL L. REV. 80, 95–96 (2012) (“[S]mall and solo firms are where working people go for legal help—when they go to a lawyer at all . . .” (citations omitted)).

111. *See Lawyer Demographics: Year 2016*, ABA http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf (providing statistics on the percentage of solo practitioners for the years 1980, 1991, 2000, and 2005, during which the statistics have remained between 45–49%).

income was \$10,850, which was \$74,806 adjusted to 2013 dollars.¹¹² By 1988, solo practitioners were earning \$74,735, as adjusted for inflation.¹¹³ In 2010, a solo practitioner earned \$49,741, as adjusted for inflation.¹¹⁴ Incredibly, “[s]olo practitioners saw their buying power shrink by over 34% from 1988 to 2010.”¹¹⁵

Partnership income is also published by the IRS, but the figures include all sorts of partnerships—big law and small partnerships—but not LLCs.¹¹⁶ Partnership income rose steeply compared to solo practitioner income until the Great Recession, at which time it declined 16% in real earnings between 2008 and 2011.¹¹⁷

Furthermore, lawyers have a perception that they are billing more than they are. Responding to a 2012 survey by LexisNexis, lawyers reported billing rates between 60%–92%.¹¹⁸ In other words, they reported billing 6.9 hours for every 8.9 hours worked.¹¹⁹ In contrast, recent data released by Clio, a company that provides a project management application,¹²⁰ paints a sharply different picture. Clio aggregated data from about 40,000 solo and small-to-medium-sized firm attorneys, who used the Clio application system during 2015.¹²¹ The data shows that lawyers logged only “2.2 hours of billable time per day,” which amounts to just over a quarter of an eight-hour day, and actually collected payment on only 1.5 hours per day, or 86% of the hours actually billed.¹²² What are the non-billable tasks that are consuming lawyers’ time and attributing to their dropping income? It seems reasonable to assume that a large amount of this time is spent on nonlawyer activity including attempts to understand and use technology.¹²³

112. BENJAMIN H. BARTON, *THE GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 47 (2015).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 47–48.

118. LEXISNEXIS, *LEXISNEXIS LAW FIRM: BILLABLE HOURS SURVEY REPORT 6* (2012), <http://www.lexisnexis.com/law-firm-practice-management/documents/Billable-Hours-Survey.pdf>.

119. *Id.* at 2.

120. *See About Clio*, CLIO, <https://www.clio.com/about/> (last visited May 14, 2017) (declaring the company’s goal is to improve lawyers’ quality of practice by providing “cloud-based practice management technologies”).

121. CLIO, *LEGAL TRENDS REPORT 3* (2016), <https://files.goclio.com/marketo/ebooks/2016-Legal-Trends-Report.pdf>.

122. *Id.* at 5.

123. According to a survey of lawyers in Illinois who attended a statewide future law conference in 2016, purchasing, understanding, and using technology was an over-riding concern. *THE FUTURE IS NOW: LEGAL SERVICES 2.016 SUMMARY REPORT 10* (2016), <https://2hla47293e2hberdu2chdy71->

IV. DEVELOPMENTS IN OTHER COUNTRIES

For several decades, jurisdictions outside the United States have been expanding the permissible business models of lawyers. ABSs are allowed in Australia, the United Kingdom, parts of Canada, and, to various lesser extents, some other European and Asian countries.¹²⁴ It is instructive for the regulators in the United States to consider the experiences of these other jurisdictions.

A. *Australia*

The Australian state of New South Wales gradually modified its regulations of lawyers beginning in the 1990s.¹²⁵ Lawyers were permitted to form multidisciplinary practices with other professionals as long as they “retain[ed] the majority voting rights . . . and . . . at least 51% of the net income of the partnership.”¹²⁶ In 2001, this limitation was eliminated by legislation that allowed legal services providers to incorporate, becoming incorporated legal practices (ILPs), which could include multidisciplinary practices, meaning providers who may or may not be lawyers.¹²⁷ The stated

wpengine.netdna-ssl.com/wp-content/uploads/The-Future-Is-Now-2016-Summary-Report.pdf.

124. “Germany, the Netherlands, Spain, Belgium, and Poland” allow multidisciplinary practices in various forms. ABA Comm’n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (citation omitted). Regarding ABSs, Scotland, Spain, Italy, and Denmark all permit ABSs but require lawyers to have a majority control. *See id.* (indicating Scotland permits nonlawyer ownership up to 49%, Denmark allows such ownership up to 10%, Spain caps nonlawyer ownership at 25%, and Italy places the maximum nonlawyer ownership at 33% (citation omitted)). Singapore recently enacted statutes allowing nonlawyer ownership of up to 25% of entities that are called Legal Disciplinary Practices (LDPs), but does not permit such ownership in MDPs. *Id.* at 6–7 (citation omitted).

125. *See id.* at 5 n.14 (stating New South Wales began allowing MDPs in 1994); *see also* Tahlia Gordon & Steve Mark, *The Australian Experiment: Out with the Old, in With the Bold*, in *THE RELEVANT LAWYER, REIMAGINING THE FUTURE OF THE LEGAL PROFESSION* 185, 188 (Paul A. Haskins ed., 2015) (recounting legislative efforts in New South Wales, including new 1991 legislation that governed until the MDP legislation took force in 1994).

126. Gordon & Mark, *supra* note 125, at 188.

127. On July 1, 2001, the Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (the 2000 Act) and the Legal Profession Amendment (Incorporated Legal Practices) Regulation 2001 (the 2001 Regulation) became effective. *See Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW) s 1 (Austl.) (stating the date of commencement will be subsequently announced by proclamation); *Legal Profession Amendment (Incorporated Legal Practices) Regulation 2001* (NSW) explanatory note, cl 1 (Austl.) (proclaiming its date of commencement to be July 1, 2001); *see also Incorporated Legal Practices*, L. SOC’Y N.S.W., <http://www.lawsociety.com.au/cs/groups/public/documents/internetcostguidebook/008712.pdf> (last visited May 14, 2017) (recognizing ILPs have been permitted ever since the 2000 Act took effect on July 1, 2001). The 2000 Act and 2001 Regulation amended the Legal Profession Act 1987 to enable providers of legal services in New South Wales to incorporate by registering a company with the Australian Securities and Investment Commission, which is the agency responsible for ensuring compliance with Australian corporations legislation. *See Act 2000* (NSW)

purpose for the legislation was:

removing regulatory barriers between Australian states and territories to facilitate a . . . national legal services market and regulatory framework; greater flexibility in choice of business structures for law practices; enhancing choice and protection for consumers of legal services; enabling greater participation in the international legal services market; providing improved access to justice; and providing “one-stop shopping” for consumers of legal services.¹²⁸

Under the 2001 legislation, the ILPs, in addition to individual lawyers, are regulated.¹²⁹ In making the entity, rather than only the individual, responsible for ethical compliance, Australian regulators sought to have firms set in place an ethical infrastructure that was proactive in focus.¹³⁰ Part of this entity regulation requires ILPs to appoint a “legal practitioner director” and be able to demonstrate that the incorporated firms have “appropriate management systems” in place to ensure that all legal services are provided in accord with professional conduct obligations.¹³¹

sch 1 item 47O (permitting investigations of ILPs and authorizing future regulations to extend investigative functions by reference to the authority of the Australian Securities and Investment Commission, to which ILPs must also furnish certain documentation); *Regulation 2001* (NSW) sch 1 item 5 (amending the 1987 legislation to include a provision pertaining to the director's report and financial report that, with regards to an ILP, are required to be prepared and filed with the Australian Securities and Investment Commission); see also Gordon & Mark, *supra* note 125, at 188–89 (explaining how the restrictions imposed upon ownership in MDPs was eliminated by the 2001 legislation that allowed incorporated legal practices and enabled lawyers and nonlawyers to freely share in receipts); STEVE MARK, CREATIVE CONSEQUENCES P/L, THE REGULATORY FRAMEWORK IN AUSTRALIA 4 n.9 (2014), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session1_02_mark_the_regulatory_framework_in_australia_final.authcheckdam.pdf [hereinafter MARK, THE REGULATORY FRAMEWORK IN AUSTRALIA] (reporting on how the culmination of the 2000 Act and the 2001 Regulation effectuated the amendments to the 1987 law).

128. Gordon & Mark, *supra* note 125, at 188.

129. The entity is responsible for designing and implementing the appropriate management systems, which apply to both lawyers (directly) and all other members of the ILP's staff, including nonlawyers (indirectly), thereby promoting ethics and professionalism. MARK, THE REGULATORY FRAMEWORK IN AUSTRALIA, *supra* note 127, at 7, 9. Accordingly, this requires the entity to collaborate with regulators because upon establishing a system designed to promote ethical behavior, regulators or corporate auditors scrutinize the system to determine its results. *Id.* at 8–9.

130. It has been said that the system is proactive as the system is intended to prevent and mitigate against recurring issues. *Id.* at 8. Moreover, under the collaborative framework established in New South Wales, regulators proactively work with firms in an effort to decrease the possibility of future violations by detecting and reducing ethical issues through a system aimed at embedding ethical behavior. *Id.* Therefore, both the regulators and the entity proactively seek to avoid problems in the future, rather than merely having the regulators step in after a lawyer has acted unethically. *Id.*

131. *Id.* at 5–6. The legal practitioner director is responsible for establishing the maintaining the “appropriate management system.” *Id.* at 6.

In 2015, New South Wales and Victoria eliminated the requirement for a director and changed some of the requirements for ILPs through the Legal Profession Uniform Law (LPUL).¹³² The new law requires that all principals, which generally means all partners of the firm or directors of the corporation,¹³³ be responsible for ensuring that all legal practitioners in the law practice comply with all professional obligations and that the legal services provided by the law practice are provided in accordance with the law and with professional obligations.¹³⁴ A failure to do so may qualify as professional misconduct.¹³⁵ Moreover, although the LPUL was developed with the idea that each of Australia's eight states and territories would adopt it,¹³⁶ only the two largest states, New South Wales and Victoria, have adopted it to date.¹³⁷ However, about 80% of Australian lawyers are located in New South Wales and Victoria.¹³⁸

Since 2007, the number of incorporated legal practices has steadily grown.¹³⁹ Many Australian firms have changed their structure to operate as ILPs.¹⁴⁰ A significant decline in consumer complaints confirms that the proactive management regulation systems has had a positive impact on the

132. *Compare Legal Profession Act 2006* (ACT) s 107(1)–(2) (Austl.) (requiring ILPs to have one legal practitioner director, at minimum, who is “responsible for the management of the legal services provided in the [Australian Capital Territories] by the incorporated legal practice”), with *Legal Profession Uniform Law (No. 16a) 2014* (NSW) ch 3 pt 3.7 s 105 (Austl.) (providing a new business structure for ILPs, which does not require a legal practitioner director, but rather requires at least one authorized principal).

133. *Legal Profession Uniform Law (No. 16a)* ch 1 pt 1.2 s 6(1).

134. *See id.* ch 3 pt 3.2 s 35(1) (extending liability pertaining to the law practice's violation of the law to principals of the practice if certain conditions are satisfied).

135. *Id.* s 35(2).

136. *See* MARK, THE REGULATORY FRAMEWORK IN AUSTRALIA, *supra* note 127, at 10–11 (discussing the then-pending legislation and pointing out it was intended to originally apply in Australian's two largest states, New South Wales and Victoria, with implementation of the law throughout the remainder of the country at a later date).

137. *See A New Framework for Practising Law in NSW*, L. SOC'Y N.S.W., <http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/nationalreform/> (last visited May 14, 2017) (highlighting the various states' reservations that vitiated the intention to bring about uniformity, but praising the “common legal services market across” Victoria and New South Wales brought into existence when the two jurisdictions adopted of LPUL).

138. MARK, THE REGULATORY FRAMEWORK IN AUSTRALIA, *supra* note 127, at 11.

139. OFFICE OF THE LEGAL SERVS. COMM'R, 2014–15 ANNUAL REPORT 12 (2014–2015), <http://www.olsc.nsw.gov.au/Documents/Annual%20Report%202014%202015.pdf> [hereinafter 2014–15 ANNUAL REPORT].

140. *Compare id.* (reporting by mid-2015, over 1,800 incorporated legal practices were operating in New South Wales), with OFFICE OF THE LEGAL SERVS. COMM'R, 2007–08 ANNUAL REPORT 5 (2007–2008), http://www.olsc.nsw.gov.au/Documents/0708_olsc_annual_report.pdf [hereinafter 2007–08 ANNUAL REPORT] (indicating over 800 firms expressed a desire to incorporate or be publicly traded since 2001).

quality of lawyer services rendered under the new regulatory scheme.¹⁴¹

B. *England and Wales*

The Legal Services Act of 2007 (LSA) radically transformed the regulatory scheme for lawyers in England and Wales.¹⁴² The LSA permits lawyers to form an ABS that allows external ownership of legal businesses and multidisciplinary practices.¹⁴³ The change was long in the making, and the Australian experience was certainly influential in making it.¹⁴⁴

A watershed precursor event was Sir David Clementi's 2004 report (the Clementi Report), reviewing and recommending changes in the regulatory framework for legal services in England and Wales.¹⁴⁵ The Clementi Report recommended ABSs, in which lawyers and nonlawyers both managed and owned the legal practice.¹⁴⁶ In addition, the report proposed the establishment of regulatory objectives and a new regulatory governance scheme that would eventually permit multijurisdictional practices.¹⁴⁷

Three years later, Parliament enacted the LSA. The regulatory objectives of the LSA include supporting "the rule of law; . . . improving access to justice; . . . promoting the interests of consumers; . . . [and] encouraging an independent, strong, diverse[,] and effective legal profession."¹⁴⁸ Three

141. Compare 2014–15 ANNUAL REPORT, *supra* note 139, at 9 (reporting 1,668 consumer complaints in New South Wales for the 2014–15 reporting period), with 2007–08 ANNUAL REPORT, *supra* note 140, at 13 (reporting 2,747 consumer complaints in 2006–07 and 2,653 consumer complaints in 2007–08).

142. See generally Legal Services Act 2007, c. 29 pt. 5 (Eng. & Wales) (providing for ABSs); see also *History of the Reforms*, LEGAL SERVS. BD., http://www.legalservicesboard.org.uk/about_us/history_reforms/ (last visited May 14, 2017) (expounding upon the provisions set forth in the Legal Services Act 2007 one of which facilitated lawyers and nonlawyers owning and managing law practices together through ABSs).

143. Legal Services Act 2007, c. 29 pt. 5.

144. See generally DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES 114 & n.43, 123 (2004), http://www.avocatsparis.org/Presence_Internationale/Droit_homme/PDF/Rapport_Clementi.pdf (pointing out the influence New South Wales had on model federal rules when it opted to permit nonlawyer ownership, and noting requirements in the New South Wales' model).

145. See generally *id.* at 1 (describing the scope and concern in conducting the review); see also *History of the Reforms*, *supra* note 142 (recognizing the broad implementation of the key recommendations set forth in the Clementi Report).

146. See generally CLEMENTI, *supra* note 144, at 105–39 (discussing the demand for LDPs, the issues presented by LDPs in which management and ownership are separated, regulatory issues surrounding LDPs, and the demand for and issues with MDPs, and subsequently recommending legal services be permitted to use ABSs).

147. See *id.* at 139 (advocating for a regulatory structure that "would represent a major step toward" MDPs that would bring lawyers and professionals together to provide legal services for consumers).

148. Legal Services Act 2007, c. 29 pt. 1 s. 1.

main changes were made to the existing system. With respect to regulation, a Legal Services Board was created to oversee the regulation of legal services by approved regulators,¹⁴⁹ such as the Solicitors Regulation Authority (SRA) for solicitors¹⁵⁰ and the Bar Standards Board for barristers,¹⁵¹ and to oversee a new system to handle consumer complaints, Parliament created the Office for Legal Complaints and an Ombudsman Scheme.¹⁵²

The LSA facilitated ABSs by providing that the firm itself, in addition to the individuals, must be licensed and regulated.¹⁵³ As part of the entity regulation component, each firm, including ABS firms, must designate an officer responsible for ensuring that professional obligations are met (the Compliance Officer for Legal Practice) and an officer responsible for ensuring that sound financial measures and management practices are maintained (the Compliance Officer for Finance and Administration).¹⁵⁴ In addition, any firm wishing to employ a nonlawyer as an owner or manager of an ABS must apply to the SRA for approval and satisfy the SRA that the individual is fit and proper to assume that role.¹⁵⁵

The number of incorporated companies (ABSs) in the United Kingdom has continued to rise,¹⁵⁶ and the trend is likely to continue. In just one of many surveys of legal services purchasers documenting the desire for

149. See generally *id.* pt. 2 (providing for the creation of the Legal Services Board, and outlining its functions).

150. See *Who We Are and What We Do*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/consumers/what-sra-about.page> (last visited May 14, 2017) (describing the SRA's regulatory authority, which extends to England's and Wales's solicitors, law firms, firm managers or employees who are not lawyers, and other lawyers).

151. See B. STANDARDS BOARD, <https://www.barstandardsboard.org.uk> (last visited May 14, 2017) (indicating the Bar Standards Board regulates barristers, as well as specialized legal services business, to protect the public interest).

152. See generally Legal Services Act 2007, c. 29 pt. 6 (enumerating provisions regarding legal complaints).

153. See *id.* pt. 5 § 72 (providing a definition of and for the regulation of "licensed bodies").

154. See *SRA Authorisation Rules 2011*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/solicitors/handbook/authorisationrules/content.page> (last visited May 14, 2017) (describing the compliance officer's requirements in rule 8.5).

155. See *Introduction to the Suitability Test*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/solicitors/handbook/suitabilitytest/part1/content.page> (last visited May 14, 2017) (explaining the test applies to non-solicitors who will work in the legal profession). For the SRA's "suitability test," outlining the necessary requirements for admission, see *Suitability Test*, SOLIC. REG. AUTHORITY, www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page (last visited May 14, 2017).

156. See Dan Bindman, *Report: ABSs Punch Well Above Their Weight*, LEGALFUTURES (Apr. 27, 2016, 12:01 am), <http://www.legalfutures.co.uk/latest-news/report-abss-punch-well-above-their-weight> (acknowledging "the structure of the profession is changing," and while noting partnership has held strong as the dominant organization in domestic private practice, there is an increasing amount of organizations outside private practice hiring solicitors, predominantly in industry and commerce sector).

broader legal services, a 2016 report by Deloitte indicated that one-third of purchasers of legal services “want their legal services providers to bring industry, commercial[,] or non[.]legal expertise, which currently they do not.”¹⁵⁷

Models of ABSs now operating in the United Kingdom take many forms.¹⁵⁸ I will mention here two examples of American companies that have taken advantage of the opportunity to engage with lawyers by becoming ABSs in England: LegalZoom and Crawford & Company.

The technology company LegalZoom has been offering legal documents online for over fifteen years.¹⁵⁹ More recently, it began connecting consumers to lawyers through legal plan subscriptions, offering to meet the legal needs of an individual or business at a low monthly price.¹⁶⁰ In 2015, LegalZoom became the first United States firm to be granted an ABS license in the United Kingdom.¹⁶¹ It later bought the firm Beaumont Legal, which offered services in conveyancing, dispute resolution, wills, and estates.¹⁶² LegalZoom UK lawyers deliver legal services directly to consumers. A major development announced by LegalZoom UK in late 2016 is a digital will that people can update on their phone, creating a “digital scrapbook” of memories and passwords to pass on to their heirs and that will provide automatic updates when legal events occur.¹⁶³

In June 2016, Atlanta, Georgia-based Crawford & Company, self-

157. DELOITTE, FUTURE TRENDS FOR LEGAL SERVICES: GLOBAL RESEARCH STUDY 7 (2016), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-future-trends-for-legal-services.pdf>. The survey was of general counsel, CEOs, and other executive managers of “multinationals and mid-sized companies present in five or more countries.” *Id.* at 9. “Company headquarters were split between the U[.]K[.] (27%), North America (25%), Asia Pacific (24%), Europe (excluding the U[.]K[.] (21%), and Africa [and] the Middle East (3%).” *Id.*

158. For an in-depth analysis of various models, see Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEO. J. INT’L L. 665 (2016) (analyzing ABS law firms in the United Kingdom and the benefits provided by each).

159. *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> (last visited May 14, 2017).

160. See *Attorneys*, LEGALZOOM, <https://www.legalzoom.com/attorneys/> (last visited May 14, 2017) (offering “legal help when you need it” upon purchase of either Business Advisory Plan or Legal Advantage Plus).

161. Neil Rose, *LegalZoom Makes Its Move with Beaumont Legal Acquisition*, LEGALFUTURES (Dec. 7, 2015), <http://www.legalfutures.co.uk/latest-news/legalzoom-makes-its-move-with-beaumont-legal-acquisition>.

162. *Id.*

163. LegalZoom UK CEO Craig Holt explained that the new app, called Legacy, “is the first significant re-invention of a will since their inception thousands of years ago; creating this next generation of legal products and services—combining the best technology and legal expertise—is at the heart of our approach.” Neil Rose, *LegalZoom Launches ‘Digital Will’ in First UK Product Roll-Out*, LEGALFUTURES (Nov. 28, 2016), <http://www.legalfutures.co.uk/latest-news/legalzoom-launches-digital-will-first-uk-product-roll-out>.

described as “one of the world’s largest independent providers of claims management solutions to the risk management and insurance industry,”¹⁶⁴ announced that it is establishing an ABS in the United Kingdom.¹⁶⁵ A spokesman for Crawford UK said “[i]t is imperative that loss adjusting companies evolve to meet the changing dynamics of the claims sector. Creating an ABS will allow us to support our clients with a genuine need for seamless, high-quality claims and legal service.”¹⁶⁶ Furthermore, they indicated they were not “afraid to break the mould in creating proactive solutions for the challenges ahead.”¹⁶⁷

C. Canada

Some provinces of Canada have allowed nonlawyer ownership and/or multidisciplinary practices for some time.¹⁶⁸ For example, the province of Quebec allows lawyers to practice and share profits with other professionals.¹⁶⁹ Similarly, in Ontario, lawyers are permitted to share profits and practice with regulated paralegals.¹⁷⁰

In August 2014, the Canadian Bar Association¹⁷¹ issued a sweeping report, *Futures: Transforming the Legal Delivery Services in Canada* (the *Futures Report*),¹⁷² which provided a catalyst for significant regulatory changes now being considered by various law societies across Canada.¹⁷³

164. *Company History*, CRAWFORD (last visited May 14, 2017), <http://nl.crawfordandcompany.com/about-us/company-history/full-company-history.aspx>.

165. Nick Hilborne, *Here Come the Loss Adjusters: US Giant to Launch ABS*, LEGALFUTURES (June 16, 2016), <http://www.legalfutures.co.uk/latest-news/come-loss-adjusters-us-giant-launch-abs>.

166. *Id.*

167. *Id.*

168. See CANADIAN BAR ASS'N, *FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA* 41 (2014), http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf (stating British Columbia and Ontario permit limited nonlawyer ownership in authorized MDPs (citation omitted)).

169. *Id.* at 100 n.31.

170. *Id.*

171. The Canadian Bar Association is a voluntary association, which advocates for its members. See *Why Join?*, CANADIAN B. ASS'N, <http://www.cba.org/Membership/Why-Join> (last visited May 14, 2017) (describing the benefits of membership). The regulation of lawyers is handled by fourteen “provincial and territorial law societies.” *About Us*, FED'N L. SOC'YS CAN., <http://flsc.ca/about-us/what-is-the-federation-of-law-societies-of-canada/> (last visited May 14, 2017). Every lawyer in Canada is required “to be a member of a law society and to be governed by its rules.” *Id.* The law societies have a mandate under provincial and territorial law to ensure the public is served by competent and professional attorneys. *Id.*

172. CANADIAN BAR ASS'N, *supra* note 168.

173. See Yamri Taddese, *Entity Regulation on the Horizon for Prairie Provinces*, CANADIAN LAW & L. TIMES: LEGAL FEEDS (Dec. 23, 2015), <http://www.canadianlawyer.com/legalfeeds/3047/entity-regulation-on-the-horizon-for-prairie-provinces.html> (describing pending regulatory developments).

Included within the *Futures* Report are broad-reaching recommendations that lawyers be allowed to practice in ABSs that permit fee sharing, multidisciplinary practice, and nonlawyer ownership.¹⁷⁴ Several aspects of the report condition the nonlawyer ownership, management, and investment with fiduciary and ethical requirements applied to the entity, not just the individual lawyer, including protecting client confidentiality, guarding against conflicts of interest, and other ethical duties that lawyers must uphold.¹⁷⁵

According to the *Futures* Report, the recommendations “would advance the public interest in improving access to legal services” and, in addition, acknowledge lawyers’ central role in providing legal services.¹⁷⁶ “Properly interpreted, the professionalism of lawyers allows for innovation in the provision of legal services, as well as the ability to compete in a more global marketplace.”¹⁷⁷

The law societies in Canada are proceeding individually and together to consider modifications to lawyer regulation. For example, Nova Scotia has adopted regulatory objectives and is considering proactive and entity regulation, as well as amendments to the Code of Professional Conduct “to eliminate barriers to fee sharing with non[]lawyers.”¹⁷⁸ Based on a recommendation from the Law Society of Manitoba, the Manitoba Legislature enacted legislation broadening the definition of “law firm” to include a law corporation or any joint arrangement and granting the Law Society authority to permit and regulate “different types of arrangements to provide legal services, including arrangements between lawyers and between lawyers and non[]lawyers.”¹⁷⁹ In addition, Manitoba and the other two Prairie provinces, Alberta and Saskatchewan, are banding together to study the issue of entity regulation.¹⁸⁰ There is also a movement afoot among the law societies to coordinate their efforts and develop national standards, for

prompted after the *Futures* Report emboldened law societies by encouraging such regulatory bodies to reimagine the way in which the legal “profession is governed in hopes of improving access to justice”).

174. CANADIAN BAR ASS’N, *supra* note 168, at 42–44.

175. *Id.* at 42.

176. *Id.* at 40.

177. *Id.*

178. *Legal Services Regulation: The Policy Framework*, N.S. BARRISTERS’ SOC’Y, <http://nsbs.org/legal-services-regulation-policy-framework> (last visited May 14, 2017).

179. The Legal Profession Act, C.C.S.M. 2002, c L107 r 24.1, *amended by* S.M. 2015, c.29 (Can. Man.) 40th Legislature of Manitoba, Government Bill 19, The Legal Profession Amendment Act, <http://web2.gov.mb.ca/bills/40-4/pdf/b019.pdf>.

180. Taddese, *supra* note 173. Notably, the Provinces opted for a collaborative approach to the study as they believe better, more efficient results will be achieved through the combination of “a diversity of perspectives from different jurisdictions.” *Id.*

example with respect to admission, mobility between provinces, and discipline standards,¹⁸¹ so we may at some point expect to see a harmonized approach to regulatory reform.

V. A SUMMARY OF THE CONTROVERSY: PROS AND CONS

In the United States, discussions about changing lawyer regulation to allow ABSs seem to repeatedly stall at the emotional or theoretical level. Opponents call for evidence that ABSs would be helpful and not cause harm.¹⁸² Such evidence must be garnered from the jurisdictions that allow ABSs and deduced from the current state of affairs in the United States.¹⁸³ Correlation is not necessarily causation. But we should look at all the evidence.

A. *How Would ABSs Be Helpful?*

1. Increasing Access to Legal Services

As mentioned earlier, research shows that many low- and moderate-income individuals,¹⁸⁴ as well as small business owners, do not have their legal needs met.¹⁸⁵ It has been estimated that up to 80% of the legal needs of low income individuals in the United States are unmet.¹⁸⁶ Allowing ABSs is only one of many ideas put forth to address this gap.¹⁸⁷

The World Justice Project created the *Rule of Law Index* to measure and provide a ranking “of the extent to which countries adhere to the rule of law

181. See *National Initiatives*, FED’N L. SOC’YS CAN., <http://flsc.ca/national-initiatives/> (last visited May 14, 2017) (enumerating the Federation of Law Societies of Canada’s efforts, alongside the many Canadian law societies, to promulgate consistent rules and practices).

182. See McMorrow, *supra* note 158, at 675 (reciting opponents’ concerns that the benefits of ABSs will actualize and their demands for evidence that such regulatory reforms will not affect professional judgment).

183. See *id.* at 675, 708 (responding to opponents’ demand for evidence by noting the United Kingdom and Australian experiences with ABSs close the informational gap and provide the United States with “concrete evidence” that ABS models should be more openly considered); see also ILL. STATE BAR ASS’N’S TASK FORCE ON THE FUTURE OF LEGAL SERVS., *supra* note 93, at 22 (recognizing only two United States’ jurisdictions permit ABSs, whereas ABSs exist in a variety of forms in other countries).

184. See discussion *supra* Section III.A.1.

185. See discussion *supra* Section III.A.2.

186. LEGAL SERVS. CORP., 2015 ANNUAL REPORT 2 (2016), <https://lsc-live.app.box.com/v/LSC-2015-AnnualReport>.

187. See Knake, *supra* note 61, at 3 (refuting the effectiveness of proffered solutions such as more pro bono work, an expansion of governmental or nonprofit legal assistance, and increasing the number of solo practitioners and small firms).

in practice.”¹⁸⁸ As mentioned above, the 2016 World Justice Project *Rule of Law Index* gave the United States a ranking of 18 out of 113 countries, as compared to a rank of 19 out of the 98 countries measured in 2014 and a rank of 19 out of the 102 countries considered in 2015.¹⁸⁹ However, the United States is losing ground on a civil justice sub-factor measuring whether “people can access and afford civil justice.”¹⁹⁰ In 2014 and 2015, reports on this sub-factor indicated the United States ranked 65th out of the 98 and 102 countries studied, respectively.¹⁹¹ However, in 2016, the United States ranked 94th out of the 113 countries analyzed,¹⁹² representing a *drop* of 29 positions in the rankings. This statistic signifies that the people of 93 countries, including Belarus, Kazakhstan, Myanmar, Russia, Venezuela, and Zimbabwe, to name a few, are potentially more aware of their rights and obligations, as well as being able to access and afford legal representation and civil courts more easily, than the people of the United States.¹⁹³ Moreover, it should be noted in regards to this sub-factor of affordable civil legal services, where the United States lost 29 positions between 2015 and 2016,¹⁹⁴ Australia, the United Kingdom, and Canada all ranked significantly higher than the United States, at numbers 42, 46, and 48 out of the 113 countries accounted for in the study.¹⁹⁵ However, whether there is any relationship to the regulatory framework in these countries is not known.

Many state bar association committees and task forces have issued reports calling for reform based in part on the lack of access to justice in their state. For example, every year since 2010, the New York Permanent Commission on Access to Justice has held hearings, considered testimony, and documented an increasing need for resources to bridge the access to justice gap.¹⁹⁶ Similarly, the unmet need for legal services has been documented

188. *Current & Historical Data*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016/current-historical-data> (last visited May 14, 2017).

189. *WJP Rule of Law Index: Rankings for Four Sub-Factors*, NOT JUST FOR LAW. (Apr. 17, 2017), <http://notjustforlawyers.com/wjp-rule-of-law-index-rankings/>.

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.* (“[T]his means that the persons living in those countries have better access to civil justice than Americans do. In most if not all aspects of their lives, they are better able to learn their rights and obligations, and better able to assure their rights and obligations are respected.”).

194. *See id.* (reporting the United States grading in at 65th out of 102 countries in 2014 and yet, in 2016, plummeting to the 94th position out of 113 countries considered for the sub-factor measuring the accessibility and affordability of civil justice).

195. For an excel sheet displaying the countries’ rankings for the sub-factor, *see id.*

196. LAURA SNYDER, *DEMOCRATIZING LEGAL SERVICES* 45–46. (2016) (citations omitted).

in Illinois,¹⁹⁷ Michigan,¹⁹⁸ Oregon,¹⁹⁹ Utah,²⁰⁰ and Washington.²⁰¹

There is of course no *guarantee* that ABSs will significantly improve access.²⁰² But a leading expert on the access to justice problem, Gillian Hadfield, has unequivocally stated that there is no humanly possible amount of legal aid or pro bono services that could satisfy the unmet need for legal services and that only by permitting a change in regulations to allow ABSs do we have a chance of addressing this country's access to justice problem.²⁰³

The legal profession's purpose, as stated in the Code of Professional Responsibility, "is to make educated legal representation available to the public."²⁰⁴ This concept was brought into the current rules as requiring "competent representation to a client."²⁰⁵ Doesn't it follow that the legal profession has the obligation to provide competent legal representation to potential clients? And if lawyer-made ethical rules prohibiting certain business structures impede that provision of legal services—even in a limited way—shouldn't they be examined and altered to effectuate the profession's purpose?

197. ILL. STATE BAR ASS'N'S TASK FORCE ON THE FUTURE OF LEGAL SERV., *supra* note 93, at 7.

198. *See* STATE BAR OF MICH. 21ST CENTURY PRACTICE TASK FORCE, ENVISIONING A NEW FUTURE TODAY 3 (2016), https://www.michbar.org/file/future/21c_WorkProduct.pdf (recognizing the widening "justice gap" existing within the United States as evidenced by an estimated 80% deficit in unmet legal needs).

199. *See generally* D. MICHAEL DALE, THE STATE OF ACCESS TO JUSTICE IN OREGON (2000), https://www.osbar.org/_docs/resources/LegalNeedsreport.pdf (assessing the unmet legal needs of those with less resources in the State of Oregon).

200. *See generally* THOMAS M. CLARKE, NAT'L CTR. FOR STATE COURTS, NON-LAWYER LEGAL ASSISTANCE ROLES: EFFICACY, DESIGN, AND IMPLEMENTATION (2015), https://www.utcourts.gov/committees/limited_legal/NonLawyer%20Legal%20Assistance%20Roles.pdf (exploring nonlawyer legal assistance as a measure to satisfy unmet legal needs for low-income people in Utah).

201. *See generally* CIVIL LEGAL NEEDS STUDY UPDATE COMM., 2015 WASHINGTON STATE CIVIL LEGAL NEEDS STUDY UPDATE (2015), http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf (identifying the plight of low-income Washingtonians facing unaffordable civil litigation).

202. *See* Perlman, *supra* note 33, at 53 (disagreeing with the notion that ABS models, alone, are sufficient to catalyze bold improvements).

203. *See* Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. (SUPPLEMENT) 43, 46 (2014), http://ac.els-cdn.com/S014481881300063X/1-s2.0-S014481881300063X-main.pdf?_tid=7028894e-2518-11e7-af38-00000aab0f27&acdnat=1492617435_a944a66381678eb82ced2098968a271c ("The only way to achieve the kind of scale and innovation needed . . . is through the corporate practice of law."); *see also* Knake, *supra* note 61, at 11 (concluding the unmet need for legal services can be only be met by allowing law practices to be financed by corporations and corporations to deliver legal services).

204. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-7 (AM. BAR ASS'N 1980).

205. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2012).

2. Flexibility and Reduced Pricing for Clients

Related to increasing access to justice, a business structure offering the services of both lawyers and nonlawyers may improve customer service and lower costs to the customer.²⁰⁶ There are many nonlegal matters that are intrinsically connected to legal ones.²⁰⁷ The ABS model allows lawyers and those in other specialties to come together and use their skills to provide holistic services to their clients in a one-stop shopping environment.²⁰⁸

From the clients' perspective, they can obtain advice and services from various specialties, rather than being forced to take their legal questions to a lawyer, their accounting questions to an accountant, and possibly other questions to other specialists, such as social workers.²⁰⁹ This can lead to a team approach, which better aids the client and reduces costs.²¹⁰ Clients who seek out the associated nonlegal service first may also decide to access legal services if they are conveniently located in the same place.²¹¹ This might enable clients to avoid some of their legal problems or resolve them sooner (and potentially less expensively).²¹²

Data from the United Kingdom supports an argument that ABSs provide

206. See Adams, *supra* note 6, at 796 (concluding attorneys and nonlawyers need to unite to more effectively meet the needs of clients due to the "indistinct line between legal and non[legal services]").

207. See *id.* at 810 (agreeing clients frequently experience other professional service needs inseparable from their legal needs (citing Cliff Ennico, *How to Hire an Attorney*, ENTREPRENEUR, <https://www.entrepreneur.com/article/58326> (last visited May 14, 2017))).

208. See *id.* ("[C]lients would find the alternative business structure appealing as a convenient one-stop shop that could offer a comprehensive solution to their legal and non[legal issues]").

209. See ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (reciting proponents' argument that ABSs will facilitate "a 'one-stop shopping' approach for problems requiring services in different fields" (quoting John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 117 (2000))).

210. See *id.* (crediting ABSs for providing clients with an integrated team approach, thus, saving clients both money and time (citing John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 117–18 (2000))); see also Adams, *supra* note 6, at 799 (noting accounting firms would like to enhance the services they can provide by collaborating with law firms and clients desire such an integrated professional service).

211. See Knake, *supra* note 61, at 7 (imagining creative ABSs, such as a collaboration between a legal service provider and Walmart wherein "Wal[m]art could add a legal assistance window next to the banking center or health care provider located in its stores" and, thus, could extend legal services to low-income individuals who are the least likely to have access to legal services they need and who Walmart already seeks to serve by providing financial services).

212. See ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (identifying ABSs ability to save clients time and money while ensuring they receive higher quality product at a lower transaction cost (quoting John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 118 (2000))).

higher quality services at lower prices. In April 2016, the Legal Services Board (LSB) issued a report on prices individual consumers pay for three types of legal services: conveyancing, divorce, and wills.²¹³ The findings were that the majority of services cost less when delivered by ABS firms, although the difference was not significant.²¹⁴ In the most recent version of the United Kingdom's survey of the impact of reforms on legal consumers, "67% of consumers who paid for" private legal work reported that they received "good or very good value for [their] money," which was a marked increase from the first consumer survey conducted in 2011.²¹⁵

3. Innovation

As mentioned earlier, there are only three acceptable ways that lawyers can currently organize themselves as they deliver legal services: sole proprietorships, legal partnerships, or LLCs.²¹⁶ In these structures, money is received as fees and profits are distributed to partners/owners at the end of the fiscal year.²¹⁷ There is little incentive to forego distributions and invest in technology or other long-term solutions to better serve clients or potential clients.²¹⁸

In contrast, research supports the assertion that ABSs encourage novel, online solutions. A July 2015 report for the SRA and LSB prepared by Enterprise Research Center states:

While the existence of ABS is a recent phenomenon[,] our analysis which

213. OMB RESEARCH, PRICES OF INDIVIDUAL CONSUMER LEGAL SERVICES RESEARCH REPORT 3 (2016), <https://research.legalservicesboard.org.uk/wp-content/media/Prices-of-Individual-Consumer-Legal-Services.pdf>.

214. *See generally id.* at 14, 25, 38 (comparing ABS firms' and non-ABS firms' average prices for services involving conveyances, divorces, wills, estate administration, and power of attorney).

215. LEGAL SERVS. CONSUMER PANEL, CONSUMER IMPACT REPORT 20 (2014), http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf.

216. *See generally* Adams, *supra* note 6, at 778–84 (evaluating the evolution of permissible law firm structures).

217. *See id.* at 779 (explaining in general partnerships, the firm's profits are taxed as partners' personal income when the profits are distributed to partners (citing 26 U.S.C. § 701 (2011))).

218. *See id.* at 789 (stressing outside investment is necessary because firms often "lack flexibility in funds that would otherwise allow them to innovate and invest in new recruits" or to enhance the firm's efficiency by investing in more technology, training, and knowledge management systems (citations omitted)); *see also* ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (reiterating ABS proponents' contention that the traditional firm financial structure hinders firms' ability to enlarge "their scale and scope to engage in risky but potentially lucrative business" (quoting LARRY E. RIBSTEIN, REGULATING THE EVOLVING LAW FIRM 9 (2008), <http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/lawfirm.authcheckdam.pdf>)).

includes data from around a third of Solicitors with ABS status suggests this ambition has been realized. In particular we find ABS Solicitors have higher levels of innovative activity of all types than other Solicitors. This is consistent with ABS Solicitors' higher level of investment, staff engagement[,] and external involvement in innovation. Our econometric analysis suggests that ABS Solicitors are 12.9[–]14.8 percentage points more likely to introduce new legal services, with potential benefits for service users. They are also more likely to engage in strategic and organi[s]ational innovation.²¹⁹

Moreover, data from research conducted in 2014 showed that nearly two-thirds of ABSs were investing in technology.²²⁰ It is unclear how much investment in technology was being made by traditional firms in 2014, however, in a survey conducted in 2015, only 14.6% of traditional firms provided clients with online interactive services beyond email, whereas 44.4% of ABSs did.²²¹

4. Flexibility in Raising Capital

The issue of spurring innovation is closely related to the ability to raise capital. Although most businesses have a variety of options to raise the capital needed to operate, lawyers and law firms are not permitted to raise capital outside of seeking bank loans and partnership buy-ins.²²² Entrepreneurial lawyers with novel ideas for the delivery of legal services have very few options to finance new ventures.²²³

Permitting ABSs would allow legal services providers to experiment with the best model for delivery in a complex and rapidly changing market for law.²²⁴ Options might include mergers of law firms, franchising options, co-operatives, and partnerships with other professions, as well as offering

219. STEPHEN ROPER ET AL., ENTER. RESEARCH CTR., INNOVATION IN LEGAL SERVICES 71 (2015), <https://www.sra.org.uk/documents/SRA/research/innovation-report.pdf> (footnote omitted).

220. *ABSs Leading the Way on Information Technology*, CLC BLOG (Apr. 13, 2016), <http://www.conveyancer.org.uk/CLC-Blog/April-2016/ABSs-Leading-the-Way-on-Information-Technology.aspx>.

221. *Id.*

222. *See* ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (“The traditional law firm relies on law partners and banks for funding . . .”).

223. *See id.* (asserting the allowance of nonlawyer investment could enable a new attorney to collaborate with skilled technology professionals to innovate novel methods of delivering legal services).

224. *See* Groth, *supra* note 1, at 602 (advocating for one form of regulatory reform that would integrate flexibility into the now-rigid American approach to multidisciplinary models, and contending the ABA will be forced to consider the matter again due to the rapid changes occurring in today's legal market (citations omitted)).

employee incentives.²²⁵

Firms could also benefit from passive investors who may provide capital to the firm that otherwise would be very difficult to raise from capital-constrained professionals within the firm or from banks because passive investors may be willing to take more risks.²²⁶ This would be particularly true where there are many equity-owners as they would be better able to spread the risk amongst them.²²⁷

One testimonial of the importance of the availability of capital comes from the United Kingdom chief executive of Slater & Gordon. He has stated that being listed on the Australian Stock Exchange²²⁸ enabled the firm to “invest in technology and innovation.”²²⁹ “The firm’s dramatic growth, from 400 staff and 17 offices in 2007 to 4,600 staff and 86 offices in 2016, would not have been achieved if [Slater & Gordon] had retained its partnership structure and refused external funding”²³⁰ He went on to note that the firm’s leadership board was chosen for its “managerial rather than [their] legal skills and none of the non-executive directors [a]re lawyers.”²³¹

Furthermore, evidence from England shows that ABSs are far more likely to invest in their businesses than non-ABSs. In an analysis of 218 regulatory

225. See Adams, *supra* note 6, at 790, 807 (expounding upon the ways incorporation and a capital advantage open the door to possibilities that might otherwise be too risky, such as “large-scale corporate law firm mergers,” issuing shares to lawyers yet to make partner to align their interest with the firm’s interest, and poaching already successful partners at other firms).

226. See ABA Comm’n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (contrasting the ability to ascertain financial flexibility through ABSs to the traditional financial model employed by firms, which depends upon funding from firm partners and banks and hampers firms’ ability to engage in risky yet possibly lucrative businesses endeavors).

227. Cf. Adams, *supra* note 6, at 807 (reasoning large amounts of equity investment is a necessity for firm expansion because it provides the firm with more flexibility to take on additional risk and pursue potentially lucrative endeavors).

228. See *id.* at 802 (referring to the firm, which sought public capitalization and is currently “traded on the Australian Stock Exchange,” as “the poster child of publicly-owned law firms” (citation omitted)).

229. Nick Hilborne, *Slater & Gordon Targets Improved Customer Experience*, LEGALFUTURES (Nov. 10, 2016), <http://www.legalfutures.co.uk/latest-news/slater-gordon-targets-improved-customer-experience>.

230. *Id.*

231. *Id.* It should be noted that Slater & Gordon has had severe accounting and financial problems. See generally Melissa Fyfe, *The Undoing of Slater and Gordon*, SYDNEY MORNING HERALD (June 25, 2016, 12:15AM), <http://www.smh.com.au/good-weekend/the-undoing-of-slater-and-gordon-20160613-gphmej.html> (expounding upon Slater & Gordon’s financial and accounting downfalls, which was described as “one of the biggest falls from grace in Australian business history” (citation omitted)). It is less than clear, however, whether—and to what extent—these problems are related to its business structure. See *id.* (“There are several theories about why Slater & Gordon ended up where it is today . . .”).

returns,²³² completed in a yearly survey by the Council for Licensed Conveyancers (CLC), over half of ABSs (52.2%) made sizable investments in 2015, whereas slightly less than one-fourth (23.2%) of non-ABS bodies did.²³³ It was also reported that non-ABS bodies were almost twice as likely as ABSs to seriously consider making an investment and then decide not to commit to the expenditure.²³⁴ While acknowledging “the caveat that correlation does not equal causation, it nevertheless seems that there may be something about the ABS[s] which engenders a greater sense of entrepreneurialism.”²³⁵

5. Flexibility in Remunerating Employees

Research in the United Kingdom and in the field of organizational behavior supports the conclusion that employee ownership can provide significant benefits to the organization, including “increased productivity and return on assets.”²³⁶ There are many aspects to managing a law practice,²³⁷ and many lawyers have neither the skill nor the interest in some of those areas.²³⁸ The organization would benefit from having a partner who specializes in those areas, freeing up the lawyers to “practice at the top of their licenses.”²³⁹

From the perspective of the nonlawyer with both skill and interest in

232. COUNCIL FOR LICENSED CONVEYANCERS, ANNUAL REGULATORY RETURN ANALYSIS 9 (2016), [http://clc-uk.org/CLCSite/media/Research-Reports/CLC-ARR-2015-16-Report-\(FINAL\).pdf](http://clc-uk.org/CLCSite/media/Research-Reports/CLC-ARR-2015-16-Report-(FINAL).pdf).

233. *Id.* at 50. “The Council for Licensed Conveyancers (CLC) is a specialist property law regulator. It has authority over the profession of licensed conveyancers, but it is primarily an entity regulator. This means that it has a particular interest in the good management of the practices for which it has regulatory responsibility.” *Id.* at 8.

234. *See id.* at 50 (reporting 4.3% of ABSs seriously considered an investment that they did not make, while 8.3% of other recognized bodies considered the same).

235. *Id.*

236. *See generally* SNYDER, *supra* note 196, at 49–52 (discussing the benefits derived from employee ownership (citations omitted)).

237. *See* Hadfield, *supra* note 203, at 52 (noting even in the context of a conventional law practice, a successful and efficient office can only be supported by “expertise in finance, business management, billing and collection, customer service,” and more).

238. *Cf. id.* at 53 (“Even if lawyers can learn enough office management expertise to handle a small business . . .”); McMorro, *supra* note 158, at 672 (acknowledging “some lawyers have very poor business acumen, such as lack of organization skills, poor systems of communication with clients, and excessive caseloads”).

239. *Cf.* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 125 (2000) (analyzing how nonlawyer partners could provide firms with enhanced management techniques (citations omitted)); Hadfield, *supra* note 203, at 53 (contending lawyers’ time and effort is better spent being an attorney and innovating legal reasoning, than attempting to innovate improvements in the nonlegal mechanisms for delivering legal services).

human resources, process management, efficiencies, or data collection, for example, being able to become a partner in a venture is attractive.²⁴⁰ And ownership in the work enterprise has been shown to improve employee attitudes and commitment.²⁴¹ In light of this data, the argument that a salary (and perhaps a bonus) should be sufficient incentive for nonlawyers to become employed by a law firm rings hollow.²⁴² If this were an attractive option to nonlawyers, *a fortiori* it should be an attractive option to lawyers. Tell that to the lawyers elbowing their way to become equity partners at the top of the pyramid.

B. *What Is the Opposition to ABSs?*

Critics of nonlawyer ownership argue that the stated benefits discussed above will not be actualized.²⁴³ They argue that there should be data or evidence that the benefits will actually accrue before the regulations should be changed.²⁴⁴

In addition to arguing the proposed benefits are speculative, opponents of ABSs assert allowing nonlawyer ownership or management will erode the “core values” of the legal profession.²⁴⁵ These core values are reflected in the fact that law is characterized as a profession—in juxtaposition to a business.²⁴⁶ The values most often referred to are professional

240. See ABA Comm’n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (alleging ABSs could enable firms to employ stronger management teams more because offering a share of ownership in the firm might make it easier to attract nonlawyer managers); cf. Dzienkowski & Peroni, *supra* note 239, at 125 (stressing nonlawyer partners who offer firms professional management techniques “will often be better than law partners at determining how the firm may deliver quality legal and other professional services to the consumer in the most efficient fashion and at the lowest possible costs” (citation omitted)).

241. See SNYDER, *supra* note 196, at 49–50 (referencing research that establishes the extensive benefits an employer can derive from employee ownership, including “attracting and retaining good employees” and increased employee job satisfaction, productivity, and “trust in the firm and its management” (citations omitted)).

242. See *id.* (rejecting the argument due to its failure to consider research analyzing benefits derived from employee ownership).

243. See, e.g., Perlman, *supra* note 33, at 78 (“[T]here was far less evidence supporting the idea that ABSs would produce helpful transformative change than many proponents of ABSs have implied.”).

244. See generally *id.* at 76–79, 83 (exploring how regulatory reform attempts have failed due to the lack of proof that ABSs would serve the public interest without eroding the profession’s core values).

245. See Thies, *supra* note 49, at 8 (expressing concern over an ABA proposal that would allow “non[]lawyer ownership and control of law firms and the approval of fee splitting with non[]lawyers, both in contravention of the core values of our profession”). The Indiana State Bar Association House of Delegates, citing the ABA’s actions over the years, recently rejected the notion of ABSs after a debate, citing fears that ABSs would compromise law firm’s independence and client loyalty. *Id.*

246. See Knake, *supra* note 61, at 42 (describing the “professional paradigm” as one that differentiates lawyers from businesspersons because of the knowledge lawyers’ possess and because

independence, confidentiality, and client loyalty.²⁴⁷ Professional independence, the argument goes, will be undermined because lawyers naturally will prioritize profits and the interest of their shareholders or nonlawyer managers over their clients' interests.²⁴⁸ In addition, critics contend ABSs will also jeopardize confidentiality and loyalty by injecting nonlawyers into the lawyer–client relationship.²⁴⁹ These arguments have merit and should be addressed in any regulatory reform process.

1. “Law Is a Profession, Not a Business.”

- a. Profits Do Not Necessarily Undermine Professionalism.

The assertion that law is a profession and not a business and must remain separate from the profit motive,²⁵⁰ is weak. Lawyers go into their careers with the idea that they will be able to make a profit, or at least a decent living.²⁵¹ The American Lawyer's annual report of profits per partner in the largest of law firms²⁵² belies the notion that there is no business concern of making a profit. Moreover, certain aspects of business, such as efficiency, quality customer service, and effectiveness absolutely should be reflected in

“lawyers altruistically place the good of their clients and the good of society above their own self-interest” as opposed to businesspersons who focus on maximizing financial self-interest (quoting Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1231 (1995)).

247. See Thies, *supra* note 49, at 8 (distinguishing lawyers from nonlawyers due to “core values of loyalty to clients, competence in the law, confidentiality, avoidance of conflict of interest, and independence from outside pressure that would influence our representation of clients”).

248. See Knake, *supra* note 61, at 14 (outlining opponents' arguments against nonlawyer ownership, one of which is lawyers will be subjected to “insurmountable conflicts of interests driven by a profit motive instead of service to the client”); see also Adams, *supra* note 6, at 794–95 (reporting opponents worry attorneys practicing in an MDP might succumb to business pressures and take actions, such as settling a lawsuit, in an effort to please shareholders (citations omitted)).

249. See Groth, *supra* note 1, at 583 (announcing opponents' main fear is transforming attorney–client privilege and confidentiality into dead letters of the law if lawyers and nonlawyers are able to practice together and freely share information (citing Dzienkowski & Peroni, *supra* note 239, at 174–78)).

250. See Knake, *supra* note 61, at 42 (noting opponents distinguish between lawyers and businesspeople and rely upon an “artificial notion of adhering to professionalism rather than the profit-motive”).

251. See *id.* at 14 (asserting the “professional/independence paradigm” fails to account for “the economic realities of law practice” since the practice of law is in fact a business pressured by twenty-first century realities like educational debt, overhead costs, competition, billing inefficiencies, and technological innovation).

252. See David Lat, *The 2016 Am Law 100: Trouble Ahead?*, ABOVE L., <http://abovethelaw.com/2016/04/the-2016-am-law-100-trouble-ahead/> (last updated Apr. 27, 2016, 10:15 a.m.) (exploring The American Lawyer's findings, and expressing amazement over one firm's “whopping \$6.6 million” profits per partner).

how legal services are delivered.²⁵³

In fact, pressures to prioritize profits, even at a client's expense, are already pressed upon lawyers.²⁵⁴ On a contingency fee case, a lawyer "ha[s] an incentive to settle a case before spending a substantial amount of money on trial preparation, even if the client might recover more money by going to trial."²⁵⁵ Furthermore, when lawyers bill by the hour, they are incentivized to "spend more time than is necessary to solve a client's problems."²⁵⁶

Firms already require associates to meet billable hour targets that emphasize maximizing profits²⁵⁷ and to drop clients who cannot afford to pay.²⁵⁸ Further, lawyers can be beholden to third parties who pay clients' fees, such as insurance companies,²⁵⁹ and usually have economic interests that differ from those of the client.²⁶⁰

b. We Can and Do Regulate for Professionalism.

Safeguards inherent to a self-regulated profession will continue to uphold the ideals of professionalism if and when Rule 5.4 and other Rules are modified to allow ABS.²⁶¹ First, the mandate of regulators to place the

253. See Groth, *supra* note 1, at 575–76 (highlighting the benefits business behaviors and considerations could have for firms, and pointing out the value in "having a law firm that is run with the efficiency, profit-cognizance, and long-term planning of a business" (citations omitted)).

254. Perlman, *supra* note 33, at 75.

255. *Id.* at 98 (citing GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 799–800 (5th ed. 2010)).

256. *Id.* (first citing GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 789–91 (5th ed. 2010); and then citing Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008)).

257. See *The Truth About the Billable Hour*, YALE L. SCH., <https://law.yale.edu/student-life/career-development/students/career-guides-advice/truth-about-billable-hour> (last visited May 14, 2017) (warning the billable hour is a nearly unavoidable aspect of working for a firm, and explaining in order for an attorney to be an asset to their firm, they must bill enough hours to generate firm revenue while still covering their own overhead and salary).

258. Cf. Heather Gray-Grant, *Why It's Good Business to Fire a Client*, SLAW (Jan. 24, 2017), <http://www.slw.ca/2017/01/24/why-its-good-business-to-fire-a-client/> (adopting the view that firing a "bad client" can be good for business because an unpaid hour is valueless).

259. See Dzienkowski & Peroni, *supra* note 239, at 197 (admitting a lawyer's independent professional judgment can be impaired in situations aside from MDPs, such as where the lawyer's fee for legal services provided to an individual is paid for by an organization (citation omitted)).

260. Cf. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS'N 2012) ("A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property[,] or financial transaction with a client . . .").

261. See Knake, *supra* note 61, at 6 (advancing the notion that the ethical standards would continue to fortify independent professional judgment even if corporations could own or invest in a law practice).

public interest above the interests of the bar creates a safeguard against the erosion of professionalism.²⁶² Second, individual members of the profession generally have a strong desire to preserve both their individual reputations and that of the profession at large.²⁶³ As an exclusive group of people trained in specialized knowledge and skill, lawyers recognize each other as an elite group of peers, in part by virtue of their common ethical obligations.²⁶⁴

Many acknowledge that risks to professionalism and independence and risks of legal services becoming increasingly institutionalized are equally present under the current regulatory scheme. Professor Renee Newman Knake captures this reality:

The economic realities of twenty-first century law practice pose a host of challenges to lawyer independence, ranging from the pressure of massive educational debt held by many recent law graduates to the mounting inefficiency of the billable hour. Indeed, external investment may be the very thing that preserves lawyer independence—especially given the burdens of law school debt, billing inefficiencies, and leveraging of overhead costs—thereby allowing for meaningful pro bono representation because the lawyer no longer needs to worry about maintaining a case-by-case cash flow.²⁶⁵

Notably, the regulatory reforms in England and Australia contain several examples of provisions to protect the “core values of the profession.”²⁶⁶ Attorney–client privilege, for example, is protected by rules requiring: a) the entity to comply with the ethical obligations of lawyers;²⁶⁷ and b) the

262. MODEL RULES OF PROF'L CONDUCT pmb. para. 12 (AM. BAR ASS'N 2012).

263. See Adams, *supra* note 6, at 794–95 (relaying opponents' concern about the legal profession's reputation if passive investment is permitted); Groth, *supra* note 1, at 583 (considering opponents' fear that lawyer-nonlawyer partnerships will tarnish the legal profession's image (citations omitted)).

264. See Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1231 (1995) (distinguishing businesspersons, who prioritize financial self-interest, from lawyers, who “altruistically place the good of their clients and the good of society above their own self-interest” and who possess wisdom inaccessible to lay persons).

265. Knake, *supra* note 61, at 43–44.

266. See McMorro, *supra* note 158, at 668 (emphasizing the regulations governing United Kingdom ABSs safeguard adherence to professional obligations (citing *Responsibilities of COLPs and COFAs*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/solicitors/colp-cofa/responsibilities-record-report.page> (last updated Sept. 10, 2014))).

267. *Cf.* Legal Services Act 2007, c. 29, § 190 (Eng. & Wales) (binding individuals acting at the direction and supervision of a relevant lawyer with the legal professional privilege). In England and Wales, under section 190 of the Legal Services Act 2007, privilege applies to communications made by an ABS, provided that the communications are made through, or under the supervision of, a relevant lawyer. *Id.* § 190(2)–(4).

naming of a lawyer-director to assume responsibility for that compliance with the ethical obligations.²⁶⁸ The legislation pioneered in New South Wales (currently in effect in most Australian states other than New South Wales and Victoria)²⁶⁹ includes a provision that makes it very clear that a lawyer's duties to the client, to the court, and to conduct oneself in a manner that upholds the rule of law and administration of justice under the LPA, supersedes the ABSs' duties to shareholders.²⁷⁰ Australia's publicly listed legal practices have stated in their "prospectus[es], constituent documents[,] and shareholder agreements" that their primary duty is to the court; their secondary duty is to the client; their tertiary duty is to the shareholder; and that where there is a clash between legal profession regulation and the Corporations Act 2001, the former will prevail.²⁷¹

Similarly, in Washington State, attorney-client privilege has been extended to apply to LLLTs.²⁷² The Supreme Court of Washington authorizes LLLTs to render limited legal assistance or advice in approved areas of law under ethical rules akin to those applicable to lawyers.²⁷³

2. "ABSs Will Undermine Lawyers' Independent Judgment and Client Loyalty."

a. Exercising Independent Judgment Does Not Necessarily Require Separation from Other Professionals.

It is important to recognize that our current ethical rules do not require lawyers to deliver their legal advice in a vacuum. In fact, a comment to Model Rule 2.1 recognizes that the practice of law is not only about law and that "narrow" or "[p]urely technical legal advice" usually does not

268. *Legal Profession Act 2006 (ACT)* s 107 (Austl.).

269. See *A New Framework for Practising Law in NSW*, *supra* note 137 (discussing the discrepancies that exist amongst Australian jurisdictions and New South Wales and Victoria's adoption of the LPUL in 2014).

270. See *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* No 73 sch 1 s 47H (Austl.) (detailing the "professional obligations [include] . . . duties to the court, . . . obligations in connection with conflicts of interest, . . . duties of disclosure to clients, . . . [and] ethical rules required to be observed by a solicitor").

271. Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45, 55 (2009) (citation omitted).

272. WASH. ADMISSION AND PRACTICE RULES r. 28(K)(3) (2016).

273. *Id.* r. 28(K). Rule 28 prescribes the limitations on the provision of services by LLLTs and includes subrule (K)(3) as follows: "The Washington law of attorney-client privilege and law of a lawyer's fiduciary responsibility to the client shall apply to the Limited License Legal Technician-client relationship to the same extent as it would apply to an attorney-client relationship." *Id.* r. 28(K)(3).

adequately serve the client.²⁷⁴ Another comment recognizes the value of association with other professionals to enhance the quality of services a lawyer provides.²⁷⁵

Critics argue that nonlawyer shareholders or partners might undermine independence by, for example, forcing lawyers to disclose confidential client information,²⁷⁶ encouraging lawyers to cut corners,²⁷⁷ and accepting only the most profitable clients while dropping the others.²⁷⁸ However, the current regulatory reality does not require lawyers to operate in a way that maximizes the principles of independence and client interest.²⁷⁹

Moreover, an individual is not ethical or unethical based merely on their education or licensure.²⁸⁰ To argue that mixing with nonlawyers at work will make lawyers abandon their ethical obligations is insulting to both lawyers and other professionals. It should not be assumed that nonlawyer businesspeople would always act only to pursue profits, regardless of ethics

274. See MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2012) (indicating moral and ethical considerations may be properly referred to in rendering advice).

275. See *id.* r. 2.1 cmt. 4 (stating attorney's advice may include a referral to a professional outside the domain of legal work).

276. See ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 ("If nonlawyer partners are privy to privileged conversations between attorneys and clients, court might refuse to uphold the attorney[–]client privilege.").

277. See Knake, *supra* note 61, at 42–43 (2012) (rooting the abhorrence for business conduct in the vilification of profit maximizers who would be tempted "to cut ethical corners in search of a buck" due to their competition with other lawyers in marketing legal services (quoting Pearce, *supra* note 264, at 1242–43)).

278. See ABA Comm'n on the Future of Legal Servs., *Issues Paper Regarding Alternative Business Structures*, *supra* note 2 (extending opponents' concerns to fears that less pro bono work will be performed and access to justice for low- and middle-income individuals will not be improved because nonlawyer ownership will primarily occur in areas with potentially high return rates and such ownership will lead lawyers' to prioritize maximizing return on nonlawyers' investments).

279. See Perlman, *supra* note 33, at 98 ("[L]awyers already have an incentive to prioritize profits over client needs.").

280. See Groth, *supra* note 1, at 575–76 (refuting the opponents' argument that professional ethical standards can only be maintain by way of lawyers' monopoly on the legal service sector as presumptuous, and pointing out the desire to make a profit does not necessarily implicate a unethical propensities or deficient services). As one author has argued:

Nonlawyers can and do recognize the ethical rules and requirements of the legal profession. Indeed, many nonlawyers are required to follow and uphold state ethical standards and professional codes of conduct for their own business professions. Many nonlawyers such as accountants and engineers have their own professionalism statutes or rules of ethics, additional training requirements, and examination requirements. Thus, suggesting that nonlawyers, simply by virtue of being nonlawyers, cannot separate morality from money is inapposite.

Id. at 576 (footnotes omitted).

and morality, any more than lawyers will.²⁸¹ And it should not be assumed that the ethical backbone of lawyers is so weak as to turn to jelly due to working alongside nonlawyers.

Significantly, the argument that association with nonlegal professionals will dilute professional independence and client loyalty is arguably only voiced by lawyers.²⁸² Arguably, clients and members of the public have not been asked their opinion. It is not clear whether members of the public are aware of the ethical rules applicable to lawyers' business structures or that there is a proscription against going into business with nonlawyers. Furthermore, it is not at all clear they are concerned about their lawyers possibly forming a joint venture with other professionals.

Notably, Responsive Law, an organization "representing the interests of individuals in the legal system,"²⁸³ has commented numerous times to the ABA and other regulatory authorities in favor of ABSs.²⁸⁴ In one of those comments, the desires of consumers was explicitly emphasized: "[W]e can confirm that consumers nationwide would welcome the lower prices and new combinations of services that true innovation in the delivery of legal services would bring."²⁸⁵ Furthermore, Responsive Law argued multidisciplinary practices should be allowed because "partnerships between social workers and family lawyers or between financial advisors and tax lawyers could create new service models benefiting the large majority of the public that currently has limited access to the legal system."²⁸⁶

Crucially, data from both England and Australia shows that allowing ABSs for lawyers has not undermined the core values of the legal profession. In Australia, the disciplinary complaints against lawyers have remained static or dropped significantly in the years since the ethical infrastructure to ABSs was put in place.²⁸⁷ Similarly, in England, the Legal Consumer Panel noted

281. See McMorrow, *supra* note 158, at 674 (criticizing the argument due to its underlying presumption that nonlawyers behave immorally).

282. Compare *id.* at 670 ("Scholars have been much more receptive and supportive of non[]lawyer owners and investors than the U.S. practicing bar." (citations omitted)), with Adams, *supra* note 6, at 794–95 (identifying "professionals" and "practitioners" as ABS opponents), and Perlman, *supra* note 33, at 82 (opining that "the legal profession's resistance to ABSs will eventually wane").

283. RESPONSIVE L., <http://www.responsivelaw.org> (last visited May 14, 2017).

284. Tom Gordon, *Disappointing ABA Commission Identifies What's Wrong with Regulation of Lawyers But Fails to Act*, RESPONSIVE L. (Aug. 05, 2006), <http://www.responsivelaw.org/index.php/blog/item/141-disappointing-aba-commission-identifies-what-s-wrong-with-regulation-of-lawyers-but-fails-to-act?highlight=WYjYnMiXQ==>.

285. Memorandum from Thomas M. Gordon, Legal & Policy Dir., Consumers for a Responsive Legal Sys., to ABA Comm'n on Ethics 20/20 (Jan. 30, 2012), <http://www.responsivelaw.org/files/responsive%20law%20comments%20on%20alps.pdf>.

286. *Id.*

287. Gordon & Mark, *supra* note 125, at 192.

that there were “no major disciplinary failings . . . or unusual levels of complaints” in the data collected since ABSs have been allowed.²⁸⁸ In fact, the Panel concluded “the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS[s] have not materialised.”²⁸⁹

3. Core Values of the Profession Include Duties to the Legal System and for the Quality of Justice.

The Preamble to the Model Rules makes clear there are core values of the legal profession that extend beyond the attorney–client relationship. In addition to duties owed to their clients, lawyers also have a set of responsibilities as “officer[s] of the legal system” and, separately, as public citizens with a “special responsibility for the quality of justice.”²⁹⁰ Lawyers fail to live up to the full complement of the core values of their chosen profession by focusing only on the duties owed to their (ever-shrinking) client base to the exclusion of the other two categories of responsibilities.

A lawyer’s representation of her client must be tempered by the obligation to uphold the integrity of the administration of justice.²⁹¹ As an officer of the legal system, for example, Model Rule 3.3 requires a lawyer to exercise her duty of candor to a tribunal and not allow a court to be misled by false statements of law or fact.²⁹² We cannot turn a blind eye to the fact that increasingly, members of the public believe the administration of justice is not applicable to them.²⁹³

Importantly, the Preamble exhorts a lawyer to “seek improvement of the law, access to the legal system, the administration of justice[,] and the quality of service rendered by the legal profession.”²⁹⁴ These are important core values that set lawyers apart from other individuals who may be providing legal products or services. It is unacceptable for lawyers to fail to facilitate the public’s “access to the legal system” or to seek to improve the administration of justice and “the quality of service rendered by the legal profession.”²⁹⁵

288. LEGAL SERVS. CONSUMER PANEL, *supra* note 215, at 15.

289. *Id.*

290. MODEL RULES OF PROF’L CONDUCT pmb. para. 1 (AM. BAR ASS’N 2012).

291. *See id.* r. 8.4(d) (defining professional misconduct to include “conduct that is prejudicial to the administration of justice”).

292. *Id.* r. 3.3.

293. *See id.* pmb. para. 6 (requiring lawyers to “seek improvement of the law, access to the legal system, the administration of justice[,] the quality of service rendered by the legal profession”).

294. *Id.*

295. *Id.*

VI. TEMPLATE FOR STATE ADOPTION OF ABSs

This Article has laid out several arguments for allowing ABSs in the United States. First, the public interest currently is not being adequately served by the legal profession.²⁹⁶ Second, lawyers currently are not financially able to provide less expensive or more pro bono services sufficient to adequately serve the public.²⁹⁷ Third, other countries have modified attorney regulation with resulting increased service and satisfaction—by both customers and lawyers.²⁹⁸ In light of these factors, attorney regulations in the United States should be re-examined and reformulated to better effectuate their purpose of serving the public interest.

Given those arguments, this Article will now propose some suggested steps to ethically and professionally change the regulation paradigm. These steps draw on lessons learned from the experiences of other countries, the rationale of the ethical rules, and the need for data-driven decisions. They also are offered in the context of the understanding that no one action is likely to be a panacea for the problems plaguing both the public who lack access to legal services and the lawyers who are charged to serve the public.

- A. Baseline surveys of the public and the profession should be conducted to determine the level of satisfaction and the pain points of each. (Many states already have comprehensive access to justice surveys and reports.)
- B. Establish a process for approving ABSs that includes:
 - 1) Proactive regulation and entity registration or both. If entity regulation is pursued, designate one or more individuals in each entity who will be responsible for the ethical infrastructure. (Some states, such as Colorado, Illinois, and New Mexico, have started down this path by exploring the concept of proactive attorney regulation.)²⁹⁹
 - 2) Rules for the acceptable ethical infrastructure required of ABSs

296. See discussion *supra* Section III.A.

297. See discussion *supra* Section III.B.

298. See discussion *supra* Section III.C.

299. Interview with William D. Slease, Chief Disciplinary Counsel, Disciplinary Bd. of the N.M. Supreme Court (Dec. 13, 2016); see also SNYDER, *supra* note 196, at 15–16 (discussing the activity taking place in Colorado and Illinois). Recently, Illinois took the spotlight as the first state “to adopt Proactive Management Based Regulation.” Press Release, Supreme Court of Ill., *Illinois Becomes First State to Adopt Proactive Management Based Regulation* (Jan. 25, 2017), <http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf>.

that include protection of client confidentiality and independent professional judgment of lawyers.

- C. To monitor the efficacy of ABSs, the regulatory reform should establish a procedure that includes:
- 1) Periodic audits of process and recordkeeping as to ensure compliance with the ethical infrastructure;
 - 2) Reporting as to innovative techniques utilized by both ABSs and non-ABS legal structures;
 - 3) Reporting as to passive investors and capital infusions; and
 - 4) Client complaints and satisfaction of both ABS and non-ABS clients.
- D. Modify Rule 5.4. For examples, the District of Columbia's rule, the Washington State rules, and prior drafts of Rule 5.4 of the Kutak Commission should be consulted. In addition, Rules 5.5 and 1.5 should be modified, as well as any other rules as necessary to bring harmony to the regulatory framework. As a touchstone, the ABA Model Regulatory Objectives can be used.
- E. Implement the reformed regulatory framework. The legal community should wait and see the results and be willing to change regulations, as necessary and appropriate, to promote the interests of the public.

VII. CONCLUSION

The evidence shows the legal system in the United States is not serving the public or the lawyers well. Evidence further shows that in Australia and England, as well as some parts of Canada, ABSs are providing better service to the public without a negative impact on the core values of the profession. History suggests that the ABA is not likely to soon amend the Model Rules to allow ABSs in the United States.³⁰⁰

The ABA House of Delegates and some state and local bar associations that have considered the issue have called for evidence that ABSs will provide benefits and not harm.³⁰¹ Given the fact that the only data being

300. See generally Perlman, *supra* note 33, at 75–83 (“History offers a useful guide as to why the ABA House of Delegates was highly likely to reject any changes proposed by the Commission in th[e] ABS area.”).

301. See McMorrow, *supra* note 158, at 675 (indicating opponents’ are concerned about whether the benefits of ABSs will accrue and their call for proof professional judgment will not be harmed).

gathered is in other countries, with regulatory schemes that are distinguishable from those in the United States,³⁰² one wonders what evidence will ever be sufficient.

While lawyers fail to address this issue, all the while claiming to have the interests of clients and the public at heart, the legal profession is failing to adequately serve the public. And those without law degrees and unhampered by regulation are filling that void. We should not be satisfied with the status quo.

As aptly articulated in the Preamble to the Model Rules, “[t]he profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”³⁰³ A state supreme court should revamp their regulations to better serve the public interest, garnering data each step of the way. The others will follow.

302. For a discussion regarding the divergent reform pressures in the United States and the United Kingdom, see *id.* at 675–80.

303. MODEL RULES OF PROF'L CONDUCT pmbl. para. 12 (AM. BAR ASS'N 2002).